A Wise Return to Judicial Restraint

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Abstract
In this comment I argue that although I think that secularism properly understood is the best constitutional arrangement for keeping peace in multicultural and religiously pluralistic societies, nevertheless the Grand Chamber judgement rightly overruled the Chamber in Lautsi v. Italy. In view of the subsidiary nature of its jurisdiction and the diversity of constitutional arrangements throughout Europe, it is not for the European Court of Human Rights to erase the cultural and religious traditions of the contracting states and to force them into a conception of secularism that they did not choose.

Keywords
Lautsi; freedom from religion; freedom of religion; secularism; subsidiarity; judicial restraint; religious neutrality; religious symbols

Even if it has a rather weak basis in Italian law, the display of crucifixes on classroom walls in Italian public schools has been a tradition for a long time. Preserving such a tradition in the 21st century in a multicultural society where people can have many different religious beliefs or can be agnostics or atheists, is only natural as long as that tradition is not challenged by non-Christians who reject it on the ground of their negative freedom of religion and conscience. Once such a challenge takes place, the preservation of the tradition against the will of those who reject it, becomes a matter of power of the majority culture over minorities. Under what conditions is such a deployment of power legitimate in a democracy that abides by the rule of law?

Article 9 of the European Convention of Human Rights guarantees freedom of and from religion. Article 2 of Protocol I confers an obligation to the contracting parties to ensure that parents are in the possibility to educate their children in conformity with their own religious and philosophical convictions. Consequently, state schools should convey knowledge in an objective manner which respects pluralism and should abstain from religious or philosophical indoctrination and proselytism. I think that the best setting in order to respect these norms, is a school environment that is religiously neutral (except for denominational schools) and that this neutrality should reflect the neutrality of the state itself. The principle
of confessional state neutrality has not only been recognised by the supreme or constitutional courts of several European countries such as Germany, Switzerland or Poland; it has also been derived from the Italian constitution by the Italian Constitutional Court as one of the fundamental principles (laicità). This principle is of special importance in state schools since pupils are present in that environment under a compulsory school attendance law from which they can extract themselves only if their parents make disproportionate efforts and financial sacrifices. Of course, in a free and pluralistic society no one can claim to be spared from perceiving the manifestations of religious faith and practice by his fellow citizens. But as the German Constitutional Court observed in its famous Kruzifixbeschluss, this is different when it is the state that exposes individuals without the possibility to escape from the influence or from the symbols of a particular religious faith. In an analogous way the Chamber judgement in the Lautsi case emphasized that the negative right to freedom from religion deserved special protection against the expression of a confessional belief by the state itself through the display of a symbol of which the significance is predominantly religious. The Chamber concluded that the compulsory display of the crucifix in state schools restricted the religious freedom of the children and the right of their parents to educate them in accordance with their own convictions, which constitutes a violation of Art. 2 of Protocol I taken together with Art. 9 of the Convention.

I think that religious and philosophical neutrality of the state can best be achieved through secularism understood as a normative constitutional doctrine which separates the religious realm from state politics and takes a stance of equidistance towards any religious creed as well as towards agnosticism or atheism. Such a conception of secularism as a constitutional doctrine should be carefully distinguished from state atheism, anti-religious activism or any other identification of the state with a particularistic creed or philosophy of life. The constitutional doctrine of the secular state implies respect for freedom of and from religion and for all religious practices in society as long as they are compatible with public order and as long as they do not infringe on the analogical rights and freedoms of others. But it assumes also that it is not for the state to take sides in matters about philosophies of life or religion and that it is not for the state either to financially subsidize religious practices, denominational schools or any other religious or anti-religious activities. Secularism understood as a normative constitutional doctrine in my view is the most adequate model to keep the peace in multicultural and religiously pluralistic societies and to combine tolerance and respect for diversity without the state becoming an easy prey to ever more particularistic claims for recognition and financial support. That constitutional ideal to which the French “laïcité” comes closest, has sometimes been described as ‘exclusive neutrality’ (as contrasted to ‘inclusive’ or ‘open’ neutrality) and it has been said in a rather obscure and imprecise manner that ‘exclusive neutrality’ bans all religious
symbols from the public sphere, without explaining what was meant by ‘the public sphere’. In France, for example, nobody has been forbidden by law from wearing religious clothes or symbols in public streets, squares or railway stations or on busses or trains. What has been prohibited (rightly so in my opinion) is the wearing of religious attire when performing public functions as a civil servant and *a fortiori* when the person performs a public function wearing a uniform as in the police or the army. In those functions the individual does not represent his own particularistic sub-community or his religious identity, but he represents the state that is at the service of every citizen regardless of his religious identity or his cultural background. The civil servant has a duty of impartiality towards all the citizens and, in relation to him who represents the state, they are primarily subjects of human rights. The prohibition for civil servants to wear religious clothes in France and in some other European countries symbolizes the norm of state neutrality and impartiality.

Now, from the perspective of this normative constitutional doctrine of secularism (which I politically support as a citizen and which I prefer as a philosopher of law), the Chamber judgement in the *Lautsi* case can count on my sympathy. And nevertheless I think that the Grand Chamber decision which overruled the Chamber judgement is the better of the two rulings. Why is that so? For several reasons. First and foremost because the European Court of Human Rights is not a body that should try to force the parties to the Convention to adopt a uniform constitutional doctrine about religious neutrality, about the separation of church and state or any other constitutional matter about which there is no European consensus. The normative constitutional doctrine of secularism which I described very succinctly is a minority position when one compares the constitutional systems of the different European countries, and it is not part of the competence of the Strasbourg Court to act as if it were a political body mandated to erase cultural and religious traditions when they are not in accordance with the aforementioned normative constitutional doctrine of secularism. Of course the Chamber only ventured itself on what it considered to be the constitutional high ground because, as already mentioned, the Italian Constitutional Court had derived the principle of denominational state neutrality as a fundamental principle of the Italian Constitution and the penal division of the Court of Cassation had ruled in favour of an individual who had refused to perform his duty as a scrutineer.

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1 Moreover it has been realised nowhere in its theoretical purity, not even in France, where the state partially subsidizes denominational (mainly catholic) schools on certain conditions, where it pays for the maintenance and restoration of the historical churches and cathedrals and pays the salaries of chaplains performing their duty in the army or in prisons, and where the three *Départements* of Alsace-Moselle are a mockery to the constitutional phrase that the French republic is “indivisible, laïc etc.” (art. 1 of the French Constitution) because they are still under the regime of the Napoleonic concordat of 1801 with the Holy See instead of the regime of separation of church and state.
in a polling station because of the display of a crucifix in the room. The Court of Cassation held that the crucifix infringed the principle of laicità and the impartiality of the state and that it was a violation of the freedom of conscience of those who did not accept that symbol. Yet the different levels of Italian administrative jurisdiction had ruled against the Lautsi family on the ground that the crucifix was a symbol of the entire Italian civilisation including its allegiance to democracy, equality and religious tolerance. In an article about the Chamber judgment that was published in the Dutch Journal of Constitutional Law,\(^2\) I argued that the Chamber had ironed out the contradictions between the Italian domestic courts concerning the interpretation and the scope of the religious neutrality of the Italian state and that it had issued the ruling that the Italian Constitutional Court would have rendered if it had not declared itself incompetent for formalistic reasons in the Lautsi case. Even if I tempered my approval of the ruling by formulating the caveat that the Court should be careful not to manoeuvre itself into a position where it becomes itself a party that is a threat to the always precarious confessional peace in a country by ruling against the sentiments of the vast majority of its citizens, I nevertheless underestimated the real scope and the far-reaching consequences of the chamber ruling.

It was only after reading some of the legal memoranda of the third-party interveners which opposed the Chamber ruling that I realized that the Court had not only overstepped its jurisdiction, but that it had also rendered a judgement that was not a legally correct interpretation of the Court’s case law.\(^3\) Setting aside the already mentioned confusion about the concept of secularism that led some of the interveners into the exaggerated and erroneous vision of a Court defending a radically anti-religious ideology, some of them nevertheless rightly pointed out that the Court had lost sight of the subsidiary nature of its jurisdiction and that it was not a constitutional court (an assessment that the Grand Chamber judgement now explicitly confirms). In fact the subsidiary nature of the Court’s jurisdiction is double: it comes not only after the national legislative bodies but also after the domestic supreme and constitutional courts and it should respect a broad margin of appreciation of the contracting states in sensitive matters where there is a great diversity of constitutional arrangements among the European member states. The Chamber’s preference for secularism, even properly understood as denominational neutrality and equidistance, was not a neutral position that

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\(^2\) In my opinion the legal memorandum of the NGO “European Centre for Law and Justice” written by Grégor Puppinck and Kris Wenberg stood out as to the force of its argumentation and the thoroughness of its research into the case law of the Court. The influence of this memorandum on the Grand Chamber judgement is obvious (see http://www.eclj.org/pdf/ECLJ-MEMO-LAUTSI-ITALY-ECHR-PUPPINCK.pdf).
reminded the Italian government of a universally accepted constitutional conception about the relation between the religious and the secular realm (which does not exist), but an activist decision that forced Italy into a conception of secularism that trampled on its religious and cultural tradition and failed to appreciate the wide diversity of constitutional arrangements in the states that are party to the Convention. Those national traditions and constitutional arrangements mostly pre-existed the states’ accession to the treaty, and they certainly never had the intention of putting all this at the free disposition of the Strasbourg Court. In ruling that the public school environment should be entirely secular and devoid of all religious symbolism, the Chamber exceeded its jurisdiction because this creates a new obligation without any evidence that the parent’s educational freedom or the children’s freedom of conscience had been violated by the display of the crucifix. As Judge Bonello argued in his (concurring) harangue to the Grand Chamber judgement, secularism and separation of church and state are “superior democratic commodities” which contracting states are free to invest in or not, but “these are not values protected by the Convention”.4 What is not optional for the contracting states is respect for the freedom of and from religion.

The Grand Chamber was therefore right when it tightly framed the Lautsi case to the question whether the right of the parents to educate their children in accordance with their own religious or philosophical convictions had been violated, thereby considering Article 2 of Protocol I in matters relating to education as the lex specialis in relation to Article 9 of the Convention. In accordance with the relevant case law the Grand Chamber holds that the setting and planning of the curriculum fall within the competence of the contracting states including the incorporation of religious and philosophical matters, as long as these teachings do not amount to indoctrination or proselytism. The continuation of the tradition to display a religious symbol in the classroom that confers on the country’s majority religion a preponderant visibility in the school environment, falls also within the margin of appreciation of the state on condition that this does not imply a process of indoctrination and does not infringe upon the rights of the parents in religious and philosophical matters. In view of the fact that the display of the crucifix did not imply any further compulsory teaching or didactic speech about Christianity; that the Italian public school environment is open and tolerant to other religions and to non-believers; that pupils are free to wear Islamic head-scarves and that optional religious education could be organised for other religions, the Grand Chamber concluded that there had been no violation of the relevant rights of the Convention.

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4 In his list of optional “superior democratic commodities” Judge Bonello also mentions “pluralism” and “religious tolerance”. I do not think that these are optional because pluralism is a sociological fact and religious tolerance is inherently linked to freedom of religion in a pluralistic society.
As Judge Rozakis pertinently added in his concurring opinion, even if the display of the crucifix objectively affects neutrality and impartiality, the core question is whether in the present case it does so to an extend that justifies the finding of a breach of the Convention. With its judgement that there is no evidence that such a violation exists in the *Lautsi* case, the Court wisely returned to a modest operational mode of judicial restraint from which the chamber judgement constituted a departure in breach of the subsidiary nature of its jurisdiction.