
Editorial

Lautsi: Crucifix in the Classroom Redux

There are few legal issues which still manage to evoke civic passion in the wider population. Increasingly, and sometimes for the wrong reasons, the place of religion in our public spaces has become one of them. In the age of the internet and Google we can safely assume that all readers of this Journal will have either read the *Lautsi* decision of the European Court of Human Rights or have read about it, thus obviating the need for the usual preliminaries. As is known, a Chamber of the Court held that the displaying in Italian public schools of the crucifix was a violation of the European Convention on Human Rights.

Independently of one's view of the substantive result, the decision of the Second Chamber of the ECtHR is an embarrassment. There are few long-term issues on the European agenda that are more urgent, more complex and more delicate than the way we deal with the challenging problems of State and Church, religious minorities, the questions of collective identities of Europe and within Europe, and the parameters of uniformity and diversity of our states and within our states. All these issues are encapsulated in *Lautsi*. All are disposed of, Oracle like, in 11 impatient and apodictic paragraphs. Compare this to the 90 pages of the Supreme Court of the UK in the recent *JFS* Case, to give but one example.¹

The European Court of Human Rights is not an Oracle. It is a dialogical partner with the Member States Parties to the Convention, and the legitimacy and persuasiveness of its decisions resides both in their quality and communicative power. The ECtHR is simultaneously reflective and constitutive of the European constitutional practices and norms. When there is a diverse constitutional practice among the Convention States – and there certainly is in this area – the Court needs to listen, not only preach, and to be seen to be listening. In this decision not only does it not engage with the rich jurisprudence, doctrine and practice to be found in many of the Member States, while blithely citing mostly its own decisions, it does not even address some of the issues raised by the defendant state.

¹ Length does not ensure necessarily a good decision as that very decision of the Supreme Court proves. But reasoning, even if misguided, is preferable to oracular commands. For a critique of the *JFS* decision see <http://www.jewishreviewofbooks.com/publications/detail/discrimination-and-identity-in-london-the-jewish-free-school-case>.

The Decision of the Chamber is undergirded by the following breathtaking understanding of the Convention system in matters of Church and State: '[t]he duty of neutrality and impartiality of the state is incompatible with any judgment on its part of the legitimacy of religious beliefs or ways of expressing them' (Recital 47(e)).

The mind simply boggles. What, for example, of a Britain, with its established Church, in which the Monarch is not only the Head of State but the Head of the Church of England, in which schoolchildren might be invited to sing the national anthem (God [oy vey] Save the Queen). Is that very constitutional structure of an Established Church not some kind of judgment that in some way at least Anglicanism is not illegitimate? Would the UK ever be able to comply with this norm? Is the Court intimating that Britain is to become a France on this issue? May Irish schools no longer teach the Irish Constitution to schoolchildren because the Constitution endorses *expressis verbis* in its Preamble the Holy Trinity? Must Denmark, like Sweden, abandon Lutheranism as the official Danish Church or hide this fact from *its* children? One could cite endless other examples. Can one have an established church, or an endorsed church, or a supported church, or a privileged church (one of the many modalities of the non-*laïque* group of states who are, *pace* the Chamber, still part of Europe), as one does in so many European states, which does not, at a minimum, impinge on the issue of legitimacy of religious beliefs as the Court seems to say no state may?

What is so interesting about the European constitutional doctrinal landscape is that whilst insisting on Freedom of Religion and Freedom from Religion, it allows a rich diversity in the constitutional iconography of the state and different forms of entanglement of religion in its public life: from fully established churches to endorsed churches to cooperative arrangements as well as, of course, to states in which *laïcité* is part of the definition of the state, as in France.

It is not possible to establish a hermetic border between the symbology of the state which may be religiously imbued and the positive asset of its constitutional law which must respect freedom from religion any more than it is impossible to prevent some spillover from, say, the French *laïque* self-understanding into the classroom. When one prohibits all religious dress in school, rather than allowing all religious dress, is one not making some kind of statement on religious belief?

How one draws the line between the identitarian aspects of the state which might have religious elements and the need for an education which is free and not religiously coercive is an important and delicate issue. But you cannot even begin to draw that line if you do not acknowledge that in Europe there is such a line to be drawn. These issues were raised in the pleadings, but find no echo at all in the decision.

This is not merely a formal critique of the Chamber's failure to understand the doctrinal and conceptual field in which this decision is situated. The European landscape which accepts as legitimate a UK and a France, a Malta or Greece or Ireland as well as an Italy, is a unique and uniquely promising model of tolerance and pluralism. You would not guess such from the decision of the Court. The rhetoric of this decision, its underlying sensibility, its omission to acknowledge these distinctions, would be understandable if it were penned by the French Constitutional Council or, for that matter, the US Supreme Court. But not from the ECtHR.

What, then, of the actual holding? In some way the Government of Italy raised the white flag of surrender even before the Court issued its decision by relying exclusively on the argument that the school crucifix was little more than a cultural symbol that transcended or marginalized its original or outwardly religious significance. Still, their argument was not specious. The cross in the 'Red Cross' we see on ambulances or in the battlefield are accepted as a symbol of human value that has long lost its identification with the Christian tradition. And the same is true for the cross which is to be found in many national flags. But context does matter and I think that the Court was right to reject this argument in the context of the classroom. This is especially so when, as is so often the case, the cross in the classroom is not the 'logo-ized' simple cross but a veritable crucifix with the body of Christ. But even had Italy won on this argument, it would, in my eyes, have been a pyrrhic victory. In the cultural, social and political circumstance of Europe today one does not want to win on such ground – because it implies that if a symbol still maintains its religious significance, it has no place in the public square. That cannot be a correct reflection of the European constitutional sensibility.

The Court was right to emphasize that the Convention provisions in question should be interpreted in the light of the objective of educating towards a democracy which instils the values of pluralism and tolerance. It is also right to emphasize that in our understanding of Religious Freedom one must emphasize both the positive (Freedom of Religion) and the negative (Freedom from Religion). We may, too, accept its ruling that in the classroom the Crucifix may have a plurality of meanings, but its predominant one is religious. And we may even accept its premise that what the public authority puts on the walls of its schools has an educational impact, at a minimum by validating or invalidating certain world views.

Does all this lead ineluctably to the conclusion that the Crucifix, as a religious symbol, has no place in the school? It is here that things require very careful and close attention and where we meet the most disappointing aspect of this decision: its failure seriously to grapple – except in 'knee jerk' fashion – with the new circumstance of Europe in which these issues suddenly seem pressing.

In a multicultural society, where the principal cleavages are *among* different religions or different religious denominations, a display in the public school attended by, say, Christians, Jews and Muslims, of the crucifix could be seen as educationally coercive. The remedy in this scenario might be either to remove the crucifix, validating no religion, or to add, as appropriate, say the crescent and the Star of David, validating all equally. One might think that the second option is better since, if handled appropriately, it would offer more hope of teaching a positive lesson of mutual respect and tolerance – especially when one is faced with a majority religion that is not in need of validation and others that are subject to suspicion or scorn. The effect of a naked wall, and a wall which displays all symbols, though formally equal in its neutrality, is educationally very different.

But the Europe of today is not such a multicultural society. In many of our states, the cleavage between, say, religious Catholics, Jews and Muslims, is far smaller than between the 'faithful' (whether Jews or Christians or Muslims) and the 'secular'.

Laïcité is not an empty category which signifies absence of faith. It is often, as in this case, a rich world view, a position of conscience. It is not an indifference to religion. The secularist would find the crucifix as offensive as might the Jew or Muslim. Having on the wall a crucifix, a crescent and a Star of David would be to someone for whom a secular world view was not just a description of absence of religious faith, but a ‘faith’ in its own right, triply offensive.

So what of a naked wall? Easy solution?

Consider the following parable of Marco and Leonardo, two friends just about to start a new school. An exciting moment. They live in a place like Abano Terme, the locale where Ms Lautsi lived. Leonardo visits Marco for the first time at his home. He enters and notices a crucifix on the wall at the entrance. ‘What is that?’, he asks. ‘A crucifix – why, you don’t have one? Every house should have one.’ Leonardo returns to his home agitated. His mother patiently explains: ‘They are believing Catholics. We respect them and their beliefs.’ (Or, we don’t believe in such stuff, but we respect their right to believe etc.) ‘Can we have one on our wall?’ ‘No’ would surely be the answer of a firm and decided mother like Ms. Lautsi. And rightly so. It is a secular world view that she wants to impart to her children. Now imagine a visit by Marco to Leonardo’s house. ‘Wow!’, he exclaims, ‘no crucifix? An empty wall?’ He returns agitated to his house. ‘Well’, explains his mother, ‘they are a wonderful family, good and kind and charitable. But they do not share our belief in the Saviour. We respect them.’ ‘So can we remove our crucifix?’ ‘Of course not. We respect them, but for us it is unthinkable to have a house without a crucifix.’ The next day both kids go to school. Imagine the school with a crucifix. Leonardo returns home agitated: ‘The school is like Marco’s house. Are you sure, Mamma, that it is okay not to have a crucifix?’ That is the essence of Ms. Lautsi’s complaint. But imagine, too, that on the first day the walls are naked. Marco returns home agitated. ‘The school is like Leonardo’s house,’ he cries. ‘You see, I told you we don’t need it.’ And even more alarming would be the situation if the crucifixes, always there, suddenly were removed.

In a society where one of the principal cleavages is not among the religious but between the religious and the secular, absence of religion is not a neutral option. Some countries, like the Netherlands and the UK, understand better the dilemma. The state there is more serious in trying to be neutral or agnostic in the educational area. It funds secular schools and, on an equal footing, religious schools. It is a system that has clear advantages in allowing parents to give the kind of education they choose for their children with equal funding by the state – though, of course, respecting a certain core of civic content. It ensures freedom of religion, in that critical area of education, and allows freedom from religion on an equal footing. It is an option which, apparently, is not available under the Italian Constitution. In any event, I think that there is something noble and educationally challenging in having all kids in the same public school and learning to respect each other in the rich diversity which characterizes our societies. But in the conditions of our societies, the naked public square, the naked wall in the school, is decidedly not a neutral position, which seems to be at the root of the reasoning of the Court. It is no more neutral than having a crucifix on the wall. It is a disingenuous secular canard, the opposite of pluralism, which has to be

dispelled once and for all if we are serious about teaching our children, religious and secular, Christian, Muslim and Jew, to live as a harmonious society in mutual respect. Further, to say that the cross is predominantly religious does not mean that it is only that and that Italian history and identity started with, say the French Revolution. Is one to revoke from the public space one's symbols as if 'contaminated' by their religious content? Change the British National Anthem? Amend the first phrase of the German Constitution? On the other hand, the Italian government cannot credibly simply insist on the *status quo ante* under the unconvincing legal stratagem that the crucifix is nothing more than, or predominantly, a cultural icon. That is nonsense and even committed Christians should rebel against such a reductionist notion of the Christian principal religious icon.

What then should the Court do? It has every right and duty to impose an obligation on states to ensure that their public schools are not a place which is religiously coercive. (Militant atheism is also religiously coercive.) But there is no 'One Size Fits All' manner in which this can be achieved. It depends on demographics, tradition, and creative educational solutions.

In every context in which this becomes an issue, public authorities, educational experts, representatives of the different social forces must engage in a conversation of the best means to ensure a school precinct and classroom that will positively show respect for different religions, and not hide them away, as well as equal respect for the secular *Weltanschauung*. It may require the removal of all crucifixes, of some crucifixes, of none at all. It may require the addition of other religious symbols. It may require a school precinct which reflects the pluralism of society – some rooms with, some rooms without, etc. I am sure that those whose field is education can come up with creative, differentiated solutions – not only lawyers are creative.

By this reasoning, Ms. Lautsi is perhaps entitled to her damages because the Italian government failed to demonstrate that the use of religious symbology in its classroom was part of a credible programme of education for tolerance and mutual respect. It is that which should be the guideline and constitutional imperative of contemporary Europe.

In this issue

We begin this issue with a symposium to honour one of our Founding Editors, Professor Antonio Cassese, who recently celebrated his 70th birthday. Many happy returns. We publish five short pieces on the role that public international law plays and can play in the protection of individuals, a topic of abiding concern to Nino. From a variety of perspective our writers, Giorgio Gaja, Christian Tomuschat, Andrew Clapham, Luigi Condorelli and Francesco Francioni each provide tribute by providing insight in this particular area of international law. We extend warm thanks to Paola Gaeta, an *EJIL* Editorial Board member, for Guest Editing this symposium.

In our articles section you will find a trenchant piece by B.S. Chimni – 'Prolegomena to a Class Approach to International Law' – with a distinct and challenging theoretical voice. Next, we have an article by Mario Mendez entitled, 'The Legal Effect of Community

Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques’, which suggests that a ‘twin-track’ approach to treaty enforcement is developing in the European Community. We turn then to two pieces which engage with fresh questions concerning international humanitarian law. We hope you will read these articles by Katherine Del Mar and Carlo Focarelli as logical extensions of the symposium in this issue. Our final article by Roozbeh Baker addresses an ever fresh topic: ‘Customary International Law in the 21st Century: Old Challenges and New Debates’.

As part of our occasional series – Critical Review of International Governance – we publish a piece by Milagros Álvarez-Verdugo which investigates the relationship between climate change and the Non-Proliferation Treaty. Life continues even after the Copenhagen farce.

In an earlier editorial, we encouraged review essays which cover a variety of texts on a single topic. In this issue we include a good example of an insightful review essay by Lindsey Cameron and Rebecca Everly on territorial administration.

The Last Page features a poem by Laura Coyne entitled ‘Market Fictions’ – food for the soul.

JHHW
doi: 10.1093/ejil/chq032