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A COMMENT ON LAUTSI

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Jesus can be left hanging: A Pontius-Pilate-like Strasbourg Court decided not to remove him from the cross – pardon, from the wall of Italian classrooms. In more technical jargon, few days ago the Grand Chamber of the ECHR reversed the decision of the second section in the Lautsi case and concluded that the presence of the crucifix is not incompatible with the right of parents to have their children educated compatibly with their own philosophical convictions (see Joseph Weiler's comment on previous decision here).

The decision is a defeat for everyone, not just for the appellant. It is a defeat because the Court does not provide a much needed reflection on the question of the presence of religion in the public sphere. The quality of its reasoning is very poor and unsatisfactory, as it has been noticed times and times again, even when the Lautsi decision went the other way. The Grand Chamber does not articulate its reasons, its assessment is short and brutish and only consists of 20 short paragraphs where the courts simply hides itself behind the screen of the margin of appreciation, a rather laconic euphemism for deference to the national authorities. True, deference serves the purpose of legitimizing the international court vis-à-vis ferocious national criticism which was very vocal recently in the UK parliament. But what the ECtHR does not seem to understand is that

its legitimacy as an international court of human rights also crucially depends on the quality of its reasoning, that should be regarded as exemplar in articulation and depth. Without those qualities, any decision is a defeat for Justice even if it may be a Pyrrhic victory for institutional respectability.

The Court frames the problem in the narrowest possible terms from the beginning: the issue is only about the compatibility of the crucifix with the right of education and freedom of religion. It controversially holds that the decision does not have to do with the compatibility of the crucifix with the principle of secularism (para 57). I am not against judicial minimalism in so far that I believe that the Court does not have to pronounce itself on every possible issue connected with one case. But it is impossible to detach the protection of freedom of and from religion from the idea of the secular state as developed in our modern age. Without secularism, freedom of religion would only be based on the whim of the state who would decide arbitrarily whether or not to tolerate this or that religious group as it is the case in the Toleration Act 1689 which prohibits the practice of Catholicism in England.

The way of introducing the problem is all the more doubtful since the Court adds that secularism is cogent, serious and coherent enough to qualify as a matter of philosophical conviction that parents can invoke as part of their right to have their children educated compatibly with their convictions (Art 2, Protocol 1). Secularism is therefore demoted from an overarching principle of the constitutional state to one possible philosophical conviction amongst others. This suggestion is deeply problematic and denotes well the spirit of uncertainty within which we live. Secularism is often understood as an absence: the effacing of religion from the public sphere. But it truly should be understood as an eminently positive stance which made the republican values of liberty, equality and solidarity possible, as the Consiglio di Stato points out eloquently in the excerpt cited by the very ECHR (para 16—To this extent at least I am happy that Italian institutions, and not Strasbourg, will have to deal with the problem).

It is true that secularism can be understood in many different ways: it is a constitutional doctrine, a philosophical stance, a worldview, and ideology, and even an extreme stance in the hands of scientist who sees religion as the arch-enemy. In a legal context, however, the appropriate understanding of secularism is as a constitutional doctrine which attempts to protects diversity of thought and belief by removing itself from any religious or philosophical conviction. Thus, the constitutional understanding of secularism must be distinguished at any price from secularism as a personal philosophical conviction, contrary to what the Court claims here. An individual, like Mrs Lautsi, is free to believe that any religion is detrimental and incompatible with her own convictions. The state, on the other hand, should refrain from taking such a conviction since it is committed to protect freedom of religion.

The Court frames the problem incorrectly, pitting the interest of the state in protecting religious symbols against the philosophical conviction of the parents. The Court goes on to say that the philosophical convictions of the parents must be respected by the State. It is noted by the court here that respect requires a more open attitude than simply acknowledgment. Legally, this means that the State has a positive obligation to take into account parent's convictions (para 61). Nevertheless, the Court manages to take away with one hand what it gives with the other in the very same paragraph, and in a feast of poor logic holds that this respect will vary from case to case. In other words, the Court says that respect is a stringent moral and legal requirement, but also holds that it is not that stringent as it depends on the context and European consensus. This display of flawed logic is the basis upon which the Court asserts the existence of a margin of appreciation on the part of individual states.

In its 20 short paragraphs of assessment, the Court mentions the margin of appreciation 8 times (it is mentioned 27 times in the whole decision—this is to give a sense of importance of this notion). As just mentioned, the Court grounds the margin of appreciation in the notion of respect. Surely, to show respect to parents' convictions involves a great deal of effort on the part of the State! Not at all, says the Court, since respect depends on whether there is consensus on certain practices at

the European level. This is like saying that I respect everyone's opinion, but I am happy to silence those thoughts that are not approved by the majority (consensus). Or even worse for the Court's fate: I respect the ECHR, but I am prepared to disregard it completely if there is no consensus on its authority. Those are the kind of problems that the Court entered into by engaging (poorly!) with the notion of respect.

According to the Court respect is a matter of consensus; as a consequence of a lack thereof states have a wide margin of appreciation. But then the Court comes full circle and adds lthat the established margin of appreciation is not challenged by contrary evidence on the basis of consensus (para 70). Well that is surprising! If a wide margin of appreciation is based on lack of consensus, it should not come as a surprise that there is no consensus on the prohibition of religious symbols…Perhaps it is even a tautology! This is the gist of the reasoning of the Court and I hope that you can see that it is not a very strong position.

Not surprisingly, Strasbourg-Pilate concludes that the State is free to decide whether or not to have religious symbols in state schools. As a matter of politeness, the Court still notices that even a wide margin of appreciation has its limits under the Court's supervision. But once again the reasoning is virtually nonexistent. Firstly, the Court acknowledges that the crucifix confers 'on the country's majority religion preponderant visibility in the school environment.' But this, the court states without argument, ' is not in itself sufficient to denote a process of indoctrination on the respondent State's part and establish a breach of the requirements of Article 2 of Protocol No. 1.' In clearer words, the state can place religious symbols wherever it wants and this will never amounts to indoctrination.

This idea is confirmed shortly after when the Court affirms that 'a crucifix on the wall is essentially a passive symbol.' This statement is near-comical: what does it mean for a symbol to be 'passive'? A symbol is a symbol and by tautological definition it only has symbolic value. The idea of a passive symbol makes no sense, because it cannot be opposed to an active symbol. What would that be? A crucifix that moves and hypnotizes

children into believing in God?? A symbol can be neither active nor passive, but it can nevertheless have a great impact on conscience and belief. The Court does not accept thi
s, since it believes instead that other activities such as ‘didactic speech or participation in religious activities’ have much greater impact. On this basis, the Court distinguishes between Dahlab and Lautsi. In Dahlab the Court upheld a ban on teachers wearing headscarves—as if someone who wears a scarf will by definition engage in indoctrination, whereas the crucifix is just a passive symbol that does not interfere with anybody’s thinking.

The Court’s last point is also totally off the mark, when it says that in any case parents retain their full rights as educators of their children (para 75). However, this is not at all the issue of the case. Mrs Lautsi is interested in the presence of the crucifix in the PUBLIC sphere and its impact on her children in that context. She cannot possibly care less about her ability to educate her children in private: it goes without saying that she will do whatever it takes to educate them according to her principles. One almost wishes that the Court did not say anything on this point, but then the reasoning would have been even shorter.

Judge Bonello joined the feast with a rant that reads like an advertisement on why nation states should opt out of the Court. In a nutshell, he claims that the ECHR should leave untouched national traditions. Christianity has promoted education more than anyone else. The secular state has nothing to teach us in matters of public education and should therefore bow to those historical roots. Moreover, he adds that secularism, pluralism and religious tolerance have nothing to do with the Convention, which is only concerned with freedom of religion.This is not a tenable position: freedom of and from religion is a byproduct of the historical struggle between the Church and the state. I am tempted to say that even a child would know this, but I am worried that children will soon be educated otherwise. Judge Bonello’s rant reaches its apex when he bemoans the Court’s protection from Turkish censorship of Apolinnaire’s Les onze milles verges (‘a smear of transcedental smut’). Bonello, the lyrical poet, points out that Europe would therefore be a fool not to

protect the crucifix, which is ‘a timeless symbol of redemption through universal love.’

The only redeeming part of the decision is Judge Malinverni’s dissenting position who, thank God!, has difficulty following the argument that leads to a wide margin of appreciation. Malinverni rightly points out that the Court relies too heavily on the notion of consensus to deduce a wide margin of appreciation. However, the doctrine of margin of appreciation makes sense only if understood as a complex set of factors: ‘the right in issue, the seriousness of the infringement, the existence of a European consensus, etc.’ To juggle them all requires careful analysis and a well crafted reasoning. None of these are displayed in the Court’s lamentable decision.

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