

THE EXPOSITION OF RELIGIOUS AND CULTURAL SYMBOLS ACCORDING TO THE POLITICAL EUROPEAN SYSTEM. THE CASE LAUTSI VERSUS ITALY AT THE EUROPEAN COURT OF HUMAN RIGHTS

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ABSTRACT

THE EXPOSITION OF RELIGIOUS AND CULTURAL SYMBOLS ACCORDING TO THE POLITICAL EUROPEAN SYSTEM. THE CASE OF LAUTSI VERSUS ITALY AT THE EUROPEAN COURT OF HUMAN RIGHTS

On 3rd November 2009 the European Court of Human Rights in Strasbourg ruled that Italy had to remove crucifixes from school classrooms, thereby supporting the application submitted by Soile Lautsi Albertin, an Italian citizen of Finnish origin, “in the name of the principle of state secularism.” The above decision sparked an uproar and criticism which reverberated throughout entire Europe.

On 30th June 2010, an appeal against this ruling, inspired by an ideological vision of religious freedom, had been discussed by Italian government lawyers before the Grand Chambre of the Court of Justice in Strasbourg.

The Appeal judgment cancelled the first verdict and recognized the Italian Government’s reasons and rights to display crucifixes in public schools. It was concluded that the first judgment didn’t take into consideration the social and public role of religion, especially the Christian one, in the process of building a civil society and a public law system and promoted religious indifference which stands in contradiction with the entire history, culture and rights of the Italian people and the peoples of Europe.

Key words: Religious Freedom, Religious Identity, Religious Symbols, Human-rights, European Union, Principle of Subsidiarity, Council of Europe

Słowa kluczowe: wolność religijna, tożsamość religijna, symbole religijne, prawa człowieka, Unia Europejska, zasada subsydiarności, Rada Europy

In Strasbourg, on 3th November 2009, with a trial that sparked criticism throughout Europe – the European Court of Human Rights ruled that Italy had to remove the crucifix from the public school classrooms, allowing the application submitted by

Mme Soile Lautsi Albertin, an Italian citizen of Finnish origin, “in the name of the principle of state secularism.”

A short-sighted judgment in terms of ethical assumptions that each State based on principles of democracy and rule of law is called to uphold and promote the benefit of its citizens: just for these reasons this judgment was subject of criticism by several institutional organizations and by civil society in Italy and Europe.

On 30th June 2010, the Grand Chambre of the Court of Justice in Strasbourg has discussed an Appeal by the Italian Government against that ruling inspired by an ideological vision of religious freedom.

The Appeal judgement cancelled the first sentence and recognized the reasons of the Italian Government and the right to display crucifixes in public schools.

I have been member of the staff of lawyers who followed the debate preparation of the Italian Government application.

As evidence of the legitimacy of the reasons of the Appeal presented by the Italian Government is well noted that a dozen European Countries have formed the third side of the same Italian Government, to request cancellation of the Court’s ruling against crucifix.

Among these Countries there were States with great religious traditions, Catholic and Orthodox, as Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, Russia and San Marino.

It is not an accident that unfortunately great absents in this trial at the European Court of Justice were the Western States where the cultural secularist, relativistic political drift overcomes the civil society: France, Germany, Great Britain.

We make some general observations on the delicate subject matter of the Appeal by the Italian Government; according to all jurists and lawyers involved in the judgment Lautsi versus Italie what was at stake was the most important right of freedom of choice for every citizen, the freedom of religion and its events in public places.

We cannot forget that the Court of Justice on Human Rights is an institution of the Council of Europe and not of the European Union.

The Council of Europe is an international organization that brings together several Countries outside the EU, and their outlines are often at odds with the fundamental principles of the Aquis Communautaire about the subject of religious freedom: this is the case of Turkey, that behind the shape of the secularist State maintains de facto Muslim religion as State religion, and discriminates every other manifestation of faith in civil society: the Catholic Church for example in Turkey cannot promote any charitable, educational, social institutions, because cannot obtain legal personality.

I think we can say that this sentence is the result of the work of a Court sought to deny the meaning of the project of Europe cultural unification thought by the founding fathers Alcide De Gasperi, Konrad Adenauer, Schuman.

The sentence of the Strasbourg Court is a classic example of a secular setting time to lock the manifestation of freedom of religion, especially Christianity, in a real ghetto. In this perspective we can explain the framework of the written judgment, whereby the exposure of any religious symbol violates the rights of parental choice

on how to educate children, the rights of children of believing or not, and violates the “educational pluralism.”¹

The judgment of the Court was patently illogical. The judgment doesn't appreciate the social and public role of religion, especially Christianity, in the construction of civil society and public law and promotes religious indifferentism which is in contradiction with the history, culture and the right of the Italian people and peoples of Europe: a manifestation of aggressive secularism fighting religious freedom is objectively revealed in the Judgment Lautsi.

We know that the crucifix is a symbol of religious and cultural identity and as such it has never taken a coercive value, as alleged by the Court in its judgment.

As witnessed earlier decisions made by judges in Italy, the crucifix is an element of public identity based on values and ethical assumptions underlying the Constitution of our Country, in a society that can not be separated from its Christian tradition recognized and promoted even in the Constitution.²

It follows that if we remove the crucifixes from schools, as public places, we should remove all the crosses and the magnificent sacred works that are present in our streets and in our squares, which is absurd.

It's good to mention – in particular – that the Italian Constitutional system, unlike the French and others inspired by an abstract concept of *laïcité*, has always been in keeping with the recognition and inclusion in their law of Christian cultural identity.³

The display of crucifixes in Italian school classrooms is prior to the Republican Constitution, but was decided during the liberal and anticlerical age of Risorgimento through the Casati Law n. 3725 of 13 November 1859.

The European Court's judgment is therefore quite abstract and does not take into account national contexts, the realities of individual countries.

The Italian Constitution rejects the secular and irreligious setting typical of the French law regulations, for which the religious factor is purely individual and is intended to remain within the private sphere.

The constitutional discipline, therefore, while ensuring all the religious faiths, recognizes individual confessions as found in social reality.

Thus, the Constitution recognizes the equal religious freedom, but not equal treatment because it aims to respect and promote the ethical values that underlie the prominent beliefs of their people.⁴

Avoiding any public sphere from the religious traditions means to deny the State role as a promoter, protector and defender of human freedom.

In the Appeal at the Council of Europe, the council for the defence focused criticism against the assessments of the Court of Justice on three fundamental issues of constitutional legal nature that are the basis of the judgment: the principles of neutrality of the State, of negative and active secularism and the principle of subsidiarity. ended to remain within the private sphere.

¹ J. Ratzinger, J. Habermas, *Etica, religione e Stato liberale*, Brescia 2005, p. 50.

² F.A. Von Hayek, *La società libera*, Roma 1999, p. 490.

³ A. Del Noce, *Filosofi dell'esistenza e della libertà*, Milano 1992, p. 632.

⁴ S. Satta, *Colloqui e soliloqui di un giurista*, Padova 1968, p. 416.

The constitutional discipline, therefore, while ensuring all the religious faiths, recognizes individual confessions as found in social reality.

The American philosopher and jurist Joseph Weiler, Director of the Jean Monnet Centre and representing the Governments of Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, The Russian Federation and San Marino, all Third Parties in the Lautsi Appeal stressed the extreme danger of the concept of state neutrality in the legal claims of the judges of the Court of Justice: the State, because its primary task is to protect, promote and ensure the multiple manifestations of freedom of thought of the citizens, on an individual as an associate, has a responsibility to consider the religious factor as a constitutive pillar of social life of people – within the public sphere of civil and politic society.⁵

The Chamber also articulates the principle of “neutrality:” “The State’s duty of neutrality and impartiality is incompatible with any kind of power on its part to assess the legitimacy of religious convictions or the ways of expressing those convictions.” This formulation of “neutrality” is based on two conceptual errors which are fatal to the conclusions.⁶

First, under the Convention system all Members must, indeed, guarantee individual freedom of religion but also freedom from religion. This obligation represents a common constitutional asset of Europe. It is, however, counter balanced by considerable liberty when it comes to the place of religion or religious heritage in the collective identity of the nation and the symbology of the State.

Thus, there are Members States in which laïcité is part of the very definition of the State, such as France and in which, indeed, there can be no State endorsed or sponsored religious symbol in a public space. Religion is a private affair.

But no State is required under the Convention system to support laïcité. Thus, just across the Channel there is England in where there is an Established State Church, in which the Head of State is also the Head of the Church, in which religious leaders, are members, ex officio, of the legislative branch, in which the flag carries the Cross and in which the National Anthem is a prayer to God to save the Monarch, and give him or her Victory and Glory.

There is a huge diversity of State-Church arrangement in Europe. More than half the population of Europe lives in States which could not be described as laïcist. Inevitably in public education, the State and its symbols have a place. Many of these, however, have a religious origin or contemporary religious identity. In Europe, the Cross is the most visible example appearing as it does on endless flags, crests, buildings etc. It is wrong to argue, as some have, that it is only or merely a national symbol.

This European arrangement constitutes a huge lesson in pluralism and tolerance. Every child in Europe, atheist and religious, Christian, Muslim and Jew, learns that as part of their European heritage, Europe insists, on the one hand on their individual right to worship freely – within limits of respecting other people’s rights and public order – and their right not to worship at all.

⁵ A. Passerin d’Entrèves, *La dottrina del diritto naturale*, Torino 1954, p. 176–177.

⁶ Z. Grochowski, *La filosofia del diritto di Giovanni Paolo II*, Roma 2002, p. 31.

At the same time, as part of its pluralism and tolerance, Europe accepts and respects a France and an England; a Sweden and a Denmark, a Greece and an Italy all of which have very different practices of acknowledging publically endorsed religious symbols by the State and in public spaces.

In many of these non-laicist States, large segments of the population, maybe even a majority are no longer religious themselves. And yet the continued entanglement of religious symbols in its public space and by the State is accepted by the secular population as part of national identity and as an act of tolerance towards their co-nationals.

As said Prof. Joseph Weiler, it may be, that some day, British people, exercising their constitutional sovereignty, will divest themselves of the Church of England. But that is for them, not for an European Court judgement. Italy is free to choose to be laïque. The Italian people may democratically and constitutionally elect to have a laïque State. But the applicant, Ms Lautsi, does not want this Court to recognize the right of Italy to be laïque, but to impose on her a duty. That is not supported by law.

In today's Europe Countries have opened their gates to many new residents and citizens. The Europe of the Convention represents a unique balance between the individual liberty of freedom of and from religion, and the collective liberty to define the State and Nation using religious symbols and even having an established Church. We trust our constitutional democratic institutions to define our public spaces and our collective educational system.

In this issue the principle of subsidiarity has a fundamental importance. The subsidiarity, a constitutional principle of the EU Treaties came indeed from the Social Doctrine of the Catholic Church, infact it was elaborated through the Enciclica Quadregesimo Anno of the Holy Father Pius XI during the thrtiees years of the last century.⁷ Let me say that it's curious that very few politicians and intellectuals remember that Europe is indebted to the Catholic Church for this important social policy concept.

The principle of subsidiarity in the EU's treaties asks in fact that European institutions leave member states free to legislate on religious freedom of their citizens, without imposing authoritative decisions, but merely to harmonizing national laws with European ones.

The Court of Justice has instead taken an obsolete constitutional interpretation, inspired by the so-called "negative laicism," a typical concept inspired by the French illuministic law: through the pretext of imposing the indifference of the State on religious issues in order to respect the diversity of faiths, in fact it prevents, discriminates, does not protect the religious freedom of expression of the majority of citizens.

I must remember that in our Italian Constitution really is not mentioned at all the concept of secularism.

Actually it seems that in the political-institutional program of implementation of European unification, the temptation, as is typical of Lautsi case, to give an applica-

⁷ L. Galantini, *La tutela delle identitculturali nel governo d'Europa: sovranite sussidiarietnel processo di integrazione europeo*, Milano 2008, p. 47 segg.

tion of the concept of secularism “negative” or “discriminatory” or totalitarian as in communist Countries.

Although the effort of the philosophes was oriented to give an injection of positive content – such as ‘freedom,’ ‘autonomy,’ ‘tolerance,’ ‘fraternity’ and more – to the concept of ‘secularism,’ we can not yet say that it has been crowned by actual success.

As previously stated one of the founders of the European Union, the statesman Jacques Delors, the principle of subsidiarity is rather the tool that prevents the invasion of a single thought homologating the political sovereignty of civil society and the values that inspired, first of all the religious factor.

The judge of the Court of Justice in Strasbourg on behalf of Spain, Prof. Borrego. Borrego has effectively shown that the Lautsi decision belongs to a virtual legal world which is not able to face the reality of cultural, historical, social and local heritage of values that characterizes the experience of European history.

A different value has the principle of “positive secularism,” which provides the necessary recognition of a margin of appreciation to religion, to faith as a social factor that rightfully should be protected and promoted in the public domain, as an expression of the cultural identity of a society.

Otherwise the values outlined in the Western constitutional Cards are reduced to a sterile exercise in style: it is good to mention the crystal clear mind of the Italian jurist and philosopher Passerin Entreves, that the law is not only a measure of the action, but it is also a value judgment of the action.⁸

For the law – although with certain hypocrisy some Courts of Justice trying to ignore the point – indicates what is good and evil: and in turn good and bad are the conditions that justify a legal obligation.

We must recognize that the religious phenomenon, and in particular the Christian heritage of the West is a primary and essential value even at the political level, that remains so despite the opposition.

It is necessary, in particular, to limit the growing judicial activism of law-courts that are increasingly looking to replace the law purporting to interpret it, trying not to recognize to the various States a margin of appreciation – recognized linked to issues of national values and roots that underpin the social pact of coexistence of a nation.

The issue of religious freedom concerns the European Union as a supranational institution such as democratic organization, and can not discriminate in each Member State separately. The basic problem is that the type of Lautsi Judgment purports to approve, to homologate the cultures according to a logic of abstract legal person that is incompatible with human freedom.⁹

Europe, must be forced to rethink the notion of secularism that comes from Illuministic age.¹⁰ Its limitation is in the abstract character – purely rational – that laicism has received at birth and that the Judgment Lautsi blatant cheating to an extent. The

⁸ A. Passerin d’Entreves, op.cit., p. 176–177.

⁹ S. Andersen, K.A. Eliassen, *The European Union: How Democratic Is It?* London 1996, p. 98.

¹⁰ J.H.H. Weiler, *La nuova Costituzione dell’Europa*, Bologna 2003, p. 139.

Illuministic pretense of finding a law alike in every latitude – and so universal – could create only discrimination.

All citizens are equal before the law without doubt and no one can be, therefore, discriminated against for their beliefs, religious or other nature. This principle, solemnly proclaimed by our Republican Constitution and certainly intangible, requires us to recognize the crucial role of Christianity in the construction of our continent, our country up to shaping the landscape, language, social behavior, political and legal thought. The reality principle requires us to take note of it, with rational statement.

