AN ACTIVIST STATE FOR DIVERSITY: SOME REFLECTIONS ON "NEUTRALITY" AND SECULARISM IN *LAUTSI V ITALY*

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SUMMARY

The European Court of Human Rights, sitting as a Grand Chamber, recently rendered judgment in arguably among its most watched cases of all time, *Lautsi v. Italy.* The Court's judgment turned extensively on the idea that "States have responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs." Intervenors such as Human Rights Watch also argued that, "Effective protection against violations of the rights of parents and children … requires State neutrality …."

We take issue with the question of whether – philosophically or legally – "neutrality" is an appropriate conceptual or normative framework. We argue that little in the history of human rights seems to suggest that "neutrality" or anything like it has ever been a norm conducive to the effective protection of minorities or other groups facing exclusion. Only an activist state, engaged in rigorous and ethical, rather than selective and instrumental, defence of diversity can effectively secure fundamental human rights. As religious fundamentalisms increasingly lead to patterns and practices of human rights abuses in all corners of the globe, we find the doctrine of neutrality not merely barren but an abdication of core human rights principles. We invite a call for an activist state for diversity.

PART I: INTRODUCTION

The European Court of Human Rights, sitting as a Grand Chamber, recently rendered judgment in arguably among its most watched cases of all time, *Lautsi v. Italy*. The case concerned Ms Soile Lautsi, who on behalf of herself and her two children brought a petition to the Court contending that the display of the crucifix in the State school attended by the latter was contrary to her right to ensure their education and teaching in conformity with her religious and philosophical convictions, and her freedom of conviction and religion, both protected under the European Convention of Human Rights. At domestic level, she had sought justice through a series of legal actions complaining of an infringement of the principle of secularism, relying in that connection on Articles 3 (principle of equality) and 19 (religious freedom) of the Italian Constitution, as well as on the principle of the impartiality of public administrative authorities (Article 97 of the Constitution).

In November 2009, a Chamber of the European Court, convened as seven judges, ruled that the presence of the crucifix – which it was impossible not to notice in the classrooms – could easily be interpreted by pupils of all ages as a religious sign and they would feel that they were being educated in a school environment bearing the stamp of a given religion. The Court held that the State was to refrain from imposing beliefs in premises where individuals were dependent on it. In particular, it was required to observe confessional "neutrality" (the Court's term) in the context of public education, where attending classes was compulsory irrespective of religion, and where the aim should be to foster critical thinking in pupils. The

compulsory display of a symbol of a given confession in premises used by the public authorities, and especially in classrooms, thus restricted the right of parents to educate their children in conformity with their convictions, and the right of children to believe or not to believe. The Court concluded, unanimously, that there had been a violation of the European Convention's Article 2 of Protocol No. 1 right to education, taken jointly with Article 9 of the Convention, guaranteeing the right to freedom of thought, conscience and belief.

The ensuing firestorm was truly noteworthy. Italy appealed to the Court's Grand Chamber, and this request was granted on 1 March 2010. In addition, leave to intervene in the written procedure was given to thirty-three members of the European Parliament acting collectively, the non-governmental organisation Greek Helsinki Monitor, which had previously intervened before the Chamber, the non-governmental organisation *Associazione nazionale del libero Pensiero*, the non-governmental organisation European Centre for Law and Justice, the non-governmental organisation Eurojuris, the non-governmental organisations International Committee of Jurists, Interights and Human Rights Watch, acting collectively, the non-governmental organisations *Zentralkomitee der deutschen Katholiken*, *Semaines sociales de France* and *Associazioni cristiane lavoratori italiani*, acting collectively, and the Governments of Armenia, Bulgaria, Cyprus, the Russian Federation, Greece, Lithuania, Malta, Monaco, Romania and the Republic of San Marino. The Governments of Armenia, Bulgaria, Cyprus, the Russian Federation, Greece, Lithuania, Malta, and the Republic of San Marino were also given leave to intervene collectively in the oral procedure. A public hearing in the case took place in Strasbourg on 30 June 2010.

PART II: "NEUTRALITY": COURT CONSENSUS

In a remarkable reversal of the Chamber's unanimous judgment, ruling on 18 March 2011, the Court's Grand Chamber held that the issues in question fell within the so-called "margin of appreciation" of the State (meaning beyond the jurisdictional range of matters on which the Court would pronounce a violation), and therefore that there had been no violation of the Convention.

Our purpose here is not to assess the quality of the Grand Chamber judgment, nor to reopen the question of the politicization of the court, about which much erudite ink has been convincingly spilled.[1] Nor do we pose the question of what it means that seven judges of the Chamber, ruling unanimously, could have been so wrong, although (wink-wink) someone easily might seek to do so.[2] Rather, we seek solely to note the following apparently remarkable feature of the proceedings: that evidently all sides in the case agreed that what was at issue was something called "neutrality" (that is, of the State), as a value of the highest consequence. No parties articulated the idea that diversity needs to be actively defended. We find that troubling.

1 See Dembour, Marie-Benedicte, *Who Believes in Human Rights?: Reflections on the European Convention*, Cambridge: Cambridge University Press, 2006.

2 The blogosphere is indeed already full of interesting comments – mostly critical -- on legal aspects of the Grand Chamber judgment. See for example:
www.strasbourgobservers.com/2011/03/22/lautsi-v-italy-the-argument-from-neutrality/
www.ejiltalk.org/a-comment-on-lautsi/#more-3161
combatsdroitshomme.blog.lemonde.fr/2011/03/21/crucifix-dans-les-salles-de-classes-la-capitulation-de-la-cour-europeenne-des-droits-de-l%E2%80%99homme-cour-edh-gc-18-mars-2011-lautsi-c-italie/.

During the proceedings, the Italian government and its proponents argued that a lack of belief needed to be seen as merely one belief among many:

> *"The Government … criticised the Chamber's judgment for deriving from the concept of confessional 'neutrality' a principle excluding any relations between the State and a particular religion, whereas neutrality required the public administrative authorities to take all religions into account. The judgment was accordingly based on confusion between 'neutrality' (an 'inclusive concept') and 'secularism' (an 'exclusive concept'). Moreover, in the Government's view, neutrality meant that States should refrain from promoting not only a particular religion but also atheism, 'secularism' on the State's part being no less problematic than proselytising by the State. The Chamber's judgment was thus based on a misunderstanding and amounted to favouring an irreligious or antireligious approach of which the applicant, as a member of the Union of atheists and rationalist agnostics, was asserted to be a militant supporter."*

Note the subtle taking over by the Court of the voice of an oppressive majority. Mrs. Lautsi, a minority in a system surrendered in its near totality to one ideology, is gently branded a "militant" for seeking relief for her children from religious dogma, in a place to which she must, by law, send them every day.

The Grand Chamber, summarized the Chamber judgment in the following terms: "According to the Chamber, the State had a duty to uphold confessional neutrality in public education, where school attendance was compulsory regardless of religion, and which had to seek to inculcate in pupils the habit of critical thought. It observed in addition that it could not see how the display in State-school classrooms of a symbol that it was reasonable to associate with the majority religion in Italy could serve the educational pluralism which was essential for the preservation of 'democratic society' within the Convention meaning of that term."[3]

The Grand Chamber, having heard all intervenors, summarized the law of the Convention in the relevant area: "… States have responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs. Their role is to help maintain public order, religious harmony and tolerance in a democratic society, particularly between opposing groups .... That concerns both relations between believers and non-believers and relations between the adherents of various religions, faiths and beliefs. …" As noted above, reviewing the facts in Lautsi, the Grand Chamber: "in deciding to keep crucifixes in the classrooms of the State school attended by the first applicant's children, the authorities acted within the limits of the margin of appreciation left to the respondent State in the context of its obligation to respect, in the exercise of the functions it assumes in relation to education and teaching, the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions" and did not find Italy in violation of the Convention.

Two judges – Malinverni and Kalayjieva – dissented from the Grand Chamber. Remarkably, however, they accepted the basic premises of the majority opinion and dissented primarily against the idea that the matter fell within the margin of appreciation of the State. Indeed,

3 European Court of Human Rights, Grand Chamber, Judgment on the Merits, Case of Lautsi v. Italy, 18 March 2011 (Hereafter "Grand Chamber judgment"), para.31.

the dissent arguably does a better job of articulating the idea of "neutrality" than the majority opinion:

> *"We now live in a multicultural society, in which the effective protection of religious freedom and of the right to education requires strict State neutrality in State-school education, which must make every effort to promote pluralism in education as a fundamental feature of a democratic society within the meaning of the Convention."*

On the losing side of the judgment, as noted above, were a number of particularly respected intervenors. These too, however, deemed the issue to be one of something called "neutrality". Here, for example, is the conclusion of the joint Human Rights Watch/Interights/International Commission of Jurists third-party intervention:

> *"Effective protection against violations of the rights of parents and children under Article 2, Protocol 1 and Article 9 ECHR requires State neutrality between religious beliefs in all aspects of education, including both in the curriculum and in the educational environment. Children in compulsory education are required to be present in the classroom and are therefore especially vulnerable to influence or indoctrination. In these circumstances, particular vigilance by the State is required to protect neutrality. International standards presented above support the conclusion that official display of symbols of one particular religion, such as the crucifix, in the classroom, displayed uncritically as objects meriting worship or loyalty, violates this duty of neutrality and the rights of parents and children in respect of education and religious freedom." (emphasis added)*[4]

From whence comes this new zeal for "neutrality"? "Secularism" is suddenly a harried thing.5 Here, for example, is a passage from the Concurring Opinion of Judge Bonello: "Seen in the light of the historical roots of the presence of the crucifix in Italian schools, removing it from where it has quietly and passively been for centuries, would hardly have been a manifestation of neutrality by the State. Its removal would have been a positive and aggressive espousal of agnosticism or of secularism – and consequently anything but neutral. Keeping a symbol where it has always been is no act of intolerance by believers or cultural traditionalists. Dislodging it would be an act of intolerance by agnostics and secularists."

Apparently, into the vacuum once filled by secularism has flooded "neutrality", distinguished from its discredited cousin by the quality of viewing all beliefs – secularism included – as on equal terrain. Neutrality poses as the view from nowhere, a gaze outward out at a vast and vibrant field of flowers, each one a slightly different hue.

PART III: "NEUTRALITY" AND SECULARISM

But does that really characterize the current struggles for diversity and the threats faced by minority views by mobilizing – and in many cases fundamentalist – ideologies, some of them welded to state power? A brief glance at a map of the human rights world at present finds

4 At: www.interights.org/documentbank/index.htm?id=618 (accessed 30 April 2011).

5 Although the Court recognized that the supporters of secularism are able to lay claim to views attaining the "level of cogency, seriousness, cohesion and importance" required for them to be considered "convictions" within the meaning of the Convention (see Grand Chamber judgment para.58).

few if any places where diversity is not under threat not only by aggressive doctrines, but under threat even as a value itself. How, for example, to fit the vision of the "neutral" state in Lautsi into the current extreme threats to LGBT persons and groups in Uganda? Or to Muslims in Gujarat? Or to moderates in Pakistan? Or to non-Orthodox Christians in Serbia? Etc., etc., etc.

Joseph Weiler, an eminent jurist who acted as Counsel to the Italian government in its Grand Chamber appeal, apparently missed this point when arguing that, although Italy is unlike societies which allow oxygen into education to foster diverse viewpoints, well, it should be like those societies:

> *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. …*[6]

Are most places more like Netherlands and the UK? Or are they more like Italy? Decidedly, most of the places where anyone might struggle to articulate a non-religious or other alternate viewpoint are like the contexts in which Mrs. Lautsi raised her claims. Can she or those in similar situations draw any comfort from the logic of the above? Is an appeal to "neutrality" of any use to her?

With no side in the case articulating the value of a vigorous obligation of the State to defend diversity, the outcome in Lautsi seems, with the benefit of hindsight, foreordained. The judgment, the dissenting opinion, as well as the brief submitted by ICJ et. al. feel no need to spell out what they mean by neutrality, a subject of significant controversy in political theory and philosophy[7], but one whose meaning they appear to take for granted and self-evident. This taken-for-grantedness has at least two dimensions to it. The first may be related to the (so-called) objective and *neutral* gaze of human rights. This gaze approximates to what Zizek calls "the empty point of universality", a seemingly untainted position from which one can appreciate (or depreciate) other positions. Human rights actors seem to assume they occupy an ideology free zone and are hence seemingly uncomfortable with secularism, whereas neutrality is, ostensibly, more legally determinate, a misconception that anyone with even a fleeting familiarity with political philosophy would not entertain.[8]

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6 Weiler, Joseph, "EJIL Editorial Vol 21:1 – Lautsi: Crucifix in the Classroom Redux", at www.ejiltalk.org/lautsi-crucifix-in-the-classroom-redux/.

7 See, for instance, S. Wall and G. Klosko (eds.), 2003, Perfectionism and Neutrality, Lanham, MD: Rowman & Littlefield, 2003, or Andrew Mason, 1990, Autonomy, liberalism and state neutrality. *Philosophical Quarterly*. See also more generally works of John Stuart Mill, John Rawls, Joseph Raz, Brian Barry, Richard Arneson etc.

8 For instance, is neutrality to mean outcome-neutrality (also neutrality of effect), neutrality of intent or neutrality of procedure (neutrality of justification)?

The second has to do with liberal origins of the idea of neutrality that calls for the state to not favour any particular conception of the *good life* over others but the reality is that some conceptions of the *good life* may have more power behind them than others.[9] The Court, as well as the human rights organisations that intervened, did not seem to take cognizance of the implications of professing neutrality in a context marked by deep religious diversity and deep inter- and intra-group inequality, some of it based on religion and related racism and xenophobia. In such a context, the idea of strict neutrality that calls for the state to help or hinder all religions equally and in much the same manner, cannot possibly promote diversity and inclusion. Thus, for example, even though the Swiss state was not exactly neutral in the referendum to ban the construction of minarets, it was effectively neutralized, while the minority Muslim community's right was subjugated by "popular will" and an ostensibly democratic process. The response to the crisis of inclusion in Europe (or the 'west' in general) does not lie in promoting politico-legal fictions such as neutrality, but rather by building a state committed to ethical diversity, the pursuit of which requires going beyond conceptions of rights that are inherently diversity-resistant.[10]

Europe today is characterized by deep inter- and intra-religious diversity as well as other serious socio-economic cleavages. Furthermore, the contemporary European state is not engaged in a conflict with the Church for political authority and by virtue of many national, regional and international obligations is actually a guarantor of rights. And therefore a thick understanding of secularism is vital for courts, the state and indeed human rights organisations in responding meaningfully to the challenge of deep religious diversity. So, what does this mean for secularism? The Court and human rights organisations appear to have missed an opportunity to flesh out a rights-based secularism.

PART IV: TOWARDS A PRINCIPLED ENGAGEMENT

With due acknowledgement to the argument that positions on the place of religion in the public sphere can no longer be neatly divided into exclusivist and inclusivist, it is nevertheless important also to accept that religion will continue to pose significant challenges for the liberal public sphere. This is particularly the case when conceptions of the good life, spelt out in relation to ultimate ideals, are articulated in metaphysical rather than political terms, in other words placed beyond public reasoning. Therefore, as Bhargava argues, when the "minimally overlapping good that exists, namely, the ordinary but dignified life of all that cannot be undermined in the name of any ultimate ideal. [...] all ultimate ideals including those infused with religious flavor need to be expelled from the public arena. In this sense, a right-based secularism requires that political institutions keep a principled distance from religious institutions and practices."[11]

9 For an analysis of what this means in the context of international human rights see Saladin Meckled-Garcia, International Justice, Human Rights and Neutrality in *Res Publica* 10: 153–174, 2004.

10 See Rajeev Bhargava *Should Europe learn from Indian secularism?*, Seminar No. 621, May 2011 available at www.india-seminar.com/2011/621.htm.

11 Rajeev Bhargava, *What Is Secularism For?* A pre-seminar reading for the Victoria Colloquium in Political Legal and Social Theory, 2008, page 40. See also by Bhargava *Should Europe learn from Indian secularism?*, Seminar No. 621, May 2011 available at www.india-seminar.com/2011/621.htm and Giving Secularism its Due, *Economic and Political Weekly*, July 9 1994.

Principled distance in the sense which Bhargava uses it implies that the "state intervenes or refrains from interfering depending on which of the two [interference or non-interference] better promotes religious liberty and equality of citizenship. If this is so the state may not be able to relate to every religion in exactly the same way, intervene to the same degree or in the same manner. All it must ensure is that the inclusion or exclusion of religion into politics be guided by non-sectarian principles consistent with a set of values constitutive of a life of equal dignity for all."[12]

Indeed one may well speak of principled engagement rather than distance. Secularism is best viewed an evolving and dynamic concept. It also has a later history in contexts such as India or West Asia, for example, which cannot simply be labeled 'western', for indeed these contexts differed sharply from French or American contexts. It is in fact best to speak of secularisms. As Taylor and Bouchard point out, open forms of secularism tend towards "protection of freedom of conscience and religion and a more flexible conception of State neutrality" as contrasted with more rigid forms of secularism.[13] As An-Na'im points out, while its forms are inherently historical and contextual, secularism is, in fact, a pre-condition for the full exercise of freedom of religion and beliefs.[14] The idea of neutrality, in this view, extends only is far as neutrality towards religious doctrine and a distance between state and religion but not necessarily politics and religion.

One can speak of a rights-based secularism that acknowledges difference between religious communities and between religious and non-religious communities; looks beyond liberal individualism and adopts an attitude of critical respect (as opposed to hostility or passive respect for the religious); and, adopts a principled distance rather than neutrality. Far from excluding religious communities from the political arena, under certain conditions a rights-based secularism may grant "immunities, privileges and guarantees to these communities, particularly to smaller ones"[15] provided such claims are subject to an "ethical-political evaluation" to guard against reinforcing any repressive tendencies of state or communal power.[16]

PART V: CONCLUSION: AN ACTIVIST STATE FOR DIVERSITY

In a thoughtful and incisive comment on the Grand Chamber judgment in *Lautsi,* Lorenzo Zucca observes that:

> *"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*

12 Bhargava, 2008, page 22.

13 Gérard Bouchard & Charles Taylor, *Building The Future: A Time For Reconciliation,* Report of Consultation Commission on Accommodation Practices Related to Cultural Differences, 2008.

14 Abdullahi Ahmed An-Na'im, *Islam and the Secular State*, Harvard University Press, 2008.

15 Bhargava, 2008, page 40.

16 For an analysis of the dangers of unethical evaluations same, for example, see Chetan Bhat, The Fetish of the Margins: Religious Absolutism, Anti-racism and Postcolonial Silence, *NewFormations* 59, (2006) 98-115.

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."[17]

It is questionable whether the idea of "neutrality" adequately captures that insight, or whether "neutrality" remains (if it ever was one) an appropriate response for our age. The rising tide of religious fundamentalisms and cultural chauvinisms embedded within a global matrix of economic imbalances as well as discourses such as the war-on-terror are posing enormous challenges for human rights. In contemporary Europe, inclusion is increasingly restricted to the cultural agenda while myriad exclusions characterize the economic, political and legal agendas.

It is somehow quaint that the European Court of Human Rights has delivered us *Lautsi,* since it reminds us of injustice past, as well as of the way in which the judicial wheel ultimately corrects itself. In 1940, at the height of persecution of Jews, Roma, homosexuals, persons with disabilities and others in Europe, the US Supreme Court, labouring under a doctrine known as "judicial restraint" – something like the "neutrality" of its time – ruled in the case of *Minersville School District v. Gobitis* that the children of Jehovah's Witnesses had no right to decline to salute the American flag in classrooms. The ruling led immediately to a wave of persecution of Jehovah's Witnesses throughout the United States. The ruling -- and in particular its impact of giving the nod to the persecution of minorities – was gradually deemed an embarrassment both inside and outside the Court. It is now seen as having paved the way for its corrective: the landmark 1954 school desegregation ruling in *Brown v. Board of Education*.

We now must hope for a similar corrective to *Lautsi.* The majority of the Court indeed opened the possibility for such a corrective when it recalled that "Article 2 of Protocol No. 1 does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. … its aim is to safeguard the possibility of pluralism in education … it requires the State, in exercising its functions with regard to education and teaching, to take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner, enabling pupils to develop a critical mind particularly with regard to religion in a calm atmosphere free of any proselytism. ..."

Little in the history of human rights seems to suggest that "neutrality" or anything like it has ever been a norm conducive to the effective protection of minorities or other groups facing exclusion. Only an activist state, engaged in rigorous and ethical, rather than selective and instrumental, defence of diversity can effectively secure fundamental rights. As religious fundamentalisms increasingly lead to patterns and practices of human rights abuses in all corners of the globe, we find the doctrine of neutrality not merely barren but an abdication of core human rights principles. We invite a call for an activist state for diversity.

17 Zucca, Lorenzo, "A Comment on Lautsi", at: www.ejiltalk.org/a-comment-on-lautsi/#more-3161 (accessed 8 June 2011).