

# THE *LAUTSI* DECISION AS SEEN FROM (CHRISTIAN) EUROPE

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It is a very interesting, as well as a strange, situation for the French to comment on behalf of the Americans on the *Lautsi* case, especially the decisive pleading of Joseph Weiler in the Grand Chamber of the European Court in 2011. French people heard about Joseph Weiler a few years ago in 2009 when he published: “*L’Europe Chrétienne?: Une Excursion*” (*Christian Europe? : An Excursion*). The book was prefaced by the French (Catholic) philosopher Remi Brague. The French edition had been translated from its 2003 Italian version. There is no English edition of it. Such a lacking may seem strange, but the fact is that it is not an American Professor educating Americans about Europe, it is an essay written for Europeans at the time of the framing of the dead-born “*European constitutional treaty*” by a Jewish law professor who has exhibited complex identity and is deeply rooted in European culture. French or European, the music of the essay sounded very clear to us. However, Joseph Weiler failed in his attempt to convince the European framers that they should mention the Christian roots of Europe in the Preamble of their Constitution. He failed, but a couple of years later the Grand Chamber of the European Court of Human Rights accepted that crucifixes stay hanging on the walls of Italian classrooms, and there is undoubtedly a close connection between these two events.

As seen from France, the First Section decision in the *Lautsi* case that was stated in 2009<sup>1</sup> was welcomed by most people as true evidence. The assertions of the Second Chamber were congruent with the French republican conception of *laïcité*, (secularism) as the Court said (§ 56):

The State has a duty to uphold confessional neutrality in public education, where school attendance is compulsory regardless of religion, and which must seek to inculcate in pupils the habit of critical thought.

The Court cannot see how the display in state-school classrooms of a symbol that it is reasonable to associate with Catholicism (the majority religion in Italy) could serve the educational pluralism which is essential for the preservation of “democratic society” within the Convention meaning of that term. It notes in that connection that the (Italian) Constitutional Court's case-law also takes that view.

Furthermore, the decision was unanimous: even the Italian judge Zagrebelsky approved it.

On the contrary, the decision of the Grand Chamber in 2011 was mostly understood as a capitulation of the European court to Christian European lobbies. It might be interesting to explain the reasons for such a harsh criticism, and deliver a commentary of the *Lautsi* decision from a French legal point of view, but everybody already knows the answer, which is held in the single word *laïcité*.

One must remember that in France the secular republican program under the

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1. ECHR, 3 November 2009.

third Republic started with school twenty-five years before the separation of State and Churches in 1905. Religious signs have been removed from public schools in the early 1880's and today hanging a crucifix on a school wall would be a serious blaspheme. Of course, Italy is not France, but the French conception of *laïcité* is paradigmatic. For the French, the absolute visual neutrality and the religious blindness of the public sphere, especially in public schools where young children from all origins have to live together, is the only way to respect the convictions of everybody, believer or non-believer. Rather than presenting French common opinion regarding the *Lautsi* case, I will try to interpret it in light of arguments that Joseph Weiler developed in his book, "*L'europe chrétienne*," as I would do if I had to explain to my French students why the European Court ruled that way.

I will develop two points that seem essential to me and which were raised in both the *Lautsi* case as well as in Joseph Weiler's book. The first one is substantive: the legal status of religions in European States. The second one is both structural and conceptual: the meaning of Europe.

#### I. RELIGIONS IN EUROPEAN STATES

The matter of principle that was at stake in the *Lautsi* case is the following: what are the means for a State to grant freedom of consciousness—or if you prefer, freedom of religion in its both negative and positive sense—to all its citizens in the frame of a pluralistic society, such as European societies have all become today in greater or lesser proportion. Reading the Section *Lautsi* decision we notice that there is a *conceptual model*, which is secularism or *laïcité* of State, prescribing, like in France or the United States, that public authorities maintain a position of distance from all religious convictions. The State is defined in its Constitution as non-religious, or a-religious, or secular-laïc. For example, article 1 of French Constitution states, "France shall be an indivisible, secular (*laïque*), democratic and social Republic." But reading the second *Lautsi* case we see that there is also a *pragmatic model* that guarantees freedom of and from religion within the frame of a State that continues to express its cultural and religious ethos inherited from its history: Anglicanism in England, Lutheranism in Denmark or Norway, Catholicism in Spain, Italy, or Austria, Orthodoxy in Eastern Europe. Of course there is a tension between these two conceptual models, otherwise the *Lautsi* case would not be discussed as it is.

Let us say a word about the French secular model. It is a legacy of the revolutionary times. When sovereignty moved from the Monarch by divine right to the Nation, the new State had to define its religious identity, and it ceased to understand itself as Catholic. The process was directly linked to the new conception of citizenship that was defined independently of any religious membership. Religion had become a single *opinion*, as says the Declaration of Human and Civic Rights (article 10), it was not any more a matter of status, of belonging, or affiliation.

In that sense the origins of French secular tradition are basically political. Secularism in France is much more than a process to regulate religious pluralism. It is part of the French concept of citizenship, a concept that expels religion from the common public sphere. It may be intolerant in a way, but we also have to

remember that it is the way Protestants and Jews became full French citizens two hundred years ago. If there must be a European citizenship, don't ask the French people to conceive it differently from what citizenship means for them.

The decision of the Great Chamber in the *Lautsi* case echoes in a large way Joseph's Weiler argument in his pleading. One of the most important passages of the decision is the following (§ 74):

According to the indications provided by the Government, Italy opens up the school environment in parallel to other religions. The Government indicated in this connection that it was not forbidden for pupils to wear Islamic headscarves or other symbols or apparel having a religious connotation; alternative arrangements were possible to help schooling fit in with non-majority religious practices; the beginning and end of Ramadan were "often celebrated" in schools; and optional religious education could be organised [sic] in schools for "all recognised [sic] religious creeds. Moreover, there was nothing to suggest that the authorities were intolerant of pupils who believed in other religions, were non-believers or who held non-religious philosophical convictions.

We will not discuss the reality of those "indications provided by the government," though many Italians contested an unrealistic sugar-coated description of Italian public schools. The fact is that for the Grand Chamber, Italian authorities have not been intolerant.

*Tolerance* in fact is the key-word. It is a word that also belongs to French national history. Four centuries ago, in 1598, the French predecessors of Professor Weiler would have been the legists who drafted the Edict of Nantes, also called Edict of tolerance. The French Edict of tolerance recognized the right for Protestants to practice their religion freely in the French Catholic kingdom. It established that they would never be constrained to act against their consciousness for matters of religion.<sup>2</sup> It is the Edict of Nantes that restored peace in France after decades of deadly civil war. The Edict was suppressed in 1685 by Louis XIV, who reestablished the religious unity of the Kingdom, according to the epochal political principle *Cujus regio ejus religio*. Toleration was no longer tolerable. More than 200,000 Protestants had to leave France. In 1789, some priests proposed to restore tolerance but it was too late. The revolutionaries preferred to nationalize the Old unitary Catholic matrix. We the French should remember our story, it teaches us that we have not always been what we are today.

The *Lautsi* case is a good illustration of the dualism of European countries in the fields of religion. The aim of tolerance is pacification through diversity, whereas the aim of secularism is unity through integration. So if you feel deeply faithful you may prefer to live in a country of pluralism that grants a more complete freedom of public behavior even if you belong to a minority and have to support the predominance of an established religion.

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2. Article VI: Et pour ne laisser aucune occasion de troubles et différends entre nos sujets, avons permis et permettons à ceux de ladite religion prétendue réformée vivre et demeurer par toutes les villes et lieux de cestui notre royaume et pays de notre obéissance, sans être enquis, vexés, molestés ni astreints à faire chose pour le fait de la religion contre leur conscience, ni pour raison d'icelle être recherchés dans les maisons et lieux où ils voudront habiter, en se comportant au reste selon qu'il est contenu en notre présent Édit.

## II. THE LAUTSI CASE IN THE EUROPEAN CONTEXT

The question that the *Lautsi* case had to answer was whether both models (secularism and tolerance) can coexist in Europe or not. As Joseph Weiler suggests, Europe, unlike a federal nation like the United States, is not composed of a single people, but of twenty-seven (or forty-seven) different peoples. Europe is “a people of others” as he says, and as long as it will be so, national identities have to be respected. This is the structural reason why the Grand Chamber decided to reverse the Section decision. I quote (§ 68):

The Court takes the view that the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State. The Court must moreover take into account the fact that Europe is marked by a great diversity between the States of which it is composed, particularly in the sphere of cultural and historical development.

This does not mean that French secularism is contrary to article 9 and freedom of religion. The Great Chamber merely said that from the moment a State respects the rights and freedoms enshrined in the Convention it is free to refer to its religious tradition. As far as France is concerned, from the moment it ratified the Convention until today, France has been condemned only one time for violation of article 9—freedom of religion (30 June 2011, Case of Jehovah Witnesses, tax affair). On the contrary, if the first *Lautsi* decision had not been cancelled, all the States would have been obliged to follow the French secular model, and suppress all signs of religious identity as non-neutral. When Joseph Weiler raised the specter of an Americanization of European society, he referred mainly to the federal contexts of both Europe and America, considering that the substance of the separation principle is very different in France from what it is in America. The aim of separation in France is to protect the State—and the individuals—from religions; the aim of separation in America is to protect freedom of religions through a strict equality.

In the *Lautsi* affair, the Strasbourg Court refused to impose neutrality of the public sphere as the only way to protect freedom of and from religion within the European sphere. It did not condemn the French secular model, but it clearly said that it is and will remain a national model because there is no European model, and this is why it raised such criticisms in a country that has always understood itself as a light in the fields of Human rights. As said Saint Just at the revolutionary time, “the French people proclaim the freedom of the world.” But there is something more in this decision, something that has to do with the identity of Europe and its “Christian roots.” When the Grand Chamber gathered in 2011, its session was something more than the ordinary audience of a Court. Leave to intervene in the (written and/or oral) procedure was given to thirty-three members of the European Parliament acting collectively, to eight non-governmental organizations from both secular and Christian sides,<sup>3</sup> and also to the Governments of ten States,<sup>4</sup> among

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3. Including the *Semaines sociales de France*, a French organ of social Catholicism created in the aftermath of the Encyclical *Rerum novarum*.

4. Armenia, Bulgaria, Cyprus, the Russian Federation, Greece, Lithuania, Malta, Monaco, Romania and the Republic of San Marino

which six are members of the European Union. The procedure went far beyond the Italian case and the question of right to education; it dealt no more or no less with the place of Christianity (whose central logo is the crucifix) in the identity of Europe itself. Considering that all member States of the European Union are also parties to the European Convention, and that the Union itself (Article 6 of the European Treaty) *shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, we may suggest that the European Court acted as a kind of judiciary Convention that implicitly acknowledged in its decision the Christian roots of Europe and the right for its member countries to make them part of their current identity. The European Court has in fact reintroduced Christianity in the substantive provisions of European Constitutionalism, and it is also why the *Lautsi* decision was given such a bad reception in France. This is why Christian Europe owes much to Joseph Weiler.