Editorial

State and Nation; Church, Mosque and Synagogue—the trailer

The debate that won't go away

At its most recent Paris meeting, the I•CON Board of Editors decided to invite contributions and eventually publish a major symposium on Church and State in Europe. This should not surprise our readers: A topic which had seemed passé for some decades, encrusted in the genres of "typology" and "taxonomy"—endless articles and books with all appropriate graveness explaining the different "models" of Church and State — has rather abruptly come to life. One reason for this, often swept under the carpet of political correctness, has been the advent of Muslim communities in many European states, frequently espousing a vibrant and unapologetic Islam. The perception, justified or otherwise, of a nexus between Islam and Muslim communities and terror organizations, and the reactions—popular, populist (and oft ugly) and official—have occupied the front pages.

Today's front pages, however, are proverbially used for wrapping up tomorrow's fish. More interesting has been the less visible, more profound debate on the place of religion in European society, not only Islam but a simmering engagement, in the face of a Christianity which has been continuously losing ground in an ever-secular Europe, with the role of Christian culture in the self-understanding of the European nations and nation states. There was a huge discussion on the possible reference to "Christian Roots" as part of the Identikit of the European Union in the Preamble to its defunct "Constitution" and now questions arise in national contexts with the debate, for example, on the appropriateness of a crucifix in public schools—which has been litigated before the German Constitutional Court, is under legislative consideration in several countries, and was the subject of consideration by the Grand Chamber of the ECHR following the November 2009 *Lautsi* decision by the Second Chamber. It is hard to recall in recent times ECHR litigation which has attracted as much public and media attention. Relate the discussion on the cross to that on the burqa and you have your finger on the constitutional pulse in and of Europe.

I want to offer a somewhat novel, surely contestable, way of framing the issues as they manifest themselves today. But let me first declare an interest: In a recent editorial in the sister publication of I•CON, the European Journal of International Law, I wrote a sharp critique of the first *Lautsi* decision. Subsequently, I was invited by eight intervening States to appear for them in the Oral Hearing of the appeal before the Grand Chamber which I readily accepted (*pro bono)*. As an annex to this Editorial I will post my Pleadings with a view to provoke reactions and with the undertaking to publish the most effective counter-pleadings which any of our readers cares to submit.

I•CON (2010), Vol. 8 No. 2, 157–166 doi: 10.1093/icon/moq016

For reasons which shall emerge, I do not believe *Lautsi's* own pleadings really engage the critical issues.

Framing the issue

We habitually talk of the commitment to religious freedom, both positive and negative: Freedom of religion and freedom from religion, which European states are constitutionally, and under the Convention system, to guarantee their citizens and residents.

In fact, I would suggest, the European constitutional landscape posits two rather than one "Freedom of Religion." In addition to the classical *individual* Freedom of and from Religion, in its very structure Europe represents a second *collective, identitarian,* Freedom, conceptually stemming from self-determination, namely the freedom of nations/states to include in their self-definition, in their self-understanding and in their national and statal symbology, a more or less robust entanglement of religion and religious symbols. (Right 'off the bat' let me say that there is no small measure of hypocrisy in the oft-heard insistence that Turkey must be laïque. Turkey yes and Denmark no?)

Consider France and the United Kingdom, good examples because both are founding members of the European Convention of Human Rights and, with the usual imperfections, are both considered robust liberal democracies in good standing.

France, in its very Constitution, defines itself as laïque—usually understood as a political doctrine which does not allow the State any endorsement or support of religion and would, say, consider the display of religious symbols by the State or the funding of religious schools, as, well, anathema. At an *individual* level, laïcité does not necessarily mean individual atheism or agnosticism. I know many persons, and so do you, who are religious in a profound and capacious way, but uphold laïcité. They do so because they believe that, independently of their personal conviction, it is wrong for the State to get entangled with religion. This precision is important since it helps highlight the fact that laïcité is a political doctrine about the best way to regulate the relationship between the State and Religion. The origins of, and justification for, laïcité can be historical (the specificities, for example, of the *Ancien Régime* and the subsequent French Revolution) but also theoretical—rooted in both principled and pragmatic consideration of, say, how best the State may ensure peaceful coexistence among religious factions.

Laïcité is to be contrasted with an opposing doctrine, which is also very common in Europe and which has no accepted name. "Theocracy", even the most ardent supporters of French style laïcité, would not be an appropriate label to describe a state like the modern UK or Denmark. For convenience let us refer to 'non-laïque' states. Like France, like everyone else, the non-laïque are both committed to, and obligated by, an imperative of assuring individual freedom of and from religion, but see no wrong in a religious, or religiously rooted, self-understanding of nation and state, and in a public space more or less replete with state-endorsed religious symbology. In England, part of the UK, the Monarch is both the Head of State but also the Titular head of the Anglican Faith and its institutional manifestation in the Church of England: the "Established

Church" of the Nation and State. Many state functions have a religious character: clergy sit (or sat) ex-ufficio as part of the legislature, the flag carries the Cross (of St. George) and the national anthem is a Prayer to God.

In somewhat of a mirror image of what I wrote above, I know, and so do you, many persons in England who are very convinced atheists and yet see no harm in the 'non-laïque' state, also able to invoke considerations of principle and pragmatism: Has the UK been more riddled with religious strife than, say, France? It would seem that at least until recently, Catholics, Jews and Muslims were at peace with, say, a photo of the Monarch on the wall of a classroom or, more significantly, the English (or British) population at large has been at peace with a Catholic, or Jewish or Muslim or Church of England classroom funded from the general tax receipts of a population which is mostly secular, just as their French counterparts would be uncomfortable with the above.

It is not my purpose to claim normative parity for these two positions—a proposition which makes many people become very hot under the collar, so kindly reread this sentence twice and have a cold shower before you put pen to paper and inundate I•CON's emailbox. But I will make two claims in relation to them. First, both the France and the UK (English) models are considered constitutionally legitimate in Europe. The UK (or Denmark, or Malta, or Greece and many others with different recipes from the 'non-laïque' cookbook) is not, simply by being what it is, in violation of the Convention or in violation of the common constitutional traditions of Europe. Second, and more controversially, I do assert that the claim that laïcité embodies a principle of neutrality—requires a very narrow (and self-serving) definition of what we mean by neutrality. Sure, a laïque state, a la France, is neutral as between different *religious* factions in the French public space. But it is not neutral in a broader political sense. What may hang on a French classroom wall will depend on the political colour of French democracy at any given time: A bust of Voltaire? *S'il Vous Plait*. Marx? *Pourquoi Pas?* The noble Battle Cry of the French Revolution—*Liberté, Égalité, Fraternité*—is, in fact, to be found on countless schools across the country. The only things that may not be displayed, independently of the contemporary colour of voter preference, is a cross, or a mezuzah or a crescent. Kids may come to school with any manner of emblems such as the famous peace triangle, but not with you-know-what.

There is not contestation in Europe about the principle of freedom of and from religion (though many debates about its application). But there is a deep contestation about the most suitable way to regulate the symbolic and iconographic entanglement of Church and State. The laïque position is surely not "neutral" about that contestation: It is as much a polar position as is the 'non-laïque' position. It does not simply choose a side. It is a side. It is theoretically autistic or disingenuous to claim neutrality for a term which defines one pole in a bipolar dispute.

This argument brings about yet a third very important underlying distinction which is rarely articulated, but which was very visible in *Lautsi*, since, in my view, it undergirded the impassioned plea by the lawyers of the redoubtable Ms. Lautsi and, in my most humble and respectful opinion, also undergirded the decision of the Chamber currently on appeal before the Grand Chamber. There are those who truly believe that laïcité is a primordial condition—sine-qua-non for a good liberal democracy and that,

at least implicitly, the non-laïque position is sub-optimal at best and aberrational at worst. Consequently, it is morally imperative for good democrats and liberal pluralists to attempt to clip the wings of religious manifestations of the non-laïque state as far as possible—a principled and consistent position.

There are others (myself included) who hold the view that, even more in today's world than before, the European version of the non-laïque state is hugely important in the lesson of tolerance it forces on such states and its citizens towards those who do not share the "official" religions and in the example it gives the rest of the world of a principled mediation between a collective self-understanding rooted in a religious sensibility, or religious history, or religiously-inspired values and the imperative exigencies of liberal democracy. That there is something inspiring and optimistic by the fact that even though the Queen is the Titular Head of the Church of England, the many Catholics, Muslims and Jews, not to mention the majority of atheists and agnostics, can genuinely consider her as "their Queen" too, and equal citizens of England and the UK. I think there is intrinsic value of incalculable worth in the European pluralism which validates both a France and UK as acceptable models in which the individual right to and from religion may take place.

This, then, is how I would frame the issues against which the spate of cases and debates currently present in the European public space must take place. All too often these debates are reduced to the oft-difficult line drawing exercises between freedom of and from religion and their counterbalancing by other societal mores.

We all accept that when it comes to Freedom OF Religion, the right, like all other fundamental rights, is not absolute. We would not allow in the name of religious freedom human sacrifice, or even the kind of conduct which incites to hatred or threatens public order and peace. The individual liberty is 'balanced' against a collective good variously defined.

But surely Freedom FROM Religion is not absolute, and its vindication has to be so balanced, and the principle collective good against which it should be balanced would, in my view, be the aforementioned collective freedom of a self-understanding, self-definition and determination of the collective self as having some measure of religious reference. Freedom OF Religion surely requires that no school kid be obligated to chant God's name, even in, say, God Save the Queen. But does Freedom FROM Religion entitle such to demand that others not so chant, to have another national anthem? How does one negotiate the individual and the collective rights at issue here?

I think that both to understand the new debates and to arrive at meaningful, ethical, deontological, identitarian and pragmatic results may profit by this reframing.

I do hope that you do not expect the Director of the Journal, like the state, to be "neutral" on such issues. But you may well expect fairness and pluralism and I assure you that the planned symposium will be rich and diverse. What follows is my Oral Pleading before the Grand Chamber applying the above framework to *Lautsi*. As promised—the best counter-brief, limited to 2,500 words, if submitted, will be published by I•CON, with my laïque co-Editor–in–Chief, Michel Rosenfeld, being ultimate referee.

ORAL SUBMISSION BY PROFESSOR JHH WEILER ON BEHALF OF ARMENIA, BULGARIA, CYPRUS, GREECE, LITHUANIA, MALTA, THE RUSSIAN FEDERATION AND SAN MARINO – THIRD PARTY INTERVENING STATES IN THE LAUTSI CASE BEFORE THE GRAND CHAMBER OF THE EUROPEAN COURT OF HUMAN RIGHTS

JUNE 30TH, 2010

May it please the Court,

1. My name is Joseph H.H. Weiler, Professor of Law at New York University and Honorary Professor at London University. I have the honour to represent the Governments of Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, The Russian Federation and San Marino. All Third Parties are of the opinion that the Second Chamber erred in its reasoning and interpretation of the Convention and its subsequent conclusions.
2. I have been instructed by the President of the Grand Chamber that the Third Parties must not address the specifics of the case and be limited to the general principles underlying the case and its possible resolution. Time allocated is 15 minutes. I will, thus, only mention the most essential arguments.
3. In its Decision the Chamber articulated three key principles with two of which the Intervening States strongly agree. They strongly dissent from the third.
4. They strongly agree that the Convention guarantees to individuals Freedom of Religion and Freedom from Religion (positive and negative religious freedom) and they strongly agree on the need for a class room that educates towards tolerance and pluralism and is bereft of religious coercion.
5. The Chamber also articulates a 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. [paragraph 47]

6. From this premise the conclusion is inevitable: Having a crucifix on the walls of classrooms was obviously found as expressing an assessment of the legitimacy of religious conviction—Christianity—and hence violative.
7. This formulation of "neutrality" is based on two conceptual errors which are fatal to the conclusions.
8. First, under the Convention system all Members must, indeed, guarantee individuals 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.
9. Thus, there are Members 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.

10. But no State is not required under the Convention system to espouse laïcité.Thus, just across the Channel there is England (and I use this term advisedly) in which 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 ufficio, 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. [Sometimes God does not listen as in a certain football match a few days ago. . .]
11. In its very self definition as a State with such an established Church, in its very ontology, England would appear to violate the strictures of the Chamber for how could it be said that with all those symbols there is not some kind of assessment of the legitimacy of religious belief?
12. 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 *laïque*. 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. But it is equally wrong to argue, as some have, that it has only religious significance. It is both—given history that is part of the national identity of many European States. [There are scholars who claim that the 12 Stars of the Council of Europe has this very duality too!]
13. Consider a photograph of the Queen of England hanging in the classroom. Like the Cross, that picture has a double meaning. It is a photo of the Head of State. It is, too, a photo of the Titular head of the Church of England. It is a bit like the Pope who is a Head of State and Head of a Church. Would it be acceptable for someone to demand that the picture of the Queen may not hang in the school since it is incompatible with their religious conviction or their right to education since—they are Catholics, or Jews, or Muslims? Or with their philosophical conviction—they are atheists? Could the Irish Constitution or the German Constitution not hang on a class room wall or be read in class since in their Preambles we find a reference to the Holy Trinity and the Divine Lord Jesus Christ in the former and to God in the latter? Of course the right of freedom from religion must ensure that a pupil who objects may not be required actually to engage in a religious act, perform a religious ritual, or have some religious affiliation as a condition for state entitlements. He or she should certainly have the right not to sing God Save the Queen if that clashes with their world view. But can that student demand that no one else sing it?
14. 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. 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.

15. In many of these non-*laïque* 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. It may be, that some day, the British people, exercising their constitutional sovereignty, will divest themselves of the Church of England, as did the Swedes. But that is for them, not for this distinguished Court, and certainly the Convention has never been understood as forcing them to do so. Italy is free to choose to be laïque. The Italian people may democratically and constitutionally elect to have a laïque State. (And whether or not the crucifix on the walls is compatible with the Italian constitution is not a matter for this court but for the Italian Court.) 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.
16. In today's Europe countries have opened their gates to many new residents and citizens. We owe them all the guarantees of the Convention. We owe the decency and welcome and non discrimination. But the message of tolerance towards the Other should not be translated into a message of intolerance towards one's own identity, and the legal imperative of the Convention should not extend the justified requirement that the State guarantee negative and positive religious freedom, to the unjustified and startling proposition that the State divest itself of part of its cultural identity simply because the artefacts of such identity may be religious or of religious origin.
17. The position adopted by the Chamber is not an expression of the pluralism manifest by the Convention system, but an expression of the values of the laïque State. To extend it to the entire Convention system would represent, with great respect, the Americanization of Europe. Americanization in two respects: First a single and unique rule for everyone, and second, a rigid, American style, separation of Church and State, as if the people of those Members whose State identity is not laïque, cannot be trusted to live by the principles of tolerance and pluralism. That again, is not Europe.
18. 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 systems. We trust our courts, including this august court, to defend individual liberties. It is a balance that has served Europe well over the last 60 years.
19. It is also a balance which can act as a beacon to the rest of the world since it demonstrates to countries which believe that democracy would require them to shed their religious identity that this is not the case. The decision of the Chamber has upset this unique balance and risks to flatten our constitutional landscape robbing

of that major asset of constitutional diversity. This distinguished Court should restore the balance.

20. I turn now to the second conceptual error of the Chamber—the conflation, pragmatic and conceptual, between secularism, laïcité, and neutrality.
21. Today, the principal social cleavage in our States as regards religion is not among, say Catholics and Protestants, but among the religious and the 'secular'. Secularity, *Laïcité* is not an empty category which signifies absence of faith. It is to many a rich world view which holds, inter alia, the political conviction that religion only has a legitimate place in the private sphere and that there may not be any entanglement of public authority and religion. For example, only secular schools will be funded. Religious schools must be private and not enjoy public support. It is a political position, respectable, but certainly not "neutral." The non-laïque, whilst fully respecting freedom of and from religion, embrace some form of public religion as I have already noted. Laïcité advocates a naked public square, a classroom wall bereft of any religious symbol. It is legally disingenuous to adopt a political position which splits our society, and to claim that somehow it is neutral.
22. Some countries, like the Netherlands and the UK, understand the dilemma. In the educational area these States understand that being neutral does not consist in supporting the secular as opposed to the religious. Thus, the State funds secular public schools and, on an equal footing, religious public schools.
23. If the social pallet of society were only composed of blue yellow and red groups, than black—the absence of colour—would be a neutral colour. But once one of the social forces in society has appropriated black as its colour, than that choice is no longer neutral. Secularism does not favour a wall deprived of all State symbols. It is religious symbols which are anathema.
24. What are the educational consequences of this?
25. Consider the following parable of Marco and Leonardo, two friends just about to begin school. Leonardo visits Marco at his home. He enters and notices a crucifix. '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 are not. We follow our path.' Now imagine a visit by Marco to Leonardo's house. 'Wow!', he exclaims, 'no crucifix? An empty wall?' 'We do not believe in that nonsense' says his friend. Marco returns agitated to his house. 'Well', explains his mother, 'We follow our path.' 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.'
26. Even more alarming would be the situation if the crucifixes, always there, suddenly were removed.
27. Make no mistake: A State-mandated naked wall, as in France, may suggest to pupils that the State is taking an anti-religious attitude. We trust the curriculum

of the French Republic to teach their children tolerance and pluralism and dispel that notion. There is always an interaction between what is on the wall and how it is discussed and taught in class. Likewise, a crucifix on the wall might be perceived as coercive. Again, it depends on the curriculum to contextualize and teach the children in the Italian class tolerance and pluralism. There may be other solutions such as having symbols of more than one religion or finding other educationally appropriate ways to convey the message of pluralism.

28. It is clear that given the diversity of Europe on this matter there cannot be one solution that fits all Members, all classrooms, all situations. One needs to take into account the social and political reality of the locale, its demographics, its history and the sensibilities and sensitivities of the Parents.
29. There may be particular circumstances where the arrangements by the State could be considered coercive and inimical but the burden of proof must rest on the individual and the bar should be set extremely high before this Court decides to intervene, in the name of the Convention, in the educational choices made by the State. A one rule fits all, as in the decision of the Second Chamber, devoid of historical, political, demographic and cultural context is not only inadvisable, but undermines the very pluralism, diversity and tolerance which the Convention is meant to guarantee and which is the hall mark of Europe.

In this Issue

We begin this issue with an article on the "new Commonwealth model of constitutionalism" by *Stephen Gardbaum*, who insightfully analyzes its experience to date before concluding with recommendations as to how it could be further improved. *Richard Albert* follows with a piece which goes beyond the typical distinction between presidential and parliamentary systems regarding the separation of powers: deepening the treatment of this subject offered by recent scholarship, Albert argues that the values of the separation of powers can be achieved in both presidential and parliamentary systems—at least partially in the case of the latter. Returning to an older constitutional model than the abovementioned, *John McCormick* reconstructs and reviews Niccolò Machiavelli's proposals for a 'perfect' constitution. *Iddo Porat* and *Moshe Cohen-Eliya* offer a rather different, though equally enriching, historically-minded study. Posing the question of why balancing elicits vocal resistance in America while proportionality meets with little opposition in Europe, the authors suggest answers grounded in the histories of both. In the final piece in our articles section, *Daniel Robinson* examines the theory of rights developed by the eighteenth century legal theorist James Wilson.

We continue our I•CON:Debate! series with an exchange centered around an article *Stavros Tsakyrakis* published in I•CON last year: 'Proportionality: An Assault on Human Rights?' *Madhav Khosla* replies to *Tsakyrakis's* critique of proportionality, with the latter providing a spirited rejoinder.

The issue concludes with a Constitutional Development piece by *Gianluca Gentili* exploring two recent cases which came before the European Court of Human Rights: *Saadi v. Italy* and *Ben Khemais v. Italy*. The author argues that, in deciding these cases,

the Court affirmed that no circumstances could permit an individual to be exposed to potential human rights mistreatment—rejecting in the process the reasoning put forward by several states in recent years suggesting that the protection of certain fundamental rights should be balanced against national security concerns when combating terrorism or seeking to better protect citizens.

JHHW