



WORKING PAPER 2

The Secular Court?

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I come to this topic not as a lawyer but as a political scientist steeped in sociology of religion literature for the last 10 years¹. I am interested in the *intersections* between religion and law and in how religion-related matters of great political and sociological significance are shaped at those intersections - e.g. from religious symbols in public spaces (whether worn, as the headscarf, or on the wall, as the crucifix), to whether a right **not** to be offended can be upheld through blasphemy laws, and from abortion to same-sex marriage.

In posing 'The secular court?' as a question, I question specifically whether the judiciary can be considered a force promoting secularism. I would argue that we cannot speak, wisely anyway, in terms of clear, mono-directional trends in court-promoted secularism, because of the complex nature of everyday religion in its engagement with the law, and with courts. I will support this argument with examples from the European Court of Human Rights (ECtHR) and the United States Supreme Court jurisprudence and will explore complexities of everyday/lived religion at different levels.

First, as an element in debates on the proper role of the courts in relation to religion. Scholarly texts such as W. Fallers Sullivan's *The Impossibility of Religious Freedom*, or Marc de Girolami's *The Tragedy of Religious Freedom* are part of a broad and rapidly developing genre of literature, written from very different perspectives, and exploring objectively challenges posed by religion in Court contexts. I take as an example, at the risk of exacerbating a *Lautsi*-fatigue from which I suspect many readers may suffer, the various courts' efforts to define the crucifix as a religious symbol or as something else, which was simultaneously entertaining and troubling.

Throughout the *Lautsi* decisions, the reader finds remarkably in-depth and often loaded definitions and interpretations of the crucifix. From a symbol of Italian history and culture to a symbol of equality, freedom and tolerance, and even a symbol of the Italian state's secular bias. We also read descriptions of the cross as representing the primacy of the individual over the group; the importance of freedom of choice; the separation of politics from religion; and love of one's neighbour extending to forgiveness of one's enemies (*Lautsi* 2009, para 35).

Quite apart from whatever one may feel about the great breadth and validity of these characterisations, their mere airing in a court room is, from a political and sociological perspective, striking in a way: is this the place to determine the meaning of the cross and the crucifix?

The same challenges apply to the case of the Ten Commandments displayed in Kentucky public schools, raised in the *Stone v. Graham*, where the display failed the Lemon test as the Court did not accept the argument that its purpose was secular in nature inasmuch as the Ten Commandments were adopted into the fundamental legal code of Western civilisation

¹ This paper is based on a presentation made at the European University Institute in October 2014. It draws on research conducted under the auspices of the Grassrootsmobilise Research Programme (ERC Grant No. 338463). The paper benefits also from my work on Berger, Davie and Fokas (2008) *Religious America, Secular Europe?*

and the common law of the United States. But the case was, notably, decided with four dissents.

In short, this is a messy business, and courts have often been put on trial for getting it wrong, whether for emptying religious symbols of their meaning, or applying definitions in a prejudicial way from one religious groups' symbols to another's...

A **second** and related challenge to our ability to speak **authoritatively** about secularist trends in both Court's jurisprudence has to do with the seeming banality in the relationship between religion and national identity and how that feeds into case law in both court contexts.

In describing this relationship as banal I borrow from another provocative book title: *Banal Nationalism*, by Michael Billig (1995). The religion-national identity link in most of western Europe, but also in the United States in the form of civil religion, is often conceived of as 'merely' manifested in all kinds of symbols around us, including flags, anthems, depictions on currency, etc., much like Billig's description of 'banal nationalism'.

A religion-national identity link underlies a number of 'invisible national norms', as an 'invisible sacred' wherein a norm may be neutral but still discriminate indirectly and **yet** go unnoticed, as captured by the uses of the term *Catho-laïcité* in the French context (something Cecile Laborde has examined, Laborde 2012). Another example is the Swedish case of the taken-for-grantedness of using church buildings for public school functions and ceremonies (Petterson and Edgardh 2008).

The question is **where** do these banal manifestations of a majority religion (or of majority *non*-religion, **or** of state *secularism*, as the case may be) **stop** being banal and actually impinge upon freedoms of religious minority or non-religious groups? As Billig notes, banal does not imply benign (1997: 6). A lot more than we realize may fall within a gray area between the benign and the pernicious.

Certainly a religion-national identity link is a basic element of much religious freedom jurisprudence in both US and European contexts, but there is a critical difference in that the Supreme Court has a remit to defend non-establishment, whilst the relevant remit of the Strasbourg Court is to *not* interfere in the form of religion-state relations in each country context.

Just to bring the point to life, I will cite Louisiana Governor Bobby Jindal talking about the US Supreme Court Hobby Lobby case and about what he calls the 'silent war against religious liberty'.

'This war is waged in our courts and in the halls of political power... by a group of like-minded elites, determined to transform the country from a land sustained by faith — into a land where faith is silenced, privatized, and circumscribed. When we ... are told that our faiths and our consciences are inimical to good

governance and the law — **then** we are not simply facing a threat to our faiths and consciences. We are facing a threat to the very idea of America'.

This is just an anecdotal example that shows the intensity with which 'tradition' may be defended, and the difficulty of balancing that with various other rights claims.

Jindal's words serve as a good transition to a third dimension I want to address, that of grassroots and grassroots mobilisations around religion case law, mobilisations which **often** but not **exclusively** arise from perceived threats to these religion-national identity links (whether 'positive' links, as in the Greek or Norwegian cases, or 'negative', as in the French and Turkish cases). This is the topic of the Grassrootsmobilise Research Programme, but limited to mobilisations around the European Court of Human Rights religion jurisprudence (See Fokas 2015). The underlying premise of this research is that such mobilisations, at local, national and international level, at the grassroots and grassroots levels, are one place we need to look to understand the Court's effects on religious pluralism. I would also argue that the impact of these mobilisations contributes to the unpredictability of secularist, or non, trends in the two courts' jurisprudence.

In terms of the grassroots level:

There is much debate in legal scholarship about the ultimate influence of case law over the issues which it targets. Do court judgments make a difference? This is a line of questioning well developed in the US but less so in Europe. In the US context scholars have argued that courts have little direct and independent impact on citizens' behaviour and thus the notion that they can bring about social change is a 'hollow hope' (Rosenberg 1991): the courts' decisions are implemented in practice and can influence policy only as long as they find support among government decision-makers.

In fact, based on comparative analysis Eyal Benvenisti (1993) contends that national courts' case law tends to protect short-term governmental interests.² Measured by such a direct standard, courts often appear to provide powerful support for the status quo but weak sources for challenging the prevailing order³. As Malcolm Feeley puts it, 'the conventional wisdom among political scientists and sociologists who have studied these matters is that the courts by themselves are not very powerful and, at best, are important at the margins or in conjunction with other governmental bodies'.⁴

Adding to this point the fact that actual resort to judicial intervention is more the exception than the rule, the message one gets is that courts are not always 'where it's at': we need a

² Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991).

³ Michael McCann, 'Law and Social Movements', in Austin Sarat (ed.), *The Blackwell Companion to Law and Society* (Oxford: Blackwell, 2004), 506-522

⁴ Malcolm M. Feeley, 'Hollow Hopes, Flypaper, and Metaphors', *Law & Social Inquiry*, Vol. 17, No. 4 (1992), 745-760.

closer look at the margins, and at local, national *and* transnational level developments around the Court's handling of religion.

On the one hand, this entails examining what is happening in the *aftermath* of a law or judgment, at the grassroots level. This 'decentered' approach shifts attention from the direct effects of case law and recognises that court decisions can significantly facilitate the placement of issues on the public agenda and thus serve as catalysts for significant social change – what Stuart Scheingold (1974) calls the development of a 'politics of rights'.

According to Scheingold, marginalised groups may capitalise on *perceptions* of entitlement associated with particular legal developments in order to initiate and to nurture political mobilisation. This is an important dimension of 'rights consciousness raising'. A Court's decisions may significantly define the 'political opportunity structures' and the discursive frameworks within which citizens act. What is the aftermath of the Court's religion jurisprudence, in terms of its applications (beyond but also including its implementation) at the local and national level? Do the Court's judgments serve as a platform for mobilisations at the local and national level in favour of rights won at the ECtHR level? Alternatively, do litigation losses in Strasbourg demobilize groups and individuals at the local and national level?

From this de-centred perspective, actual compliance with a court ruling is only a small part of the possible policy consequences of any given court decision.

According to McCann, 'judicial opinions can reshape the strategic landscape in ways that encourage other citizens and officials to circumvent, defy, and even initiate counter-reform efforts to alter court rulings'.⁵ A bottom-up approach, then, includes attention to the various ways that reform activists deploy court decisions as resources to wage their campaigns in multiple venues, including but also beyond courts.

These indirect effects of the Court's engagement with religion and consequent impact on religious pluralism may be effectively described with the use of Marc Galanter's term, 'the radiating effects of courts'.⁶ Instead of a perspective focusing on the centripetal movement of cases into courts (as, for example, characterises much literature examining and critiquing the workings of the European Court of Human Rights and discussions of its reform required because of the heavy case load and large backlog of cases), Galanter proposes a consideration of the *centrifugal* flow of influence outward from courts and into the wider world.

Courts [Galanter notes] resolve by authoritative disposition only a small fraction of all disputes that are brought to their attention. These are only a small fraction

⁵ Michael McCann, 'Reform Litigation on Trial', *Law & Social Inquiry*, Vol. 17, No. 4, (1992), 715-743, 733.

⁶ Marc Galanter, 'The Radiating Effects of Courts', in Keith O. Boyum & Lynn M. Mather (eds.), *Empirical Theories about Courts* (New York: Longman, 1983), 117-142.

of all disputes that might conceivably be brought to court and an even smaller fraction of the whole universe of disputes.⁷

But the potential impact of courts on the 'whole universe of disputes' is much broader, if one considers the 'radiating effects' of courts. Courts supply standards and *the setting* for negotiations among the parties. The nature, extent, and *results* of such negotiations, taking place 'in the shadow' of European Court of Human Rights religious freedoms cases, are critical to an understanding of the fuller impact of the Court on religious pluralism.

A great deal of a Court's influence is enacted through transmission and reception of information, rather than by 'concrete imposition of controls' by a court. As Galanter explains, 'Courts produce not only decisions, but messages. These messages are resources that parties use in envisioning, devising, pursuing, negotiating, vindicating claims (and in avoiding, defending, and defeating them)'⁸ Meanwhile, the impact of these messages is largely contingent on who receives what messages from the Court, who is in a position to evaluate and process those messages, *how* he or she processes the information, and who is in a position to use that information.

Thus, inaccuracy in the transmission of the message is one variable. The plot thickens further when we consider the additional factor of variations in *reception* of the message: 'a single judicial action may radiate different messages to different audiences'.⁹

And then we must also consider the competing messages already present in the space where the new, *court-originated* messages land. Because of course, courts are not the only, nor are they the primary, sources of normative messages in a given society, or of *controls* in a given society: family, work group, church, associations and networks of various forms, all of these make up what Galanter calls the 'indigenous law', or the 'indigenous ordering' of society.

The latter entails – to my mind – a loud cry for *contextualisation* of any study of the effects of the Courts in general, and specifically in the European context, a call for national and local case-study based approaches to the impact of the European Court of Human Rights religious freedoms case law on religious pluralism at the grassroots level.

It is at this level that we can best detect not only indirect but also *unexpected* and/or *counterproductive* effects of the Court's decisions. Just as an example, it is interesting to note that in the aftermath of the Chamber *Lautsi* decision in 2009, by most accounts a clearly secularist-tending decision, in three different contexts at the local and national, the decision had effects quite contrary to the spirit of the decision.

-- One Greek Orthodox bishop in a Greek town, feeling certain the 2009 decision would be overturned, rallied his fellow Orthodox to start thinking of ways to 'nationalise our religious symbols so we can protect them from Europe'. Thus an indirect, unexpected and in fact

⁷ Ibid., 119.

⁸ Ibid., 126.

⁹ Ibid.

counterproductive effect of the Court was to encourage further nationalisation of an already nationalistic-tending church. That same Greek Orthodox Church actively engaged in grassroots mobilisations around the *Lautsi* Grand Chamber hearing.

-- In a different cultural context, a Romanian humanist activist was encouraged by the *Lautsi* chamber decision in his own case against the Romanian state for the presence of icons in public school classrooms, but his case was significantly weakened in the aftermath of the 2011 Grand Chamber decision.

-- And in Italy, of course, since the 2009 Chamber decision, there have been three law proposals brought before the Italian Parliament to make the crucifix compulsory¹⁰. The Northern League gathered signatures for a referendum and proposed to add a cross to the Italian flag. And several mayors bought and hung crucifixes, offered them to citizens, and imposed sanctions against their removal from public spaces.¹¹

From the above I conclude that, any real understanding of the ECtHR's impact on religious pluralism requires our understanding the extent to which its case law is *known in the first place*, at the grassroots level, and how it is received, interpreted, reacted against, supported, etc., within the context of indigenous law in given national and cultural contexts¹². And it is at this level we may expect to find a broad gamma of effects of the same ECtHR actions and decisions.

Turning to the grassroots level:

The term 'grassroots mobilisation' encompasses a broad range of activity carried out by an equally broad spectrum of actors; I use the term to indicate legal and political mobilisation which takes place at the national, international, European and transnational levels and which may be enacted by cause lawyers, judicial activists, NGOs, faith-based organisations (FBOs), political figures and national governments, and by transnational networks which may develop within and between the above groups, depending on their stakes in a given issue.¹³ The repertoire of activities may include petitions, demonstrations, lobbying of politicians and judges, legal activism, pressure on the Council of Europe for reform of the Court, etc.

As mentioned at the outset, I come to this topic as neither a lawyer nor a judge, and as such I will claim sincere ignorance of certain matters which may be slightly taboo. But I take for granted that Courts are constrained by what Susannah Mancini (2010: 26), amongst others (and who is amongst us today) has pointed out: that the collective reputation of a court

¹⁰ The first two were presented by PDL - People of Freedom coalition (a coalition gathering the former Berlusconi's party Forza Italia and the former right-wing party Alleanza Nazionale), and the last one was presented by the UDC - Catholic center party, Südtiroler Volkspartei and movements for autonomies. They have not been discussed in the Parliament, yet.

¹¹ Luca Ozzano and Alberta Giorgi, 'The debate on the Crucifix in public spaces in twenty-first century Italy', *Mediterranean Politics*, Vol. 18, No.2, (2013) 259-275, at 268.

¹² *Ibid.*, 133.

¹³ Dia Anagnostou, 'Law and Rights' Claiming on Behalf of Minorities in the Multi-Level European System', in Dia Anagnostou (ed.), *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-Level European System* (Oxford: Hart Publishing, 2014), 1-24.

largely depends on the audience at which its opinions are aimed, and judicial authority ultimately depends on the confidence of its citizens. This applies both to the European and US contexts, though with some very important differences, to my mind, to do with the perennial tension, in the European context, between European unification and national sovereignty – which has its distant counterpart in the US historical tensions around federalism (but is of course not quite the same).

A very conspicuous example from the European context, supporting Mancini's point, is the impact of the UK reactions to *Hirst vs. UK prisoners'* voting rights judgment of 2005, and how this impact can be traced through the Brighton Process¹⁴ to the introduction of the subsidiarity principle and the Margin of Appreciation into the text of the Convention with the 15th protocol. Which of course is not to say that the 15th protocol is due solely or even mainly to that judgment, but nonetheless the connection is compelling.

So too the fact that since the *Lautsi GC* decision, issued at a very critical moment, timing-wise, in the Court's on-going legitimacy crisis, the main religion GC decisions¹⁵ (including *SAS*, *Fernandez-Martinez* and *Sindicatul Pastoral*, and with the exception of *Bayatyan*, on conscientious objection¹⁶), were all decided with no violations found, with reference to the Margin of Appreciation.

In other words, I take for granted significant constraints on courts and judges, such as those which led to the embedding of the Margin of Appreciation and the subsidiarity principle into the Convention. Whether this development is positive or negative, and whether those constraints welcomed or regretted by each of us is a different matter.

By way of conclusion:

Limiting our attention to 'direct' effects of the Court on religious pluralism (e.g., by focusing solely on actual decisions it takes related to religion, and on the implementation, or non, of those decisions) entails a drastic and *imprudent* narrowing of our purview of the Court's influence. The Court's religious freedoms jurisprudence covers a strikingly contentious topical ambit; thus the Court has been addressing some of the most divisive and emotive social issues facing European societies.

¹⁴ And more generally to the reform process the Court has been undergoing, especially in the context of the Interlaken (February 2010), Izmir (April 2011) and Brighton (April 2012) conferences on the future of the Court; the Brighton Declaration and the role of the UK government in urging for a more subsidiary role of the Court (during its Presidency of the Council of Europe, January – June 2012, but not only); and the on-going consultation on the 'longer-term future of the system of the European Convention on Human Rights and the European Court of Human Rights' under the Council of Europe's auspices.

¹⁵ According to Van den Eynde, 'The Grand Chamber...has a special role in safeguarding a unified interpretation of the Convention and preventing risks of inconsistency among judgments'. Laura Van Den Eynde, 'An Empirical look at the Amicus Curiae practice of human rights NGOs before the European Court of Human Rights', *Netherlands Quarterly of Human Rights*, Vol. 31, No. 3, (2013) 271-313, at 280.

¹⁶ And with the only exception of *Bayatyan v. Armenia*, which dealt with the already well-established principle of conscientious objection.

And in the process, the Court has been setting, from above, wittingly or unwittingly, parameters for religious pluralism in Europe (and beyond). This is amongst several reasons for the Court, as with many other European institutions, to be viewed by European citizens as non-transparent and distant from 'the people'. This is *in spite of* the direct recourse citizens have to the Court: spontaneous litigation is increasingly rare and replaced by strategic litigation reflecting agendas which, again, may be far from the individual European citizen. Thus a focus on developments taking place 'in the shadow' of the European Court of Human Rights brings the influence of the Court on religious pluralism into sharp focus, but from the ground up.

Can we detect a particular direction being taken in the Court's influence on religious pluralism? For example, can we trace patterns towards an encouragement of pluralism through decisions promoting secularism as a form of neutrality? Or, alternatively, can we detect a trend towards acceptance of the various national and cultural approaches to religion, without passing judgment on the form of religion-state relations in a given case?

I have argued here that, valuable though these questions are, they cannot be adequately addressed through a study of the Court's case law. And this for at least two basic reasons. First, courts are not immune to social and political pressures. There are too many unpredictable influences from too many sources, grassroots and grasstops, to be able to suggest one direction in the courts' handling of matters related to religion. Scholars either praising or condemning the European Court of Human Rights' judicial activism in the religious domain, both groups seeing evolutionary trends in the direction of secularism which climaxed in the *Lautsi v. Italy*, 2009 decision, were given pause for thought with the 2011 *Lautsi* Grand Chamber decision. And this will likely be the case again and again over time as we seek to draw evolutionary charts of the Court's engagements with religion. And second, as Marc Galanter emphasises, the effects of the courts also do not exist in a vacuum: they are contingent on how the court's messages are received, interpreted, and used by potential actors which, in turn, is contingent on the information, experience, skill and resources that individual or collective actors bring to those messages.¹⁷

Hence the emphasis on developments 'in the shadow' of the European Court of Human Rights. The shadow is where we find evidence of the fact that judicially articulated legal norms take a life of their own when deployed in social actions¹⁸; and it is here that we can detect how the messages of the courts may be amplified, cancelled, or transformed by the presence of indigenous norms and controls, in ways that lie well beyond anticipation of the courts or the scholars studying them¹⁹ Quite apart from offering scholars a more realistic sense of the multilevel and multidirectional influences of the Court on religious pluralism, such insight would also entail valuable feedback for the Court itself.

¹⁷ Galanter 'The Radiating Effects of Courts', 117-142.

¹⁸ McCann, 'Reform Litigation on Trial', 733.

¹⁹ Galanter, 'The Radiating Effects of Courts', 136.