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John Gray and the Implications of Value Pluralism for Legal Philosophy*

Abstract: John Gray is the thinker who has reconstructed the main tenets of ethical pluralism inherent in the work of its initiator - Isaiah Berlin - and pointed to its consequences for political philosophy. In particular he singled out three levels of conflict in ethics identifiable in Berlin's writings: among the ultimate values belonging to the same morality or code of conduct, among whole ways or styles of life and within goods or values which are themselves internally complex and inherently pluralistic.

It is the third, internal kind of conflict that proves to be the richest in implications.Because it undermines a whole constellation of contemporary liberal doctrines informed by the Kantian-Lockean tradition that conform to the legal paradigm. From the pluralist perspective such monumental theories (e.g. those of Rawls or Dworkin) are no longer sustainable due to the recognition that no ultimate value is immune to the phenomenon of incommensurability. Thus, irresolvable conflicts may also break out within the given regulative value.

Confronting ethical pluralism with general reflection on law has mostly negative consequences. Nevertheless, the incommensurability thesis sheds considerable light on certain legal disputes. This claim will be illustrated by interpreting from the pluralist perspective the controversy over the verdict by the European Tribunal of Human Rights of 3 November 2010 concerning hanging crosses in classrooms.

Keywords: value pluralism, ethical conflict, value incommensurability, Kantian-Lockean tradition, liberal legalism, American legal paradigm, human rights, Lautsi vs Italy case, European Court of Human Rights

I. Main Tenets of Ethical Pluralism

The article offers an interpretation of the two strikingly different judgements passed by the European Court of Human Rights in the famous Lautsi vs Italy case in terms of value pluralism. This novel, dynamically developing position in ethics bears on political and legal philosophy. It was initiated by Isaiah Berlin in the second part of the 20th century and made widely known by John Gray in his vividly discussed monograph devoted to Berlin's thought.[1] Thanks to Gray the ground-breaking idea of ethical pluralism instantly attracted worldwide interest to become nowadays one of the most hotly debated positions.

* I wish to thank Mr Maciej Pleszka, L.L.M. for his having kindly made the research into the ECHR judicature for the sake of this publication.

[1] John Gray, *Isaiah Berlin*, 1995.

Value pluralism is a sort of a halfway standpoint in ethics, distancing itself both from monism and relativism. A theory is monistic if it reduces all values to a common denominator, or if it identifies or establishes a comprehensive hierarchy of goods. According to different kinds of relativism all values are tantamount to social conventions or personal preferences. The core of value pluralism boils down to the thesis that human values are objective and knowable, but they are irreducibly plural. This is why they can neither be ranked nor reduced to a common measure. Moreover, some of them may prove to be incompatible and/or incommensurable. These phenomena are bound to result in unavoidable clashes among values that are sometimes rationally unsolvable. Thus, the idea of ethical harmony and of perfection appears as logically incoherent. Conflicts and the possibility of tragedy can never be eliminated from human life.

II. John Gray's Contribution

Gray singled out three types of conflicts inherent in Berlin's ethical standpoint that may break out among plural values. First, collisions may occur between different ultimate values within any given morality (e.g. freedom and equality which provide a suitable example of two goods conflicting, so to say, by their very nature.) Second, clashes may also arise among whole ways or styles of life. Machiavelli's differentiation between two types of moralities - manly, pagan *virtù* and Christian values - adequately illustrates the second level of ethical conflict. And finally, collisions may also break out within single values which are immanently complex and inherently pluralistic. Unveiling this very feature of human goods is a characteristic trait of Berlin's account of values. This rich in implications thesis was put forward by him in an innocent looking footnote to his inaugural lecture of 1958, *Two Concepts of Liberty*. It is worth quoting here the most important excerpt:

'It may well be that there are many incommensurable kinds and degrees of freedom, and that they cannot be drawn up on any single scale of magnitude. (…) the vagueness of the concepts, and the multiplicity of the criteria involved, are attributes of the subject-matter itself, not of our imperfect methods of measurement, or of incapacity of precise thought.'[2]

It was once said that Berlin's contribution is like the bomb planted in the academy, which somehow failed to go off.[3] We actually owe it to John Gray that the bomb *did* go off. For it was him who reconstructed the foundations of the new ethical doctrine from Berlin's writings,

[2] Isaiah Berlin, 'Two Concepts of Liberty', in: idem, *The Proper Study of Mankind: An Anthology of Essays*, ed. Henry Hardy,1997, 202, ft. 1.
[3] See: Charles Taylor, Pluralism, in: *The Legacy of Isaiah Berlin*, ed. Ronald Dworkin, Mark Lilla and Robert B. Silvers, 2001, 117.

and who entirely recognised its far-reaching consequences. On Gray's interpretation pluralism with its recognition of value incommensurability amounts to 'a death-blow to the central classical Western tradition.'[4] The thesis of pluralism undermines a whole range of dominant, contemporary moral theories. In particular, the pluralist perspective in ethics with its stress on the limits of reason impeaches both the classical and the modern versions of utilitarianism. Moreover, pluralism also subverts Kantian ethics and Lockean theories of fundamental rights. For it shows that neither basic liberties nor fundamental rights are immune to the phenomenon of value incommensurability. Because unavoidable conflicts may (and do) break out also within single values, which are by their very nature pluralistic. No liberal ideal of liberty, justice, or equality can be insulated from either clashes with other incomparable human values, or from collisions among incommensurables in the heart of these ideals themselves. This implies that conceptions of the priority of the right over the good can no longer be sustained.

There is no doubt that the last conclusion is absolutely fundamental to legal philosophy, especially to the monumental theories, inspired by the Lockean-Kantian tradition and by an idealised version of American jurisprudence, that put forward the project of replacing politics with legal reasoning. Let's refer directly to Gray's considerations:

'The existence of conflicts among basic liberties and fundamental rights, the consequent impossibility of anything akin to a pure philosophy of right, and the sensitivity of principles of justice and liberty to divergences of judgment about human interests and well-being rule out all such legalist doctrines.'[5]

Gray has in mind mainly the theories of John Rawls, Ronald Dworkin and their followers whom he labels as liberal legalists. According to these thinkers all crucial questions in the restraint of liberty are treated in terms of constitutional rights and thus decided by judicial review and not by legislation. As a result legal philosophy, so to say, swallows up political philosophy.

Asked by me in an interview conducted in 1995 - just in the middle of a heated discussion in Poland on the new constitution - about his reflection on the mistakes which constitutionalists should mainly avoid, Gray developed a similar train of thought:

> 'It's a fundamental error to represent all important issues about public policy as matters of right, which Americans have done. Since rights are unconditional, uncompromiseable in the American tradition, then one side has to lose completely and the other side wins completely. So, rather than follow their unfortunate example, post-communist countries should be minimalist, meagre,

[4] John Gray, 'The Unavoidable Conflict', *Times Literary Supplement*, 5 July 1991, 3.
[5] John Gray, *Enlightenment's Wake: Politics and Culture At the Close of the Modern Age*, 1995, 73.

> parsimonious, about what they put into the constitutional framework. They shouldn't attempt to go too far in defining basic rights which are then immune to political intervention; they should, as far as possible, leave open fundamentally contested issues on which there's no national consensus, to forms of political settlement and compromise which can be renegotiated later.'[6]

III. Value Pluralism and the Lautsi vs Italy Case

In my opinion Gray's harsh critique of liberal legalism together with his powerful argument for an alternative perspective, provided by pluralistic liberalism offer an excellent interpretive key for a well-known case of Lautsi and Others vs Italy, and for both judgments passed by the European Court of Human Rights on 3 November 2009 and on 18 March 2011.

This is my hypothesis that the aforementioned case has to do with the influence of the American legal paradigm. The present time is witnessing an undoubted shift in power from the legislative to the judicial. It is said that while the 20th century was the age of parliaments, the 21st century is the age of the judicature. What seems to be highly significant is the fact that the European Court of Human Rights was established by the Council of Europe Member States as long ago as in 1959 (to deal with alleged violations of the 1950 European Convention on Human Rights). The ECHR's judicature reveals that the flow of similar cases to that of Lautsi vs Italy, concerning a violation of Article 2 of Protocol No.1 (infringement of the right to education) taken together with Article 9 of the Convention (infringement of the right to the freedom of thought, conscience and religion) was initiated in 1976 by the precedent Kjedlsen and Others vs. Denmark case. Since mid-seventies till mid-nineties there were a couple of dozens of similar applications. Since 1993-1994 there has been a flood of them; up to now the ECHR has passed about two hundred judgments in cases concerning the presence of religious symbols at State-schools.

Thus, for nearly 20 years no citizen of the Council of Europe Member States wished to complain to the ECHR about having his or her right to education in connection with the right to the freedom of thought, conscience and religion infringed. The institutional arrangements were there all the time but nobody felt motivated to make use of them. Perhaps it is due to the increased impact of the American legal paradigm that Europeans have recently started to perceive their situation in terms of rights guaranteed by supranational law.

Let us analyze the conflict involved in Mrs Soile Lautsi's application to the ECHR from the pluralist perspective. What is highly symptomatic is that the conflict brought out within the idea of freedom itself. The collision at stake was the clash between freedom from religious symbols in the public sphere, in this case from the presence of crucifixes in State-school

[6] Transcript of the interview entitled 'What you Need Is a Piece of Luck and … Wits' (unpublished in the original English version), Oxford, 29. 05. 1995, 4-6.

classrooms, with freedom to express one's attachment to religious, cultural and historical symbols, which constitute stable points of reference in everyday life. Both colliding freedoms signify perfectly understandable, deep human needs that cannot be put on the same scale. They can neither be reduced to a common measure, nor arranged in a hierarchy. Thus, they constitute incommensurable, ultimate goods. According to pluralists when such values come into conflict reason leaves us in the lurch. There is no one correct solution which would satisfy all reasonable people and lead to settling the conflict. In other words, there can exist more than one rationally justifiable answer to such a collision. Clashes of ultimate, objective incommmensurables typically arouse acute controversies. The heated discussion initiated by the legendary Lautsi vs. Italy case has confirmed this very interpretation of the conflict at stake since the moment of its origination in 2006. What is utterly significant is the striking disparity between both judgments passed by the ECHR in this very case. For while in its judgment of 3 November 2009 the Chamber of seven judges held unanimously that there had been a violation of Article 2 of Protocol No. 1 (infringement of the right to education) taken together with Article 9 of the Convention (infringement of the right to the freedom of thought, conscience and religion), in its final decision of 18 March 2011 the Grand Chamber held, by fifteen votes to two, that there has been no violation of Article 2 of Protocol No. 1 and that no separate issue arises under Article 9 of the Convention.

One may speculate about the reasons for the Court's total reversal of the original judgment. There are many answers given in the commentaries, from the influence of some of the submissions of the third-party interveners, through huge political pressure put on the Court by Catholic and Orthodox states, to the impact of 'hysterical reactions' responsible for 'a lost opportunity' to make Europe secular. Yet, there seems to be a much deeper reason for such a radical shift in the ECHR's decision. If there existed a Dworkinian 'one right answer' to the involved conflict and if the final decision were contrary to it, this would be tantamount to an utter embarrassment to the Court. Elucidating of the ECHR's reversal of judgment exclusively in terms of outer pressures seems to be too crude.

I would risk a thesis that it is the nature of the conflict involved (i. e. the fact that it is a collision between incommensurables), that is mainly responsible for the surprising change of the Court's decision. No doubt that there are also other reasons that come into play; yet, it is a huge oversimplification to omit this important, if not the decisive, factor.

All the aforementioned hallmarks suggest that the analyzed context fits perfectly with the pluralist perspective in ethics. It is then worth referring to pluralists' recommendation on how to deal with clashes of incommensurables. As such conflicts by their very nature do not allow

for the one right resolution, the only way out is in striking a purely pragmatic compromise that gives opportunity for 'at any rate some of the central values to realize themselves at some but too not much cost to other ones.'[7] In other words, pluralists advocate achieving unstable balance through making trade-offs among colliding incommensurables. The natural way for pursuing such an aim is, for obvious reasons, political and *not* legal reasoning. John Gray elucidates this point with great insight when he writes that:

> '(…) if, as the truth of value-pluralism implies, hard cases undecidable by general principles are pervasive in questions having to do with liberty, then there seems a natural presumption in favour of dealing with such questions by political reasoning which is inherently and avowedly inconclusive, and which admits of compromises and of provisional settlements that change over time and which vary from place to place, rather than by legal reasoning – especially that species of legal reasoning that invokes grand jurisprudential or moral theories of the sorts that value-pluralism subverts. If the truth of value-pluralism is assumed, such that there are no right answers in hard cases about the restraint of liberty, then it seems natural to treat questions of the restraint of liberty as political, and not as theoretical or jurisprudential questions.'[8]

The final judgment of the ECHR (of 18 March 2011) seems to be in accord with the pluralist viewpoint. For it leaves the decision concerning the presence of crucifixes in State-school classrooms to the domestic law of the member States. Thus, it preserves the possibility that such controversial, sensitive matters may be dealt with political means, which allow for striking compromises and for diversified solutions, taking into account different local contexts. In this sense the final decision is in the spirit of value pluralism, especially in its version developed by John Gray; though of course one side, as it is the case in lawsuits, had to lose completely.

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[7] Isaiah Berlin, Beata Polanowska-Sygulska, *Unfinished Dialogue* , 2006, 111.
[8] See Gray (note 5), 74.