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*The Lautsi Papers:
Multidisciplinary
Reflections on Religious
Symbols in the Public
School Classroom*

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STATE NEUTRALITY AND THE LIMITS OF RELIGIOUS SYMBOLISM

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I. INTRODUCTION

The European Court of Human Rights (ECtHR) has concluded that the mandatory display of crucifixes in public school classrooms does not violate the European Convention.¹ Many have questioned whether a supra-national court like the ECtHR is entitled to interfere in issues that are so intimately linked to the national identity of state parties. However, even if one agrees that the Court's *Grand Chamber* was in the end correct not to interfere (by employing the margin of appreciation), one can still question whether a constitutional democracy like Italy is justified in enforcing an explicit Christian symbol in public schools.

In this chapter, I analyze the *Lautsi* case from the perspective of state neutrality. It is generally acknowledged in legal and political philosophy that contemporary constitutional democracies cannot be formally linked to some religious confession, except in a vestigial and largely symbolic sense.² Of course, modern states can never be perfectly secular and neutral toward the plurality of religions and philosophies of life. Still, as Rajeev Bhargava argues, the idea of neutrality requires a "principled distance" between religion and the state, two entities that should be seen as distinct spheres with their own respective areas.³ In this chapter, I analyze whether the wish to hold on to such a religiously inspired tradition is consistent with the idea of state neutrality, a central value of contemporary constitutional democratic states.⁴

Thus, the question in this chapter is whether the obligatory display of crucifixes should be considered merely to be a symbolic utterance of a 'national particularity' or whether the display actually breaches the principled distance

* I would like to thank Wibren van der Burg for the collaboration on a related research project on state neutrality. This paper could not have been written without the knowledge and insights I gained from this collaboration.

¹ *Lautsi and Others v. Italy*, 18 March 2011, European Court of Human Rights (GC), No. 30814/06 (referred to as the Grand Chamber decision or *Lautsi II*).

² Charles Taylor, 'The Meaning of Secularism', *The Hedgehog Review* (2010), p. 23.

³ Rajeev Bhargava, 'What is Secularism for?', in Rajeev Bhargava (ed.), *Secularism and its Critics* (Delhi: Oxford University Press, 1998), pp. 493-494.

⁴ It should be noted that the Catholic crucifix—a more or less detailed representation of the crucified Jesus—is a much more pronounced symbol than the more abstract simple cross as it is commonly used by Protestants.

between state institutions and religion, because the crucifix is an expression of the state's preference for a particular religion in an environment that should be devoid of such religious utterances.

In the first part of the chapter (sections II–III), I analyze the arguments that were employed when the case was before the ECtHR. In the second part (sections IV–VIII), I analyze the obligatory crucifix in terms of state neutrality. I argue that the Italian insistence on holding on to the obligatory display of the crucifix is an example of what I will call the *European constitutional deficit*: the unwillingness or inability of European states to justify government institutions in a way that does justice to the pluralistic nature of European societies.

II. THE ITALIAN DEFENCE OF THE OBLIGATORY CRUCIFIX

Which arguments did the Italian government employ to justify the obligatory presence of crucifixes in public schools? Before the ECtHR, the Italian government followed various argumentative strategies in order to show the obligatory display of the crucifix in classrooms had nothing to do with (infringements of) state neutrality. In this section, I reconstruct the two major arguments. The first is constitutional: the government sees the display of the crucifix in state schools as 'natural' because it is the banner of the Catholic Church, the only church mentioned in the constitution.⁵ Article 7 of the Italian Constitution does indeed *mention* Catholicism, but it is a *non sequitur* to conclude that this reference provides any justification for the crucifix in state schools. Article 7 reads as follows:

The State and the Catholic Church are independent and sovereign, each within its own sphere. Their relations are regulated by the Lateran pacts. Amendments to such Pacts which are accepted by both parties shall not require the procedure of constitutional amendments.

Indeed, the emphasis on the independence and sovereignty of the Italian state implies quite the opposite. In addition, the connection between the Italian state and the Catholic Church has been broken officially, when Catholicism lost its status as the state religion in 1985.

The second argument, employed by the Italian government, downplays the association of the crucifix with Catholicism. Although the government acknowledges that the crucifix is primarily a religious symbol, it nevertheless emphasizes that in the context of the classroom the crucifix should primarily be understood as a secular symbol:

⁵ *Lautsi v. Italy*, 3 November 2009, European Court of Human Rights, No. 30814/06 (Chamber decision or *Lautsi I*), para. 11.

It also had an ethical meaning which could be understood and appreciated regardless of one's adhesion to the religious or historical tradition, as it evoked principles that could be shared outside Christian faith (non-violence, the equal dignity of all human beings, justice and sharing, the primacy of the individual over the group and 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).⁶

Those who think that the crucifix is solely a Catholic symbol are mistaken—so the Italian government argues. In the classroom, the crucifix should primarily be considered a symbol of the history of Italian democracy:

The democratic values of today were rooted in a more distant past, the age of the evangelic message. The message of the cross was therefore a humanist message which could be read independently of its religious dimension and was composed of a set of principles and values forming the foundations of our democracies. As the cross conveyed that message, it was perfectly compatible with secularism ... In conclusion, as the symbol of the cross could be perceived as devoid of religious significance, its display in a public place did not in itself constitute an infringement of the rights and freedoms guaranteed by the Convention.⁷

The government thus argues that the crucifix delivers a humanist message that can be read independently of the object's religious dimension and is composed of a set of principles and values that constitute the foundations of our democracies.

The Veneto Administrative Court employed similar arguments when it rendered a judgement on the *Lautsi* case in 2005. Constitutional principles and Catholicism seem to run together seamlessly, for example, when the Court asserts that:

with the benefit of hindsight, it is easy to identify in the constant central core of Christian faith, despite the inquisition, despite anti-Semitism and despite the crusades, the principles of human dignity, tolerance and freedom, including religious freedom, and therefore, in the last analysis, the foundations of the secular State.⁸

The Court thus concludes:

The logical mechanism of exclusion of the unbeliever is inherent in any religious conviction, even if those concerned are not aware of it, the sole exception being Christianity – where it is properly understood, which of course has not always been and still is not always the case, not even thanks to those who call themselves Christian ... It follows that the rejection of a non-Christian by a Christian implies a radical negation of Christianity itself, a substantive abjuration; but that is not

⁶ Ibid., para. 35.

⁷ Idem.

⁸ Statement of the Veneto Administrative Court, as quoted in *Lautsi II*, *supra* note 1, para. 15.

true of other religious faiths, for which such an attitude amounts at most to the infringement of an important precept.⁹

In her analysis of the case, Mancini observes that this decision generated considerable amusement among constitutional law scholars, and it is not hard to see why.¹⁰ Who had expected that the obligatory crucifix in public schools provides the best symbolization of the secular character of the Italian state?¹¹ Moreover, it is quite remarkable to conclude in a single sentence that the exclusion of unbelievers is inherent in any religious belief, that those actors are often unaware of this, but Christianity is the only exception. It is unfortunate that the Court does not elucidate why Christianity has this insight that other religions apparently lack.

III. THE LAUTSI CASE BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

When the case was brought before the ECtHR, the Court had to balance a citizen's human right to freedom of religion (notably Article 2 of Protocol I on parental religious liberties) against the discretionary freedom of the Italian government to maintain a cherished tradition with strong religious leanings. Although the term 'neutrality' does not occur in either the Convention or in any of the Protocols, this term has been accepted in ECtHR case law as an obligation of the state as a safeguard for ensuring pluralism, which in turn is seen as one of the foundations of a "democratic society" within the meaning of the European Convention of Human Rights (ECHR).¹² These *Lautsi* verdicts must therefore be considered in the context of a large body of Article 9 religious freedom jurisprudence. In the context of education, Article 2 of Protocol I is the *lex specialis* in relation to Article 9 of the ECHR. The ECtHR argues that these articles in tandem guarantee freedom of religion in education, including the freedom not to belong to a religion. This imposes a "duty of neutrality and impartiality" on the part on Contracting States.¹³

The *Chamber's Second Section* concluded that the obligatory crucifix display violated the ECHR because states have an obligation "to refrain from imposing

⁹ *Idem*.

¹⁰ Susanna Mancini, 'The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty', 6 *European Constitutional Law Review* (2010), p. 10.

¹¹ "A crucifix displayed in a classroom ... should be seen as a symbol capable of reflecting the remarkable sources of the civil values ... which define secularism in the State's present legal order" (the *Consiglio di Stato* as quoted in *Lautsi II*, *supra* note 1, para. 16).

¹² *Kokkinakis v. Greece*, 25 May 1993, European Court of Human Rights, No. 14307/88, para. 31; *Bessarabia v. Moldova*, 13 December 2001, No. 45701/99, para.116. For a discussion of these and related cases, see Aernout Nieuwenhuis, 'The Concept of Pluralism in the Case-Law of the European Court of Human Rights', 3 *European Constitutional Law Review* (2007).

¹³ *Lautsi II*, *supra* note 1, paras. 59–61.

beliefs, even indirectly, in places where persons are dependent on it or in places where they are particularly vulnerable.”¹⁴ In the context of the *Lautsi* case, it contended that although the crucifix might have various meanings, the religious meaning is predominant, and the presence of the crucifix in classrooms goes beyond the use of symbols in specific historical contexts.¹⁵ Accordingly, the Chamber concluded that the obligatory presence of crucifixes violates Article 2 of Protocol I:

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 is of the opinion that the practice infringes those rights because the restrictions are incompatible with the State’s duty to respect neutrality in the exercise of public authority, particularly in the field of education.¹⁶

In 2011, the *Grand Chamber* overturned the *Chamber’s* decision and concluded that the obligatory presence of crucifixes in public schools is not in violation of neutrality. However, before arriving at that conclusion, the Grand Chamber gave an illuminating elaboration of how Article 9 of the Convention and Article 2 of Protocol I impose a duty of neutrality and impartiality on Contracting States. The relevant second sentence of Article 2 reads as follows:

In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

The word “respect” implies more than simply acknowledging the rights of parents or taking them into account; instead, it implies a positive obligation on the part of the state.¹⁷ The Grand Chamber argues that Article 2 of Protocol I does not prohibit states from passing over “information or knowledge of a directly or indirectly religious or philosophical kind” through teaching or education, as long as it does not “pursue an aim of indoctrination.”¹⁸ It argues more particularly that:

the Contracting States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals ... The setting and planning of the curriculum fall within the competence of the Contracting States.

¹⁴ *Lautsi I*, *supra* note 5, para. 48.

¹⁵ *Ibid.*, paras. 51–52.

¹⁶ *Ibid.*, paras. 56–57.

¹⁷ *Lautsi II*, *supra* note 1, para. 61.

¹⁸ *Ibid.*, para. 62. This emphasis on fighting indoctrination should be seen as a way of safeguarding pluralism as mentioned in the introduction.

In principle it is not for the Court to rule on such questions, as the solutions may legitimately vary according to the country and the era.¹⁹

In the *Folgerø* case, the ECtHR accepted that Norway gave more attention in the school curriculum to Christianity than to other religions and philosophies of life, because Christianity has played such an important role in Norwegian history and tradition. In the *Zengin* case, Turkey was allowed to give greater prominence to knowledge of Islam in the curriculum on the grounds that, notwithstanding the state's secular nature, Islam was the majority religion practiced in Turkey.²⁰ However, the *Grand Chamber* formulates two limitations:

[a] The State [should] 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.

[b] The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions.²¹

The Grand Chamber's final verdict ignores the first (more objective) criterion and is solely based on the second. Moreover, the Court places the burden of proof on the plaintiff:

There is no evidence before the Court that the display of a religious symbol on classroom walls may have an influence on pupils and so it cannot reasonably be asserted that it does or does not have an effect on young persons whose convictions are still in the process of being formed . . . However, it is understandable that the first applicant might see in the display of crucifixes in the classrooms of the State school formerly attended by her children a lack of respect on the State's part for her right to ensure their education and teaching in conformity with her own philosophical convictions. Be that as it may, the applicant's subjective perception is not in itself sufficient to establish a breach of Article 2 of Protocol No. 1.²²

This conclusion is striking for two reasons. First, such parental perceptions can only be subjective, so the subjective character cannot *ipso facto* be a reason to reject the claim. Second, it seems very difficult for Ms Lautsi to demonstrate convincingly that this concerns a case of indoctrination—as much as it would be difficult for the Italian state to show that there is no question of indoctrination. Determining whether a crucifix in the classroom leads to indoctrination

¹⁹ *Ibid.*, paras. 61–62.

²⁰ *Ibid.*, para. 71, *Folgerø and Others v. Norway*, 14 February 2006, European Court of Human Rights, No. 15472/02; and *Hasan and Eylem Zengin v. Turkey*, 9 October 2007, European Court of Human Rights, No. 1448/04.

²¹ *Lautsi II*, *supra* note 1, para. 62.

²² *Ibid.*, para. 66.

is more the domain of psychologists than of lawyers or individual plaintiffs before the Court. Thus, by employing the criterion of indoctrination and placing the burden of proof on the plaintiff, the *Grand Chamber* makes it nearly impossible for the applicant to show a breach of Article 2 of Protocol I.

It seems to make much more sense to endorse the first, less subjective, criterion. To what extent is the curriculum conveyed in an objective, critical and pluralistic manner and in an atmosphere free of proselytism? This criterion does not require proof that pupils actually are or are not indoctrinated. It requires only an assessment of the way that the curriculum is set up, and whether certain elements give rise to a reasonable doubt regarding whether the curriculum is violating the requirements of objectivity and pluralism.

The Italian government saw no problem because, as the state argued, the crucifix has different connotations for different people and it will always be interpreted in different ways. This may be true in general, but the case before the ECtHR was not about the philosophical question of what meanings the crucifix might or might not have in all possible contexts. The question is how pupils interpret a crucifix in their classroom. A crucifix is not an indiscriminate symbol; on the contrary, it is primarily and explicitly associated with the Catholic Church, and thus, it is explicitly employed as a logo by the Vatican. Within the Catholic Church, the crucifix is also a distinctive symbol, the sign of salvation from sin through Christ that is employed to bring followers together and to exclude outsiders.

In the course of developing into adulthood, children (consciously or unconsciously) make all kinds of choices, including the choice to either endorse or not to endorse a certain religious conviction or philosophy of life. This process is difficult to fathom, but it is obvious that the everyday environment, including the school environment, affects such choices. Pupils see the same symbol on churches (predominant religious institutions) and in school (for students pre-eminently an institution of authority). How realistic is it that a student enters the classroom and thinks, look, a crucifix: *the* symbol of secularism and justice? Is it not more obvious that a non-Catholic scholar concludes, ok, the message is clear, the school has chosen to display this crucifix, this is clearly a Catholic area, I do not really belong here, I am tolerated at best.

Especially when we employ the first, more objective criterion, it becomes clear that a governmental obligation to display the crucifix in public school classes violates the duty to create a school environment free of any proselytism that enables pupils to develop a critical mind particularly with regard to religion. Seen from this perspective, Article 2 of Protocol I is violated, whether actual pupils are indoctrinated by the crucifix or not.

The Grand Chamber has shown too much respect for the discretionary freedom of the Italian government by accepting a predominant religious symbol as

an icon of Italian national unity. The first judgement of the Court (Second Section), on the other hand, correctly employs the first criterion by concluding that the display in state school classrooms of a symbol that can reasonably be associated with Catholicism does not contribute to educational pluralism and is incompatible with the state's duty to respect neutrality in the exercise of public authority.

IV. THE EUROPEAN CONSTITUTIONAL DEFICIT

Apart from the analysis of how the ECtHR decided the *Lautsi* case, one can access the crucifix question from a second angle. Is a constitutional democracy such as Italy justified in enforcing an explicit Christian symbol in public schools? The *Lautsi* case exemplifies very nicely the contemporary tension in European states. On the one hand, Italy considers itself a well-established liberal democracy in which constitutional values are properly secured, including the rule of law, rights of citizens and the demands of state neutrality. On the other hand, political, legal and educational institutions in such states are usually still intimately intertwined with the historically dominant religion (Christianity in its various denominations), and usually a desire exists to keep these traditions alive. What is more, in reaction to perceived threats to national unity such as globalization, mass integration, the (alleged) terrorist threat after 9/11 and the (alleged) decline of 'Judeo-Christian values,' such societies have reappraised these familiar symbols to reconfirm their shared identity. However, if the icons chosen are themselves controversial (i.e., a crucifix with a strong religious connotation), the desire for shared identity paradoxically turns into a means of exclusion in current multicultural societies.

The desire to hold on to such comprehensive traditions in constitutional democracies leads to what we could call *a European constitutional deficit*: the unwillingness or inability of European states to justify (elements of) their institutions in terms that does justice to the pluralistic character of their societies and the constitutional principles the states have endorsed over the last few decades.

This tension between constitutional values and Christian-inspired traditions has long remained invisible in European states. However, as a result of the increasing assertiveness of minorities (atheists and other persons with a non-Christian background), the dominance of the Christian-inspired symbols has increasingly come under discussion. The *Lautsi* case is a characteristic example: a centuries-old tradition is challenged by an atheist citizen, Ms Soile Lautsi. Equally telling is the reaction of Italian politicians to the initial ban by the Court. Former Italian Prime Minister Silvio Berlusconi stated, "This decision is not acceptable for us Italians. It is one of those decisions that make us

doubt Europe's common sense."²³ His defence minister, Ignazio La Russa, declared on television:

Anyway, we won't take away the crucifix! They can die! The crucifix will remain in all school's rooms, in all public rooms! They can die! They can die! Them and those fake international organization that count for nothing!²⁴

Instead of accusing 'Strasbourg' of making unjustified infringements on the Italian national identity, these politicians could also ask themselves whether their reliance on familiar symbols of national identity is still fitting in a pluralist society and whether it is consistent with the endorsed self-image of the constitutional-democratic state.

V. EXCLUSIVE AND INCLUSIVE NEUTRALITY

One of the constitutional values primarily at stake in this discussion of the obligatory display of the crucifix is state neutrality. Although 'neutrality' is a household term in legal analysis and in political theory, what the term implies in public policy or legal decisions is not always clear. In this section, I present a conceptual overview of relevant interpretations of what state neutrality can imply; the next section analyzes to what extent the obligatory crucifix fits within these interpretations.²⁵

The general idea underlying the various conceptions of neutrality is that the 'fact of plurality' implies that citizens in a society are likely to have adopted a wide variety of plans of life and endorse different views about what makes life valuable and society good. The government should not penalize or reward any of these ideas of the good life; instead, the government should provide an impartial framework within which each citizen can pursue the good life as he or she sees it.²⁶ This basic idea may be developed in two different ways. *Exclusive neutrality* contends that this impartial framework can be achieved only if the state completely disregards religious and cultural differences. This implies that religious or cultural expressions, in terms of arguments, practices and symbols, should be excluded from the public sphere, including schools. John Rawls defends exclusive neutrality when he argues that "the state is not to do

²³ As quoted in Mancini, *supra* note 10, pp. 6–7.

²⁴ This TV interview can be found at: <<http://www.youtube.com/watch?v=goWDmbvNGr0>>.

²⁵ For an elaborate discussion of state neutrality and the distinction between inclusive and exclusive neutrality, see Roland Pierik and Wibren van der Burg: 'What is Neutrality?', *Amsterdam Law School Research Paper No. 2011–20* (available at SSRN: <<http://ssrn.com/abstract=1917392>>). In this paper we further subdivide inclusive neutrality in proportional and compensatory neutrality, a distinction that is less relevant in the context of this paper.

²⁶ Will Kymlicka, 'Liberal Individualism and Liberal Neutrality', 99 *Ethics* (1989), p. 883.

anything intended to favor or promote any particular comprehensive doctrine rather than another, nor to give greater assistance to those who pursue it.”²⁷ Exclusive neutrality is usually explained in metaphors such as “hands-off” and “difference-blind.” These metaphors suggest that the government should disregard all divisive differences among and between citizens, such as religion or culture, to ensure equal treatment.²⁸ Indeed, exclusive neutrality seeks to exclude sources of controversy from the political decision-making process and governmental institutions. Exclusive neutrality claims the advantage that this exclusion makes it easier to arrive at decisions that everyone can support. If we can keep controversial views of the good life at bay, this will result in neutral institutions in which each person can live according to her own views of what constitutes a good life. In actual politics, this ideal of exclusive neutrality toward religion can be seen in US constitutional practice and in the dominant interpretation of the French doctrine of *laïcité*.

The second interpretation, *inclusive neutrality*, does not seek to eliminate controversial views of the good life from the political sphere. On the contrary, inclusive neutrality aims to take them fully into account, with regard to justifying policies and with regard to their consequences. In political debates, references to worldviews are allowed, and in the outcome, policies and legislation should try to do justice to the views of all citizens. Citizens are free to express and organize themselves in the public sphere on a religious or cultural basis. The state can support certain religious activities, for example, allowing funding for religious schools. Inclusive neutrality tries to take account of culture and religion in the public sphere in an even-handed way by including all relevant worldviews. Inclusive neutrality implies that the state should not unfairly privilege or discriminate against some religions or philosophies of life. Instead, inclusive neutrality argues that different comprehensive views should be taken into account by making the representation of minority groups or state support for their culture proportional to their size. For example, it advocates funding for religious schools in proportion to the ratio of the adherents of the various religions. In such situations, the hands-off interpretation of neutrality is replaced by an interpretation of ‘comparable support’.

VI. CRUCIFIXES AND NEUTRALITY

In the previous section, I presented two ideal-typical conceptions of neutrality that have dominated academic debates in recent decades. In this section,

²⁷ John Rawls, ‘The Priority of the Right and Ideas of the Good,’ 17 *Philosophy & Public Affairs* (1988); see also John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971), p. 94.

²⁸ Anna Elisabetta Galeotti, ‘Neutrality and Recognition,’ in Richard Bellamy and Martin Hollis (eds.), *Pluralism and Liberal Neutrality* (Ilford, Essex: Cass, 1999), pp. 37–38.

I argue that the mandatory display of crucifixes in public school classrooms does not fit comfortably in either of the two models. Defenders of exclusive neutrality argue that respecting citizens implies that the state treats them as intelligent, autonomous beings that can decide and act on their own conceptions of the good life. Thus, citizens should be left to decide for themselves what constitutes a good life, and the government should not take a stance on those views. Thus, the government should abstain from appeals to controversial views of the good life in justifying its policies and provide an impartial framework in which various ideas of the good life can thrive equally. A symbol that is first and foremost associated with one religious confession does not fit comfortably in the framework of exclusive neutrality. Indeed, this is the argument that the Chamber (Second Section) employed when it argued “the display in state-school classrooms of a symbol that it is reasonable to associate with Catholicism [is] incompatible with the State’s duty to respect neutrality in the exercise of public authority, particularly in the field of education.”²⁹

Moreover, pursuant to this view, if citizens are to identify with the state as *their* state, it is important that the public domain in general and public symbols such as oaths, courtrooms and public ceremonies, are organized in such a way that all citizens can identify with them. This identification is hindered if reference is made to controversial views of life, for example, by including controversial religious or cultural symbols such as crucifixes in public schools. Moreover, this identification is hindered if the government’s justification for such a controversial symbol is phrased in terms that address only one religious group.

Supporters of *inclusive neutrality* argue that the problem with exclusive neutrality is that it requires citizens to leave part of their identity at home when they enter the public sphere, and that it requires the state to disregard the identity of their citizens when the state tries to do justice to them. In both cases, *exclusive neutrality* requires disregarding a part of citizens’ personal identity, which is often very important to them. What language one speaks, which religion one practices, which culture one identifies with are all central aspects of one’s life. *Prima facie*, there is a good argument that neither the state nor citizens should be required to ignore this part of citizens’ identity. In the words of Veit Bader:

In the end [exclusive] neutrality and fairness as hands-off would literally strip people of their histories, languages, public holidays, monuments, rituals and symbols of national identity, dress codes, public monuments, history and literature lessons in public education. The result would be the fiction of a ‘naked public square.’ [This is] neither morally required nor desirable.³⁰

²⁹ *Lautsi I*, *supra* note 5, paras. 56–57.

³⁰ Veit Bader, *Secularism or Democracy? Associational Governance of Religious Diversity* (Amsterdam: Amsterdam University Press, 2007), p. 88.

The alternative line of reasoning of inclusive neutrality takes this argument seriously. It also starts from the notion that citizens should be treated with equal respect and concern, but contends that the autonomous citizen should have equal opportunities to live her life according to her own view of the good life and in line with her deep-felt commitments and identities. “To treat people fairly, we must regard them concretely, with as much knowledge as we can obtain about who they are and what they care about,” Bader argues.³¹

Arguing from the perspective of inclusive neutrality, the crucifix can be allowed in public schools, but it should not occupy the exceptional position it now does. The crucifix should be one symbol among other religious and non-religious symbols. At first sight, such an inclusive approach seems impractical: putting dozens of symbols of the various main religions in the classroom would still be offensive to atheists and small minorities. In addition, there seems to be no good justification why public institutions should be decorated with an abundance of such evidently biased symbols.

None of the parties in the *Lautsi* case has proposed a solution based on the idea of inclusive neutrality.³² However, it might be interesting to elaborate this position, if only to analyze its possible implications.³³ Inclusive neutrality would imply that all relevant religions and other views of life are symbolically represented in the classroom. A crucifix for Roman Catholics and a simple cross for Protestants, a Star of David for Jews, a crescent for Muslims, etcetera. In principle, this might be possible, although it might generate certain practical problems. The collection of symbols might give rise to endless debates: should Wicca symbols be included, and Zen Buddhism? Moreover, some religions and philosophies of life do not employ symbols and might even resent the use of symbols.

On the other hand, the presence of a plurality of symbols might be an interesting representation of pluralism, one of the foundations of a ‘democratic society’ as aimed for in the European Convention of Human Rights. Parents, teachers and pupils (depending on their age) in a certain school can deliberate about which constellation of symbols provides the representation of the pluralist character of the micro-community. The discussion on which symbols to display in a classroom and how they should relate to another might provide an interesting instance of *pluralism in action* and a unique opportunity for mutual learning. It might raise questions such as the following: to what extent can

³¹ Ibid., 82.

³² However, Joseph Weiler, in an editorial in the *European Journal of International Law*, mentions this option in passing. Weiler’s position will be discussed further in the next section. Joseph Weiler, ‘Lautsi: Crucifix in the Classroom Redux (Editorial)’, 21:1 *European Journal of International Law* (2010).

³³ Cf. Roland Pierik and Wibren van der Burg, ‘The Neutral State and the Mandatory Crucifix’, 6 *Religion & Human Rights* (2011), p. 272.

parents claim that only their symbol should be displayed and that their symbol does not tolerate others in its presence? Parents might conclude that an empty wall is the best solution, or a wall on which all religions and philosophies of life present in that school are displayed on an equal footing. However, again, it seems highly unlikely that the end result of such a process is that only the Catholic crucifix will be displayed; the wall will either include a set of relevant symbols or be empty. The Italian constellation in which only one religion is obligatorily displayed and all others remain invisible is quite at odds with this idea of inclusive neutrality.

VII. NEUTRALITY, SECULARISM AND THE EMPTY WALL

In the *Lautsi* discussion, the term secularism is used in two quite different meanings. In one interpretation, secularism is seen as a comprehensive philosophy of the good life, on par with other religions and philosophies of life. The Grand Chamber saw secularism in this way and argued that it had a “‘level of cogency, seriousness, cohesion and importance’ required for them to be considered ‘convictions’ within the meaning of Articles 9 of the Convention and 2 of Protocol No. 1.”³⁴ This is the way Judge Power interprets secularism in her concurring opinion to the verdict of the Grand Chamber:

A preference for secularism over alternative world views—whether religious, philosophical or otherwise—is not a neutral option. The Convention requires that respect be given to the first applicant’s convictions insofar as the education and teaching of her children was concerned. It does not require a preferential option for and endorsement of *those* convictions over and above all others.³⁵

This way of conceptualizing secularism seems to be patently unhelpful in a discussion on state neutrality. Of course, many present secularism as an anti-religious moral or political program, the most prominent examples being Christopher Hitchens and Richard Dawkins.³⁶ In this discussion before the ECtHR, however, the term ‘secularism’ should first and foremost be interpreted as a constitutional principle, arguing that the government should be neutral to all religious, non-religious and anti-religious ideas of the good life.³⁷ Secularism should not be seen as one of the various comprehensive (predominantly anti-religious) philosophies of the good life. Secularism is a way for the

³⁴ *Lautsi II*, *supra* note 1, para. 58.

³⁵ Concurring Opinion of Judge Power to *Lautsi II*, pp. 44–45.

³⁶ Richard Dawkins, *The God Delusion* (London: Bantam Press, 2006); Christopher Hitchens, *God is Not Great: How Religion Poisons Everything* (New York: Twelve, 2007).

³⁷ Cf. Stijn Smet, *Lautsi v. Italy: the Argument from Neutrality* (Strasbourg Observers, 2011; accessed 23 January 2012; available at <<http://strasbourgobservers.com/2011/03/22/lautsi-v-italy-the-argument-from-neutrality/>>).

government to deal with religious pluralism, ensuring equal treatment of all citizens, regardless of their (lack of) religious conviction or philosophy of life.

This confusion is most prominent in cases where authors argue that the empty wall is as biased (in the sense of a-neutral) as having a crucifix on the wall, because the empty wall should be considered a symbol of anti-religiousness. For example, the Italian government criticizes the Second Section of the ECtHR because its judgement was 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 judgement 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.³⁸

In a similar vein, Joseph Weiler argues:

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. ... In the conditions of our societies, the naked public square, the naked wall in the school, is decidedly not a neutral position, which seems to be at the root of the reasoning of the Court. It is no more neutral than having a crucifix on the wall. It is a disingenuous secular canard, the opposite of pluralism, which has to be dispelled once and for all if we are serious about teaching our children, religious and secular, Christian, Muslim and Jew, to live as a harmonious society in mutual respect.³⁹

Neutrality is a normative ideal that can never be fully attained, and different policies will be more or less successful in achieving this ideal. And of course, the moment the crucifix is removed from Italian schools is an awkward one, and might send a certain signal to students. However, to see the empty wall as promoting a form of (anti-religious) atheism, and to argue that an empty wall is equally biased as the display of a crucifix seems to be a—wilful?—misreading of what neutrality and secularism are all about. Viewing the empty wall as one on which the crucifix is lacking, or as anti-Christian symbolism, is a quite Christian-centred approach. An empty wall is merely what it is: it is a wall without *any* religious and non-religious symbolism. Mocking an empty wall as “a disingenuous secular canard” is quite disingenuous itself.

At the end of the day, neutrality implies that the government should not punish or reward any idea of the good life, whether religious, a-religious or

³⁸ *Lautsi II*, *supra* note 1, para. 35.

³⁹ Weiler, *supra* note 32, pp. 4–5.

anti-religious. Neutrality can never be attained in full, and different policies will be more or less successful in achieving this ideal. However, the argument cannot be reversed: not every policy is equally biased. If there are only two options available, the empty wall or the display of the crucifix, the former is, all things considered, by far the more neutral choice.

VIII. NEUTRALITY, OTHER CONSTITUTIONAL VALUES AND THE CONSTITUTIONAL DEFICIT

The obligatory crucifix in public schools is at odds with the general gist of neutrality, in either the exclusive or inclusive interpretation. However, this is *ipso facto* not a reason why crucifixes in public schools should be prohibited in a constitutional liberal-democratic state. For one thing, modern states can never be perfectly secular and neutral toward the plurality of religions and philosophies of life. States will always contain vestigial traces of historic traditions that, more often than not, have religious roots. Moreover, neutrality is not the only foundational value of constitutional-democratic states. Neutrality is part of a larger set of ideals characterizing the constitutional order of liberal democracies, including the rule of law, fair equality of opportunity and basic rights. In a well-ordered constitutional democracy, these values have to be weighed against one another. The question, then, is not whether Italy meets the demands of perfect neutrality, either in the inclusive or exclusive interpretation. The question is whether this obligatory display of crucifixes in public schools is so much in violation of the ideal of state neutrality that, all things considered, Italy does not meet the basic standards of what counts as a constitutional democracy.

Italy is not expected to offer a strictly neutral public space or to remove all contingent symbols from political, legal and educational institutional settings. A society is more than a random collection of citizens, organized according to abstract principles: “for the people to be sovereign, they need to form an entity and have a personality.”⁴⁰ A society requires a shared political identity and collective agency, which is strengthened and enforced through regulation and legislation. This political identity:

is usually defined partly in terms of certain basic principles (democracy, human rights, equality), and partly in terms of their historical, or linguistic, or religious traditions. It is understandable that features of this identity can take on a quasi-sacred status, for to alter or undermine them can seem to threaten the very basis of unity without which a democratic state cannot function.⁴¹

⁴⁰ Taylor, *supra* note 2, p. 29.

⁴¹ *Ibid.*, 31.

This shared identity is obviously built upon contingent values that, in the case of European states, are predominantly Christian in character. As Scheffler argues:

In enforcing the political culture ... and so in shaping the broader national culture, the state will inevitably be enforcing a set of practices and values that have their origins in the contingent history and traditions of a particular set of people. This is not in itself inappropriate, and there is in any case no alternative. The state can neither avoid promoting a national culture nor invent that culture *ab initio*.⁴²

The background culture within a society has a contingent moulding during the process of nation building cannot be undone retrospectively. This implies that certain infringements of the ideal of neutrality are unavoidable and acceptable.

On the other hand, this does not imply that all symbols and practices in state institutions are equally acceptable. Certain symbols in official institutions violate the “principled distance” between religion and the state and cannot be maintained in contemporary liberal democracies, even though they might have a firm historical basis in a certain society.⁴³

In the final analysis, the obligatory crucifix in public schools does indeed violate this principled distance between state and religion. By adhering to the practice, the Italian government explicitly chooses to employ its state power to officially represent the historically dominant religion in public schools and not to represent all other religious, non-religious and anti-religious philosophies of life. Subsequently, when the government had to defend its stance before the ECtHR, it employed arguments that are persuasive only to Catholics.

This attitude is a striking example of the *constitutional deficit* discussed in section IV: the unwillingness or inability of states to justify government institutions in a way that does justice to the pluralistic nature of its societies. In the defence before the ECtHR, the Italian government preaches only to the choir; the government makes no attempt whatsoever to provide a justification that addresses non-Catholics, nor does the government provide any argument why the crucifix would contribute to good and pluralistic education. The fact that Catholicism is the most widely professed religion in Italy does not make it a Catholic monoculture. As a result of secularization and immigration, Italy is as much pluralistic as any other western state. Why should non-Catholic or former Catholic citizens accept the provided justification of obligatory crucifixes in schools, when the very same crucifix has, over the last centuries also

⁴² Samuel Scheffler, ‘Immigration and the Significance of Culture’, 35:2 *Philosophy and Public Affairs* (2007), p. 113.

⁴³ Bhargava, *supra* note 3.

symbolized Crusades, the Inquisition, anti-Semitism and the subordination of women and homosexuals?

On the one hand, European states nourish a self-image of being secularized. On the other hand, they are still strongly and structurally intertwined with Christianity in ways that even secular Christians hardly notice but nonetheless might have a confining effect on religious minorities.⁴⁴ This constitutional deficit stems from the fact that European states do not fully recognize that residues of their Christian background are still manifest within their state institutions, that this may be at odds with their self-appointed status of constitutional-democratic state and that this tension is insufficiently recognized.

States can counter this deficit by either justifying such controversial symbols in an open debate or by abolishing symbols that are too explicitly linked to a specific religious tradition. The democratic deficit can be further prevented by endorsing national symbols that transcend the plurality of religions and other ideas of the good life—symbols that can bind *all* members of society.

IX. CONCLUSION

This chapter discussed the question whether the obligatory display of crucifixes in Italian public schools can be justified. Of course, the presence of crucifixes may well be explained historically by the important role that Catholicism played in Italian history. However, a historical explanation for the existence of a certain practice is quite different from a justification of the continuity of this practice, especially in the face of serious objections against it. I have given several arguments why the presence of crucifixes in public schools is incompatible with constitutional values, especially that of state neutrality. I have also argued why I think the Grand Chamber of the ECtHR wrongly concluded that this display was not in violation of the ECHR.

Joseph Weiler correctly contends the Court is a “dialogical partner with the Member States Parties to the Convention,” and that it “is simultaneously reflective and constitutive of the European constitutional practices and norms.”⁴⁵ For Weiler, this is an important step to concluding that the Court should not interfere when there is diversity in the constitutional practice of the member states. I would interpret the dialogical contribution of the Court to constitutional debates in the opposite way. The Court has an important role to raise questions when the practice of a member state is in violation of the state’s own constitutional ideals and the ECHR. In cases like *Lautsi*, the Court should not

⁴⁴ Jytte Klausen, *The Islamic Challenge: Politics and Religion in Western Europe* (Oxford: Oxford University Press, 2005), p. 136.

⁴⁵ Weiler, *supra* note 32, p. 1.

hide beyond the margin of appreciation and should enforce the Convention upon the member states. Constitutional principles must be more than a generous gesture of predominantly Christian states to religious and nonreligious minorities. When European states recognize the freedom of religion only under the condition that the hegemony of Christianity is not seriously questioned, the constitutional principle of state neutrality degenerates into a toothless tiger.