

## The Neutral State and the Mandatory Crucifix

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### Abstract

In this article we present a conceptual overview of relevant interpretations of what state neutrality may imply; we suggest a distinction between inclusive neutrality and exclusive neutrality. This distinction provides a useful framework for understanding the several positions as presented by the parties in the *Lautsi* case. We conclude by suggesting a solution of the *Lautsi* case that might provide a more viable solution.

### Keywords

inclusive neutrality; exclusive neutrality; *laïcité*; even-handedness; religious symbols; democracy; liberalism; offensive symbols; neutral symbols; *Lautsi*; crucifix

## I. Introduction

In a Grand Chamber judgment, the European Court of Human Rights has concluded that the mandatory presence of crucifixes in classrooms of public schools is not in violation of the European Convention. The *Lautsi* verdicts should be considered in the context of a long Article 9 ECHR religious freedom jurisprudence. In the context of education, Article 2 Protocol I is the *lex specialis* in relation to Article 9 ECHR. The Grand Chamber argues that both articles in connection guarantee freedom of religion, including the freedom not to belong to a religion. This imposes a “duty of neutrality and impartiality” on the part of Contracting States.”<sup>1</sup> Although the term ‘neutrality’ does not occur in the Convention or in any of the Protocols, it has been accepted in case law as an obligation of the state as a safeguard for ensuring plurality, which in turn is seen as one of the foundations of a “democratic society” within the meaning of the Convention.<sup>2</sup>

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<sup>1</sup> *Lautsi v. Italy*, 18 March 2011, ECtHR, No. 30814/06 [hereinafter ‘*Lautsi II*’], para. 59–61.

<sup>2</sup> *Kokkinakis v. Greece*, 25 May 1993, ECtHR, No. 14307/88, para. 31; *Bessarabia v. Moldova*, 13 December 2001, ECtHR, No. 45701/99, para. 116. For a discussion of these and related cases, see Aernout

However, it remains unclear what neutrality entails in ECtHR case law in general and in the Lautsi case in particular. We suggest that a philosophical analysis may help. Although ‘neutrality’ is a household term in legal analysis and in political theory, it is not always clear what the term implies in public policy or legal decisions. In this paper we will present a conceptual overview of relevant interpretations of what state neutrality can imply and we will analyze the positions as presented by the several parties in the Lautsi case in the light of our conceptual description.

## II. Two Conceptions of Neutrality

The general idea underlying the various conceptions of neutrality is that the ‘fact of plurality’ implies that citizens are likely to adopt a wide variety of plans of life and endorse different views about what makes life valuable. Government should not penalize or reward any of these ideas of the good life; instead it should provide an impartial framework within which each citizen can pursue the good life as (s) he sees it.<sup>3</sup> This basic idea may be developed in two different ways.<sup>4</sup> *Exclusive neutrality* contends that the state should be completely blind to religious and cultural differences, and every religious or cultural expression, both in terms of arguments, organizations and symbols, should be excluded from the public sphere. *Inclusive neutrality*, on the other hand, maintains that, both in political discussions and in laws and government policies, there is room to take account of religious and cultural differences. Citizens are free to express and organize themselves in the public sphere on a religious or cultural basis and the state supports some religious and cultural activities. In this version, neutrality implies that the state should not unfairly privilege or discriminate against some religions or views of life.

We may find this distinction between inclusive and exclusive neutrality under many different labels in the literature. For example, we may discern exclusive neutrality in the currently dominant interpretation of the French *laïcité*, and inclusive neutrality in a more moderate interpretation.<sup>5</sup> We suggest that there is not one version which is justified in all circumstances; it depends on the context which version of neutrality is to be preferred. Although an inclusive version

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Nieuwenhuis, ‘The Concept of Pluralism in the Case-Law of the European Court of Human Rights’, 3 *European Constitutional Law Review* (2007).

<sup>3</sup> Will Kymlicka, ‘Liberal Individualism and Liberal Neutrality’, 99 *Ethics* (1989), p. 883.

<sup>4</sup> For an elaborate discussion of state neutrality and the distinction between inclusive and exclusive neutrality, see Roland Pierik & Wibren van der Burg, *What is Neutrality?* [forthcoming]. In this paper we further subdivide inclusive neutrality in proportional and compensatory neutrality, a distinction irrelevant in the context of this paper.

<sup>5</sup> Bauberot refers to the idea of a *laïcité ouverte*, which has various similarities with the idea of inclusive neutrality. Jean Bauberot, ‘The Two Thresholds of Laïcization’, in R. Bhargava (ed.), *Secularism and its Critics* (Oxford: Oxford University Press, 1998), p. 131.

should often be preferred, because it takes all citizens seriously in their full identity, and does not require them to leave part of their personality at home when entering the public sphere, there may be contexts where exclusive neutrality does better justice to liberal-democratic ideals, for example, because an inclusive version is not feasible.

### III. The Several Stances on Neutrality in the *Lautsi* Case

The position of the *applicants* can be best described in terms of exclusive neutrality. Ms Lautsi wants to have crucifixes banned from the walls of public schools because their display constitutes an interference incompatible with her right to ensure that her children receive education and teaching in conformity with her religious and philosophical convictions.<sup>6</sup> This claim can be regarded as a requirement of exclusive neutrality. However, she also argues that by requiring the crucifix to be displayed in classrooms the State was granting the Catholic Church a privileged position and discriminates against non-Catholics.<sup>7</sup> In our terms, this argument could be reconstructed as arguing that the state does not live up to the requirements of inclusive neutrality either, because it only prescribes the symbol of one religion. If there are to be religious symbols at all, they certainly should not be restricted to only one religion or philosophical conviction. Thus, the mandatory presence of the crucifix violates both interpretations of neutrality although, obviously, Ms Lautsi prefers as a solution the removal of crucifixes altogether.

The *Italian government* does not consider crucifixes in classrooms as an issue of state neutrality. It follows various argumentative strategies to arrive at that conclusion. We 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 (art. 7).<sup>8</sup> Second, it downplays the association of the crucifix with Catholicism; it acknowledges that the crucifix is primarily a religious symbol; nevertheless it should primarily be seen as a symbol for the secular character of the Italian constitution:

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).<sup>9</sup>

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<sup>6</sup> *Lautsi v. Italy*, 3 November 2009, ECtHR, No. 30814/06 (hereinafter ‘Lautsi I’), para. 27.

<sup>7</sup> *Ibid.*, para. 30.

<sup>8</sup> *Ibid.*, para. 11.

<sup>9</sup> *Ibid.*, para. 35.

The government thus argues that the crucifix delivers a humanist message that can be read independently of its religious dimension and is composed of a set of principles and values forming the foundations of our democracies. As such, the Government sees it as “perfectly compatible with secularism and accessible to non-Christians and non-believers, who could accept it in so far as it evoked the distant origin of the principles and values concerned.”<sup>10</sup> Since the symbol of the crucifix “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.”<sup>11</sup>

The position of the *Second Section (Chamber) of the ECtHR* can best be understood in terms of exclusive neutrality. It argues that states have an obligation “to refrain from imposing beliefs, even indirectly, in places where persons are dependent on it or in places where they are particularly vulnerable.”<sup>12</sup> In the context of the *Lautsi* case it concludes that although the crucifix might have various meanings, it considers the religious meaning as predominant and concludes that the presence of the crucifix in classrooms goes beyond the use of symbols in specific historical contexts.<sup>13</sup> The Second Section argues that it “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 concludes that the practice is “incompatible with the State’s duty to respect neutrality in the exercise of public authority, particularly in the field of education.”<sup>14</sup>

The *Grand Chamber* argues that Article 2, 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.”<sup>15</sup> It concludes that there is no evidence that the obligatory presence of crucifixes has this indoctrinating effect on young persons.<sup>16</sup> Moreover, given the fact that there is no European consensus on religious symbols in State schools, “the decision whether crucifixes should be present in State-school classrooms is, in principle, a matter falling within the margin of appreciation of

<sup>10</sup> *Ibid.*, para. 35.

<sup>11</sup> *Ibid.*, para. 35. A third reason why the Italian government does not see a breach with state neutrality is that it argues that an image on the wall is a “passive symbol”, whose impact is “not comparable with the impact of an active, daily conduct extending over a long period such as teaching. *Lautsi II*, *supra* note 1, para. 36.

<sup>12</sup> *Lautsi I*, *supra* note 6, para. 48.

<sup>13</sup> *Ibid.*, paras. 51–52.

<sup>14</sup> *Ibid.*, para. 56.

<sup>15</sup> *Ibid.*, para. 62. This emphasis on fighting indoctrination should be seen as a way of safeguarding pluralism as mentioned in the introduction around footnote 2.

<sup>16</sup> *Lautsi I*, *supra* note 6, para. 66.

the respondent State.<sup>17</sup> Consequently, it refrains from taking an explicit position on whether, even *prima facie*, a crucifix violates state neutrality.

#### IV. Exclusive Neutrality, Inclusive Neutrality, or None of the Above?

Two positions dominate the Lautsi discussions: the applicant and the Second Chamber argue that the presence of crucifixes violates the requirements of neutrality and strive for the removing of crucifixes from state-school walls altogether. The Italian Government and the Grand Chamber give various reasons why the obligatory presence of crucifixes in state schools is not a violation of state neutrality. We think that the argument as presented by the applicant and the Second Chamber should primarily be understood in terms of exclusive neutrality and, as such, as a valid claim in terms of neutrality. The implication of exclusive neutrality is straightforward: there should be no symbols in the classroom at all. No Crucifix, no Crescent. In general, we can also agree with the Italian Government and the Grand Chamber that not every rights claim can or should be analyzed in terms of neutrality and that there might be more important values that might trump state neutrality. This is the reason why the Grand Chamber ultimately concluded that the state obligation to display crucifixes in state schools fell within the limits of the margin of appreciation. However we think that the current constellation, in the end accepted by the ECtHR, violates the requirements of state neutrality, in both versions we distinguished. Many citizens associate the crucifix with a religion that once was highly oppressive, e.g. with regard to Jews (pogroms) and Muslims (the Crusades and colonial times). In some respects, it may still be perceived as oppressive, e.g., by homosexuals, divorced women or atheists who all are condemned by the Roman Catholic Church, sometimes in very intolerant and insulting terms.

The Italian government seems to be incapable to understand that for many non-Catholics the crucifix is an exclusive and even offensive symbol. In an earlier trial in this case an Italian administrative court concluded:

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. . . . It can therefore be contended that in the present-day social reality the crucifix should be regarded not only as a symbol of a historical and cultural development, and therefore of the identity of our people, but also as a symbol of a value system: liberty, equality, human dignity and religious toleration, and accordingly also of the secular nature of the State—principles which underpin our Constitution.<sup>18</sup>

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<sup>17</sup> *Ibid.*, paras. 69–71.

<sup>18</sup> As quoted in Lautsi I, *ibid.*, para. 30.

This claim is, in our view, not only factually incorrect, but it is also extremely insensitive to the legitimate feelings of many non-Catholics. It may be that some Catholics regard the crucifix as the symbol for humanist and secular values, but for most non-Catholics, it is not such an inclusive symbol, but the symbol of a specific religion that has often been (and still is) oppressive to substantive minority groups in society.

## V. An Inclusive Alternative?

None of the various parties in the *Lautsi* case explicitly proposes a solution based on inclusive neutrality. However, it might provide an interesting angle to analyse its possible implications. Inclusive neutrality would imply that all relevant religions and other views of life are symbolically represented in the classroom. A crucifix for the Roman-Catholics and a simple cross for the Protestants, a Star of David for the Jews, a crescent for the 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 Wiccan symbols be included, and those from Zen Buddhism? Moreover, some religions and views of life cannot find symbols so easily, 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, which is seen as one of the foundations of a “democratic society” as aimed for in the European Convention of Human Rights.<sup>19</sup> Parents, teachers and pupils (depending on their age) in a certain school, can deliberate about which constellations of symbols represent the pluralist character of their 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 of mutual learning. To what extent can parents claim that only their symbol should be displayed, and that their symbol does not tolerate others in its presence? They might conclude that an empty wall is the best solution, or a wall in which all religions and philosophies of life as present in that school as displayed on an equal footing. It would not only be an interesting experiment, but it might well be an intermediate solution which can be, if not fully acceptable, at least more tolerable for all the parties involved than the dichotomous choice now provided by the two different chambers of the European Court.

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<sup>19</sup> See literature as mentioned in *supra* note 2.