

RELIGIOUS DISPLAYS AT PUBLIC SCHOOLS – COURTS, CRUCIFIXES AND MASTERS OF IDENTITIES

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ABSTRACT

This contribution compares the judgment of the Grand Chamber of the European Court of Human Rights (ECtHR) in the case of Lautsi v. Italy with the decision of the German Federal Constitutional Court in the Classroom Crucifix case. An examination of the way that the courts dealt with the common issues of state neutrality in education, parents' rights to direct the religious education of their children, students' right to religious freedom, as well as of the consistency of the rulings with relevant case law, reveals that the ECtHR's Grand Chamber rendered a judgment open to criticism on a number of grounds. It erroneously conflated state action interfering with the applicant's rights with the exercise of some 'collective' rights and liberties. The mis-characterization of the crucifix as a 'passive symbol' led the ECtHR to trivialize or disregard the effects of the crucifix on dissenting students and the state neutrality mandate in public education. Finally the judgment is not consistent with the relevant case law of the Court and the application of the doctrine of the margin of appreciation has served to weaken its role as Europe's 'fundamental rights protector', seeming to be a means through which the Court has gracefully given in to 'popular sentiment'. The contribution concludes by offering a 'pluralist approach' as a legislative framework for regulating the display of religious symbols in public schools.

Keywords: crucifix; ECHR; freedom of religion; public school; religious symbols

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§1. INTRODUCTION

The importance of symbols for religious communities, individual religious believers, and the state cannot be stressed enough. Symbols have been recognized as powerful purveyors of ideas and meanings.¹ Religious symbols are also closely connected with identity. According to Renteln, individuals feel that their identities are connected to symbols and therefore, the preservation of these symbols signify an enormous importance in their lives. Moreover, there is a tendency to accept the notion that ‘seeing is believing’, which often results in the reification of the symbol.²

This article will offer a comparative analysis of the legal controversies engendered by laws requiring the display of crucifixes in public school classrooms – in the German *Bundesland* of Bavaria in 1995 and in the Council of Europe Member State of Italy in 2010–2011. The article will begin with a comparison of the decision of the German Federal Constitutional Court in the *Classroom Crucifix* case³ and the judgment of the Grand Chamber of the European Court of Human Rights (ECtHR) in the case of *Lautsi v. Italy*.⁴

These cases invite comparison because of the similarity of the issues involved as well as the extraordinary public attention and strong reaction that they attracted. The article will examine how each court dealt with the common issues of state neutrality in education coupled with parental rights to steer the religious education of their children, as well as students’ rights to be free from religious coercion and indoctrination, and to manifest their religious or philosophical beliefs. Furthermore, the article will look into how consistent the two decisions are with the relevant case law of the two courts.

A major difference between the disputes is the nature of the legal instruments that were employed and the positions of the courts *vis-à-vis* the state authorities, whose actions were challenged by the individuals: a federal constitution applied by a federal

¹ See for example, Justice Jackson in *West Virginia Board of Education V. Barnette*, 319 U.S. 629 (1943), Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a colour or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the cross, the crucifix, the altar and shrine, and clerical raiment. Symbols of state often convey political ideas just as religious symbols come to convey theological ones.

Theologians and anthropologists have also attested to the constitutive power of religious symbols. See for example Geertz: ‘[religious symbols] function to synthesize people’s ethos – the tone, character, and quality of their life, its moral and aesthetic style and mood – and their world view – the picture they have of the way things in sheer actuality are, their most comprehensive ideas of order’. See F.S. Ravitch, ‘Religious Objects as Legal Subjects’, 40 *Wake Forest L. Rev.* (2005), p. 1031–1023.

² A.D. Renteln, ‘Visual Religious Symbols and the Law’, 47 *American Behavioral Scientist* 1573 (2004), p. 1575.

³ BVerfGE 93, 1 1 BvR 1087/91 (*Kruzifix*), 1995 (The *Crucifix* case).

⁴ *Lautsi v. Italy*, no. 30814/06, 3 November 2009 (referred to the Grand Chamber on 1 March 2010, overruled in *Lautsi v. Italy*, Grand Chamber judgment of 18 March 2011).

constitutional court to a sub-unit of the federation, and an international treaty applied by an international court to a state party to the treaty. The article will argue that these differences do not lead to different outcomes for the two cases, and that the Grand Chamber of the ECtHR erred when it reversed the judgment of the Second Section in the case of *Lautsi v. Italy*. The article will conclude with a proposition of a pluralist approach to the issues that would best protect the rights and serve the interests identified above.

§2. THE CLASSROOM CRUCIFIX CASE

The German Federal Constitutional Court dealt with the constitutionality of permanent displays of religious symbols. The case concerned a ministerial regulation of the predominantly Catholic land of Bavaria, requiring the placement of a crucifix on classroom walls in public schools.⁵ Bavaria was and still is the only *Bundesland* requiring the display of crucifixes. In comparison, the *Länder* of Baden-Württemberg, North Rhine-Westphalia, Hesse, Rhineland-Palatinate, Saarland, and Thuringia permitted the display of crucifixes in classrooms while Brandenburg, Mecklenburg-Western Pomerania and the city-state of Hamburg prohibited such displays.⁶

The controversy leading to the case emerged when two students and their parents, as followers of the Austrian humanist Rudolf Steiner, objected to the presence of a large crucifix in the students' classroom.⁷ Initially a compromise was reached whereby the crucifix was replaced with a smaller cross over the door, but the school authorities refused to do the same in all classrooms in which the children were also instructed, to guarantee that the compromise would be permanent. The parents then took the case to the Bavarian Constitutional Court, which ruled against them in 1991, upholding the constitutionality of the aforementioned regulation.⁸ When the parents filed a constitutional complaint with the Federal Constitutional Court, a majority of the Justices found the regulation incompatible with the negative religious freedom of non-Christian students and parents, as well as with the state's neutrality mandate with respect to religion.

§3. THE CASE OF *LAUTSI V. ITALY*

Seven years later, the mother of two public school children in the Italian town of Abano Terme objected to having crucifixes displayed in their classrooms. The crucifixes were

⁵ §13 (1), third sentence, of the School Regulations for Elementary Schools in Bavaria (*Volksschulordnung-VSO*) of 21 June 1983 (GVBl. p. 597).

⁶ L. Auslander, 'Bavarian Crucifixes and French Headscarves: Religious Signs and the Postmodern European State', 12 *Cultural Dynamics* 3 (2000), p. 288–289.

⁷ I.B. Wuerth, 'Private Religious Choice In German And American Constitutional Law: Government Funding And Government Religious Speech', 31 *Vand. J. Transnat'l L.* (1998), p. 1182.

⁸ *Ibid.*

placed there pursuant to decrees and regulations dating back to the 1920s under the auspices of the fascist government, which are still in force today.⁹ The Italian courts, when faced with the dispute, ruled against the parent, maintaining that the crucifix was a symbol of Italian history, identity, and cultural values. Due to the nature of the legal norms, the Italian Constitutional Court had no jurisdiction to rule on the compatibility of the regulations with the Italian constitution.

The children's mother filed an application with the European Court of Human Rights, and the Court's Second Section ruled that Italy had violated her right to have the state ensure that her children's education and teaching were in conformity with her own religious and philosophical convictions, in conjunction with her right to religious freedom. Italy then asked for referral of the case to the Grand Chamber and that request was granted. The Grand Chamber in turn ruled against the applicant, finding that the decision of the Italian state to place crucifixes did not exceed the wider margin of appreciation the Strasbourg Court accorded to the state in the sphere of religious symbolism in public schools. The Grand Chamber also emphasized the 'passive' nature of the symbol and its *de minimis* level of compulsion, which did not amount to 'indoctrination'.

§4. THE SYMBOL OF THE CRUCIFIX

In both cases a key point of contestation between the individual complainants and the state authorities was the symbolic message of the crucifix – religious or secular, or a mixed message where different meanings are mingled, with some more dominant than others. The article will proceed with an analysis of how the courts decided the dispute over symbolism and what ensuing inferences were made about the compliance of the state authorities with the German Constitution, and respectively the European Convention on Human Rights.

In its decision in the *Classroom Crucifix II* case the German Constitutional Court found that the German regulation violated the Federal Constitution. The Constitutional Court stated that Article 4 (1) of the Grundgesetz protects not only the freedom to hold, manifest, and act according to one's faith but also the freedom to detach oneself from rituals as well as symbols representing a faith not shared by the individual.¹⁰ It is the judgement of the individual's conscience and not the dictate of the state that should determine which symbols an individual would venerate and which not. The mandatory hanging of the crucifix in the classrooms of each elementary school infringed upon the negative freedom of non-Christian students and the parents' right to direct the religious education of their children. Parental rights, guaranteed by Article 4(1) in connection

⁹ Circular (no. 68 of the Ministry of Education) from 22 November 1922; royal decree no. 965 of 30 April 1924, Article 118; royal decree no. 1297 of 26 April 1928, Article 119.

¹⁰ BVerfGE 93, para. 34.

with Article 6(2), include the right not to expose one's children to religious convictions which one considers wrong or harmful.¹¹

The Court's majority also rejected the contention that crucifixes or crosses are not placed in schools for their religious symbolism but as an expression of Western culture influenced by the Christian religion.¹² Affirmation of Christianity as a cultural and educational factor had been held as constitutional in the *Interdenominational School* case. The Federal Constitutional Court affirmed the constitutionality of the establishment of Christian interdenominational schools as the uniform type of school in the *Bundesland* of Baden-Württemberg, against the constitutional complaint of parents who objected to having their children educated following any religious or ideological tenets.¹³ In order to be in conformity with the German Constitution, such schools were not permitted to have a missionary character, nor affirm the faith doctrines of Christianity, and had to be 'open to other ideological and religious ideas and values'.¹⁴

According to the German Federal Constitutional Court, the crucifix was not a cultural symbol but a symbol of faith signifying the 'release of humans from hereditary debt (...) [for the] victory [of] Christ over Satan and death'.¹⁵ The crucifix had a missionary character and represented the Christian faith as exemplary and worthy of following.¹⁶ The missionary character of the cross carried particular significance in the context of elementary public schools where children are still unsure of their opinions and have not yet developed the capacity to form their own points of view and to engage in critical thinking.¹⁷ Thus, although the display of the cross did not involve any direct coercion to identify with, or practise a particular faith, it nevertheless affected children significantly.¹⁸ School education has an effect on children's 'emotional capacity and development' and should be aimed at 'the full mental and spiritual or emotional development of schoolchildren and the creation of social awareness and conduct'.¹⁹ In view of the school's role, the missionary character of the religious symbol was in contradiction to the negative religious freedom of the students.

In the *Lautsi* case, the Grand Chamber of the ECtHR confirmed the finding of the Second Section that, regardless of any secular value, the crucifix was a referent to Christianity.²⁰ However, the Grand Chamber, in contrast to the Second Section, found that this fact in itself was not sufficient for holding that the limit on indoctrination

¹¹ Ibid., para. 36.

¹² Ibid., para. 41.

¹³ BVerfGE 41, 29.1 BvR 63/68 (*Simultanschule*) 1975 (*The School Prayer* case).

¹⁴ Ibid., para. 3.

¹⁵ BVerfGE 93, 1, para. 43.

¹⁶ Ibid., para. 46.

¹⁷ Ibid., para. 46.

¹⁸ Ibid., para. 45–46.

¹⁹ Ibid., para. 46.

²⁰ *Lautsi and Others v. Italy*, [GC], no. 30814/06, para. 71.

prescribed by Article 2 of Protocol 1 had been exceeded.²¹ Before discussing the different inferences the Grand Chamber and the Second Section drew from this finding, a more detailed examination of the opposing claims that were made with respect to the symbolism of the crucifix follows.

The dissent in the German *Classroom Crucifix* case concerned disagreement that the border between cultural initiation and religious identification had been crossed. It argued that the crucifix, besides being a religious symbol, was also a symbol of Christianity's influence over Western cultural traditions.²² As such, its presence was justified *vis-à-vis* non-Christians as it served an educational function. The Italian government presented the same argument in the *Lautsi* case, and this argument, quoted at great length in the Grand Chamber judgment, was accepted by the Italian administrative courts when they rejected the applicant's complaints.²³ Thus, the question of whether a given symbol is mainly a religious referent or a cultural one is often at the centre of the controversies arising from symbolic religious expression by the government.

In the *crucifix* cases, as in the *Ten Commandments*²⁴ and *holiday display* cases²⁵ in the US, one of the main contentious issues that emerges concerns the boundary between acknowledgement and transmission of cultural traditions and values on the one hand, and government endorsement of religion and proselytizing on the other. This issue is complicated because it is nearly impossible to ascribe a single meaning to symbols and religious texts, particularly when one takes into account that the same symbol may have different meanings for different individuals and groups. This factual circumstance also conditions the second issue: What is the proper role of the judiciary in ascribing meaning to a religious symbol?

Brugger suggests one approach to these issues.²⁶ He argues that the constitutionality of the display of a religious symbol in the classroom should depend not on the nature

²¹ Ibid.

²² BVerfGE 93, 1, para. 75.

²³ *Lautsi and Others v. Italy* [GC], no. 30814/06, para. 15, 16.

²⁴ See *Stone v. Graham*, 449 U.S. 39 (1980) in which the US Supreme Court held that a Kentucky law requiring the posting of a copy of the Ten Commandments in public school classrooms violated the First Amendment's Establishment Clause in the US Constitution, which reads that 'Congress shall make no law respecting an establishment of religion'. The Court held that the statute had no secular purpose and the display was not confined only to secular matters but rather, matters related to the worshipping of God and observing of the Sabbath. See also *ACLU v. McCreary County*, 2003 *FED App. 0447P* (6th Cir).

²⁵ During the winter holidays, public schools in the US are faced with the 'December Dilemma' – the challenge of acknowledging the different cultural traditions and religious beliefs of students, while avoiding the endorsement of religion prohibited by the US Constitution. Federal courts have upheld the constitutionality of displays combining religious symbols. See for example *Florey v. Sioux Falls School District* 49–5, 619 F.2d 1311 (8th Cir), cert. denied, 449 U.S. 987 (1980); *Cleaver v. Cherry Hill Township Bd. of Educ.* 838 F. Supp. 929 (D.N.J. 1993).

²⁶ See W. Brugger, 'Communitarianism as the Social and Legal Theory Behind the German Constitution', 2 *Int'l J. Const. L.* (2004).

of the symbol but on the way it is used at school.²⁷ He contends that if the crucifix is ‘used actively in classroom instruction or serves as an “object of religious worship” then the display is unconstitutional because of “the need to separate society from state and church from state”’.²⁸ On the other hand, the crucifix may serve as a reminder of ‘a tradition’ that has had a great impact on the country’s culture. Then the display is constitutional under the German Constitution even though it may send a ‘faint, message of state support for this “tradition” but “without discriminating against non-believers or believers in other religions or world views”’.²⁹ It seems that the Grand Chamber in *Lautsi* has applied a similar reasoning by emphasizing that the symbol had not been used for development of ‘teaching practices with a proselytising tendency’, nor had the students experienced a ‘tendentious reference to that presence by a teacher in the exercise of his or her functions’.³⁰

Returning to Brugger’s argument, one must note that the substitution of ‘religion’ with ‘tradition’ cannot obscure the fact that it is a religious tradition that he refers to. The argument does not answer the difficult question of when religious culture residue ceases to be religious. A particular symbol, because of its long and widespread usage, may seem too secularized to those of the majority religion and at the same time, remain too much of a symbol of religious oppression to those outside that religion. The Italian Federation of Evangelical Churches, for example, has argued that the crucifix is not a symbol of Italy’s common cultural heritage, but ‘baggage from a society dominated by Catholics’.³¹

If Brugger’s distinction is used as a test for the constitutionality of displays of religious symbols, then those exhibiting purely religious symbols of the majority religion will always be constitutional so long as they are not used actively as tools for proselytizing. Such a test completely ignores the inherent effect of symbolic expression on students. As Ravitch notes, religious objects are not just ‘passive things’ but also a powerful medium for conducting religious meaning and cultural meaning.³² Whether the meaning is cultural or religious, or even whether one can draw a distinction between the two, does not only depend on their use in the classroom. Their use at school can only reinforce one meaning but symbols also speak for themselves and convey meanings to both believers and non-believers.

Even when the school does not employ a religious symbol as a means for proselytizing, the endorsement by the school of the religious meaning conveyed by the symbol may

²⁷ Ibid., p. 450.

²⁸ Ibid., p. 450.

²⁹ Ibid.

³⁰ *Lautsi and Others v. Italy* [GC], no. 30814/06, para 75.

³¹ A. Cline, ‘Evangelicals vs. Evangelicals, Crosses vs. Crucifixes’, *About.com* (2011), <http://atheism.about.com/b/2011/04/03/evangelicals-vs-evangelicals-crosses-vs-crucifixes.htm> (last visited 13 August 2011).

³² F.S. Ravitch, 40 *Wake Forest L. Rev.* (2005), p. 1020.

have an exclusionary effect on those students who cannot identify with it. A message that the religious beliefs of some students are more worthy of recognition and respect by the school than those of other students may undermine the latter's own sense of worth and dignity, religious beliefs being a core feature of identity.

Moreover, there is a great risk that students belonging to minority religions will not have the chance to have their symbols displayed because of the improbability that those symbols would be found to have significant cultural impact. If we turn to Professor Robbers' argument about the 'cultural school'— the school seen as 'a substantial place of education and cultivation, of the conveyance of cultural identity in the composed community',³³ we see that although he accepts Islam as a contemporary culture-shaping factor in German society, he does not argue that symbols of Islam be placed next to the crucifix. The cultural school should be passing down culture on future generations and 'must make room for and support the constant development of culture'.³⁴ Since Islam is a culture-shaping factor in contemporary Germany, he argues that teachers should be allowed to wear headscarves at school as this would be a valuable and educational cultural encounter.³⁵

However, although he maintains that the display of the crucifix is constitutional, he does not suggest that verses of the Koran, for instance, should also be placed on the classroom walls. Recognition of and respect for the symbols of a religious faith by the state by means of maintaining religious symbols displays at school is different from making room for the exercise and manifestation of the private religious beliefs of the state's employees in the workplace. The former much more adequately fulfils the 'cultural mission' of the school than the latter.³⁶

An approach that constitutionalizes school displays of the religious symbols of the majority because of their cultural relevance results in the selective promotion of one religion. Brugger acknowledges that the principle of neutrality interpreted from the perspective of what he calls 'liberal communitarianism' rules out such a result. However, he argues that such strict neutrality applies only to 'religions and world views in the sense that they are sources, or organised systems in the case of churches, of fundamental convictions that can and should not be adjudicated or regulated by state authority'.³⁷ However, with respect to religious values or symbols reaching 'above' or 'beyond' the genuine core of belief, such neutrality is not mandated.³⁸ Brugger also contends that

³³ G. Robbers, 'Religion in Public Schools', *The Strasbourg Conference, received papers* (2007), www.strasbourgconference.org/papers/Religion%20in%20Public%20Schools.pdf (last visited 20 April 2007), p. 3.

³⁴ *Ibid.*, p. 14.

³⁵ *Ibid.*

³⁶ An additional problem with Brugger's argument, beyond the discussion of this article, is that accommodating only teachers whose religious beliefs are culturally relevant would hardly comply with the right to equality.

³⁷ W. Brugger, 2 *Int'l J. Const. L.* (2004), p. 452.

³⁸ *Ibid.*

in such cases there has been a secularization of the religious element and it has become a common part of the cultural life of the community, acquiring meaning beyond the one conferred by the particular religious doctrine. Furthermore, in some cases, religious symbols and values have become an important element of the ‘collective moral consciousness and self-understanding of a particular community and thus have assumed the character of a “civil religion”’.³⁹

When is a religious symbol sufficiently secularized? When does it reach enough above and beyond the religious that its display is constitutional? These hard questions have come before courts in Germany, Italy and the US as well as other countries, but they do not receive a satisfactory answer in Brugger’s analysis.⁴⁰

A purely religious object may still have a strong cultural relevance in a community whose majority belongs to the same religion, but this fact does not subtract from its religious meaning. On the other hand, a religious symbol, in time, may become strongly secularized so that it is primarily a cultural referent. According to Ravitch, the way out of the interpretative dilemma is an approach that centres on the nature of the religious objects themselves and their power.⁴¹

Ravitch distinguishes three categories of religious objects in religious symbolism cases in the US: ‘Pure Religious Objects’, ‘Multifaceted Religious Objects’ and ‘Secularised Objects’.⁴² In the first category he places ‘objects of veneration, objects used in religious ritual (...) objects that represent core religious principles (...) [objects that are] central stories of a given religion’.⁴³ These objects, according to Ravitch, rarely have any secular meaning at all and he includes among them crèches, crosses, and menorahs.⁴⁴ Multifaceted religious objects, on the other hand, have both secular and religious meanings. They are important to the theology of a particular religion but they are not used in rituals or venerated and may have different meanings both for believers and for non-believers. Ravitch notes the Ten Commandment displays in the US as an example of such an object.⁴⁵ Finally, secularized objects are those that may be related to a religion or a religious holiday but over time have lost their theological relevance – for example – Christmas Trees and Santas.⁴⁶

If we accept Ravitch’s categories and apply them to the crucifix cases then the German Constitutional Court and the ECtHR were correct in stating that the crucifix cannot be reduced to a mere cultural symbol because it is a purely religious object. The

³⁹ Ibid., p. 453.

⁴⁰ For a brief description of legal solution of several European countries on the display of crosses or crucifixes in the public school classroom see, L.L. Garlicki, ‘Perspectives on Freedom of Conscience and Religion in the Jurisprudence of Constitutional Courts’, *BYU Law Rev.* (2001).

⁴¹ F.S. Ravitch, 40 *Wake Forest L. Rev.* (2005), p. 1066.

⁴² Ibid., p. 1.

⁴³ Ibid., p. 1024.

⁴⁴ Ibid.

⁴⁵ Ibid., p. 1025.

⁴⁶ Ibid., p. 1026.

Court's majority in the German case noted the theological significance of the crucifix, emphasizing that although over time many Christian traditions have become cultural bases of society, 'specific faith contents of the Christian religion or a certain Christian denomination, including its ritual realising and symbolic representation, must be differentiated from these'.⁴⁷ The second set of elements used by Ravitch for defining a pure religious object was also considered by the court – 'For the believing Christian it [the crucifix] is accordingly in many ways an object of reverence and of piety'.⁴⁸

Again, if we apply these categories it becomes clear why Professor Weiler's examples to illustrate his rejection of the preponderance of the religious symbolization of the crucifix are not apposite. He argued that a finding for the applicants would entitle a student in an English classroom to request that a photo of the Queen of England be removed since besides the Head of State she is also the titular head of the Church of England, or to have a copy of the German or the Irish Constitution removed for the contents of their preambles. These symbolic objects have a dual nature and would all fall within the second category. The crucifix is different. It is not an official symbol of the Italian state, unless Italy wished to claim Jesus Christ as its king. In the same vein, the fact that the constitution of the state which contains *invocatio Dei* is displayed, does not mean that displaying the Holy Bible is also unproblematic. The cross in the national flags of some European states would fall within the third category.

§5. BALANCING AND POSITIVE RIGHTS

In both cases the courts accepted that the crucifix is a religious symbol. The difference is in the way they treated this finding and what inferences they drew from it in their analyses of the applicants' complaints. While it was true, the German Federal Court noted, that in a society which makes space for a plurality of religions, individuals do not have the right to be free from every encounter with manifestations, rituals, and symbols of faiths they do not follow, the issue is different when the encounter happens in a state-created situation, such as in a public school. Article 4 guarantees application in a situation in which students have a long-lasting encounter, which they cannot avoid, and are forced to study 'under the cross', which confronts them in the form of the symbolic expression of the state.⁴⁹

The majority rejected the argument of the dissent that the crucifixes displayed were not missionary, but simply corresponded to the values of the Bavarian people, since everywhere in Bavaria – on roads, restaurants, private homes, people were being confronted with such displays.⁵⁰ The Court also distinguished the display of the crucifix

⁴⁷ BVerfGE 93, 1, para. 43.

⁴⁸ Ibid., para. 44.

⁴⁹ Ibid., para. 39.

⁵⁰ Ibid., para. 33.

in the classroom from an earlier case where it had held that a crucifix should be taken down from the walls of a courtroom upon the request of a Jewish litigant, but that not all such displays were contrary to the Basic Law. The Court emphasized that schools were a different environment to courtrooms, since the viewers were young impressionable children and because exposure to the crucifix was not a short but a long-term event, and repeated over years.⁵¹

The dissenters in the German *Crucifix* case argued that the state's use of religious symbols valued by the majority of students and parents in public schools was justified because it created a space where these students and parents could actively affirm their convictions, and in this way the state promoted religious freedom.⁵² The dissent viewed the symbolism of the crucifix not merely as government expression but also as an expression reflecting private religious choices, and enabling private religious expression within schools under its supervision.

The majority of the German Constitutional Court, however, held that the infringement upon the negative rights of students could not be justified by the argument that the state was giving space to realize the positive religious freedom of Christian students and parents. While it was unavoidable that in a pluralist society these rights may come into conflict, the Basic Law required that the conflict be resolved through the principle of practical concordance, according to which none of them is to be realized to an unreserved extent so that it completely negates the other one.⁵³ The conflict, the Court noted, could not be resolved according to the majority principle, since the fundamental right of religious liberty was aimed particularly at protecting minorities.⁵⁴ The Bavarian regulation which gave full protection only to the positive liberty of Christian parents and students had not achieved a compromise in conformity with the principle of practical concordance. The ordinance could not be justified under Article 7 of the Basic Law, since the state had gone beyond the permissible accommodation of religion by mandating the posting of a specific symbol of the Christian religion and sending a message of state identification contrary to the principles of neutrality.

The balancing of positive and negative rights is one of the major differences between the German and the US constitutional jurisprudence regarding state-mandated religious symbolism in schools. In the US the analysis primarily centres on whether the state sends a message of religious endorsement and thus violates its neutrality mandate, whereas in Germany, government symbolic expression is also examined as giving space to collective private religious expression. The conflict is not only between Article 7 state powers and Article 4 rights of students and parents, but also one of conflicting Article 4 rights of majority and minority.

⁵¹ Ibid., para. 39–40.

⁵² Ibid., para. 82.

⁵³ Ibid., para. 50.

⁵⁴ Ibid., para. 56.

A similar argument was also made by Professor Weiler before the ECtHR's Grand Chamber, who opened his speech by characterizing the case as a tension between individual rights and collective identity, and later as a balance between two types of liberty: 'individual liberty' and 'collective liberty to define cultural identity'.⁵⁵ Such a characterization of the legal conflict is incorrect. This mis-characterization erroneously transforms the conflict into one between an individual right and the rights and freedoms of others. Had the Court examined the complaint as falling within Article 9 and found an interference with the rights of students, this inference could not be found to serve any of the legitimate aims enumerated in Article 9. The mandatory placement of the crucifix on classroom walls does not protect the rights of others to freely manifest their religion – whether there is a crucifix on the classroom wall or not, this is immaterial to their right to exercise and manifest their Christian religion.

Therefore, the view expressed in the concurring opinion of Judges Rozakis and Vajic in the Grand Chamber judgement in *Lautsi*, is open to criticism. For them an analysis of proportionality should be made between the right of parents to ensure their children's education and teaching in conformity with their own religious and philosophical convictions, and the 'right of society, as reflected in the authorities' measure in maintaining crucifixes on the walls of State schools, to manifest their (majority) religious beliefs'.⁵⁶ Again, transforming the conflict into one between rights of individuals and rights of majorities rather than between the individual and the state, is conceptually misleading since while individuals have rights, the state has powers, in this case exercised to serve some public interest, arguably that of transmitting cultural and religious identity to the young generation.

It should be noted however, that a similar view of government symbolic speech is not far from the argument of Justice Scalia in his dissent in the *McCreary* case, where the US Supreme Court found a Ten Commandments display at the McCreary County courthouse unconstitutional, for lacking a secular purpose.⁵⁷ Scalia argued that nothing in the US Constitution forbade public acknowledgment of the Creator, acknowledgment and respect given by the people as a people through government symbolic speech.⁵⁸ He noted that minority members were protected by the Free Exercise clause and by 'those aspects of the Establishments clause not related to government acknowledgement of the Creator'.⁵⁹

Such an approach would result, however, in a majority capture of government speech resources and minorities would be very unlikely to have access to government speech.

⁵⁵ J. Weiler, 'Oral submission before the grand Chamber of the European Court of Human Rights', Grand Chamber hearing of Wednesday 30 June 2010.

⁵⁶ *Lautsi and Others v. Italy*, [GC], no. 30814/06, concurring opinion of Judge Rozakis, joined by Judge Vajic, para. (iii).

⁵⁷ *McCreary County v. American Civil Liberties Union of Ky.* (03–1693) 354 F.3d 438, Affirmed (2005).

⁵⁸ *Ibid.*, para. 2750–2753.

⁵⁹ *Ibid.*

Nothing prevents individuals from acknowledging their faith publicly, without the use of such government resources and powers. The dissenting opinion in the *Classroom Crucifix* case gives clear evidence for that by emphasizing the omnipresence of the symbol of the crucifix in Bavaria. Given the fact that citizens of Bavaria have a plethora of venues to engage in private religious speech, one may not maintain that their positive rights to religious expression would be seriously burdened if they do not utilize state powers over public education as a government mouthpiece for their convictions.⁶⁰

§6. EFFECT ON DISSENTING STUDENTS

The argument for giving room to majoritarian religious expression through government symbolic speech also trivializes if not completely ignores the effect the state's symbolic endorsement of the majority religion has on students not belonging to it. According to the dissenting judges in the *Classroom Crucifix* case, what should be decisive for the constitutional analysis was not the single theological meaning of the crucifix imposed by the Court's majority, but how the crucifix was perceived by non-Christians.⁶¹ They concluded that in the absence of outright coercion, non-believers were obliged to put up with the display because of the principle of tolerance. The psychological burdens that the display of the crucifix placed upon non-Christians were minimal, according to the dissent, and were, therefore, not unreasonable to be borne.⁶² In the same vein, Judge Power, in her concurring opinion in the *Lautsi* case, pointed out such absence of outright coercion and concluded that the test for violation of Article 9 had not been satisfied.

The display of a religious symbol does not compel or coerce an individual to do or to refrain from doing anything. It does not require engagement in any activity (...) It does not prevent an individual from following his or her own conscience nor does it make it unfeasible for such a person to manifest his or her own religious beliefs and ideas.⁶³

However it should be contended that the psychological harm is not so minimal, especially in the public school setting. As Laycock argued, such government speech has 'the inevitable result that adherents of the other [religious or world views] will feel their

⁶⁰ See E.G. Wallace, 'When Government Speaks Religiously', *21 Fla. St. U. L. Rev.* 1193 (1993–1994), p. 1202, 1256.

⁶¹ BVerfGE 93, 1, para. 87.

⁶² *Ibid.*, para. 88–89. See however Beatty, arguing that 'The three judges who wrote in dissent gave no recognition to the perception of many non-Christians of the cross as a symbol of heresy, intolerance, even horror.' (D. Beatty, 'Revelations: Religious Rights in a Comparative Perspective', *International Association of Constitutional Law – 5th World Congress – Constitutionalism, Universalism and Democracy* (Rotterdam 12–16 July 1999), <http://eur.nl/frg/iacl/papers/beatty.doc>, p. 16 (last visited 20 November 2003)).

⁶³ *Lautsi and Others v. Italy*, [GC], no. 30814/06, concurring opinion of Judge Power.

inferior status'.⁶⁴ This concern has particular force in the public school setting, as the majority of the German Constitutional Court noted:

School education is not just for learning basic cultural techniques and developing cognitive capacities. It is also intended to bring the pupils emotional and affective dispositions to development. Schooling is oriented towards encouraging their personality development comprehensively, and particularly also to influencing their social conduct.⁶⁵

The obligation of the state to create conditions for the development of personality that the Court discusses cannot be fulfilled if the state fails to accord equal respect and concern for all students, while sending an exclusionary message to religious outsiders. Although the Court's majority does not take up such an argument, it is worth noting that an exclusionary message is particularly incompatible with the German constitution whose normativity is based on a hierarchy of values, with human dignity at its centre. The same holds true for the ECHR whose 'very essence (...) is respect for human dignity'.⁶⁶

Commenting on the issue of non-coercive establishment (favouring a religion through speech and spending), Brudney argues that the psychological harm resulting from the exclusionary message of the religious establishment in the form of government religious speech is conditioned upon 'the description under which one is demeaned and excluded, and the demeaning and excluding agent'.⁶⁷ Firstly, he argues that since religious identity for many people is of fundamental importance, 'one might feel demeaned and excluded at one's core if one is demeaned and excluded on religious grounds'.⁶⁸ When the state sends a message that one religion is not as worthy as another religion or doctrine, then citizens might withdraw from state institutions and feel alienated as a consequence.⁶⁹

This psychological harm, Brudney argues, is belief-dependent, namely it depends on whether one believes that one's proper relation to the political community or the state institutions which come to represent it is one of 'connectedness or intimacy'.⁷⁰ The same holds true for the argument that one would suffer psychological harm if the state fails to treat religious outsiders with equal respect through symbolic establishment; harm is suffered only if one believes that the state should treat one with equal respect.⁷¹ A similar belief-dependency relates to the philosophical argument that human beings have a fundamental interest in recognition as being worthy and that one suffers physiological harm if the state through symbolic religious endorsement fails to recognize one's worth.

⁶⁴ D. Laycock, 'The Origins of the Religion Clauses of the Constitution: 'Nonpreferential' Aid to Religion: A False Claim about Original Intent', 27 *William and Mary Law Review* (1986).

⁶⁵ BVerfGE 93, 1, para. 46.

⁶⁶ See for example *Jehovah's Witnesses of Moscow and Others v. Russia*, no. 302/02 (2010), para. 135.

⁶⁷ D. Brudney, 'On Noncoercive Establishment', 33 *Political Theory* 6 (2005), p. 819.

⁶⁸ *Ibid.*, p. 819.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, p. 820.

⁷¹ *Ibid.*

This harm will be suffered, Brudney argues, only if recognition by the state is central to one's self-respect.⁷² The harm suffered from non-coercive establishment is related to one's belief about one's relatedness to the polity.

If this analysis is applied to public education and the public school as an institution, then it may be argued that for most of the students, what Brudney calls the 'strong-connection-to-the-polity thesis' holds true. In his research about discourse in connectedness in secondary schools, Thompson identifies connectedness as 'the ways in which an individual feels an affiliation with the community of the institution she/he experiences'.⁷³ According to him 'experiences of connectedness' in school are a significant factor for the ability of students to become 'critical and effective members of society'.⁷⁴ He argues that creating 'a sense of community, a feeling of identity and belonging' contributes to avoiding some antisocial behaviour.⁷⁵

Students have a great interest in recognition of being worthy by the institution of the school and their fellow students. The psychological harm from feeling excluded or demeaned because of one's religious beliefs likely to be suffered by school children cannot be equated to a burden to be suffered in the name of the principle of tolerance. Furthermore, students are part of a school community not by choice but because of compulsory school attendance mandated by the state. Therefore, the state may not on the one hand demand that children be a part of a school community but at the same time send a message that some of the members of that community are not as worthy as others, and that their religious convictions or world views do not deserve the same recognition and respect as those of the majority.

It is worth briefly discussing a possible objection to this argument based on the thesis developed by Professor Smith against a constitutional principle of government absolute neutrality with respect to any 'orthodoxy'.⁷⁶ Smith acknowledges the possibility of alienating citizens from the political community if the government takes an official stand in matters of belief. However, he argues that there is a competing and overriding consideration, namely, that in order to be alienated from the political community there has to be a political community that is represented by a government that enjoys some allegiance from citizens. Such allegiance, he argues, cannot be formed if the state stands for nothing and is stripped of any declaration of belief on important matters.⁷⁷

⁷² Ibid., p. 823.

⁷³ G. Thomson, 'Swings and Roundabouts: Discourses of Connectedness in Secondary Schools', *Thesis for the Degree of Master of Education of Murdoch University* (2003), www.lib.murdoch.edu.au/adt/pubfiles/adt-MU20040820.124631/02Whole.pdf (last visited 27 July 2011), p. 1.

⁷⁴ Ibid., p. 14.

⁷⁵ Ibid., p. 22.

⁷⁶ See S.D. Smith, 'Barnette's Big Blunder', *Public Law and Legal Theory, Research Paper No. 53* (Spring 2003), <http://ssrn.com/abstract=417480> (last visited 10 May 2010).

⁷⁷ Ibid., p. 21–23.

A similar dilemma has been posed by Strike in education theory.⁷⁸ He argues that if schools are to be communities, they should be united by some elements of a shared comprehensive doctrine or tradition. This, however, poses the problem that allegiance to these values would convey who has full standing in the community and then lead to exclusion or marginalization of some members.⁷⁹ Strike's answer to this dilemma is that this depends on the tradition that forms the basis of the school community.⁸⁰ He refers to the following statement of Hilary Putman:

There are two points that must be balanced, both points that had been made by philosophers of many different kinds: (1) talk about what is 'right' or 'wrong' in any area only makes sense against the background of an inherited tradition; but (2) traditions themselves can be criticised.⁸¹

What these arguments express, is that a sense of community and belonging to that community may develop only when in the presence of a unifying core, a vision shared, some common values and purposes which will pull the members together. An absolutely neutral framework agnostic of any values would not serve as a gravitational force binding individuals into a community.

On the other hand, the nature of the common values or the tradition forming the basis of the community as well as the strength of the gravitational force they exert are important, because they may be such as to serve to exclude from the community members who cannot truly identify with them. Professor Weiler has argued that the presence of the crucifix is justified for its function of bringing social cohesion and a sense of belonging to a common nation. However, this is exactly what the crucifix, standing alone on the classroom wall, as a readily recognizable and potent Christian symbol fails to do in a religiously non-homogeneous society.

Schools may have values grounded in the Christian culture and tradition – schools are not value-neutral, and no education can be value-neutral, as was held in the German *Interdenominational School* case⁸², but there should be minimum elements of compulsion and schools should be open to other values and cultures. An important value that should be included in the unifying core of the school community is that of tolerance and equal respect for the sincerely held religious beliefs or world views of its members.

The placement of the crucifix only, however, goes beyond the permissible, and one could say necessary, acknowledgment and inculcation of values. The values are expressed through a symbol that is one of the strongest identifiers of a particular religion and thus it is also a referent to the doctrinal position and related practices of that religion, to

⁷⁸ K.A. Strike, 'Schools as Communities: Four Metaphors, Three Models, and a Dilemma or Two', 34 *Journal of Philosophy of Education* 4 (2000), p. 617 et seq.

⁷⁹ *Ibid.*, p. 619.

⁸⁰ *Ibid.*, p. 613.

⁸¹ *Ibid.*, p. 631.

⁸² BVerfGE 41, 29.

the exclusion of all others.⁸³ Therefore, although it is also an expression of some of the unifying values of the community, the very mode of that expression transgresses the thin boundary beyond which the inclusionary force of these values becomes exclusionary. The state positions the crucifix as a signifier for the school community, but those who cannot identify with its religious message will not be able to adopt it as their own. For them it will be a sign of difference between themselves and the school community.

The above analysis does not provide for the particular sociological evidence that the Grand Chamber in *Lautsi* found missing in its evaluation of the effects of a religious symbol on classroom walls on young children.⁸⁴ The lack of such evidence, however, does not preclude ‘reasonable assertions’ about such effects. It is claimed that this analysis provides a reasonable assertion. To this, one can also put forth the reasonable argument that if the display of the crucifix had no effect on students, there would not be any reason for the Italian state’s insistence on having it on display in each classroom.

Let us also not forget the *Dahlab* case.⁸⁵ In the *Dahlab* case, the applicant, a primary school teacher, challenged the measure of the state authorities prohibiting her to wear a headscarf while teaching – there was no sociological evidence about the effect of the headscarf on the young children either. Furthermore, there had been no complaints about the teacher’s apparel by parents or by students. Yet, the ECtHR found that the measure the state authorities took was ‘not unreasonable’ in light of the age and impressionability of the children and the necessary message ‘of tolerance, respect for others and, above all, equality and non-discrimination’ that teachers in a democratic society have to convey to their students.⁸⁶ The same message should also be conveyed by the school as an institution as well.

§7. CONSISTENCY WITH PRIOR CASE LAW

Neither the German Federal Constitutional Court nor the European Court of Human Rights is bound to follow a formal rule of precedent. However, consistency with prior cases is important for both courts since they are not applying detailed and specific statutes. Both a constitution’s fundamental rights provisions and an international human rights convention are legal instruments operating at a high level of abstraction, thus necessitating further elaboration and concretization by the courts. Consistency in both interpretation and application of these legal instruments is thus highly significant for maintaining legal certainty and the authority of these courts. The following section

⁸³ It should be noted that the issues of the crucifix display in public schools have occurred in countries or local communities where the majority of the population belongs to the Roman Catholic Church – Bavaria, Italy, France, and Malta.

⁸⁴ *Lautsi and Others v. Italy*, [GC], no. 30814/06, para. 66.

⁸⁵ *Dahlab v. Switzerland*, (no. 42393/98), ECHR 2001-V.

⁸⁶ *Ibid.*, para. 13.

of the article examines to what extent the decisions of the two courts are supported by relevant case law.

One of the explanations suggested for the strong negative reaction that the *Crucifix* decision elicited in the German public, is that previous cases decided by the Federal Constitutional Court had intimated the possibility of a different holding.⁸⁷ The two prior cases that bear greatest significance for the *Crucifix* case are the aforementioned *Interdenominational School* case,⁸⁸ and the *School Prayer* Case.⁸⁹

The Court held that mandatory display of the crucifix failed to fulfil the requirements set in the *Interdenominational School* case for the constitutionality of religious references in public education, because of its missionary character as an article of faith.⁹⁰ The finding that the crucifix goes well beyond being a symbol of solely cultural values was the main ground on which the Constitutional Court distinguished the two cases.

It is more difficult to square the holding in the *Crucifix* case with the *School Prayer* case, where the Court addressed the issue of whether prayers held outside religious instruction classes at compulsory state schools when a pupil's parent objects to it are constitutional. The decision dealt with two lower court cases where the Hesse Constitutional Court and the Federal Administrative court had reached different conclusions with respect to the constitutionality of prayers at inter-denomination schools.⁹¹ The Federal Constitutional Court acknowledged that by permitting school prayer, which although nondenominational in character was in essence a religious exercise,⁹² and that conducting it as a school event, the state was encouraging a religious element in the school that exceeded the 'religious references flowing from the recognition of the formative factor of Christianity upon culture and education' discussed in the *Interdenominational* case.⁹³ Arguably, the holding of school prayer is even more intrusive to the negative freedom of dissenting students than the placement of the crucifix.

Nevertheless, the Court upheld the constitutionality of the school prayer practice, reasoning that the state achieved a proper balance between positive and negative rights to religious freedom when the voluntariness of the prayer was guaranteed. Dissenting students could choose not to participate by entering the classroom after prayer had been said or leaving the classroom earlier before prayers were held. Dissenting students could also remain in the classroom seated and silent while the others said their prayers.⁹⁴ The

⁸⁷ B. Schlink, 'Between Secularization and Multiculturalism', in A. Sajo and S. Avineri (ed.), *The Law of Religious Identity: Models for Post-Communism* (Kluwer Law International, The Hague 1998), p. 77.

⁸⁸ BVerfGE 41, 29.

⁸⁹ BVerfGE 52, 223, 1 BvR 647/70 und 7/74, (*Schulgebet*) 1979.

⁹⁰ BVerfGE 93, 1.

⁹¹ Ibid.

⁹² BVerfGE 52, 223, para. 47–48.

⁹³ Ibid., para. 52.

⁹⁴ Ibid., para. 65–66.

Court emphasized the role of the teacher in avoiding a situation where a dissenting student is placed in the unbearable position of an outsider.⁹⁵

The *Crucifix* case can be distinguished from the *School Prayer* case on two grounds. Firstly, as the Federal Constitutional Court states, students cannot avoid the message of the crucifix. After all, the main reason why the school prayer was held to be constitutional was that students were free to choose not to participate. In contrast, students could not extricate from the message of the crucifix affixed on the classroom wall.⁹⁶ Secondly, while the display in the crucifix was mandated by the state, the holding of school prayers was not. As the Court explained in the *School Prayer* case, ‘the role of the state is however restricted to creating the organizational framework for school prayer and permitting prayer at the request of the parents or pupils or suggesting it itself. The state does not order it, it can make an offer which the school class may choose to take up.’⁹⁷ Thus, although one may criticize the soundness of these prior cases, the Federal Constitutional Court managed to preserve the consistency of its rulings.

Turning to the Grand Chamber of the ECtHR, one finds that it referred to the cases of *Folgerø*⁹⁸ and *Zengin*⁹⁹ to support its finding that the mandatory display of the crucifix did not cross the limit established in *Kjeldsen*¹⁰⁰ – indoctrination. The Grand Chamber reasoned that although the placement of the crucifix ‘confer[s] on the country’s majority religion preponderant visibility in the school environment’,¹⁰¹ this in itself is not a violation of the requirement of pluralism and does not amount to indoctrination. According to the Grand Chamber this conformed to the Court’s findings in the aforementioned cases, that the greater emphasis on Christianity in classes about religion in Norwegian schools, and respectively on Islam in such classes in Turkish schools, was not a breach of Article 2 of Protocol 1, with regard to how these are the respective religions of the majority of the populations and that they have been formative of the countries’ traditions and culture.

However, it should be argued that reliance on these cases is misplaced. In the *Folgerø* case, the KRL (Christianity, Religion and Philosophy) subject was designed to provide ‘teaching Christianity, other religions and philosophies together’, so that ‘it would be possible to ensure an open and inclusive school environment, irrespective of the pupil’s social background, religious creed, nationality or ethnic group and so on’.¹⁰² However, the teaching of Christianity predominated quantitatively and was of a different quality, so the Court entertained doubts about whether the aim intended by the state could be achieved, and proceeded to an examination of the exemption possibilities as a way to save

⁹⁵ BVerfGE 93, 1, para. 68.

⁹⁶ *Ibid.*, para. 21.

⁹⁷ BVerfGE 52, 223, para. 52.

⁹⁸ *Folgerø and Others v. Norway*, no. 15472/02, 29 June 2007.

⁹⁹ *Hasan and Eylem Zengin v. Turkey*, no. 1448/04, 9 October 2007.

¹⁰⁰ *Kjeldsen, Busk Madsen and Pedersen*, judgment, Series A no. 23.

¹⁰¹ *Lautsi and Others v. Italy*, [GC], no. 30814/06, para. 71.

¹⁰² *Folgerø*, para. 88.

the regulation on KRL from a breach of Article 2 Protocol 1.¹⁰³ In the *Lautsi* case, there is no preponderance of Catholic faith in the school environment, but a monopoly. The regulations challenged provide for no symbol of other faiths or philosophical convictions to be integrated into the school environment. Moreover, there is no possibility whatsoever for a student to be ‘exempted’ from the message of the crucifix.

The next case is *Zengin*, also informative in its treatment of comparative law. After an overview of a variety of approaches to the teaching of religious education across Europe, the Court noted that there was, in almost all of the Member States, the possibility to opt out of such classes.¹⁰⁴ Thus while the Grand Chamber in *Lautsi* emphasized the absence of a European consensus as an important factor for the large margin of appreciation it gave to Italy,¹⁰⁵ it is worth noting that the comparative law survey actually shows that it is in fact only Italy and Austria that have a regulation that mandates the display of the crucifix with no exception provided in the law.¹⁰⁶ In two other states the law provides a mechanism for its removal upon objection of students or students’ parents, in another two states the law authorizes its display as the result of a local decision.¹⁰⁷ Thus, similarly to the *Zengin* case, a common thread through the few regulations governing religious symbols is the possibility of removal of the crucifix upon objection, a possibility not provided for in Italy. One wonders then, how the overview of comparative law on the issue of religious displays in public schools could lead the Grand Chamber to conclude the absence of a European consensus on the issue.

Also in the *Zengin* case, the Court said that the fact that the Religious Education textbooks gave priority to Islam was not in and of itself a violation of Article 2 of Protocol 1.¹⁰⁸ In the succeeding paragraphs, the Court, however, proceeded to examine whether in the particular circumstance of the case, the subject was taught in a pluralist manner, and concluded that it was not, particularly noting that

Admittedly, parents may always enlighten and advise their children, exercise with regard to their children natural parental functions as educators, or guide their children on a path in line with the parents’ own religious or philosophical convictions (...) Nonetheless, where the Contracting States include the study of religion in the subjects on school curricula, and irrespective of the arrangements for exemption, pupils’ parents may legitimately expect that the subject will be taught in such a way as to meet the criteria of objectivity and pluralism, and with respect for their religious or philosophical convictions.¹⁰⁹

¹⁰³ Ibid., para. 95–97.

¹⁰⁴ *Zengin*, para. 34.

¹⁰⁵ *Lautsi and Others v. Italy*, [GC], no. 30814/06, para. 70.

¹⁰⁶ Ibid., para. 26–28.

¹⁰⁷ Ibid.

¹⁰⁸ *Zengin*, para. 63.

¹⁰⁹ Ibid., para. 68.

It can be argued that when the state decides to include in the school environment religious symbolism, parents are entitled to expect that this shall be done in an objective and pluralistic manner, respecting their philosophical or religious convictions. The fact that students are not forbidden to wear Islamic headscarves and that religious holidays of students are accommodated is not enough to meet that requirement. Here the Grand Chamber seems to ignore the distinction between private religious speech and religious speech by the state, and to incorrectly equalize them. The students, quite contrary to arguments expressed in France by the French National Assembly Committee on religious symbols in public schools,¹¹⁰ do not have a duty of neutrality; they have a right to freely express their religious affiliation and to exercise their religion while fulfilling their obligation at school. The state on the contrary, has a duty of neutrality, while exercising its powers over the education of students.

The fact that students can express their religious affiliation through personal religious symbols does not detract from the exclusionary effect of the message of the crucifix towards those who do not share the Catholic faith. A pluralistic school environment would have included, as argued above, a forum for the religious symbols of all faiths and creeds in the school community, and even beyond.

Again, the incorrect equalization of private speech and government speech stems from the incorrect equalization of individual rights and state power, through seeking a balance between the individual rights of non-Catholic students and parents and the religious freedom rights of the majority student and parents, whose rights the state is supposedly exercising. This misconception is especially evident in Judge Bonello's concurring opinion.¹¹¹ He puts on one side of the scale the rights of the applicant, and on the other scale the rights of the other twenty-nine pupils to have their children taught in conformity with their own religious or philosophical conventions. Taken to its logical extreme, this opinion would justify all kinds of overt religious proselytism by the state, as long as the majority of parents do not object. Those in the minority would not be able to trump the higher number. Clearly this is an erroneous view of the Convention rights. This is not a case where the school opened up a forum where all students could bring religious symbols. No, it is the state through its regulation that mandates the display of the symbol of the crucifix only.

Another major point in the Grand Chamber's judgment was its characterization of the crucifix as a 'passive symbol' when compared to didactic speech or participation in

¹¹⁰ *Rapport de la Mission d'information de l'Assemblée nationale française sur la question du port des signes religieux à l'école, section – Les élèves ne doivent pas être traités comme de simples usagers du service public de l'Éducation nationale* ep (2003), (Report of the Fact-Finding Mission of the French National Assembly on the issue of wearing religious symbols in schools, Section – Students should not be treated as mere users of public services national ep of Education), www.voltairenet.org/rubrique693.html (last visited 20 April 2005).

¹¹¹ *Lautsi and Others v. Italy*, [GC], no. 30814/06, concurring opinion of Judge Bonello, para. 3.5.

religious activities.¹¹² From this comparison one could conclude that all symbolic speech is 'passive' in the sense that it does not seek an 'active' reaffirmation of its message. Be that as it may, that does not alter that, as discussed above, symbolic speech has a very potent effect on its recipients and, more often than not, images speak more powerfully than words.

The Grand Chamber attempted to distinguish the present case from the *Dahlab* case, where it called the headscarf worn by an elementary public school teacher a 'powerful external symbol' for which it cannot be denied outright may have a proselytizing effect.¹¹³ One fails to see, however, how a headscarf is a powerful symbol, while a crucifix is 'essentially [a] passive [one]'. What is more, as the dissenting judges noted in the *Dahlab* case, the headscarf was the symbolic religious speech of the teacher, who, although a public official, retains her individual right to freedom of religion. She is not solely a mouthpiece of the state. In the present case, however, the crucifix is clearly government religious speech. So it is even more problematic with regard to the duty of the state to respect parental religious and philosophical conventions in the education process and to provide an inclusive, pluralist education.

The Grand Chamber tried to distinguish *Dahlab* by focusing on the school's openness to other faiths, and emphasized that in the specific case no overt attempt at proselytizing or instance of intolerant behaviour were alleged.¹¹⁴ But this holds true with equal force in the *Dahlab* case too. It would have been interesting to ask the Government of Italy whether not only students, but also teachers were permitted to wear religious symbols, such as headscarves or kippas. It seems that the only way to reconcile the two decisions is through the margin of appreciation doctrine. Applying a very deferential review, the Court agrees with whatever regulation the state has in place with respect to religious symbols. This explanation, however, greatly undermines the leading role of the ECtHR as a protector of human rights in Europe.

So far, this has also led to an unfortunate result – in cases concerning religious symbols at school, the European Court of Human Rights has upheld the prohibition by the state of religious symbols of minorities such as a Muslim headscarf and a Sikh turban,¹¹⁵ even when they constitute purely private religious expression. On the other hand, it has upheld the imposition of the religious symbol of the majority – the crucifix – by state authorities. Since the Court's reasoning has failed to provide convincing grounds for this result, it is sending a rather disheartening message to religious minorities in

¹¹² *Lautsi and Others v. Italy* [GC], no. 30814/06, para. 72.

¹¹³ *Dahlab v. Switzerland* (no. 42393/98), ECHR 2001-V, para. 2.

¹¹⁴ *Lautsi and Others v. Italy*, [GC] no. 30814/06, para. 74.

¹¹⁵ See Decision on admissibility in the cases of *Aktas v. France* (application no. 43563/08), *Bayrak v. France* (no. 14308/08), *Gamaleddyn v. France* (no. 18527/08), *Ghazal v. France* (no.29134/08), *J.Singh v. France* (no. 25463/08) and *R.Singh v. France* (no. 27561/08), concerning the expulsion of pupils from school in France for wearing conspicuous symbols of religious affiliation, 17 July 2009.

Europe with respect to religious symbols in public spaces, by altogether putting them outside the protective mantle of the Convention.

§8. THE COURTS AND IDENTITY POLITICS

In both cases, a part of the reaction of the general public and the academics involved a critical examination of the position of the courts in the two legal regimes *vis-à-vis* the democratically elected institutions. This article contends that the nature of the legal controversies did not necessitate a deferential stance on the part of the courts. The courts' authorities should ultimately depend on procedural fairness and sound reasoning.

The *Classroom Crucifix* decision proved to be one of the most controversial rulings of the German Constitutional Court. The decision caused a very strong public reaction and high-ranking politicians, legal scholars, the Catholic Church, and public opinion in Bavaria strongly criticized and even opposed the enforcement of the decision of the Constitutional Court.¹¹⁶ Within days of its publication, Church leaders called the decision 'an attack on Germany's Christian heritage'.¹¹⁷ The Jewish community, however, did not make a public statement regarding the court's ruling.¹¹⁸ The Bavarian Christian Democratic Union called for civil disobedience.¹¹⁹ Politicians both from Bavaria and elsewhere joined in the chorus by calling for a boycott of the decision. Chancellor Kohl declared the decision 'unintelligible' and claimed that 'the values of Western culture were in danger'.¹²⁰ In an unprecedented move the vice-president of the Court, belonging to the majority in the decision, defended it in an editorial entitled 'Why a Judicial Ruling Deserves Respect', published in a national newspaper.¹²¹

The reaction to the Second Section decision in *Lautsi*, before it was overruled by the Grand Chamber, was very similar. Italian politicians denounced the decision. Italian Prime Minister Berlusconi stated that 'this decision is not acceptable for us Italians. It is one of those decisions that make us doubt Europe's common sense', and Italy's Foreign Minister said the court had dealt a 'mortal blow to a Europe of values and rights'.¹²²

¹¹⁶ L. Auslander, 12 *Cultural Dynamics* 3 (2000), p. 292–293.

¹¹⁷ G. Vanberg, *The Politics of Constitutional Review in Germany* (Cambridge University Press, Cambridge 2005), http://assets.cambridge.org/052183/6476/excerpt/0521836476_excerpt.pdf (last visited 4 December 2011), p. 3.

¹¹⁸ M. Widman, 'German Jews are Silent on Ban of Crucifixes in Schools', *Jewish Telegraphic Agency* (25 August 1995), www.jewishsf.com/content/2-0-/module/displaystory/story_id/1883/edition_id/28/format/html/displaystory.html (last visited 19 August 2011).

¹¹⁹ L. Auslander, 12 *Cultural Dynamics* 3 (2000), p. 292.

¹²⁰ Ibid. For further reading please refer to H. Caygill and A. Scott, 'The Basic Law versus the Basic Norm? The Case of the Bavarian Crucifix Order', in R. Bellamy and D. Castiglione (eds.), *Constitutionalism in Transformation: European and Theoretical Perspectives* (Blackwell, Oxford 1996), p. 103.

¹²¹ L. Auslander, 12 *Cultural Dynamics* 3 (2000), p. 292.

¹²² 'Uproar over European court ruling against Crucifix – Archbishop Cremona Reacts', *Times of Malta* (3 November 2009), www.timesofmalta.com/articles/view/20091103/local/italy-in-uproar-over-court-

The decision was condemned by the Catholic Church, and several other European governments vowed support for the Italian state and intervened as third parties in the proceedings before the Grand Chamber of the ECtHR. Thirty members of the European Parliament also intervened on behalf of the Italian government. The applicants' family, like the German family, received death threats.¹²³

Such a reaction is not surprising since, as Professor Karst has argued, religious symbols, because of their diffuse meaning may often serve 'as a handy referent for a whole world-view, a whole cultural group'.¹²⁴ He notes that both winners and losers in legal controversies about government use of religious symbols may easily recognize the symbol 'not only as a statement about what the town or school stands for, but also as a recognition of who is in charge: "This is our town", "This is our school" or "This is our Land" and "This is our State"'.¹²⁵ Analysing the rhetoric utilized during the controversy in Germany, Auslander notes the equivalence that was made between defence of the crucifix on the classroom walls and defence of the true definition of the German nation – 'a Christian nation, composed of distinctive regions, each with its own particular, but thoroughly German traditions' against the intrusion of the 'too modern, too cosmopolitan, and thus no longer German' federal state.¹²⁶ A similar position was articulated by Professor Weiler who defended the European approach on the liberty of the different states to define themselves through a reference to their religious heritage against a judgment that would make the Court too cosmopolitan, too Americanized and thus no longer European. Both courts were thus viewed as overreaching and overstepping a sphere that should be left to the political process.

The public outcry and the resistance following the Federal Constitutional Court's decision lead some commentators to argue that in a situation like this one involving 'problems of cultural diversity and the reconciliation of conflicting beliefs', constitutional scrutiny and resolution may only exacerbate matters and show 'how far claims to universality embedded in a particular constitutional order may work to deconstitute the very cultural values which it should protect'.¹²⁷ Similar arguments, with respect to the Second Section ruling in *Lautsi* were voiced by Professor Weiler, when he argued that the European values of pluralism and tolerance are exemplified not only by protection of the individual right of religious freedom, but also by its acceptance of and respect for 'very different practices of acknowledging publicly endorsed religious symbols by the state and

ruling-against-crucifix (last visited 10 May 2010).

¹²³ European Humanist Federation, 'Human Rights Court Bows to Pressure – Overrules Earlier Unanimous Judgment Against Crucifixes in Classrooms', *Press Release* (18 March 2011), www.humanism.org.uk/news/view/770 (last visited 19 August 2011).

¹²⁴ See K.L. Karst, 'The First Amendment, the Politics of Religion and the Symbols of Government', 27 *Harv.C.R.-C.L. L. Rev.* (1992).

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ H. Caygill and A. Scott, in R. Bellamy and D. Castiglione (eds.), *Constitutionalism in Transformation: European and Theoretical Perspectives*, p. 93–95.

in public spaces'.¹²⁸ By 'constitutionalizing' the controversy and not according a large margin of appreciation to the Italian state, the judgment of the Second Section would then seem, according to Professor Weiler, to go against the very values the Convention seeks to protect.

The European Convention of Human Rights, however, is silent with respect to the presence or absence of established or endorsed churches, or churches who have a special relationship with states. Similarly, the Convention is silent with respect to the form of government states have – republican or monarchical. These issues are of no concern to the Convention and thus diversity within the European public order is upheld. They become relevant to the Convention only if and to the extent that they affect rights and freedoms guaranteed by the Convention, and its underlying values of democracy and pluralism within the state. The ECHR guards democracy and pluralism within the different states of the Council of Europe, and does not have, as a primary goal, the protection of the diversity of legal regimes in Europe.

Finally, providing closure on societal debates is neither the only nor the primary function of the settlement of legal disputes by courts. Constitutional scrutiny of any issue which is emotionally or politically charged, and often both, does not have the immediate consequence of stopping conflict for a large segment of the public. Examples of such controversial decisions in the US are de-segregation, school prayers and abortion.¹²⁹ Such decisions resolve value laden issues over which there is deep disagreement in society. However, these are also issues involving individual rights which are within the field of constitutional adjudication. In most cases the vindication of these rights is more important than the immediate stifling of social disagreement and debate or even conflict.

The Bavarian legislature amended the law to comply with the Court's ruling. The new ordinance in Article 7, section 3 provides:

In light of Bavaria's historical and cultural traditions, a cross is displayed in every classroom. This act symbolises the desire to realise the highest educational goals of the constitution on the basis of Christian and occidental values while respecting religious freedom. If parents challenge the installation of the cross for genuine and acceptable reasons of faith or secular belief, the school principal shall attempt a compromise solution. If it is not possible to find a solution, the principal shall notify the school authorities and then devise an individual solution that respects the religious freedom of the person who has objected and which balances the religious and secular beliefs of all persons in a class appropriately. In doing so, the will of the majority must be considered as much as possible.¹³⁰

¹²⁸ J. Weiler, 'Oral Submission'.

¹²⁹ *Brown v. Board of Education* 347 U.S. 483 (1954), *Engel v. Vitale* 370 US 421 (1962), *Roe v. Wade* 410 U.S. 113 (1973).

¹³⁰ G. Vanberg, *The Politics of Constitutional Review in Germany*, p. 3. The law was based to a large extent on a report commission by the Land of Bavaria and was prepared by Peter Badura, former president of the Federal Constitutional Court (see I.B. Wuerth, 31 *Vand. J. Transnat'l L.* (1998), p. 1186).

The Bavarian Constitutional Court in 1997 ruled that the new ordinance conformed to the Bavarian State Constitution.¹³¹ The Court reasoned that the law had the purpose of ‘recognizing the historical and cultural importance of Christianity and promoting the religious expression of those who wanted crucifixes in the classroom.’¹³² It emphasized that, in contrast to the old law, it took into account the potential objections to the display by parents and students. The Federal Administrative Court in 1999 upheld the law in principle but decided that in this particular case the plaintiff had the right to have the cross removed.¹³³ The mere fact that the atheist parents did not wish their child to be exposed to the religious influence of the cross was sufficient grounds for the headmaster to order its removal. A judge of the Federal Constitutional Court was reported as stating during a lecture at the University of Freiburg: ‘There are more crucifixes hanging in Bavarian schoolrooms now than before the decision’.¹³⁴

With regard to the Italian crucifix case, the Grand Chamber reversed the Second Section and found no violation of Article 2 of Protocol No. 1. The Vatican welcomed the ruling,¹³⁵ and so did Italy’s Foreign Minister Frattini, joined by other members of the cabinet. According to Frattini, the case had been ‘a major battle for freedom of faith’ so that believers won’t need to hide ‘in catacombs’.¹³⁶

So, one very interesting question is what courts can and will do when legal disputes are submerged into identity politics. Did the Grand Chamber of the ECtHR retreat amidst the vocal protests? Was it humbled, after being accused of destroying European traditions and cultural identity and paving the way for the Americanization of Europe? Was the Court concerned that its judgment would be defiantly ignored and that crucifixes would remain?

§9. SOLUTION – A PLURALIST APPROACH

I would argue that a pluralist approach to the issue following the ‘wall of peace’ model advocated by the Québec Committee of Religious Affairs,¹³⁷ would be a solution conforming to the right to freedom of religion, and parental rights but at the same

¹³¹ 50 *NJW* 3157 (1997) cited in I.B. Wuerth, 31 *Vand. J. Transnat’l L.* (1998), p. 1186.

¹³² *Ibid.*

¹³³ BVerwG 6 C 18.98, 21 April 1999..

¹³⁴ G. Vanberg, *The Politics of Constitutional Review in Germany*, p. 4.

¹³⁵ Cindy Wooden, ‘Vatican welcomes European court decision on classroom crucifixes’, *Catholic News Service* (18 March 2011), www.catholicnews.com/data/stories/cns/1101097.htm (visited 13 August 2011).

¹³⁶ ‘Italy Wins Crucifix Appeal’, *ANSA* (18 March 2011), www.lifeinitaly.com/news/en/111836 (visited 13 August 2011).

¹³⁷ Comité sur les affaires religieuses, Ministère de l’Éducation, ‘Religious Rites and Symbols in the Schools: The Educational Challenges of Diversity’, *Brief to the minister of Education* (March 2003), www.mels.gouv.qc.ca/affairesreligieuses/CAR/PDF/Avis_expressions%20religieuses_a.pdf (last visited 10 September 2009).

time, serving the state's interest in teaching tolerance, which is recognized as one of the cultural values shaped by the Christian tradition in Europe.

The Committee composed a brief to the Minister of Education warning of problems if the policy of diversity and respect and promotion of the principle of multiculturalism 'compel the traditional majorities to deny their history'.¹³⁸ Recognition of this heritage according to the brief, is also necessary for the successful integration of immigrant children in Québec – 'To be welcoming, a host must prepare his or her home, not tear it down'.¹³⁹

The Committee recommends that schools should designate a place where individuals, presumably both students and teachers, can exhibit the symbols of their faith 'in ways that do not lend the school a denominational character'.¹⁴⁰ The Committee gives as examples 'walls of peace' or 'walls of respect' in the school building where 'symbols representing religious traditions and photographs of the great spiritual leaders' are displayed.¹⁴¹ In some schools students of different religions are given the floor to talk about the respective religious traditions behind the religious festivals they celebrate at home.¹⁴² The Committee correctly recommends such initiatives which help to promote dialogue and education especially to certain schools 'where problems stemming from ideological confrontation are dealt with by forbidding religious expression in their environment'.¹⁴³

The display of any religious or philosophical symbol upon students' or parents' requests would neither violate the state's mandate of neutrality under the German Basic Law, nor would it violate the neutrality with respect to religion in the school setting necessitated by Article 2 of Protocol 1 and Article 9 of the ECHR. The state would not identify with any religion nor would it treat any religion preferentially. The dissent in the *Classroom Crucifix* case implicitly acknowledged that the freedom of exercise rights of students would have been violated, had they requested their symbols to be placed alongside the crucifix and been refused.¹⁴⁴ However, the law mandates the display of the symbols of one faith while adherents to other religions or world views are in the position to request that their symbols also be displayed without any guarantee in the statutory law or administrative acts. This places adherents of majority and minority religions in unequal positions and this unequal treatment violates the neutrality of the state.

Under the proposed pluralist approach, the state would truly give space to authentic private religious expression. This is in contrast to the present situation where the crosses displayed represent pure government speech, despite the attempt to translate it into

¹³⁸ Ibid., p. 40.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid., p. 65.

¹⁴³ Ibid., p. 66.

¹⁴⁴ BVerfGE 93, 1, para. 94.

accommodation of private religious practices or only attenuated, secularized shadows of religious beliefs. This also means that there would be no inquiry into the cultural relevance of the given religion. It would serve the mission of the school to teach tolerance and respect for diversity, which is not dependent on how long a particular religion has been active in the country or how numerous its adherents are. Indeed, in the aftermath of the German Federal Constitutional Court's decision, several Catholic and Protestant church leaders did advocate that Jewish, Muslim and other religious symbols, depending on the religious composition of the students attending the school, should be displayed alongside the cross and 'would contribute more to mutual understanding and tolerance than would a naked wall'.¹⁴⁵

On the other hand, the possibility remains of a situation similar to some provincial schools in Canada, where a school community is comprised exclusively of students belonging to one religion. In this case, the display of the symbol of that religion would be unobjectionable, as long as the opportunity remains for new students to request the symbol of their faith or world view to be displayed.¹⁴⁶

It should be acknowledged that this approach is not without problems either. Luzzati identifies several thorny issues which have come to plague US courts in cases dealing with school sponsored speech coming from private parties. According to Luzzati, firstly, someone would have to draw a line between what would count as 'religion', and which 'religious symbols' may be displayed and which may not.¹⁴⁷ For instance, he asks, who would decide, and based on what criteria, whether symbols of Scientology or Satanism should be displayed? The question of what is religion, however, is not peculiar to the issue of religious symbols at schools. The question is relevant to all cases related to religious freedom rights and church-state relations and so far, a comprehensive and clear cut definition of religion has eluded both courts and legal scholars. As Robbers notes, 'German law is at a loss to define religion as a legal term'.¹⁴⁸ However, courts have provided guidelines.¹⁴⁹ In general, as long as the students or parents ask to display a symbol of a religious organization or a philosophical organization whose activities are not forbidden by law the request should be granted.

The third concern of Luzzati towards the pluralist approach, expressed also in the US cases, is that such displays may lead to conflict within schools – they may become a place of 'ruthless propaganda or [result] in a religious clash'.¹⁵⁰ The prevention of religious conflict at schools is a legitimate concern and it should be at the discretion of school

¹⁴⁵ C.L. Glenn, 'Historical Background to Conflicts over Religion in Public Schools', *Pro Rege* (September 2004), www.dordt.edu/publications/pro_rege/crcpi/115750.pdf (last visited 10 May 2010), p. 8.

¹⁴⁶ See also I. Muehlhoff, 'Freedom of Religion in Public Schools in Germany and in the United States', *Georgia Journal of International and Comparative Law* (2000).

¹⁴⁷ C. Luzzati, 'The Strange Case of the Public Display of the Crucifix an Italian Story' (14 November 2005), www.tau.ac.il/law/events/Claudia%20Luzzati.doc (last visited 10 February 2010), p. 7.

¹⁴⁸ G. Robbers, 'Religious Freedom in Germany', *BYU Law Rev.* (2001).

¹⁴⁹ See *Ibid.*, p. 633.

¹⁵⁰ C. Luzzati, 'The Strange Case of the Public Display of the Crucifix an Italian Story', p. 7.

authorities to prohibit such displays if real evidence exists that such conflicts have arisen or are being fomented. Such restrictions should be dealt with on a case-by-case basis, depending on the concrete factual situations. The approach should not be discarded for the mere abstract possibility that such conflicts may occur.¹⁵¹ Moreover, as stated in *Serif*¹⁵² and many subsequent cases of the European Court of Human Rights, when faced with tension and conflict ‘the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other’.¹⁵³

Another possible objection to the proposed solution is Professor Weiler’s overall rejection of the contention that the controversy involves objections to the exclusive visibility and endorsement of the symbol of one faith only. In his oral pleadings before the Grand Chamber he argued that the real ‘cleavage today is not among Christians and Muslims, Jews and Protestants, but between the religious and the non-religious’, and from other articles one also gets the impression that it is the militant ‘secularists’ on a crusade to banish religion that are the main driving force of these conflicts about public displays of religious symbols.¹⁵⁴ However, if one looks at Italy’s crucifix display and the nature of the discontent, one finds that such a characterization is incorrect.

The case of the Finnish-born Mrs Lautsi achieved the greatest prominence, and understandably so, since she applied to the European Court for Human Rights. It is not an isolated incident. A controversy was sparked also in 2004 in Ofena, Italy, when Adel Smith, a Muslim parent and vocal leader of a local Muslim organization, secured a court order for the removal of a crucifix from the wall of his son’s classroom on the grounds that it violated the principles of state neutrality and *laicità*. Smith had requested that a verse from the Koran be placed alongside the crucifix, a request ultimately refused by the school authorities. He argued in the media that ‘[his] children are still Italian so why should they feel inferior to the others because the symbol of their religion is not nailed on the wall like a cult?’¹⁵⁵ The judge issuing the order reasoned in his decision that,

The presence of the symbol of the cross deeply induces in the pupil one understanding of the cultural dimension of the expression of faith, because it manifests the unequivocal will, of the State... to place the Catholic cult to the centre of the universe, like absolute truth, without the minimal respect for the role carried out by the other religious and social experiences in

¹⁵¹ See BVerfG, 2 BvR 1436/02, (2003) (*Kopftuch*) (*Headscarf case*).

¹⁵² *Serif v. Greece* (No. 38178/97), 14 December 1999, para. 53.

¹⁵³ See for example, *Metropolitan Church of Bessarabia and Others v. Moldova* (no. 45701/99), 13 December 2001, para. 116.

¹⁵⁴ See for example, G. Puppnick, ‘Lautsi v. Italy: An Alliance Against Secularism’, *L’osservatore Romano* (28 July 2010), www.eclj.org/pdf/ECLJ-LautsivItaly-crucifix-case-20110315.pdf (last visited 20 August 2011).

¹⁵⁵ T. Smith, ‘Italian Muslims Fear “Crucifix Fallout”’, *BBC News* (28 October 2003), <http://news.bbc.co.uk/2/hi/europe/3219551.stm> (last visited 3 April 2011).

the historical process of the human development, neglecting completely their unavoidable relations and their mutual conditionings.¹⁵⁶

The judge's order caused a huge nationwide uproar and was soon repealed. Subsequently, a three-metre high cross was erected on the square in front of the elementary school in Ofena, while the mayor proclaimed that 'it will remain in memory of the intolerance of an individual who wanted to remove the crucifix from the school and did not succeed'.¹⁵⁷

Another incident occurred in February 2005, when an Italian judge was suspended and then discharged for his refusal to perform his judicial duties under the crucifix on the wall of his courtroom.¹⁵⁸ The judge had asked either that the cross be removed or alternatively that the menorah, symbol of the Jewish faith be added. Both claims were rejected.¹⁵⁹

These other two cases offer evidence disproving Professor Weiler's claims about rising anti-religious secularism as the primary cause of the legal contestation. Clearly, not only secular individuals, but also those adhering to religions different from Catholicism, have objected to the mandatory presence of the crucifix alone in state buildings.

Drawing attention to the rights of those who do not follow any religion, Luzzati argues, that pluralist approach would infringe upon their negative religious freedom anyway. It should be noted that in contrast to the principle of neutrality developed under the US Establishment Clause, the neutrality of the state with respect to religious and other world views mandated by the German Basic Law does not prohibit state support for all religions, as long as there is no identification of the state with any particular religion.¹⁶⁰ The European Convention on Human Rights also has no equivalent to the Establishment Clause of the US Constitution. Furthermore, the 'wall of peace' could be constructed in a place within the school building and not in every classroom. Thus no student would be required to receive instruction during the whole day under a religious symbol, minimizing the intrusion into the negative religious freedom of dissenting students.

Finally, it should be recognized that, as Wuerth argues, under any approach students from minority religions will always have a particular burden to bear in a school system based on a culture originating in other religious traditions – 'Even a simple invitation to

¹⁵⁶ 'Crocifisso nelle aule scolastiche il Tribunale ordina la rimozione' (The Court Ordered the Removal of Crucifixes in the Classroom), *la Repubblica.it* (25 October 2003), www.repubblica.it/2003/j/sezioni/cronaca/crocifisso/crocifisso/crocifisso.html (last visited 3 April 2011).

¹⁵⁷ 'Ofena, ora in piazza sierge un crocifisso alto tremetri' (Ofena, Now a Ten Feet Tall Crucifix Stands in the Square), *la Repubblica.it* (1 November 2003), www.repubblica.it/2003/j/sezioni/cronaca/crocifisso/tre/tre.html (last visited 3 April 2011).

¹⁵⁸ D. Willey, 'Italy Judge Barred Over Crucifix', *BBC News* (3 February 2006), <http://212.58.226.40/1/hi/world/europe/4676300.stm> (visited 3 April 2011).

¹⁵⁹ 'Rimozione giudice Tosti, Cassazione: "Stato Laico, ma crocifisso resta in aula"' ('Removing Judge Tosti, Supreme Court: "Secular State with a Crucifix in the Classroom"'), *La Messaggero.it* (15 March 2011), www.ilmessaggero.it/articolo.php?id=141907&sez=HOME_INITALIA (visited 3 April 2011).

¹⁶⁰ W. Brugger, *2 Int'l J. Const. L.* 431 (2004), p. 451.

bring religious symbols into the classroom puts a unique burden on students of minority or unpopular religions, who must forego their symbols (and risk ridicule) or bring their symbols with them (and run the same risk).¹⁶¹ The question to ask here is how to minimize that burden. One way would be that no religious symbols are displayed. The other way would be to allow a space within the school where all students may have their religious or world-view symbols displayed on equal terms. The second option better serves the purpose of educating students to live in a religiously pluralistic society.

§10. CONCLUSION

‘A win for European popular sentiment’, this is how Italy’s Foreign Minister acclaimed the judgment of the Grand Chamber of the ECHR in the *Lautsi* case.¹⁶² While this characterization may very well be true, assuming the popular sentiment was correctly expressed by Europe’s political classes, at the same time, it is hardly a sign that the judgment constitutes a fair and sound legal decision. After all, the European Convention of Human Rights was set up to guard fundamental individual rights and freedoms against the sways of popular sentiment.

The European Court of Human Rights faced the same issues as the German Federal Constitutional Court several years ago. The latter’s decision was very much against the popular sentiment, but the Court fulfilled its role as a guarantor of the fundamental rights protected in the German Basic Law. Having the benefit of hindsight, one can safely say, that this decision has not in any way diminished the legitimacy and respect the institution of the Federal Court enjoys in Germany.¹⁶³ While one should recognize that the position of an international court is a more precarious one, regarding the authority it has over national state governments, the ECtHR could have safely relied on its established reputation as the European protector of human rights and on sound legal reasoning to withstand the vocal opposition from some European publics and governments.¹⁶⁴ In the long term, this would have been much better to strengthen the authority and legitimacy of the institution.

¹⁶¹ See I.B. Wuerth, 31 *Vand. J. Transnat’l L.* (1998).

¹⁶² ‘School crucifixes “do not breach human rights”’, *BBC News* (18 March 2011), www.bbc.co.uk/news/world-europe-12791082 (last visited 15 August 2011).

¹⁶³ See for example Casper, writing that the German Federal Constitutional Court has become ‘the symbol of rule of law in Germany’. The institution of the Court enjoys high acceptance by the German public, which increases over time and ‘controversial decisions have interrupted, but not reversed, this trend’. G. Casper, ‘The “Karlsruhe Republic” – Keynote Address at the State Ceremony Celebrating the 50th Anniversary of the Federal Constitutional Court’, *German Law Journal* (2001), p. 12–13.

¹⁶⁴ See B. Çalı, A. Koch and N. Bruch, ‘The Legitimacy of the European Court of Human Rights: The View from the Ground’, *Strasbourg* (2 May 2011), <http://ecthrproject.files.wordpress.com/2011/04/ecthrlegitimacyreport.pdf> (last visited 15 August 2011).

This article has argued that the Grand Chamber failed in its reasoning, since it erroneously conflated state action interfering with the applicant's rights with the exercise of some 'collective' rights and liberties. Its mis-characterization of the crucifix as a 'passive symbol' led it to trivialize and disregard the effect the crucifix has on dissenting students and the state neutrality mandate in public education. Furthermore, the Grand Chamber judgment is not consistent with the relevant case law of the Court, and its application of the doctrine of the margin of appreciation has served to weaken its role as Europe's fundamental rights protector, seeming to be a means through which the Court has gracefully backed down to 'popular sentiment'.

The approach towards the issue of religious symbolism in public schools suggested by this article is a legislative one. It can be subject to discussion, deliberation, and modification to suit local conditions. Such an approach cannot be mandated by a court of law. However, a correct judicial decision to the crucifix dispute may open the doors to, and steer, such deliberation.

One could argue that after all, the opposition by the representative branches of government to a court ruling against the mandatory display of the crucifix in public schools is a move to be expected. It could be an institutional tug of war over who should be the master of identity. At least that is what the criticisms of the German crucifix decision and the Second Section ruling of the ECtHR suggest. Given that the school as an institution has a key role in forming and transmitting to the young generation the 'national identity', it seems that the popularly responsible branches of government are in a better position to direct this identity policy. However, courts should interfere when the identity formation is centred on a characteristic that cannot be unifying, inclusive and all encompassing, like that of religious affiliation, because courts have to protect the religious freedom of individuals. The times of *Cuius region, eius religio* have long passed. To be a member of the national community one need not have a particular religious identity determined by the sovereign. Religious belief, such as race, cannot be embraced by the state as the basis of a national identity and endorsed as such in public education.