Crucifix in the classroom: the best solution to the *Lautsi* case

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1. I grew up in Italy and attended a state school where a crucifix was hanging on the wall of the classroom. I am in the unique position of being a potential victim and a potential perpetrator of this situation. I am a potential victim since I am a secularist and I always opted out from the weekly class of religious education taught by a person appointed by the Church. But at the same time I am a potential perpetrator since I was raised as a catholic and belong to the majority of people who did not find the crucifix (or for what it matters all the Christian symbols in Italian public places) particularly intrusive only because it was so much part of our daily life.

2. I have been instructed by the Editors of the Journal that the counter-brief should not be longer than 2500 words. The counter-brief addresses both the general principles raised by the *Lautsi* case¹ and the brief of Professor Weiler.² For reasons of space, I will only mention the most essential arguments. I found Professor Weiler’s brief very stimulating and engaging. If I reply is to express a different view, not so much on the conclusion but on the way of addressing the issues. My disagreement lies principally in the way the issues are framed or, dare I say, simplified.

3. In its decision the chamber dealt with the nature and scope of the right to education as encapsulated in Art 2, protocol No. 1. Therein lays an important tension between the obligation of the state to provide equal access to education for all and the obligation of the state to guarantee pluralism and diversity through the respect of parents’ convictions; to achieve the latter aim, it has to promote an environment where everyone can identify with the school, its syllabus and its symbols. The central question as I understand it is the following: How can the state treat people with different religious and philosophical convictions in a way that guarantees equal concern and respect? This tension is encapsulated in the words of the court itself:

“Respect for parents' convictions must be possible in the context of education capable of ensuring an open school environment which encourages inclusion rather than exclusion, regardless of the pupils' social background, religious beliefs or ethnic origins. Schools should not be the arena for missionary activities or preaching; they should be a meeting place for different religions and philosophical convictions, in which pupils can acquire knowledge about their respective thoughts and traditions.” [paragraph 47c]

When faced with such a fundamental conflict, judges should exercise a good degree of empathy—that is the natural human capacity of putting oneself in someone else’s shoes trying to avoid the trap of dividing the camp in two sharply separate camps- the secular or the religious. This is often difficult in legal settings where the binary logic tends to polarize the discussion. I firmly believe that in order to deal with conflicts one needs to go beyond that binary logic in order to find a better compromise.

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¹ Case of Lautsi v Italy, Judgement Strasbourg, 3 November 2009 (application no. 30814/06) para. 47
² J. Weiler, “Editorial- State and Nation; Church, Mosque, and Synagogue—the trailer,” I-CON (2010), Vol.8 No. 2, 157-166
4. Professor Weiler’s analysis is thought provoking and engaging, but falls in the legalistic trap of dividing the world into two halves for the purpose of showing that the choice of a side is never neutral. His discussion follows three main lines that mirror the three legal principles he singles out from the case. The first principle is the affirmation of the right to freedom of religion and freedom from religion, which hardly is the object of contention, although its application is often difficult.

5. The second principle concerns the need for a classroom that educates towards tolerance and pluralism and is bereft of religious coercion. Here I would like to briefly say that *prima facie* we may all agree with that idea. But the practical implications of that principle are far from being fully spelled out. As said above, the court conceives of schools as meeting places for different religions and philosophical convictions. In order to create this environment, the state has to deal with three main policy issues that are all interlinked. Firstly, the state has to set up a *system* in which equal access to education is promoted; this requires a judgement as to whether, for example, faith schools should be funded by the state. Secondly, the state should make sure that the school’s *syllabus* promotes the knowledge of diversity. This means that it cannot simply impose a religious course of a given confession without giving the possibility of opting out. Ideally, the course would promote pluralism by presenting different faiths as well as the secular position on ethical issues. Thirdly, --and I want to stress here that this is only the tip of a much bigger iceberg concerning the place of religion in education-- the state should decide which *symbols* to display and refrain from embracing *symbols* that may hamper equal membership and diversity.

6. It is the third principle that chiefly concerns Professor Weiler. This is the principle of neutrality as articulated by the court: “The State’s duty of neutrality and impartiality is incompatible with any kind of power on its part to assess the legitimacy of religious convictions or the ways of expressing those convictions.”

7. Prof. Weiler criticizes the argument from neutrality proposed by the court by using one conceptual argument and two sets of dichotomies. The conceptual argument has to do with the understanding of “freedom of religion;” professor Weiler suggests that the individual freedom of and from religion is complemented by the freedom of the state to define its own national identity by selecting, among other things, its religious symbols. The two sets of dichotomies concern the definition of a *laïque/non-laïque* state and the factual situation of having a symbol/not having any symbol. Here I will attempt to resist what I regard as a conceptual mistake and as false dichotomies and in general a binary logic often typical of legal reasoning, but very detrimental when one attempts to solve a social and legal conflict that is polarizing the society into a secular and a religious camp.

8. The first conceptual mistake concerns the distinction between individual freedom of and from religion and the freedom of the state “when it comes to the place of religion or religious heritage in the collective identity of the nation and the symbology of the state.” Freedom in constitutional terms is defined in relation to the established constitutional authority of the state. The state has the power to change legal relations

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3 Case of Lautsi v Italy, Judgement Strasbourg, 3 November 2009 (application no. 30814/06) para. 47
4 J. Weiler, “Editorial- State and Nation; Church, Mosque, and Synagogue—the trailer,” I-CON (2010), Vol.8 No. 2, 157-166
in ordinary law but finds its limit in the existence of individual freedom which signpost immunity from regulation on the part of the individual as well as a disability to regulate on the part of the state. So to say that the state has freedom is inaccurate. The state has the power to determine the place of religion or religious heritage in its own collective identity by choosing the symbols it prefers, but this power can be limited by the exercise of freedom on the part of an individual or a group who can reasonably show to have been discriminated against.

9. Prof. Weiler argues that in Europe the state is not obliged to follow a given model of Church State relationship. This is correct, but even in this context it is inaccurate to claim that the state has a freedom to decide its own model, as this would suggest that the ECHR has the ultimate authority to decide these issues and the state only has residual authority. But the truth is that the ECHR can only pinpoint to a violation of convention rights, while the authority to determine the collective identity of the state remains in the hands of the state itself.

10. What kind of choice can the state make? Here Professor Weiler uses the first false dichotomy between laïque and non-laïque states. French laïcité represents one paradigmatic form of secularism, whereas England is described as a typical non-laïque state. There are two problems with this dichotomy. Firstly, laïcité is far from being a representative form of secularism; if anything it is a radical, and often ideological, exception in Europe. It is radical because it imposes since 1905 a very strict separation between Church and State which was arrived at after a bitter conflict between the French state and the Catholic Church. And more problematically it is ideological as it claims to provide the foundation of a set of values common to all the citizens of France. But of course the suggestion that once stripped of religious beliefs we would all converge towards a common national identity defined in purely political terms is just an illusion. Laïcité in this ideological sense is not compatible with freedom of belief.

11. The second problem with the dichotomy is that the polar opposite of a laïque state is defined in purely negative terms: non-laïque states. This is hardly accurate, and as a consequence not very helpful. England, the example used by Weiler, is a very complex case. It certainly cannot be defined as laïque, but it has many secular elements along with elements of establishment. In brief, as Julian Rivers points it out in his recent book entitled ‘the law of organized religions’ the English system encapsulates a tension between establishment and secularism. Instead of positing such a dichotomy, it would be more stimulating to propose a typology of the variety of secularism in Europe.

12. I want to raise en passant another problem for Weiler’s argument. The Italian Constitutional Court singles out laïcité as one of the constitutional principles embedded in the foundational text. Asked about the crucifix in the classroom, it did not express itself only because it lacks jurisdiction for reviewing an administrative decree. But the Court decided to remove the crucifix from its courtroom, thereby taking a side in this debate. It would seem that from a constitutional viewpoint crucifixes are out of place in school classrooms were we to draw the appropriate

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consequences of the principle of laïcité as recognised by the constitutional court. But as it happens Italy is for the moment an in-between case that shows a tension between its secular (or more precisely laïque) character and the acceptance of certain elements of religion in public institutions. I personally believe that the Italian state holds inconsistent positions as to the place of religion in public institutions. But I also believe that it is for the state to decide what form of secularism suits itself and to draw from it all the necessary conclusions. Conversely, it is not the job of an international court to suggest which form of secularism is the most appropriate. An international court can, however, pinpoint to an existing contradiction between principle and practice.

13. The final and most important false dichotomy is that between a wall with a symbol and a wall without. Prof. Weiler’s parable of Marco and Leonardo, two children who are equally perplexed by the presence and the absence of the crucifix, aims to illustrate that neither of these two choices is neutral. It may be true that a naked wall is not a neutral solution in particular in this case where emptiness is the conclusion of an act of rejection as it would be the case in Italy. It does not follow however, that the presence and the absence of crucifix are equivalent. Moreover, those two options do not exhaust the realm of the possible. I do believe that a solution can be found in an alternative arrangement.

14. Beside the two polar opposites, there are at least two more positions. The first option is well known and consists of having many symbols rather than one. I stress here that having many symbols would be more consistent with a so-called pluralist ethics since one symbol is reasonably to be interpreted as capturing a monistic position. I also have to stress that the many symbols solution was the original position of the Italian state that required having on the wall a picture of the valiant king along with a crucifix. It can then be argued that Italian walls should not be emptied but filled with other symbols that may capture the increasing diversity in the classroom. Or of course one could have a picture of the President or the Prime Minister, but I am not sure that this would go down very well.

15. There is another, completely different, position to consider which requires the active engagement of the interested people in the schools. Given that one, two, many or no symbols are alternative positions, it would be desirable to spark a debate about which option pleases most the local community of parents, teachers and pupils in the school. One problem remains: where to start? Should the debate take place from scratch or should it take account of the status quo? This decision is better left to the state as the constitutional authority charged with the selection of national symbols. This may mean that we would have to start with the default position of the crucifix, even though as I said this is inconsistent with a self-avowed commitment to laïcité. But the point here is not to bow or to resist to the state authority, but to take this tension as an opportunity for local deliberation and mutual learning.

16. So we can well imagine a scenario in which the rule for everyone would be unchanged: the Italian state elects the crucifix as a symbol to be hanged in classrooms. However, it would be possible to apply for an exemption to this rule. The exception works according to a deliberative model. The debate could have two stages: first parents (and/or pupils depending on their age) would have to present reasons for and against the crucifix in their children’s classroom. If they agreed to keep the
crucifix, then the deliberation would end there. If they agreed to have an exemption to the general rule, then they would have to decide what best arrangement to put in place instead: another symbol, many symbols or the white wall.

17. In this way, the power of the state to determine its own national symbols would be preserved and not overruled by the ECHR. At the same time freedom of and from religion would equally be enhanced although not in a way that is openly conflictual and exclusive, but in a way that is inclusive, pluralist and tolerant. Individual freedom is a powerful weapon that may be misused by some individuals that are not able to accept that compromises are the bread and butter of democratic societies.

18. In conclusion, the Grand Chamber has the opportunity to achieve a perfect balance between competing interests. The presence of the crucifix in Italian classrooms violates article 2 protocol 1 of the ECHR, as long as the state does not provide for the possibility of an exemption mechanism based on the freedom of and from religion as protected by art.9.