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## Does Europe Need Neutrality? The Old Continent in Search of Identity

*Andrea Pin\**

### INTRODUCTION

One of the most debated issues that European legal thinkers are tackling is surely the place that “neutrality” has in the field of constitutional theory, state-religion relationships, and human rights.<sup>1</sup> This is an extremely hot issue across the Old Continent. A vast portion of European legal culture thinks that neutrality<sup>2</sup> is needed to protect religious freedom for all, as well as to protect human rights from threats that derive from religious extremism: believers, nonbelievers and democracies alike would be protected by neutrality.<sup>3</sup>

Some European states are debating or have already legislated in this field in recent years. For example, due to its national version of neutrality, France prohibited the use of ostensible religious symbols at schools<sup>4</sup> and, later, the use of the complete Muslim veil in public places.<sup>5</sup> Along similar lines, Switzerland passed a constitutional

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1. J. HABERMAS, *FATTI E NORME. CONTRIBUTI A UNA TEORIA DISCORSIVA DEL DIRITTO E DELLA DEMOCRAZIA* 363–66 (L. Ceppa ed., Guerini e associati 1996) [hereinafter *CONTRIBUTI*].

2. *See, e.g.*, J. BAUBÉROT & M. MILOT, *LAÏCITÉS SANS FRONTIÈRES* (2011); L. ZUCCA, *A SECULAR EUROPE* (Oxford University Press, 2012) [hereinafter *SECULAR EUROPE*]; *CONTRIBUTI*, *supra* note 1, at 366.

3. BAUBÉROT & MILOT, *supra* note 2, at 76.

4. LOI 2004-228 du 15 Mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics [Law 2004–228 of March 15, 2004 Regulating, in Accordance with the Principle of Secularism, the Wearing of Symbols or Clothing Denoting Religious Affiliation in Schools, Colleges and Public Schools], *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE* [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 17, 2004, p. 5190.

5. LOI 2010-1192 du 11 Octobre 2010 interdisant la dissimulation du visage dans

referendum banning the establishment of Minarets,<sup>6</sup> notwithstanding the fact that religious freedom policies in Switzerland are generally left to cantons, not to the Federation.<sup>7</sup> Italy had to deal with state neutrality when a case about the display of the crucifix in public school classrooms was brought before domestic courts and, later, before the European Court of Human Rights (“ECtHR”).<sup>8</sup>

The issue of neutrality goes beyond the state level. It has been precisely because of the ECtHR’s case law that neutrality has become part of the framework of the European Convention of Human Rights: the ECtHR has used the neutrality principle in many situations concerning disparate cases such as conscientious objections<sup>9</sup> or religious communities’ autonomy.<sup>10</sup>

But in a broader sense, the doctrine of neutrality has also significantly influenced the European Union. It was especially influential when members of the European Union discussed whether they should explicitly mention Europe’s religious roots in the preamble of what should have been the European Constitution but later became a less daring European Treaty.<sup>11</sup> The use of neutrality therefore encompasses the whole spectrum of the relationship between religion and human rights, including the place that religion has in the public place, the relationship between democracy and

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l’espace public [Law 2010–1192 of October 11, 2010 Prohibiting the Concealment of the Face in Public Space], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010.

6. The referendum, which was held November 29, 2009, amended article No. 72 of the Swiss Constitution, introducing the following amendment to the third paragraph: “The construction of minarets is prohibited.” CONSTITUTION FÉDÉRALE [CST] [CONSTITUTION] Apr. 18, 1999, RO 101, art. 72, ¶ 3 (Switz.).

7. CONSTITUTION FÉDÉRALE [CST] [CONSTITUTION] Apr. 18, 1999, RO 101, art. 72, ¶¶ 1–3 (Switz.) (“The regulation of the relationship between the church and the state is the responsibility of the Cantons. The Confederation and the Cantons may within the scope of their powers take measures to preserve public peace between the members of different religious communities. The construction of minarets is prohibited.”).

8. *Lautsi v. Italy* App. No. 30814/06 Eur. Ct. H.R. (2011) (summarizing the Italian domestic decisions in this topic).

9. *See, e.g., Bayatyan v. Armenia*, App. No. 23459/03 Eur. Ct. H.R. (2011).

10. *See, e.g., Metropolitan Church of Bessarabia v. Moldova*, App. No. 45701/99 Eur. Ct. H.R. (2001).

11. *See* Joseph H.H. Weiler, *A Christian Europe? Europe and Christianity: Rules of Commitment*, 6 EUR. VIEW 1, 143–50 (2007).

religion, the rights of believers, freedom from religion for nonbelievers, and autonomy of religious groups.<sup>12</sup>

One thing can be stated clearly from the very beginning, the enforcement of neutrality doesn't come at a cheap price, as recent pieces of state legislation demonstrate. Neutrality can be very demanding, both for religions and for human rights, as proven by the French prohibition of the Muslim veil and of religious symbols. It is not by chance that such enforcement of neutrality in France has ignited religious conflicts in that country,<sup>13</sup> rather than extinguishing them.<sup>14</sup>

The task of this Article is precisely to highlight some of the reasons for which neutrality has become common currency in European legal thinking. For these reasons, the Article first sketches in Part I, the fields in which neutrality appears to play a major—and sometimes unpredictable—role. More precisely, it first focuses on the European Convention of Human Rights, its wording, and the ECtHR's case law (Part I.A); then it considers the debate about the preamble of the proposed Constitution of the European Union<sup>15</sup> (Part I.B); and it briefly summarizes the evolution of some states that have embraced neutrality (Part I.C). Then it explores the reasons for which neutrality is oftentimes invoked, mostly at a supranational level, and links this phenomenon to the characters of European societies (Part II). Finally, it briefly explores the difficulties as well as

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12. B. MASSIGNON & V. RIVA, *L'EUROPE, AVEC OU SANS DIEU? HÉRITAGES ET NOUVEAUX DÉFIS* 269 (Les Editions de L'Atelier-Fidélité, 2010).

13. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 BYU L. REV. 419, 479 (2004).

14. See the caseload that the ECtHR has come to face after France passed the 2004 piece of legislation banning the use of religious symbols at school; *Dogru v. France*, App. No. 27058/05 Eur. Ct. H.R. (2008); *Kervanci v. France*, app. n, App. No. 31645/04 Eur. Ct. H.R. (2004); *Ghazal v. France*, App. No. 29134/08 Eur. Ct. H.R. (2009); *Jasvir Singh v. France*, App. No. 25463/08 Eur. Ct. H.R. (2009); *Ranjit Singh v. France*, App. No. 27561/08 Eur. Ct. H.R. (2009); *Hatice Bayrak v. France*, App. No. 14308/08 Eur. Ct. H.R. (2009); *Mahmud Sadek Gamaleddyn v. France*, App. No. 18527/08 Eur. Ct. H.R. (2009); *Tuba Aktas v. France*, App. No. 43563/08 Eur. Ct. H.R. (2009); *S.A.S. v. France*, App. No. 43835/11 Eur. Ct. H.R. (2014).

15. The drafted Constitution never entered into force; however, almost all its provisions later became the body of the so-called *Lisbon Treaty*, signed December 13, 2007. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) [hereinafter *Treaty of Lisbon*], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0001:0010:EN:PDF> (last visited Aug. 16, 2013).

the implications of preferring the paradigm of “pluralism” instead of neutrality (Part III).

The hypothesis of this Article is that neutrality is expected to fill a vacuum in the constitutional identity of contemporary Europe and to give shape to a new society. Neutrality is not just a common standard for religious freedom’s protection; it is also a tool that is used to legitimize European legal and political culture and to shape European society. The European trend towards neutrality is backed by fear that the relationship between religion and human rights can be conflictive and the belief that human rights can flourish only if the two are kept separate.

It must be noted that it is extremely hard to follow all the nuances of the word neutrality, and especially to distinguish neutrality from “secularism.”<sup>16</sup> Neutrality is oftentimes described in relation to secularism,<sup>17</sup> and even some opinions of the ECtHR use neutrality and “secularism” interchangeably.<sup>18</sup> But scholars and judges diverge in interpreting them as synonymous or as different but related concepts. Also, “secularism can be understood in many different ways; it is constitutional doctrine, a philosophical stance, a worldview, and ideology, and even an extreme stance in the hands of scientists who see religion as the archenemy.”<sup>19</sup> A debate about the use of the word neutrality tends to become a debate about its very meaning<sup>20</sup> or about its hostile or friendly implications for religious freedom;<sup>21</sup> but this is not the debate this paper addresses. This Article therefore adopts an introductory and minimalist understanding of neutrality. This understanding is that neutrality is a state’s attitude that in order to protect the religious freedom of

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16. Rex Ahdar, *Is Secularism Neutral?*, 26 *RATIO JURIS* 3, 404 (2013); BAUBÉROT & MILOT, *supra* note 2, at 151.

17. MASSIGNON & RIVA, *supra* note 12, at 269.

18. See *Leyla Sahin v. Turkey*, App. No. 44774/98 Eur. Ct. H.R. (2005) (Tulken, J., dissenting) (stating that she “fully and totally subscribe[s]” to the principles of secularism and equality). “Secularism” is actually said to be a feature of Turkish constitutionalism, not of the European Convention.

19. Lorenzo Zucca, *Lautsi: A Commentary on a Decision by the ECtHR Grand Chamber*, 111 *INT’L J. CONST. L.* 218, 222 (2013) [hereinafter *ECtHR Grand Chamber*].

20. Rafael Palomino, *Religion and Neutrality: Myth, Principle, and Meaning*, 2011 *BYU L. REV.* 657, 657 (“Neutrality faces [the] danger of turning into an ‘empty’ signifier, or, alternatively, a word too ‘full’ of meanings.”).

21. *Id.* at 678.

believers and nonbelievers, the state must not take a position in favor of or against any religious view.<sup>22</sup>

#### I. THE DEBATE OVER NEUTRALITY IN EUROPE: AN OVERVIEW

Neutrality is used at different levels of legal thinking and legal practice. This Section highlights the most authoritative and influential means of human rights' protection in Europe at the supranational level, namely the ECtHR. Then it considers the debate about the religious nature and roots of the European Union. Lastly, it briefly sketches how some national legal cultures—France, Italy and Spain—that are characterized by a common linguistic heritage as well as by a historically vibrant dialogue<sup>23</sup> have shaped similar concepts of neutrality, albeit with uncertain results.

##### *A. The Need for Neutrality in the European Court of Human Rights' Case Law*

The affirmation of neutrality in the decisions of the ECtHR is highly relevant. It has become the most powerful and effective institution patrolling the respect of the European Convention of Human Rights ("Convention") and securing fundamental liberties among the members of the Council of Europe, which now includes forty-seven member states. The ECtHR was meant to provide European states with a common frame of basic liberties they were expected to protect<sup>24</sup> after the horrible violations of human rights and dignity that devastated the continent during the first half of the twentieth century. The main influence was eminently political at first. In a nutshell, it was based on the premise that "[w]hen governments know that policies must be justified in an international forum[,] an additional element enters their decision-making."<sup>25</sup>

In few words, the ECtHR's case law has distilled the principle of neutrality as a duty of the state to remain impartial in the field of religion in order to establish equal freedom of religion and of

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22. MASSIGNON & RIVA, *supra* note 12, at 269; ZUCCA, *supra* note 2, at xxi.

23. The relationship between language, communication, and political and institutional dialogue has been notoriously explored by JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* (Beacon Press, 1981).

24. J.C. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 4 (2d ed., 1995).

25. *Id.* at 1.

conscience.<sup>26</sup> Interestingly, though, Article 9 of the Convention, which is the relevant provision as to religious freedom's rights, does not mention neutrality in any way. It provides as follows:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Nor does article 14, which focuses on the prohibition of discrimination, mention neutrality:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

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26. *Hasan v. Bulgaria*, App. No. 30985/96 Eur. Ct. H.R. ¶ 78 (2000); *Refah Partisi v. Turkey*, App. Nos. 41340/98, 41342/98, 41343/98, 41344/98 Eur. Ct. H.R. ¶ 91 (2003); *Ahmet Arslan v. Turkey*, App. No. 41135/98, par. Eur. Ct. H.R. ¶ 49 (2010); *Leyla Sahin v. Turkey*, App. No. 44774/98 Eur. Ct. H.R. ¶ 107 (2005); *Metropolitan Church of Bessarabia v. Moldova*, App. No. 45701/99 Eur. Ct. H.R. ¶ 123 (2001); *Griechische Kirchengemeinde Munchen und Bayern E.V. c. Allemagne*, App. No. 52366/99 Eur. Ct. H.R. (2007); *Sevgi Kurtulmus v. Turkey*, App. No. 65500/01, par. Eur. Ct. H.R. ¶ 2 (2006); *97 Members of the Gidani Congregation of Jehovah's Witnesses v. Georgia*, App. No. 71156/01 par. Eur. Ct. H.R. ¶ 131 (2007); *Moscow Branch of the Salvation Army v. Russia*, App. No. 72881/01 Eur. Ct. H.R. ¶ 61 (2006); *Svyato-Mykhaylivska Parafiya v. Ukraine*, App. No. 77703/01 Eur. Ct. H.R. ¶ 113 (2007); *Kuznetsov v. Russia*, App. No. 184/02 Eur. Ct. H.R. ¶ 74 (2007); *Jehovah's Witnesses of Moscow v. Russia*, App. No. 302/02 Eur. Ct. H.R. ¶ 99 (2010); *Church of Scientology Moscow v. Russia*, App. No. 18147/02 Eur. Ct. H.R. ¶ 72 (2007); *Bayatyan v. Armenia*, App. No. 23459/03 Eur. Ct. H.R. ¶ 120 (2011); *Hasan and Eylem Zengin v. Turkey*, App. No. 1448/04 ¶ 54 (2007); *Kervanci v. France*, App. No. 31645/04 Eur. Ct. H.R. ¶ 62 (2004); *Mirolubovs v. Latvia*, App. No. 798/05, par. Eur. Ct. H.R. ¶ 80 (2009); *Sinan Isik v. Turkey*, App. No. 21924/05, par. Eur. Ct. H.R. ¶ 45–46 (2010); *Dogru v. France*, App. No. 27058/05 Eur. Ct. H.R. ¶ 62 (2008); *Gatis Kovalkovs v. Latvia*, App. No. 35021/05 Eur. Ct. H.R. ¶ 57 (2012); *Lautsi v. Italy*, App. No. 30814/06 Eur. Ct. H.R. ¶ 60 (2011); *Jakobsky v. Poland*, App. No. 18429/06 Eur. Ct. H.R. ¶ 44 (2010); *Ghazal v. France*, App. No. 29134/08 Eur. Ct. H.R. (2009); *Sidincatul "Pastorul Cel Bun" v. Romania*, App. No. 2330/09 Eur. Ct. H.R. ¶ 136 (2013); *Fernández Martínez v. Spain*, App. No. 56030/07, Eur. Ct. H.R. ¶ 128 (2014).

Therefore, the ECtHR has utilized the principle of neutrality as a hermeneutical device to enforce the principle of religious freedom, although the Convention doesn't command that the states be neutral in order to protect religious freedom.

Some doubts can be cast on this interpretation of religious freedom that includes neutrality. Such doubts arise from a historical consideration of the framing of the conventional text (which I will consider in Part I.A.1), from the utility of using neutrality as an instrument that would be able to shed a light on cases before the Court (Part I.A.2), and from the scattered states' opposition to the use of neutrality made by the ECtHR (Part I.A.3).

### *1. The framing of art. No. 9*

Article 9 does not say anything about neutrality as we have seen above. Moreover, records about the drafting of the Convention do not lead to the conclusion that the drafters intended the wording of the article to imply the principle of neutrality.<sup>27</sup> At the time of its framing, the state parties debated about the breadth of religious liberty as well as about its limits, but they did not debate a state's duty to be neutral towards religion in order to protect human rights.

On the contrary, Turkey wanted Article 9 to be flexible enough to allow state institutions to intervene to protect democracy and fundamental liberties against Islamic fundamentalists that supposedly threatened Turkey's republicanism.<sup>28</sup> Sweden insisted that the wording had to allow states with an established church to preserve their own regimes; Sweden was formally Lutheran and did not want to find itself in violation of religious freedom as enshrined in the Convention because of this affiliation.<sup>29</sup>

The example of Sweden is significant. Sweden was but one of the many European countries that could not call itself neutral at the time the Convention was drafted: Sweden had a clear religious view.<sup>30</sup>

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27. EUROPEAN COURT OF HUMAN RIGHTS, *Travaux Préparatoires to the Convention*, [http://echr.coe.int/Documents/Library\\_TravPrep\\_Table\\_ENG.pdf](http://echr.coe.int/Documents/Library_TravPrep_Table_ENG.pdf) (last visited Feb. 14, 2014).

28. COUNCIL OF EUROPE, *European Commission of Human Rights Preparatory Work on Article 9 of the European Convention on Human Rights* ([http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTTravaux-ART9-DH\(56\)14-EN1338892.pdf](http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTTravaux-ART9-DH(56)14-EN1338892.pdf) (last visited Aug. 22, 2013)).

29. *Id.* at 14.

30. MASSIGNON & RIVA, *supra* note 12, at 269.



And this is still true for many countries. England has Anglicanism as its established church;<sup>31</sup> Greece is formally Orthodox;<sup>32</sup> Scandinavian countries have, or used to have an, established church;<sup>33</sup> Italy went through a long era before leaving the establishment behind in 1984;<sup>34</sup> Ireland is Christian according to its constitutional preamble;<sup>35</sup> the Constitution of Switzerland opens with an invocation to God.<sup>36</sup>

Therefore, there is no apparent reason for reading art. No. 9 of the Convention as commanding state neutrality.<sup>37</sup> If neutrality means state impartiality towards any religion, such that the state may have no religious views, then many of these states are or used to be *not* neutral. Had such states intended to implement neutrality through framing or joining the European Convention, they would have named themselves as plain violators of the Convention. In fact, this is what Sweden feared at the time the Convention was being worded. Therefore, an analysis of the wording and history of art. No. 9 of the Convention does not help define the reasons for which leading cases decided by the ECtHR actually used the concept of neutrality. On the contrary, the wording and history of art. No. 9 could have discouraged the ECtHR from using the concept of neutrality.

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31. *Act of Supremacy* (1534), available at <http://www.britainexpress.com/History/tudor/supremacy-henry-text.htm>.

32. 1975 SYNTAGMA [SYN.] [CONSTITUTION] 2 (Greece).

33. KONGERIGET NORGES GRUNDLÖV [CONSTITUTION] May 17, 1814, art. 4 (Nor.) (“The King shall at all times profess the Evangelical-Lutheran religion.”). The Lutheran Church was the established religion of Sweden until 2000. See Maari Jänterä-Jareborg, *Religion and the Secular State in Sweden*, RELIGION AND SECULAR ST.: INTERIM REPS., 669, 669 (Int’l Ctr. for Law and Religion Studies, 669) <http://www.iclrs.org/content/blurb/files/Sweden.1.pdf>. Finland has special provisions for the Lutheran Church in its Constitution. See Suomen perustuslaki [Constitution] June 11, 1999, § 76). As for Denmark, see Danmarks Riges Grundlov [Constitution] June 5, 1953 § 6.

34. The Constitutional Court’s decision no. 203 of 1989 clarified that Catholicism was not the official religion of the state anymore, after the Lateran Pacts had been deeply modified in 1984. Corte Cost., 12 aprile 1989, n. 203, GU n.16 del 19-4-1989 (It.), available at [http://www.gazzettaufficiale.it/atto/vediMenuHTML?atto.dataPubblicazioneGazzetta=1989-04-19&atto.codiceRedazionale=089C0422&tipoSerie=corte\\_costituzionale&tipoVigenza=originario](http://www.gazzettaufficiale.it/atto/vediMenuHTML?atto.dataPubblicazioneGazzetta=1989-04-19&atto.codiceRedazionale=089C0422&tipoSerie=corte_costituzionale&tipoVigenza=originario).

35. It runs as follows: “*In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred.*” Ir. Const., 1937, pmb1.

36. “CONSTITUTION FÉDÉRALE [CST] [CONSTITUTION] Apr. 18, 1999, RO 101, art. 72, ¶ 3 (Switz.) (“In the name of Almighty God!”).

37. *But see* Jeroen Temperman, *Are State Churches Contrary to International Law?*, 2 OXFORD J.L. & RELIGION 119, 121 (2013).

Moreover, the Turkish and Swedish examples also tell us something more. The two countries recognized that there could be a tension between the human rights they were protecting through the Convention, and their country's prevailing religious or anti-religious attitudes. Turkey wanted to protect human rights, perhaps even at the expense of religion. Sweden meant to protect its establishment of religion, even at the expense of human rights. But they did not resolve to strike a balance between religious freedom and human rights through neutrality.

## *2. The equivocal use of neutrality in the ECtHR's decisions*

Neutrality was not included in the Convention, but the ECtHR through its decisions later implemented it. If neutrality lies outside of the perimeter of religious freedom as enshrined in the conventional text, the ECtHR has inferred that art. No. 9 requires it. In several pivotal cases that the ECtHR has decided, religious freedom is undoubtedly an "asset" for democratic societies, and not just for believers; religious freedom requires that the state keep a neutral approach where neutrality is oftentimes placed alongside religious "pluralism."<sup>38</sup> The role of the state would consist in preserving religious pluralism and granting as much freedom for religion and human rights as possible, and this could be done only through state neutrality. This reading of art. No. 9 interprets the Convention as a *living instrument*<sup>39</sup> and not as a text that needs to be understood in an originalist<sup>40</sup> or textualist<sup>41</sup> fashion. The wording of article 9 would be just the beginning of a long path that has led the meaning of the

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38. Hasan v. Bulgaria, App. No. 30985/96 Eur. Ct. H.R. ¶ 76 (2000); Dahlab v. Suisse, App. No. 42393/0898 Eur. Ct. H.R. (2001); Leyla Sahin v. Turkey, App. No. 44774/98 Eur. Ct. H.R. ¶ 104 (2005); Kuznetsov v. Russia, App. No. 184/02 Eur. Ct. H.R. ¶ 54 (2007); 97 Members of the Gidani Congregation of Jehovah's Witnesses v. Georgia, App. No. 71156/01 Eur. Ct. H.R. ¶ 132 (2007); Sinan Isik v. Turkey, App. No. 21924/05 Eur. Ct. H.R. ¶ 45 (2010); Bayatyan v. Armenia App. No. 23459/03 Eur. Ct. H.R. ¶ 119 (2011); Jehovah's Witnesses of Moscow v. Russia, App. No. 302/02 Eur. Ct. H.R. ¶ 99 (2010); Mirolubovs v. Latvia, App. No. 798/05, Eur. Ct. H.R. ¶ 80 (2009); Dogru v. France, App. No. 27058/05 Eur. Ct. H.R. ¶ 62 (2008); Moscow Branch of the Salvation Army v. Russia, App. No. 72881/01 Eur. Ct. H.R. ¶ 61 (2006).

39. See, e.g., Vo v. France, App. No. 53924/00 Eur. Ct. H.R. ¶ 82 (2004) (stating that the European Convention is a "living instrument which must be interpreted in the light of present-day conditions.").

40. On originalism, see, among many, ORIGINALISM. A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., Regnery 2007).

41. Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347 (2005).

Convention to encompass state neutrality.

The practice of assuming the Convention to include the state's duty of neutrality has led to a problematic line of case law that has failed to establish a useful standard for interpreting difficult cases. Sometimes, neutrality has been used to depict the state's role in preserving religious communities' autonomy. For instance, the ECtHR censored the Bulgarian<sup>42</sup> and Moldovan<sup>43</sup> attempts to control Islamic and Orthodox communities' affairs. Sometimes the Court has legitimized restrictions on religious practices. Notably, it allowed Turkey to forbid the use of *hijab* in universities, and Switzerland and France to forbid the same garment for schoolteachers<sup>44</sup> and students.<sup>45</sup> In other decisions, it was used both to censor and to legitimize official religious symbols in the name of human rights. The *Lautsi* case<sup>46</sup> is extremely relevant in this respect. The first decision, which was released by a section of the ECtHR (*Lautsi I*), decided that the presence of the crucifix in Italian public classrooms was inconsistent with the state's duty of neutrality,<sup>47</sup> the final decision, which was made by the ECtHR's Grand Chamber (*Lautsi II*), decided that state neutrality allows the display of official religious symbols.<sup>48</sup> Interestingly, the two decisions diverge in their outcomes, but both use neutrality to scrutinize the relevant Italian legislation. One could wonder why *Lautsi II* decided to uphold the presence of the crucifix based on the same rationale of state neutrality that *Lautsi I* offered.

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42. Hasan v. Bulgaria, App. No. 30985/96 Eur. Ct. H.R. (2000).

43. Metropolitan Church of Bessarabia v. Moldova, App. No. 45701/99 Eur. Ct. H.R. (2001).

44. Dahlab v. Suisse, App. No. 42393/98 Eur. Ct. H.R. (2001).

45. Dogru v. France, App. No. 27058/05 Eur. Ct. H.R. (2008); Kervanci v. France, App. No. 31645/04 Eur. Ct. H.R. (2004); Ghazal v. France, App. No. 29134/08 Eur. Ct. H.R. (2009); Jasvir Singh v. France, App. No. 25463/08 Eur. Ct. H.R. (2009); Ranjit Singh v. France, App. No. 27561/08 Eur. Ct. H.R. (2009); Hatice Bayrak v. France, App. No. 14308/08 Eur. Ct. H.R. (2009); Mahmud Sadek Gamaleddyn v. France, App. No. 18527/08 Eur. Ct. H.R. (2009); Tuba Aktas v. France, App. No. 43563/08 Eur. Ct. H.R. (2009).

46. It was decided also on the basis of Additional Protocol of the Convention, which, in art. No. 2, commands that "[n]o person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions." Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 Art. 2, Council of Europe, Nov. 1, 1998, <http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm>.

47. Lautsi v. Italy, App. No. 30814/06 Eur. Ct. H.R. ¶ 57 (2009).

48. Lautsi v. Italy, App. No. 30814/06 Eur. Ct. H.R. ¶ 72 (2011).

On one hand, it is understandable why the use of neutrality by the ECtHR is so nuanced and hardly predictable:<sup>49</sup> it has to conform to state constitutional systems that diverge deeply, and “accommodate a variety of national church-state arrangements, including establishments.”<sup>50</sup> In some sense, the ECtHR has to find a way to make neutrality virtually fit with France and its separation of church and state,<sup>51</sup> as well with England, whose Head of State is the Supreme Governor of the Anglican community.<sup>52</sup> And the ECtHR is aware of this, having stated that when “questions concerning the relationship between State and religions are at stake, in which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance.”<sup>53</sup>

On the other hand, one can wonder why the ECtHR insists in using neutrality, since its features do not offer guidance to policy-makers and its implications are scarcely predictable.<sup>54</sup> It is not just article 9’s wording; it is also the case law that casts doubts on the opportunity of using neutrality.

### *3. The opposition to the ECtHR’s use of neutrality*

The ECtHR’s use of neutrality is also contested for reasons that derive both from the ambiguity of neutrality itself and from its effects on national traditions.<sup>55</sup>

*Lautsi I* was opposed by a vast number of countries that criticized the decision and joined Italy in the appeal before the Grand Chamber. Interestingly, almost all the countries that

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49. Mark L. Movsesian, *Crosses and Culture: State-Sponsored Religious Displays in the US and Europe*, 1 OXFORD J.L. AND RELIGION, 338 (2012) (offering a synthetic depiction of neutrality in the ECtHR’s case law).

50. *Id.*

51. Gunn, *supra* note 14, at 419.

52. *Act of Supremacy*, *supra* note 31.

53. *Dogru v. France*, App. No. 27058/05 Eur. Ct. H.R. ¶ 63 (2008); *see also* *Mirolubovs v. Latvia*, App. No. 798/05, Eur. Ct. H.R. ¶ 81 (2009); *Murphy v. Ireland*, App. No. 44179/98, Eur. Ct. H.R. ¶ 73 (2003); *Sidincatul “Pastorul Cel Bun” v. Romania*, App. No. 2330/09 Eur. Ct. H.R. ¶ 61 (2013).

54. Some believe that the use of this principle has become even more ambiguous with the passing of time. Palomino, *supra* note 20, at 684.

55. *See* Temperman, *supra* note 37, at 126 (discussing the parallel need of the Human Rights Committee of not undermining its own legitimation through focusing on the religious freedom’s implications of establishment of religion).

supported the appeal were Eastern European;<sup>56</sup> neutrality divided Europe almost literally on that occasion. It confirmed that the principle of neutrality is not a shared value throughout Europe, and that especially Orthodox legal culture is not at ease with it.<sup>57</sup>

Moreover, the decision was criticized for being partisan. Professor Joseph Weiler, while advocating in favor of the display of the crucifix in *Lautsi II*,<sup>58</sup> explained that neutrality is actually not neutral.<sup>59</sup> Neutrality would be a legitimate, but not the only legitimate, way of understanding religious liberty and striking a balance between human rights and state-religion relationships. It would be a constitutional option, which would coexist with other, equally legitimate, options.

Whether this reading of neutrality is correct or not, one thing can be stated quite easily: neutrality is not an appropriate foundation for the protection of religion and human rights. The first reason lies in its ambiguity: the way *Lautsi I* understood neutrality was opposite to the way *Lautsi II* understood it. The second reason is that it has as many supporters as detractors. Opponents of neutrality see it as a militant political philosophy and theory of religious liberty<sup>60</sup>—not just as a mere neutral device that simply reflects religious pluralism and religious freedom and that strikes a balance between religion, state, and human rights in complete accordance with article 9 of the European Convention.

The shift away from a textualist reading of the European Convention and towards a political and philosophical reading of it is particularly evident when the ECtHR occasionally uses the terms neutrality and “secularism” interchangeably, indifferent to the

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56. Armenia, Bulgaria, Cyprus, the Russian Federation, Greece, Lithuania, Malta, Monaco, Romania, and the Republic of San Marino. See NICOLA COLAIANNI, DIRITTO PUBBLICO DELLE RELIGIONI. EGUAGLIANZA E DIFFERENZE NELLO STATO COSTITUZIONALE 97 (il Mulino, 2012).

57. MASSIGNON & RIVA, *supra* note 12, at 269.

58. See the transcription at *Oral Submission by Professor Joseph Weiler Before the Grand Chamber of the European Court of Human Rights*, ILSUSSIDIARIO.NET (July 1, 2010), <http://www.ilsussidiario.net/News/Politics-Society/2010/7/1/EXCLUSIVE-Oral-Submission-by-Professor-Joseph-Weiler-before-the-Grand-Chamber-of-the-European-Court-of-Human-Rights/96909/>.

59. *Id.* See also Joseph H.H. Weiler, *Il crocifisso a Strasburgo: una decisione “imbarazzante,”* QUADERNI COSTITUZIONALI 148–52 (2010).

60. R. Palomino, *supra* note 20, at 671 (“Liberal neutrality is more inclined to favor secular or laical world views over religious ones.”).

distinct definition of each word. Though the ECtHR has decided cases on the basis of neutrality rather than “secularism,” some Judges of the ECtHR in their opinions have maintained that “secularism” is a principle that is commanded by the Convention and that needs to be enforced, safeguarded, and protected.<sup>61</sup> “Secularism” is a trademark of countries like Turkey, and as I explained above, at the time the Convention was drafted, Turkey meant to foster human rights’ protection even at the expense of freedom of religion.<sup>62</sup> Turkey wasn’t really neutral: it was inclined to prefer human rights to religion and religious rights.

Perhaps neutrality can be neutral. But as long as it is understood as a militant political philosophy with specific priorities, or just as a model of constitutionalism amongst the many, then it is not really neutral, but instead it is divisive. It is therefore understandable that even religious minorities living in states with an established religion hardly support constitutional changes that would eliminate the establishment<sup>63</sup> because they might fall into the arms of non-neutral secularism. If the relationship between states, religions, and human rights were reassessed and aligned with the principle of neutrality, religious minorities believe that this realignment would happen at the expense of all religions, not just of the established one. Conversely, if neutrality is conceived in a nonsectarian way, it becomes ambiguous and its consequences are unpredictable.

Since neutrality is an ambiguous word, the ECtHR’s adherence to the principle of neutrality seems quite unexplainable as being merely a consistent way to expound article 9 of the Convention. It is all but evident why the ECtHR has placed neutrality within the core of the conventional principles, since there is no trace in the text of the Convention and there is no consensus amongst the state parties on its existence and implications.<sup>64</sup>

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61. *Leyla Sahin v. Turkey*, App. No. 44774/98 Eur. Ct. H.R. (2005) (Tulken, J., dissenting).

62. ABDULLAH A.A. AN-NA’IM, *ISLAM AND THE SECULAR STATE* 197 (2008).

63. REX AHDAR & IAN LEIGH, *RELIGIOUS FREEDOM IN THE LIBERAL STATE* 145 (2005) (“[N]ot a single article or speech could be found by any non-Christian faith in favour of disestablishment. Rather, secular reformers have been using minorities (claiming the desire to accommodate them) to justify courses of action that these secular elites have decided upon by themselves to advance their own purposes.”).

64. I am using the categories that Charles H. Beitz has articulated in his book. CHARLES H. BEITZ, *THE IDEA OF HUMAN RIGHTS* 75–76 (2009).

*B. The Secular-Christian European Union Debate*

A relevant legal debate that took place some years ago in Europe helps illuminate the reasons underpinning the adoption of neutrality by the European legal culture. It was the debate about the European Union's identity and legacy at the moment the EU drafted a constitution.

EU law has seldom addressed human rights issues directly, and has not grounded its legitimation upon them explicitly.<sup>65</sup> The scope of EU law, however, is expanding to reflect an increasing interest in human rights and also to encompass religious freedom among its policies.<sup>66</sup> In the EU context, ideas about neutrality, secularism, and religiosity were strongly debated at the momentous time of the drafting of the European Union's constitutional text. Interestingly, those were the years in which, after the delivery of the *Charter of Fundamental Rights of the European Union* in 2000<sup>67</sup> and after experiencing the entrance of several post-Socialist Eastern European countries, the EU was wondering about its further expansion and the inclusion of Turkey. The EU was reflecting and pondering what kind of new constitutional framework was most needed.<sup>68</sup> The Constitution was expected to consolidate the new status and set the premises for the EU's future commitment to human rights. The drafting of a "new European Constitution" was meant to "contribute to European social integration, to enhance a common

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65. J.H.H. Weiler, *Deciphering the Political and Legal DNA of European Integration: An Exploratory Essay*, in *Philosophical Foundations of European Union Law* 150 (J. Dickson, P. Eleftheriadis eds., Oxford University Press, Oxford, 2012).

66. See Council of the European Union, *EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief*, Foreign Affairs Council Meeting (24 June 2013), [http://consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/137585.pdf](http://consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/137585.pdf).

Religious freedom is also protected by the European Charter of Fundamental Rights of the European Union, as incorporated in the Treaty on European Union, under art. No. 17:

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
2. The right to conscientious objection is recognized, in accordance with the national laws governing the exercise of this right.

67. It was ratified December 7, 2000. Charter of Fundamental Rights of the European Union.

68. J.H.H. Weiler, *Federalism and Constitutionalism: Europe's Sonderweg*, available at <https://infoeuropa.euroid.pt/files/database/000036001-000037000/000036583.pdf> (last visited Nov. 10, 2013).

European identity, and to remedy the deficit in democratic legitimacy,” which were commonly considered some of the weakest aspects of the EU entity.<sup>69</sup>

The EU Constitution was later turned down as it took the more favored form of a Treaty.<sup>70</sup> Nonetheless, the debates about what was appropriate to write in the EU Constitutional Preamble are still significant to understanding the debate between pro- and anti-neutrality European scholars. The debate about the EU Constitution concerned the *identity*, the *past*, and the *founding values* of the EU and of modern Europe, but this debate was relevant for the future of the EU.<sup>71</sup> The debate was about what should have been written in the Preamble, and about what had inspired the reconstruction of Europe after hundreds of years of wars.<sup>72</sup> Although the debate did not lead to the delivery of an official text, that debate shed a light on the narratives that describe contemporary political Europe.

The drafting of the Preamble initially led to a proposal that did not highlight the religious roots of the EU,<sup>73</sup> but rather blended them into a broader, humanistic perspective:

Drawing inspiration from the cultural, religious and humanist inheritance of Europe, which, nourished first by the civilizations of Greece and Rome, characterized by spiritual impulse always present in its heritage and later by the philosophical currents of the Enlightenment, has embedded within the life of society its perception of the central role of the human person and his inviolable and inalienable rights, and of respect for law.<sup>74</sup>

The *focus* was on humanism. Religions were left out of the text. Humanism was the key, the historical climax to which previous traditions—including Christianity—had contributed. Religions were

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69. José Casanova, *Religion, European Secular Identities, and European Integration*, EUROZINE10 (June 29, 2004), <http://www.eurozine.com/pdf/2004-07-29-casanova-en.pdf> (last visited Nov. 8, 2013).

70. *See supra* note 16.

71. J. HABERMAS, *SOLIDARIETÀ TRA ESTRANEI: INTERVENTI SU FATTI E NORME* 39 (L. Ceppa, Guerini e Associati, 1997) (noting that our identity has to do with our past as well as with our projects).

72. Casanova, *supra* note 69, at 3.

73. Text European Convention pmbl., May 28, 2003, Secretariat, CONV 722/03, *available at* <http://european-convention.eu.int/pdf/reg/en/03/cv00/cv00722.en03.pdf> (last visited Aug. 16, 2013).

74. The European Convention, May 28, 2003, *available at* [http://www.foreignpolicy.org.tr/documents/b\\_290503.pdf](http://www.foreignpolicy.org.tr/documents/b_290503.pdf).



important because they had nurtured the modern culture of human rights. That was the role of religions that could be valued; including religious traditions, or naming them in the Preamble, would have been discriminatory and clearly non-neutral.<sup>75</sup>

Joseph Weiler opposed this view. In a small book, *A Christian Europe*,<sup>76</sup> which was translated in several languages but never published for an English-speaking audience, Weiler advocated the role of religious culture in the shaping of contemporary Europe and stated that the overwhelmingly Christian culture needed to be openly recognized by the EU Constitution. If a Preamble was to be included in the Constitution, then it had to include Christianity among the EU inspirational movements. An inclusive constitutional text had to include Christianity, instead of excluding it for the sake of neutrality: its exclusion would have been ideological and divisive.

Weiler was not alone. Some other prominent thinkers, such as José Casanova, supported the idea that the exclusion of religious views in the European Constitution was blatantly upholding a secularist (i.e., nonreligious), and therefore not neutral, ideal of Europe and of the Constitution, which turned “religion into a problem.”<sup>77</sup>

Weiler’s proposal lost. The “neutral” version of it was adopted, albeit deeply modified: all the historical and philosophical references were dropped.<sup>78</sup> When the constitutional project was replaced with what was called the Lisbon Treaty, the last version of the Preamble was substantially included in it.<sup>79</sup>

Interestingly, Weiler’s proposal in *A Christian Europe* was responded to by Lorenzo Zucca’s *A Secular Europe*<sup>80</sup> some years

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75. SECULAR EUROPE, *supra* note 2, at 41.

76. JOSEPH WEILER, UN’EUROPA CRISTIANA. UN SAGGIO ESPLORATIVO (Rizzoli, 2003).

77. J. Casanova, *supra* note 69, at 11.

78. European Convention Draft Treaty Establishing a Constitution for Europe, July 18, 2003, Secretariat, CONV 850/03, available at <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf> (“Drawing inspiration from the cultural, religious and humanist inheritance of Europe, the values of which, still present in its heritage, have embedded within the life of society the central role of the human person and his or her inviolable and inalienable rights, and respect for law.”).

79. Treaty of Lisbon, *supra* note 15, at 10 (“DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law.”).

80. SECULAR EUROPE, *supra* note 2.

later. Zucca addresses the problematic public role of religion in Europe, dealing with the issues of the EU's identity as well as with the ECtHR's case law. Zucca still advocates neutrality, although he insists that it should be understood in a practical, non-theoretical way. He argues that neutrality does not need to be articulated in a philosophical fashion, but only as a practical concept.<sup>81</sup> Instead of being a belief, it should be just an attitude;<sup>82</sup> it is just intended to protect European societies, since "religion is very much interested in the social game. It wants to conquer the people."<sup>83</sup> In Zucca's theory, religion is trying to conquer the state and the society, and this could compromise the possibility of securing human rights' effective respect in a pluralistic environment.<sup>84</sup> It is worth noticing that, for Zucca, the only available answer to this threat would consist of a kind of neutrality made up of "inclusive secularism,"<sup>85</sup> an expression that formally does not place any boundaries between neutrality and any anti-religious approach, and surely does not make it palatable to all European identities.

Recently, Jürgen Habermas has emphasized the perils of misunderstanding neutrality and pushing religious people out of the public sphere against their will.<sup>86</sup> With the end of the Iron Curtain and the intensification of intra-European cultural and political exchanges, the potential adverse impact of this misunderstanding has expanded to Eastern Europe. In fact, the processes of secularization that have dominated, in different shapes, Protestant and Catholic countries of Europe<sup>87</sup> are largely unknown to the Orthodox world.<sup>88</sup> The Orthodox world is therefore not at ease with such categories of secularization, "secularism" and neutrality. All things considered, neutrality offers a vision that is not truly shared by the overwhelming European legal culture: it is conceived differently by countries that accept it, while it is even rejected by other European peoples.

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81. *Id.* at 101.

82. *Id.* at 101.

83. *Id.* at 41.

84. *Id.* at 132 ("If the rule of law was contaminated by any type of cultural and religious influence it would hardly be capable of coping with diversity.").

85. *Id.* at xx.

86. JÜRGEN HABERMAS & EDUARDO MENDIETA, *LE RELIGIONI E LA POLITICA. ESPRESSIONI DI FEDE E DECISIONI PUBBLICHE* 40 (2013).

87. J. Remy, *Laïcité et construction de l'Europe*, in *RELIGIONS ET TRANSFORMATIONS DE L'EUROPE*, 367–69 (G. Vincent & J.P. Willaime eds., 1993).

88. MASSIGNON & RIVA, *supra* note 12, at 269.

Therefore, it can be embraced by the European legal culture only if it is understood in a very loose sense. But, if this is the way it is conceived, it does not help in deciding cases.

*C. Non-Secular States Moving Towards Neutrality: The Case of Italy and Spain*

Interestingly, the success of the principle of neutrality is not confined to the supranational level. It can be traced also in some relevant national contexts. I will briefly consider here two state legal systems that made their own way towards neutrality, namely Italy and Spain, when they reshaped the relationship between the state and religion when they reflected on their human rights protections. While framing their own constitutional texts, they did not follow the model of the French Constitution,<sup>89</sup> which required a strong separation of church and state.<sup>90</sup> Nevertheless, Italy and Spain later utilized French concepts and wordings when they interpreted them.<sup>91</sup>

During the Constitutional Assembly, the Italian Framers openly affirmed that they did want to mention the word “*laicità*,” the equivalent of French “*laïcité*,” which is oftentimes assimilated or at least strictly linked to neutrality.<sup>92</sup> The Italian Framers avoided this word because they did not want to communicate any hostility towards religion.<sup>93</sup> The constitutional commitment to human rights did not mean anti-religiosity. No other expression of somewhat equivalent meaning, such as neutrality, or “secularism,” was included in the text.

More generally, both Italian<sup>94</sup> and Spanish<sup>95</sup> constitutionalism led to an open affirmation of religious freedom and human rights on

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89. 1958 CONST. art. 1 (Fr.) (“France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organised on a decentralised basis.”).

90. Silvio Ferrari, *Civil Religions: Models and Perspectives*, 41 GEO. WASH. INT’L L. REV. 749, 751 (2010).

91. R. Palomino, *supra* note 20, at 661.

92. J. Baubérot & M. Milot, *Laïcités sans frontières* 77 (2011).

93. See the declaration of the Framer, Hon. Cevolotto, November 21, 1946, 418 of the Records of the First Subcommittee of the Italian Constituent Assembly, *available at* [http://www.camera.it/\\_dati/costituente/lavori/I\\_Sottocommissione/sed041/sed041.pdf](http://www.camera.it/_dati/costituente/lavori/I_Sottocommissione/sed041/sed041.pdf).

94. Art. 7 COSTITUZIONE [Cost.] (It.) (“The State and the Catholic Church are independent and sovereign, each within its own sphere. Their relations are regulated by the Lateran pacts. Amendments to such Pacts which are accepted by both parties shall not require

an equal basis, as well as of a special relationship between the state and the Catholic faith. Nonetheless, the enactment of the constitutional texts in both states led the respective constitutional courts to explicitly mention the principle of neutrality.<sup>96</sup> The Italian Constitutional Court did so starting in 1989,<sup>97</sup> only after the end of the established church regime. In 1984, the pacts between the Catholic Church and the state were renewed and the established-church regime, which had never been questioned after 1848 and had probably survived the drafting of the 1948 Constitution, was openly abandoned.<sup>98</sup> The Spanish Constitutional Tribunal affirmed “*neutralidad*” (neutrality in Spanish) a little earlier, in 1981.<sup>99</sup> The two states, which had refused to endorse the French model of neutrality at the time of drafting their constitutions,<sup>100</sup> later followed France and borrowed the word neutrality.<sup>101</sup>

The two courts’ declarations that their respective states are “neutral” say more than what the two states actually enforce.

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the procedure of constitutional amendments.”); *id.* at art. 8 (“All religious denominations are equally free before the law. Denominations other than Catholicism have the right to self-organisation according to their own statutes, provided these do not conflict with Italian law. Their relations with the State are regulated by law, based on agreements with their respective representatives.”); *id.* at art. 19 (“Anyone is entitled to freely profess their religious belief in any form, individually or with others, and to promote them and celebrate rites in public or in private, provided they are not offensive to public morality.”).

95. C.E., B.O.E. n. 311, Dec. 29, 1978 (Spain) (“Freedom of ideology, religion and worship is guaranteed, to individuals and communities with no other restriction on their expression than may be necessary to maintain public order as protected by law. No one may be compelled to make statements regarding his or her ideology, religion or beliefs. No religion shall have a state character. The public authorities shall take into account the religious beliefs of Spanish society and shall consequently maintain appropriate cooperation relations with the Catholic Church and other confessions.”).

96. Alessandro Ferrari, *Laïcité et multiculturalisme à l’italienne*, 141 ARCHIVES DE SCIENCES SOCIALES DES RELIGIONS 133, 133 (2008).

97. Corte cost., 12 aprile 1989, n. 203, Racc. uff. Corte cost.

98. Agreements made on February 18 and November 15, 1984 and executed with law no. 121 and 206 in 1985. Legge 25 marzo 1985, n. 121 (It.); Legge 20 maggio 1985, n. 206 (It.). See the additional protocol to the February 18, 1984 Agreement, *available at* [http://www.governo.it/Presidenza/USRI/confessioni/accordo\\_indice.html#3](http://www.governo.it/Presidenza/USRI/confessioni/accordo_indice.html#3).

99. S.T.C. 005, 1981 (B.J.C., No. 5) (Spain), *available at* <http://www.tribunalconstitucional.es/es/jurisprudencia/paginas/Sentencia.aspx?cod=16631>.

100. Carmen Garcimartín Montero, *La laicidad en las Cortes Constituyentes de 1978*, 36 IUS CANONICUM, 539, 558 (1996).

101. M.A. Roca, *La neutralidad del Estado: fundamento doctrinal y actual delimitación en la jurisprudencia*, IL DIRITTO ECCLESIASTICO, 405–29 (1997); B. Randazzo, *La Corte «apre» al giudizio di uguaglianza tra confessioni religiose?*, GIURISPRUDENZA COSTITUZIONALE, 1843–67 (1998).

Neutrality is hardly descriptive of the constitutional balance between religious liberty, equality, and state impartiality that they have offered. Decisions and policies are not offered a clear guidance through this concept. Again, the display of the crucifix is a good example. In Italy, in 2000 the Italian Supreme Court (“*Corte di Cassazione*”) found the display of the crucifix in ballot rooms to be inconsistent with the state’s duty of neutrality;<sup>102</sup> it did not order its removal only because it is not among its powers to issue such an order. In 2006, the Supreme Administrative Court (“*Consiglio di Stato*”), deciding the case that later brought the *Lautsi* controversy before the ECtHR, affirmed that it is reasonable to hang the crucifix in classrooms because it is not only consistent with the principle of neutrality, but it also represents the historical root of neutrality itself.<sup>103</sup> In this latter Court opinion, Christian culture, with its command of giving what is God’s to God and what is Caesar’s to Caesar, provided the seeds for what would later develop as the culture of religious freedom and of separation between church and state.<sup>104</sup>

In Spain, the display of the crucifix in public schools was discussed twice. The first decision found the display in violation of the principle of state neutrality;<sup>105</sup> the appellate decision struck a different balance between religious freedom, neutrality and the display of the crucifix. It commanded that the display of the crucifix accommodate the students’ needs and, more concretely, the actual existence of opponents of such display.<sup>106</sup> Classroom crucifixes needed to be removed only upon request of the students (or of their parents) who were actually attending classes in the relevant classrooms.<sup>107</sup> On the contrary, crucifixes displayed in common rooms were under the sight of the general public and therefore had to be removed entirely.<sup>108</sup>

These short examples of states that have made no textual reference to neutrality in their constitutions but that have endorsed it

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102. Cass., IV sez. Penale (IV Penal Law session), 1 gennaio 2000, n. 439, *available at* [http://web.unife.it/convegni/amicuscuriae/index\\_file/cassazione439.pdf](http://web.unife.it/convegni/amicuscuriae/index_file/cassazione439.pdf).

103. Cons. Stato, sez. VI, 13 febbraio 2006, n. 556, Giur. it.

104. *Id.*

105. S. Juz. Cont. Adm., 2008 (J.T.S., No. 228) (Spain).

106. S.T.S.J., Dec. 14, 2009 (J.T.S.) (Spain).

107. Holding no. 1 of the judgment.

108. Holding no. 2 of the judgment.

in the decisions of their judges are of some interest. The circulation of neutrality proves the success of this concept; but its use is ambiguous. It is not clear why and how the Italian and the Spanish constitutional tribunals resolved to adopt this principle, notwithstanding its roots, which are hostile to religion. Nor has this principle been useful in deciding cases as is evident from the fact that neutrality has led to opposing decisions about the legitimacy of the display of the crucifix even within the same state. Its fortune probably contributed to the circulation of the concept of neutrality, but affected the clarity of its meaning. It has been endorsed and utilized by legal systems with different attitudes towards the relationship between church and state, religious freedom and law and religion, to the extent that its implications have become hardly predictable.

Therefore, the success of the principle of neutrality needs clarification. The most needed clarification regards the reason that has led legal doctrine and courts to use it, notwithstanding all the criticism that such use has attracted. After all, the use of neutrality has been rightly criticized for being either elusive—think about *Lautsi II*<sup>109</sup>—or for being too rigid and close to French and Turkish secularism—think about *Lautsi I*.<sup>110</sup> This leads us to the core of this article: the reasons behind the Europe-wide fortune of neutrality.

## II. WHY EUROPEAN LEGAL THOUGHT IS TRYING TO ENFORCE NEUTRALITY: THE QUEST FOR A EUROPEAN IDENTITY

The reason for the successful expansion of the principle of neutrality cannot be found in the ECtHR as well as domestic Courts' decisions. The decisions actually *use* neutrality but do not explain *why* they do so.

It seems that neutrality keeps popping up in the case law of the ECtHR, in some domestic courts' decisions, and in the debate about the historical and philosophical roots of Europe because the European legal culture is in search of a *founding myth* for its public philosophy and for its identity.<sup>111</sup> The debate about the Preamble of the Constitution of Europe ended in a failure—the Preamble was

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109. ECtHR Grand Chamber, *supra* note 19, at 229.

110. Zoe Luca, *Religious Symbols in Public Schools and the (Lack of) Margin of Appreciation*, 17 MAASTRICHT J. EUR. & COMP. L. 98 (2010).

111. R. Palomino, *supra* note 20, at 658.

largely emptied to make it palatable to different states' cultures, and the Constitution's project was finally supplanted with a more moderate Treaty. But the debate is still there: what constitute a European identity?<sup>112</sup> What is the European model for the relationship between religion, state, and human rights?<sup>113</sup>

This is a subject that has been raised by influential thinkers such as Jürgen Habermas, who has denounced the critical situation of a European culture that would have abdicated its great common ideals for a moderate, mild governance of economic and social problems.<sup>114</sup> Thinkers like Habermas believe that only a daring, philosophically committed European legal culture would be able to address the lack of great ideals and respond to the urgent need for a European "soul," which would restore the solidarity amongst Europeans. And scholars such as John Milbank believe that only a pervasive Christian culture would be responsive to these needs and they therefore argue against the project of neutrality.<sup>115</sup>

As fielded by Habermas, the problem of a shared understanding of a collective identity in the field of the relationship between church and state in Europe must be considered as merely a part of a huge debate about the role of European supranational institutions,<sup>116</sup> on their ultimate goals, and on their effectiveness in enforcing a shared human rights' policy in Europe.<sup>117</sup> The identity of Europe is problematic not just regarding the relationship between religion and human rights, but also in the field of human rights itself. The recourse to neutrality must be understood as a part of a reliable response to the quest for European *identity* when it comes to the relationship between law, religion, human rights, and democracy broadly considered.

This quest for an identity is not only a European issue. It can

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112. J. Casanova, *supra* note 69, at 1.

113. Jean-Paul Willaime, *La Sécularisation. Une Exception Européenne? Retour sur un concept et sa discussion en sociologie des religions*, 47 REVUE FRANÇAISE DE SOCIOLOGIE, 755, 765 (2006).

114. For instance, see Jürgen Habermas, *Bringing the Integration of Citizens into Line with the Integration of States*, 18 EURO. L.J. 485, 486 (2012).

115. John Milbank, *Shari'a and the True Basis of Group Rights*, in SHARI'A IN THE WEST 138 (Rex Ahdar & Nicholas Aroney eds., 2010); Remy, *supra* note 87, at 378.

116. Jürgen Habermas, *Democracy, Solidarity and the European Crisis*, available at <http://www.kuleuven.be/communicatie/evenementen/evenementen/jurgen-habermas/democracy-solidarity-and-the-european-crisis> (last visited Nov. 9, 2013).

117. BEITZ, *supra* note 64, at 14.

also be found at a state level. States such as Italy or Spain have left established-church regimes behind. It is not by chance that both Italy and Spain introduced what they later called neutrality into their constitutional framework only after the end of the previous established or quasi-established religious regimes.<sup>118</sup> The special relationship they had with Catholicism was a powerful tool of legitimization.<sup>119</sup> After this special relationship was over, Italy and Spain started looking for another identity: something that would describe their contemporary constitutionalism with regard to religious liberty and other human rights. They thought they found it in the myth of neutrality.

This exploration so far leads to the preliminary conclusion that neutrality must be understood as an attempt to respond to the quest for a European “soul;” this is why it has been widely and increasingly utilized, even though the state and supranational constitutional framework in Europe would be too poor and even contradictory to ground its use.

Nonetheless, neutrality is *not* the right solution for this quest. Three reasons that have been explored lie behind this conclusion: (a) neutrality is not referenced in the text of the European Convention of Human Rights, in the EU *Charter of Fundamental Rights*, or in many state constitutions; (b) neutrality does not fit easily with the established-church regimes that populate Europe; and (c) the legal implications of neutrality are ambiguous. Therefore, I briefly explore an alternative solution here.

### III. THE SURVIVAL OF THE POST-WESTPHALIAN EUROPE AND THE INSUFFICIENCY OF RELIGIOUS PLURALISM

Had European legal culture looked for a substitute of neutrality, would they have found a real alternative in religious pluralism? After all, neutrality has oftentimes accompanied “religious pluralism,”<sup>120</sup> at least in the ECtHR’s case law, as seen above. The contemporary European state should be serving and protecting religious pluralism

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118. Gustavo Suárez Pertierra, *Laicidad y cooperación como bases del modelo español: un intento de interpretación integral (y una nueva plataforma de consenso)*, 92 REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 41, 42–43 (2011).

119. R. Robertson, *Globalization, Politics, and Religion*, in THE CHANGING FACE OF RELIGION 19 (James A. Beckford & Thomas Luckmann eds., 1989).

120. See Silvio Ferrari, *I simboli religiosi nello spazio pubblico*, 2012 QUADERNI DI DIRITTO E POLITICA ECCLESIASTICA 317, 327.



under article 9 of the European Convention, notwithstanding the fact that the wording of art. No. 9 does not mention “religious pluralism.”

The ECtHR is not alone in fostering this idea of religious pluralism as the environment in which European states should find their place. A wide range of constitutional law scholars,<sup>121</sup> political theorists, and even protagonists of the contemporary religious thinking<sup>122</sup> have also supported reasonably similar ideas of a “plural society,” in which public institutions are expected to preserve and cherish religious pluralism as an important asset for European and national societies.<sup>123</sup> A pluralistic society, which understands religious heterogeneity as a positive aspect of contemporary European democracies, has therefore been proposed as a model for contemporary European legal systems. Different voices have been speaking along these lines.

Nonetheless, two reasons play against this identifying power of religious pluralism as a description of contemporary Europe as well as a legal concept that should be enforced at the state level. The first reason is that states are not religiously plural. Many of them are mainly composed of a vast religious majority, which is surrounded by a number of other small religions—increasingly so because of immigration—and by an increasing number of secularized people, who do not embrace any faith.<sup>124</sup> More generally, “[t]hroughout Europe, historically dominant churches, even those churches that have been officially disestablished, continue to exert disproportionate social influence.”<sup>125</sup> Actually, if one considers the majoritarian religions that populate Europe, they are still distributed along Westphalia Peace lines. Religious pluralism is not the veritable description of the current status of Europe; the usage of this expression within the ECtHR’s jurisprudence can be understood instead as a call on European citizens and institutions, to make them

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121. Gustavo Zagrebelsky, *Stato e Chiesa. Cittadini e cattolici*, 2007 DIRITTO PUBBLICO 697.

122. ANGELO SCOLA, *UNA NUOVA LAICITÀ. TEMI PER UNA SOCIETÀ PLURALE* (Marsilio, Padova, 2007).

123. Among many, see *Kuznetsov v. Russia*, App. No. 184/02 Eur. Ct. H.R. ¶ 54 (2007).

124. J. Casanova, *supra* note 69, at 10.

125. Mark L. Movsesian, *Crosses and Culture: State-Sponsored Religious Displays in the US and Europe*, 1 OXFORD J.L. AND RELIGION 338 (2012).

committed to protect religious freedom and to welcome the proliferation of religious minorities.<sup>126</sup>

Religious pluralism is not well received by some states also for another reason. In some cases, religious identities are still understood as European states' foundations. Even the recent dissolution of Yugoslavia has taken place along religious lines.<sup>127</sup> Cyprus is still divided into two, both ethnically and religiously.<sup>128</sup> Northern Ireland's political conflict coupled the Protestant-Catholic conflict until recently.<sup>129</sup> religious pluralism can be seen as problematic in these environments, since it can affect state identity and even regional stability.

The German domestic struggle about the crucifix confirms that, where there is no religious homogeneity, religion becomes a matter of debate even within well-settled European states,<sup>130</sup> whose survival and social equilibrium is not at stake. The presence of the crucifix in classrooms has recently been accommodated along religious lines. The southern, mostly Catholic, Bayer has traditionally allowed the display of the symbol. The predominantly Protestant regions do not

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126. After the Peace of Westphalia (1648), "[f]or the next three hundred years, European societies continued exporting all their religious minorities overseas, while the confessional territorial boundaries between Catholic and Protestant and between Lutheran and Calvinist remained basically frozen until the drastic secularization of post-World War II European societies made those confessional boundaries seemingly irrelevant.

In fact, without taking into account this long historical pattern of confessionalization of states, peoples and territories, it is not possible to understand the difficulties which every continental European state has, irrespective of the fact whether they have maintained formal establishment or are constitutionally secular, and the difficulties which every European society has, the most secular as well as the most religious ones, in accommodating religious diversity, and particularly in incorporating immigrant religions.<sup>16</sup> It is true that in the last two hundred years all European states underwent some process of secularization and today all of them are formally and/or substantively secular. But the pattern of caesaro-papist regulation and control of religion established by the early modern confessional absolutist state, - by Catholic, Anglican, Lutheran, Calvinist, and Orthodox alike - has been maintained, basically unchallenged, until the present:" José Casanova, *Public Religion Revisited*, in RELIGION: BEYOND THE CONCEPT (Hent de Vries ed., 2008), available at [http://dev.wcfia.harvard.edu/sites/default/files/religionseminar\\_jcasanova.pdf](http://dev.wcfia.harvard.edu/sites/default/files/religionseminar_jcasanova.pdf) (last visited Nov. 11, 2013).

127. VJEKOSLAV PERICA, BALKAN IDOLS. RELIGION AND NATIONALISM IN YUGOSLAV STATES 3 (2002); Grace Davie, RELIGION IN MODERN EUROPE. A MEMORY MUTATES 4 (2002).

128. ACHILLES C. EMILIANIDES, RELIGION AND LAW IN CYPRUS 60 (2011).

129. TONY FAHEY, BERNADETTE C. HAYES, R & RICHARD SINNOTT, CONFLICT AND CONSENSUS: A STUDY OF VALUES AND ATTITUDES IN THE REPUBLIC OF IRELAND AND NORTHERN IRELAND 75 (2005).

130. J. Casanova, *supra* note 69, at 2.

permit such display.<sup>131</sup> And the Federal Constitutional Court, when asked to address this topic, took what has been defined as a “Protestant” approach;<sup>132</sup> namely, the Court affirmed state neutrality and added that the display of the crucifix in public places would profane the religious meaning of the symbol<sup>133</sup> (interestingly, this argument has been used in Protestant environments, whereas it is quite uncommon within Catholic culture).<sup>134</sup> In the aftermath of the Federal Court’s decision, Bayer has accommodated the presence of the crucifix, but substantially kept it. The German legal culture is therefore somewhat divided along religious lines.

The real historical alternative to a homogeneous religious environment has been to get away from religion: namely, to enforce a rigid separation—or even a control—of the state towards religions.<sup>135</sup> This is obviously the case in France, but it is also the case in Turkey, whose republic was born out of internal conflicts within different strands of Islamic political doctrine.<sup>136</sup>

But the exportation of the model of neutrality, from secularist countries like France to other European States and to all of Europe—through European Union law and the ECtHR’s jurisprudence—has proven to be delusive for several reasons. It does not respect the phrasing of the European Convention, nor does it mirror the constitutional identity of several European states. And even genuine supporters of neutrality probably would not recognize *Lautsi II* as a decision that respects this principle.

Neutrality, as a distinct secularist political and legal identity, can

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131. *Lautsi v. Italy*, App. No. 30814/06 Eur. Ct. H.R. ¶ 28 (2011) (“In Germany the Federal Constitutional Court has ruled that a similar Bavarian ordinance was contrary to the principle of the state’s neutrality and difficult to reconcile with the freedom of religion of children who were not Catholics (16 May 1995; BVerfGE 93, 1). The Bavarian parliament then issued a new ordinance maintaining the previous measure, but enabling parents to cite their religious or secular convictions in challenging the presence of crucifixes in the classrooms attended by their children and introducing a mechanism whereby, if necessary, a compromise or a personalised solution could be reached.”).

132. Francesco Patruno, *Riflessioni sul valore delle pronunce straniere in tema di esposizione del crocifisso*, FORUM DI QUADERNI COSTITUZIONALI (Nov. 30, 2003), available at [www.forumcostituzionale.it](http://www.forumcostituzionale.it).

133. Francesco Patruno, *Crocifisso, giurisprudenza straniera e laicità*, available at [www.olir.it](http://www.olir.it) (last visited Oct. 2, 2013).

134. Paolo Cavana, *La questione del crocifisso in Italia*, available at [www.olir.it](http://www.olir.it) (last visited Oct. 2, 2013).

135. BAUBÉROT & MILOT, *supra* note 3, at 70.

136. AN-NA’IM, *supra* note 62 at 199.

play this role in countries that have clearly embraced it, not in those that are not familiar with it. Such countries would not accept it for themselves or at a continental level.

#### IV. CONCLUSION

It is not a given that an alternative to neutrality is really necessary. The shaping of a shared European identity does not need to encompass all the aspects that characterize European states, including religion and religious freedom. After all, even the EU did not want to replicate a state at a bigger level, imposing a single standardized model of statehood to all the state parties.<sup>137</sup> The EU experiment strived to create a new level of government, whose components do not necessarily parallel those of states.

A fresh look at the concept of religious pluralism can provide a framework for the European quest for identity in the religious field. Religious pluralism can play this role, insofar it is not understood as applicable at the state level. Single states could find religious pluralism a concept hard to handle.

Religious pluralism presupposes heterogeneity and therefore cannot play the integrating role that each single religion did in shaping modern European states. But it can still have a role in shaping the European identity, precisely because the identity of Europe is not to be compared to the states' identities.<sup>138</sup> Europe is new in this respect. EU and the European Council's institutions were born out of peoples that did not want to annihilate each other in the name of a specific identity or national sovereignty.<sup>139</sup> They wanted to be inclusive and therefore avoided cutting off each other's identities. Europe needs a new understanding of its relationship with religion because it needs an understanding of human rights that is

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137. Armin von Bogdandy, *Doctrine of Principles*, Jean Monnet Working Paper 9, 2003, available at <http://www.jeanmonnetprogram.org/archive/papers/03/030901-01.pdf> (last visited Oct. 14, 2014).

138. *Democracy*, *supra* note 116, at 488 (“Neither can this cautious posture be justified with the familiar arguments that all integration efforts are ultimately condemned to failure by the lack of a European people or the lack of a European public. Concepts such as nation or *Volk* evoke images of homogeneous macrosubjects. [. . .] What we have to recto with in Europe today are not imaginary peoples but concrete nation-states, linguistic diversity and national publics.”).

139. Charles F. Sabel & Oliver Gerstenberg, *Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order*, 16 *EUR. L.J.* 511, 512 (2010).

inclusive of different human rights' national standards and "does not rest on mutual agreement on any single, comprehensive moral doctrine embracing ideas of human dignity, individuality or the like"<sup>140</sup> that can be easier found on a state scale. Religious pluralism could be part of the fabric of the European identity that European legal culture is looking for.<sup>141</sup>

If religious pluralism is taken seriously by the European legal culture at the Continental level, then states can also learn from it.<sup>142</sup> The states were born out of religious crucibles, but are facing growing secularization and immigration.<sup>143</sup> Perhaps they could prospectively look at Europe to draw inspiration to adjust their identity to new demands of inclusion coming from cultures they are not familiar with. If Europe is able to take religious pluralism on as part of its own identity, then perhaps states can learn and imitate it voluntarily. If not, Europe (both the EU and the ECtHR) will probably enforce rights and political agendas based on a rather selective neutrality, which does not really incorporate "religious pluralism," but which leads to the "refusal to have religion stand as the symbol of national identity" (an identity that defines many European countries),<sup>144</sup> and which leans towards a "secularized religion of humanity"<sup>145</sup> that tends to replace religious values with other abstract values.<sup>146</sup>

Since there is no agreement on the meaning of "secularism" and on its connection with neutrality, and since the use of neutrality is associated with a political ideal that characterizes only some of the European states,<sup>147</sup> enforcing neutrality through EU and the ECtHR would not be conducive to the implementation of a shared European identity. Rather, enforcing neutrality would be detrimental.

The same risk can be run if the European legal culture pushes for

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140. *Id.* at 513.

141. Peter G. Danchin, *Islam in the Secular Nomos of the European Court of Human Rights*, 32 MICH. J. INT'L L. 663, 745 (2011).

142. PETER HÄBERLE, COSTITUZIONE E IDENTITÀ CULTURALE. TRA EUROPA E STATI NAZIONALI 13 (2006) (reflects upon a pluralism of identities that would be characteristic both of Europe and of the modern constitutional states).

143. Casanova, *supra* note 69, at 6.

144. András Sajó, *Preliminaries to a Concept of Constitutional Secularism*, 6 3–4, INT'L J. CONST. L. 605, 629 (2008).

145. *Democracy*, *supra* note 116.

146. BAUBÉROT & MILOT, *supra* note 2, at 12.

147. J. Remy, *supra* note 88, at 367.

the enforcement of religious pluralism at a state level: religious pluralism is not a given for many European states, and can even jeopardize their stability, if it is imposed on them. If the EU and the ECtHR impose religious pluralism *on themselves*, and understand that the European quest for identity is inherently pluralistic and does not coincide with embracing a single church and state model, then they can both respect state identity and itself in a newer, more respectful, fashion. They can even inspire states' evolution, delicately pushing them towards the implementation of "religious pluralism." After all, the fortune of EU rests on "a political culture which internalizes, especially public authorities, obedience to the law rather than to expediency," on a rather voluntary basis, not on "a gun or coercion."<sup>148</sup> If this has happened so far with regards to the shaping of EU, it could work also with "religious pluralism."

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148. Weiler, *supra* note 65, at 154.

