

In Defense of State Neutrality

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Summary

*Most discussions of neutrality focus on the liberal tradition as it has developed in the USA. In this article we defend an approach that finds its inspiration in the Dutch tradition. In one respect, our theory of neutrality is more restricted than the American liberal positions. Three categories of the good may be distinguished: goods, the good life, and the good society. In a liberal political theory the state cannot be neutral regarding conceptions of goods or regarding conceptions of the good society, but it should be neutral regarding conceptions of the good life. This form of neutrality is, however, only a derivative *prima facie* norm. In a second respect, our theory of neutrality is broader than the usual liberal positions. Neutrality may be seen as a standard not only for the input of the procedure, but for all aspects of the political process.*

1. Introduction

Until recently, one of the core elements of modern liberalism seemed to be the neutrality thesis.¹ It is usually defined as the thesis that the state should be neutral toward different conceptions of the good. It is not difficult to see why this thesis is cherished by liberals: it guarantees a broad range of freedom against state intervention, and by excluding the most controversial ideas from the discussion, it facilitates the construction of a common basis for politics and law in a pluralist society.

In the debate between liberals and communitarians the neutrality thesis has become one of the central issues. Philip Selznick² even called it a "major obstacle to the reconciliation of liberal and communitarian perspectives". Currently, the neutrality debate seems to be in deadlock. On the one hand, communitarians have convincingly argued that a fully neutral state is not only impossible in our type of society, but is highly undesirable as well. On the other hand, they have not been able to go beyond this critique and present an attractive alternative for modern pluralist societies, which protects minorities as effectively as liberal neutrality would do.

This deadlock is not only problematic from a theoretical point of view. Some form of neutrality is, in our opinion, essential for the viability of democracy in pluralist societies. In modern history we may find various pluralist societies in which neutrality concerning religious opinions seems to be a condition for a peaceful co-existence of many groups. The

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1. On the link between liberalism and neutrality, see Goodin and Reeve 1989: 4-6. Though neutrality as a liberal idea may be found in older critiques of liberalism (Barry 1965: 66 and 75), Nozick 1974 seems the first proponent of liberalism to use it. See Waldron 1989: 62 and Musschenga 1992: 241.

2. Selznick 1989: 509.

United States of America are an example of such a society in which neutrality is combined with a rather restricted role of the state. Other countries, e.g., the Netherlands, know a different model of neutrality with a more active, interventionist role of the state.³ Noticing how important some form of neutrality has been in these pluralist societies, we should hope that a revised neutrality thesis can be construed, that can be defended against the communitarian critiques. This revision is the aim of this paper. We should add that our focus is on the state: the central question is whether neutrality is part of the normative political theory for state action. Whether this has any implications for moral norms regarding individual action is beyond the scope of this article. The problem of how political theory may deal with the growing moral concern towards animals seems a good test case, because here we meet the limits of traditional individualism. Therefore we will throughout this article use problems in the field of animal ethics to illustrate and test our approach to neutrality.

We will suggest that the form of neutrality as it has been defended by leading liberals like Rawls and Dworkin should both be restricted and extended. Our first thesis is that neutrality should be seen as a derivative *prima facie* norm which only involves a neutrality to conceptions of the good life, but not to conceptions of the good society or to conceptions of the good. The second thesis is that neutrality should not be regarded as procedural neutrality, but that it should both apply to outcome and input, in other words to all aspects of the political process. The first thesis may be partly implicit in some (communitarian-) liberal theories, but a strong normative argument for it is only possible if we combine it with the second thesis.

2. *Neutrality in the Netherlands*

Before addressing the abstract theoretical questions it may be useful to sketch the role of neutrality in the Netherlands, as this is not only the background from which we are writing, but also forms in many respects the model for the kind of neutrality we will defend. Dutch society has been strongly pluralist since centuries. There is no dominant church and civil society used to be structured on the basis of blocs or 'pillars', coherently organized groups with a common religious or political identity.⁴ The four major blocs were the Calvinist Protestants, the Roman Catholics, the liberals and the socialists. (Sometimes the socialists and liberals are considered one bloc; within the blocs subblocs may also be distinguished.) All dimensions of social and political life were organized within these blocs: a catholic would join the catholic football club, enter a catholic school, vote for a catholic party and go to catholic hospitals. As each of these blocs was a minority, national politics could only be based on compromise and on overlapping consensus, combined with a strong sense of Erasmian tolerance. State neutrality was necessary to establish a system of peaceful co-operation of those antagonistic religious and political groups. Whereas ethical outlooks were thus central to political and social organization, paradoxically the resulting policies at a national political level were quite pragmatic and neutral.

The final result may have been quite neutral, but public debate was not. Just like in other countries, ethical subjects have been rallying issues for political parties. Euthanasia, abortion,

3. Outside the Anglo-American world, the neutrality debate has received special attention in the Netherlands and Israel. Both countries have tried to embody a distinct type of neutrality in a society in which religion is a dominant factor and in which the state is very active.

4. For a description see Lijphart 1968. Since the sixties, this pillarized model has largely faded away.

equal rights for gays and lesbians and non-married couples – these and other socio-ethical issues were themes on which the Christian-democratic and right-wing Protestant parties mobilized their electorate. It was an important factor of identification for those parties. This usually prevented untidy compromise. Only after long periods of often intense public discussions the political climate would be ripe for decisions. But if in the end compromise (or defeat) proved unavoidable, the results were usually quite liberal and pragmatic.

Dutch society has therefore often known lively public debates on ethical issues. Since every group knows it can only reach its goals through consensus or compromise with other groups, these debates have not been as polarized as those in the USA or Germany. Violent actions from anti-abortionists or animal liberationists would not be very successful in Dutch culture. Although animal welfare groups may be quite radical in their rhetoric, they are at the same time on speaking terms with the government and with the animal researchers.

Active neutrality has been an important principle for integration of new minority groups in Dutch society and for adaptation to new exigencies. Thus the youth movement of the sixties, the gay and lesbian movement, and the environmentalist movement were not merely tolerated but were (at least partly) incorporated in society. To make the picture less idyllic, we should add that the model has not been very successful in integrating immigrants since the seventies, partly because they do not have a strong self-organization and because of their low social status.

The Dutch type of neutrality differs in various respects from the type of neutrality that dominates American theoretical discussions. First, neutrality often does not imply state abstinence, but active support. The state is highly active in the promotion of the good; it subsidizes and organizes culture, sports, health care, education, television and radio broadcasts, and even chaplains in the army and in state hospitals. The state financially supports religious and other groups in organizing education, health care, or television broadcasts, on their own terms. The state is neutral in the sense that each group gets state support in proportion to its popular support. Thus state action is not oriented towards one conception of the good, nor to a minimal conception, but to a plurality of conflicting conceptions. Second, neutrality is primarily used in political debate as a negative argument to criticize existing practices and not as a positive foundation for political theory. The Humanist movement has effectively argued that the distribution of government-funded army chaplains among the churches was non-neutral, because for the Humanists there were no equivalents. The reaction to this critique has not been to abolish all subsidies, but to finance a number of Humanist counselors in the army. Third, neutrality functions as a norm both regarding the procedure and the outcome. The democratic system of proportional representation matches neutrality of procedure, the distribution of army chaplains and counselors is an example of outcome neutrality.⁵

This type of neutrality may at first sight seem highly incoherent or perhaps not neutral at all. The suspicion of incoherence may be reinforced by the fact that the Dutch system is not so much the result of discussions on fundamental theory, let alone of constitutional principles, but rather of a long history of social compromises. Nevertheless we think that a coherent normative political theory can be construed in which something resembling this outline of the Dutch system may be defended. In the rest of this article we will present such a position that fully preserves the advantages of liberal neutrality but is not blind to the core of truth in the communitarian critique. We hope that this sketch of the Dutch system may be an indication

5. Of course, this sketch of Dutch society is highly simplified and idealized. But the sketch suffices to present a model of a different type of neutrality from that which dominates the American discussion.

that such a position is not only theoretically defensible, but also practically feasible.

3. Three categories of the good

A major flaw in modern liberal theory results from the fact that the good is usually regarded as a single concept or as a group of concepts that are reducible to one basic concept.⁶ On close analysis, however, the good is not such a one-dimensional concept. Various states of affairs or institutions may be called good and we should not assume that they can all be reduced to some common scale or to one basic concept.⁷ We can distinguish between a good society, a good life, and a good.⁸ This distinction between various categories of the good is one of utmost importance to the debate on neutrality.

1. *Conceptions of the good* in a narrow sense, or as we will call it to avoid confusion, *conceptions of goods*, refer to valuable things, experiences, or states of affairs, such as happiness, autonomy, or diversity of the cultural and natural environment. The philosophical debate of the last decades has shown that we need a rich theory of goods. Some of these goods are simple, like most of Rawls' primary social goods; others are very complex goods like the cultural structure of a society or the integrity of the moral life of a community.⁹

We shall not try here to give a complete definition or an exhaustive enumeration of goods. It is sufficient for our purposes to notice that goods are controversial in two ways. Firstly, it is controversial what exactly should be counted as a good, and, secondly, it is controversial whether or not there is a special subcategory of goods to which the liberal state should be neutral.

2. *Conceptions of the good life* refer to valuable ways of life or life-plans; they focus on a life seen as a whole rather than on a life as a sum of separate actions or aspects.¹⁰ This is a matter of degree; it is not necessary that one should have a complete plan for the rest of her life, but one should have a somehow coherent conception of the self as an integral whole and not just as a loose bundle of actions and experiences. The person who is leading this life can be seen as (part) author of it,¹¹ which gives it coherence and integrity beyond the set of goods that it includes. A conception of the good life will therefore have consequences for a conception of goods, and vice versa, but neither of them is completely reducible to the other. Given the variety and plurality of goods, there are many different good ways to combine some of them in a life-plan.¹²

6. The latter may either be connected to a formal analysis of the good, like Rawls' analysis in terms of 'something which it is rational to want', or to a reductionist analysis in which all goods are ultimately reduced to goods for individuals.

7. "...statements about the good of an organization are not equivalent to statements about the good of their members. Even to suppose that they must be connected more indirectly would be to make the proposition that organizations exist for the good of their members into an analytical truth rather than an exhortation." (Barry 1965: 189)

8. There are more categories to which the epitheton "good" applies than these three, even if we exclude non-moral categories like 'a good car'. We may call various institutions good: a good state, a good family, a good school. In this article, to avoid unnecessary elaborate analysis, we will simplify this complexity by assuming that the concept of the good state is part of the concept of the good society, and we will not deal with other institutions.

9. Kymlicka 1989a; Postema 1992: 163.

10. Cf. Selznick 1992: 381.

11. Raz 1986: 155.

12. Raz 1986: 395-399.

A conception of a good life therefore is more than the sum of the goods that inhere in this life; it is the life of a (partly) autonomous person.¹³ For this reason an animal cannot have a good life in the relevant sense; an animal lacks the necessary consciousness for seeing its life as a whole and autonomously planning it as a whole. The life of an animal may therefore be considered as a loose set of goods and evils. These goods and evils are politically and morally relevant, but not because they are part of a good or evil life.

3. *Conceptions of the good society* refer to valuable ways of arranging a society, to visions of the society that we should try to realize. This includes principles of justice that regulate the conditions under which people are permitted to live the lives they want to live and to pursue the goods they want to pursue. A good society is also a just society, but though justice may be the primary virtue of social institutions it is not the only one. A conception of the good society also includes ideas on the value of art and of nature. Even in a robust conception of justice there are still important collective ideals that are not part of the concept of justice.¹⁴ Conceptions of the good society also deal with the question whether the state has a responsibility for the promotion of certain goods or for the promotion of certain conceptions of the good life. A conception of the good society has to make clear which goods the state seeks to promote and whether it considers suffering of animals an evil.

Like conceptions of the good life, conceptions of the good society cannot be reduced to the goods that inhere in them or to the good lives that they will promote. A society is more than the sum of its members. Of course, one might hold, as a thesis of political theory, that the good society is that society which produces the greatest amount of goods or the greatest amount of good lives. But this is a normative thesis for which convincing arguments should be given. Once we accept that there might be public or collective goods and goods for animals, this extremely individualistic conception of the good society seems difficult to accept.

This is an analytical distinction which does not presuppose that these categories of the good are separate. They clearly are not. Because man is a social being, a conception of the good life necessarily includes elements that are also part of or at least have implications for conceptions of the good society, and vice versa. If my conception of the good life includes living as a hunter I can only realize it if my society permits hunting. Conversely, a conception of a good society that builds upon active participation by citizens in the political process is only feasible if – at least for most members – this active participation is worthwhile.

The interdependence of the various categories of the good doesn't make the distinctions useless or superfluous. Individuals and society are interdependent, but they are not identical. An ideal of the good society is usually compatible with a broad variety of conceptions of the good life, even though it may exclude some or make them more difficult to pursue. The Rawlsian conception of basic goods is compatible with a broad variety of conceptions of the good society or of the good life. Even a much richer conception of goods, which includes goods like the value of art and nature, and which considers the suffering of animals an evil, may be compatible with various conceptions of the good life and conceptions of the good society, if only because goods may be combined in many ways to form a good life or a good society. There is some interdependence, but no identity, nor can all these different categories

13. Cf. Dworkin 1989: 486 for a defense of a 'constitutive' view of the value of life as compared with an 'additive' view.

14. Selznick 1992: 428-434.

of the good be reduced to each other or to a common scale.¹⁵

4. *Neutrality regarding the three categories of the good*

We can now turn to the normative question of political theory whether the state should be neutral regarding the different categories of the good.

1. Clearly, the state can not be neutral on conceptions of the good society. It can not be neutral towards competing principles of justice; it has to take a stance on questions like whether it will use a Rawlsian, a utilitarian, or some other standard of justice. What standard is chosen will partly determine the kind of society in which we live. For the same reason, the state can not and should not be neutral towards the ideal of a democratic society; a democratic state may in its educational programs try to foster democratic attitudes in its citizens. These forms of non-neutrality can still be based upon a robust interpretation of principles of the right.

More interesting is the fact that the state cannot be neutral towards those ideas that are not part of principles of justice. Since the Brundtland-report, the ideal of the sustainable society has become commonplace in at least the rhetoric of political argument. The state cannot evade the problem of how to substantiate this ideal in its policies and must decide whether, and if so, in what ways it should take account of the effects its policies have on the possibility to realize this ideal. Even if a state were not to endorse the ideal, it still takes a (negative) stance on it. The same holds for other ideals or elements of the good society, like the cultural structure or a healthy environment. Through its actions, the state directly intervenes in society. Putting taxes on either income or gasoline will effectively influence the society we live in; the same holds for creating tax-exemptions for contributions to religious or cultural organizations, or for the costs of child care. Decisions on the tax system therefore should also take in account these effects, which means that we need a theory of the good society to evaluate the effects.

Perhaps this critique of neutrality seems too easy. Maybe we should say that, in the light of existing controversies on some ideals, exclusion of these ideals (or disregard of the effects of policies on these ideals) is the natural answer; maybe this natural answer is what we should call neutrality. This appeal to a 'natural' neutral baseline must nevertheless be rejected, simply because to the group whose ideals are excluded there is nothing natural about the baseline.¹⁶ An example might suffice. Two neighbors jointly own a beautiful small lake that is slowly deteriorating because there is no sewage cleaning system. One of them is willing to pay half the price of the system through taxes; the other is not. Is there any 'natural' neutral solution? Does it make a difference whether the neighbor argues his position with a reference to his personal enjoyment of the lake, to the inherent or intrinsic value of the lake, to a principle of intergenerational justice, or, finally, to the fact that the fish are suffering and dying? There is no neutral baseline here, no Archimedean point, from which to judge that

15. The distinction between the good life and the good society should not be confused with the famous distinction between the good and the right; it rather intersects both. A good society is more than a just society, though the latter is a constitutive element of it; a good life is more than a just life. It shouldn't be confused with the distinction between the public and the private either; it intersects here as well. Ideas about the role patterns in family life (traditionally considered as private) are part of a conception of the good society; the choice for a life in the public service is a choice for a specific way of life, and thus, though it implies working in the public sphere, belongs to a conception of the good life.

16. On the problem of baselines in neutrality, see De Marneffe 1989: 266f.

certain considerations or certain effects should be excluded and others not. Whatever decision is made, it cannot be a neutral one.

Even if, as a matter of fact, the state cannot be neutral towards the conceptions of the good society, it might still aspire for neutrality in the form of exclusion of controversial ideals. But what might be the principled ground for doing so? The primary goal of the state may be to create and sustain a just society, but that is not the only goal. Why should we limit the task of the state in this arbitrary and artificial way, thereby forgoing the opportunity that the state with its interventions promotes other important ideals as well? Why should the state not also strive for a distinct kind of community, like a community that is built upon and fosters democratic values?¹⁷ What principled arguments could be made for neutrality of the state towards the, admittedly controversial, thesis that a good society is a society in which there are large areas of unspoiled nature and in which a broad cultural variety exists? Of course, non-neutrality causes practical problems in a pluralist society, which we will discuss later. But apart from that, it seems highly artificial and undesirable to restrict the state's goals to justice and other ideals which are uncontroversial.

The idea that a state can and should be neutral regarding conceptions of a good society seems in the end only defensible if one accepts a completely atomist idea of the relationship between individuals and the society in which they live. Only if one dogmatically sticks to the idea that a society is nothing more than a set of individuals that freely choose to co-operate and that every state action should be justifiable to all these individuals, could one defend a neutral position. Once a more realistic view of the person as partly embedded in society and part author of her own life is accepted, neutrality towards conceptions of the good society must be seen as impossible, and as undesirable as well.

2. The controversy in political theory regarding conceptions of goods is not whether the state should be completely neutral: a political theory without at least a minimal conception of goods is hardly comprehensible, let alone defensible. The main controversy is whether the state should take into account only some subcategories of goods and be neutral to other subcategories, and if so, to which subcategories. Rawls tries to build his political theory on such a thin theory of the good, using the concepts of both primary social goods and of goods that are recognized as such by everyone in an overlapping consensus. Other, more community-oriented, liberals have proposed to include common, public or collective goods.¹⁸

Just as in the case of the good society, there is no 'natural' baseline for state neutrality towards conceptions of goods. Even a state that chooses a conception of basic or primary goods can not avoid endorsing a specific and controversial conception, because this implies a minimal conception of goods and because acting on such a minimal conception implies that other goods, like the goods of art, have a lesser chance to be promoted. Moreover, what counts as a basic good is not uncontroversial. For example, should cultural membership be considered a basic good or not?¹⁹

How should we then develop an acceptable political theory of goods, confronted with a real controversy in our modern pluralist societies? The best approach seems a three-way strategy. Firstly, the state should include in its conception of goods those goods that are (relatively) uncontroversial, or in other words, those goods that are generally accepted in an 'overlapping consensus'. Secondly, it should accept the existing plurality of conceptions of goods and act

17. Cf. Selznick 1992: 382.

18. An interesting discussion may be found in Soeteman 1992.

19. Compare the antagonistic positions on this issue of two liberals: Kymlicka 1989b, and Waldron 1992.

on a rich pluralist theory of goods. This strategy, however, will be mainly successful in the case of private goods and some collective or public goods that are necessary for the realization of private goods. Thus a third step is unavoidable: the state must endorse some specific conceptions of goods, even though they are controversial. It cannot avoid the choice whether to consider a rich culture a public good, or whether to consider the suffering of an animal a (private) evil.

This three-way strategy can be applied both by liberal and communitarian theories. Regarding theories of goods, the distinction between liberals and communitarians is more a matter of degree than one of principle. In this continuum, liberalism may be characterized by two characteristics. The first characteristic is that liberalism cherishes pluralism; therefore it supports a strongly pluralist conception of private goods. What is a good for me may not be a good for you. Monogamous marriage must be considered a good, because for some people it is a good, but a homosexual relationship or living in celibacy must also be considered a good, because for some other people it is a good. In a pluralist conception, mutually exclusive goods can be considered goods on the condition that they are at least a good for someone. Liberalism is not monolithic in this respect: some liberals will defend a narrower domain for plurality than others. Usually the definition of a good is the means of restriction. Some liberals use a broad definition by saying that a good is anything which is desired, desirable, or valuable. Most liberals have a more restricted definition of a good, defining it as something which is rationally desirable. Though we should correct somehow for completely irrational desires, liberals need to be very cautious in this. One may easily disguise one's biases and prejudices under the name of rationality.²⁰ A famous example is the Rawlsian idea that rational people will have a strong aversion to taking risks.

A second characteristic of liberalism (as contrasted with libertarianism) is that it stresses those common, public or private goods that are necessary for individuals as constitutive or as conditions of their goods and their good lives.²¹ We should not only focus on private goods but also recognize the importance for people's lives of the social, cultural and natural environments and of common goods. Liberals like Kymlicka and Raz have offered interesting attempts to incorporate rich theories of non-private goods into liberalism. It seems that most modern liberals are willing to accept a quite rich theory of goods, in which various types of common, public and private goods are recognized. Goods need not be limited to those things that are directly goods for individuals: there may be communal goods as well.²²

3. Neutrality regarding conceptions of the good life is less vulnerable to the objections against the other types of neutrality. At first sight these objections may seem valid in this case as well. Just as it is impossible for the state to avoid substantive positions regarding the good society, it seems that the state cannot be neutral towards the good life. The state cannot be neutral towards a life based on theft, or towards a farmer's life based on exploiting animals in a way that makes animals suffer. It must take a stance on the question of whether and under what conditions it is allowable to breed farm animals or to experiment on animals.

Ronald Dworkin suggests a distinction that is useful in this context. He distinguishes between fundamental neutrality and neutrality as a derivative norm. The state cannot be fundamentally neutral towards conceptions of the good life in the sense of neutrality as a

20. Perhaps we should emphasize here that we construct a political theory — a theory for state action. In their moral theories, liberals may well have much more limited conceptions of goods.

21. Dworkin 1990.

22. Postema 1992: 161; Dworkin 1989: 492-493; Soeteman 1992.

fundamental and absolute norm.²³ But the state may endorse a derivative, *prima facie* norm of neutrality towards different ways of life. This we might call the narrow neutrality thesis. This thesis should be, in our view, the distinguishing characteristic of a liberal theory.

There are two arguments to accept this thesis. The major argument is based on Ronald Dworkin's norm of equal concern and respect, which is at the basis of liberal democracy. Treating citizens with equal respect means treating them 'as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived'.²⁴ This latter norm can be the basis of a *prima facie* norm of neutrality: every citizen should have a right to choose for himself what kind of life he wants to live. This is not because liberals take a skeptical position towards the good life (though they have a pluralist approach), but because the good life can be only lived from within; someone else cannot lead my life for me.²⁵

The second argument is based on the value of plurality and change in a liberal society. Every person is unique and has a unique place in society; therefore, there cannot be only one good way to live a good life. Because of this plurality, the state should be neutral towards all those ways of life that are lived within its society. Because societies change, the ways of life must change as well. In order to facilitate this process of change, the state should allow for continuous experimentation. As we do not know in advance which ways of life will prove to be good for concrete individuals in the changing circumstances of the future, a broad range of experimentation should be allowed.²⁶

This neutrality towards conceptions of the good life is only a derivative norm, based on a norm of respect for autonomous persons and on the value of pluralism and experimentation.²⁷ It may conflict with other norms and basic principles on which the government should act. The obligation of concern for animals is sometimes a good reason for the legislature to prohibit activities that are important to the ways of life of some citizens. Examples may be found in prohibitions of dogfights and the use of draught dogs. At the times when these prohibitions were introduced in some Western countries, they seriously influenced the way of life of those who had built upon these practices. The same might hold in the future for the prohibition of activities like certain forms of hunting and fishing. The conclusion to be drawn from these examples is not that the narrow neutrality thesis is unsound, but that it can be overridden by other principles. The strength of the neutrality thesis in conflicts like these will depend on the extent to which the activity is central to someone's way of life. Activities that should be prohibited in the context of fishing as a sport, might be allowed where fishing is a means of subsistence.

The conclusion is that we have good reasons to accept a narrow and derivative norm of neutrality. As a *prima facie* norm it is not absolute. Sometimes the government will have good reasons to let other principles override it. But even as a *prima facie* norm it provides a good basis for protecting those freedoms and liberties that liberals cherish.

A defender of a wider neutrality thesis might reply now that the same argument we used to

23. Dworkin 1985: 205.

24. Dworkin 1978: 272.

25. Kymlicka 1989b: 13 and 17; Dworkin 1989: 486; Jacobs 1992: 43.

26. We should note that the first justification results in an unlimited neutrality, whereas the second might allow for the exclusion of those conceptions of the good life that are 'objectively' unacceptable.

27. Raz 1986: 395-399 argues that the value of plurality may be found in its being a necessary condition of autonomy. This is only part of the truth; plurality is valuable as well because it is essential to the functioning of a modern, highly differentiated society.

defend narrow neutrality might also be used to defend a broader neutrality. If a citizen must be considered competent to form conceptions of the good life, she must also be seen as competent to form conceptions of the good society or of goods. Therefore the state should be neutral towards these conceptions as well.

But this reply, which is at the core of the traditional liberal argument for wide neutrality, cannot be upheld. Whereas government can strive to be as neutral as possible towards different conceptions of the good life, it is impossible to do so towards different conceptions of the good society or of goods. The concept of the good society is at the heart of the state's activities. The interpretation of this concept cannot be simply left to each individual citizen. In modern Western societies, it is impossible to have every citizen decide on her own what a good society might be like since the main instrument to create this good society is the state. The same holds for theories of goods (but only partly, which is the reason for defending a pluralist conception of goods). If a wrong is done when an animal is suffering, then the state should not allow every citizen to act on her own conception of what claims can be made on behalf of animals. With a conception of the good life it is different: it is not only possible, but also a defensible way to let every citizen decide what would constitute a good life for her.

The norm of respect for autonomous persons on which narrow neutrality is based, is nevertheless relevant in a different way to the choice of conceptions of the good society or of goods. Democracy is based on the idea that every citizen should be considered an autonomous person who is competent not only regarding his own life, but also regarding broader questions, such as politics. This means that a democratic method is necessary for determining conceptions of goods and of the good society. This cannot be simply a majoritarian method. We need a rich theory of democracy to construct a good decision process, in which rights of minorities are protected.²⁸ This democracy endorses a pluralist conception of goods, and it will cherish plurality in society.²⁹

Once we accept that conceptions of the good society and of goods should be determined democratically, much of the liberal fears for communitarian non-neutrality may be alleviated. One of the least attractive tenets of many communitarian theories is that they refer to grown traditions, to what has been considered as natural in history. But as the history of almost every now existing community is based upon a tradition of exclusion of women, ethnic and religious minorities, gays and lesbians and upon a neglect of animals, the appeal to a 'common' tradition is not very convincing.³⁰ If conceptions of the good society and of goods are not determined with a reference to the historic community, but are developed in a fully democratic process, this may take away many of the liberal objections against the communitarian project. This will only work if we can develop a rich democratic system which is sensitive to mechanisms of exclusion and the neglect of non-human goods. Of course this is a difficult task. Though the practical problems may be difficult to overcome, there is, however, no theoretical objection to the thesis that the state should be non-neutral regarding conceptions of the good society and regarding conceptions of goods, as long as this thesis is part of a broader democratic theory of politics in which neutrality regarding the good life is also upheld.

We now may summarize the argument so far. The state cannot and should not be neutral

28. For a critique of simply majoritarian methods in decisions concerning an 'ethical environment', see Dworkin 1989: 480-483 and Van der Burg 1991.

29. Selznick 1992 and Kymlicka 1989b. See also Postema 1992: 171.

30. For a critique of this history of exclusion, see Kymlicka 1989b: 86f.

towards conceptions of the good society or towards conceptions of goods. The real controversy is whether the state can and should be neutral towards conceptions of the good life. We have argued that, if we accept equal concern and respect as a basic principle of political theory, then we may derive a *prima facie* norm of neutrality towards conceptions of the good life. In this respect we defend a rather restricted form of neutrality. We must now address the question where exactly in the political process this restricted neutrality may be used as a guideline.

5. *Neutrality and the political process*

An important distinction in the debate on neutrality is that between neutrality of procedure and neutrality of outcome.³¹ As Joseph Raz and others have shown, neutrality of procedure may have results that conflict with neutrality of outcome. However, this conflict is only a problem if one sees neutrality as a fundamental norm. Once we regard narrow neutrality as a *prima facie* norm, we can endorse both forms of neutrality. The distinction should nevertheless be refined. We may distinguish at least five aspects of the political process:

1. participation: who takes the decision and how;
2. grounds: on what grounds rests the decision;
3. decision: the contents of the decision;
4. implementation: who has to implement the decision; and
5. effects: what are the consequences of the decision.³²

Each of these five aspects is relevant in evaluating a political system and the ways it operates. Therefore the justifying norm of a political system should apply to each of these aspects, unless there are good grounds not to do so. As the norm of equal concern and respect is at the basis of our democratic political morality, this norm can be held to apply to each of these aspects.³³ Furthermore, as we have argued that narrow neutrality is based on the norm of equal concern and respect, this *prima facie* norm should apply to each of these five aspects as well. The best method to make this thesis plausible is to show how narrow neutrality may be applied to each of these five aspects.

1. On the question of who is to decide what is the best way of life for a concrete person, the neutrality thesis gives an unequivocal answer: the person herself. Defense of a neutrality thesis as applied to participation therefore gives a sound basis for the traditional liberal idea of a private sphere in which the government should not interfere. This private sphere is not to be seen as a certain space, but as a domain of personal decisions in which no one should have a say but the person herself.

This domain of freedom cannot be absolute. If in a certain society too few persons seek a living as an environmental engineer, the government may try to influence decisions of career

31. The terminology used varies. See Musschenga 1992: 242; Rawls 1988; De Marneffe 1989; Galston 1991: 100. We prefer this terminology, because "procedure" covers the first two of our five aspects, and "outcome" the other three.

Another form of neutrality sometimes called procedural neutrality, is "constitutional" or "foundational neutrality". (De Marneffe 1989: 259; Musschenga 1991: 162.) As we focus on a concrete decision process instead of on ideal and constitutional theory, we will not discuss this form.

32. Van der Burg 1991: 63-67.

33. We would even hold that the essence of a rich theory of democracy is that it is not only directed toward the input-aspects of grounds and participation, as is in more positivistic theories, but that it involves the three output-aspects as well. See also Van der Burg 1991.

choice by information campaigns or by providing financial incentives. The context within which a personal decision is made is part of the theory of the good society. But the ultimate decision within that framework should be left to individuals themselves.

2. If a citizen is to be able to identify with a democratic decision procedure and its outcome, it is necessary that he is not thereby forced to accept reasons for the decision that would injure his self-respect.³⁴ This implies that a decision should not be based on controversial conceptions of the good life. (Nor should it be based on judgments that certain elements of his life which he considers goods are not good. This is one more reason to accept a broad and pluralistic conception of goods.) Of course, for external observers this criterion will be very difficult to apply. As a principle guiding those who make the decisions it is nevertheless important.

The legislature may act on basis of arguments that a society in which animals are treated in a decent way is a better society. This is a *prima facie* reason for regulation of human behavior towards animals. But what the government is not allowed to do, is to justify regulation on the grounds that a life of hunting, fishing, or farming is more or less worthy than a lawyer's.

3. Though consequentialist reasoning might sometimes blind us to this, the decision has a moral relevance in its own right. A decision may, regardless of consequences, symbolize that certain norms and values are endorsed by the state. This can be important and legitimate when constitutional values are affirmed or when the official legal prohibition of euthanasia in the Netherlands (combined with a tolerant practice) symbolizes that the value of protecting human life is still sacred and that euthanasia should never be seen as a simple solution.³⁵ But a decision or a law that classifies as inferior certain ways of life or certain goods constitutive of these ways of life by criminalizing them, violates the norm of narrow neutrality.

An example might be found in the anti-sodomy laws in various states of the U.S.A. They have an important symbolic meaning even if they have not been enforced for decades.³⁶ Even if they have no direct practical consequences for homosexuals and lesbians, they still carry the message that homosexuality is inferior. This non-neutrality is therefore a strong argument to abolish these laws.³⁷

4. The neutrality norm has a special importance for implementation. The implementation of a decision often demands the co-operation of citizens. Citizens are obliged to abide by the law or certain administrative orders. Usually, citizens will not regard this as serious limitations of their autonomy, or they will at least accept that the measures are reasonable. But when they are forced to act in a way that directly conflicts with their conception of the good life, this will be experienced as a serious infringement upon their autonomy. In some cases someone will be requested to act contrary to his own conscience, to violate what he considers a moral duty. This extreme case has drawn much attention in legal and moral philosophy under the heading of 'conscientious objections'. A broader category is formed by those cases in which activities are prohibited that the person himself thinks justified and desirable, without claiming there is a moral duty to perform them. Normally people will not hold they have a moral duty to write a book or to have sexual intercourse with their partner, but they will nevertheless value these activities as important aspects of their life. A legal

34. Cf. Dworkin 1985: 206: "no self-respecting person who believes that a particular way to live is most valuable for him can accept that this way of life is base or degrading."

35. On legitimate use of symbolism see Postema 1987: 431-3; Soeteman 1992: 184.

36. As was the case in the Georgia statute contested in *Bowers vs. Hardwick*, 478 U.S. 186 (1986).

37. Our theory offers two ways to structure the problem. One is to see homosexuality as part of a life-style; prohibition then conflicts with neutrality. The other is to see homosexual behavior as a good; prohibition then conflicts with a pluralist conception of goods.

prohibition of activities like these may violate narrow neutrality, as in the cases that give rise to conscientious objections. In both categories a legal prohibition is a major infringement of someone's autonomy.

One implication is a strong argument against legal moralism regarding conceptions of the good life.³⁸ (In fact, the neutrality norm on the other four aspects yields arguments against this form of legal moralism as well. Our analysis therefore can account for one of the most cherished elements of liberalism.) A further implication is that the state should sometimes be barred from using the criminal law to prohibit certain activities, even though these activities are harmful to society or to animals, because this would too strongly interfere with the way of life of some citizens. In other cases, the neutrality norm is a good reason to recognize conscientious objections.

Since 1992 Dutch farmers are under a legal obligation to mark their calves with yellow ear tags. The Dutch government considers this registration system necessary to prevent epidemics of cattle diseases. Some farmers (especially those with an anthroposophist background) strongly object to the use of these ear tags, because of the calves' suffering and because of the implied objectification of animals that conflicts with their basic attitudes. The legal obligation thus strongly interferes with their way of life. Narrow neutrality demands that we seriously try to exempt these farmers by recognizing their conscientious objections.³⁹

5. The last aspect of a political process is the effects. Narrow neutrality has two implications here. Firstly, a *prima facie* norm must be defended that the state should not discourage or encourage certain ways of life that citizens have freely chosen or might freely choose. Secondly, the state should try to guarantee the largest possible variety of choice to enable citizens to choose their own way of life. The state should actively strive for a pluralist society, because it provides for a larger variety of choice. This does not imply that the state should promote particular ways of life as such, but that it should, because of its democratic conception of the good society that values autonomy highly, promote a variety of possibilities of choice.⁴⁰ This will sometimes even imply that the state will give extra facilities to experimental ways of lives or minority cultures to give these an equal position.⁴¹

Of course, these are difficult requirements to live up to. No state can be fully neutral in this sense, because the effects of actions are hard to predict and because the state's actions will always have adverse consequences for some way of life. But as a *prima facie* norm, narrow neutrality may be a useful criterion to criticize policies that result in situations where some ways of life are more severely affected by certain actions than others.

An example is the suggestion to abolish most EU-subsidies for agriculture. Traditional ways of farming in some European countries would be severely affected by it. This constitutes a strong argument against the suggestion, even though, perhaps, this argument may have to yield against other arguments. But if it does, then at least we should try to find some way to compensate for the adverse effects, such as income subsidies instead of product subsidies.

Our analysis shows that narrow neutrality may be successfully applied to all five aspects of a political process and that it justifies cherished liberal positions on civil rights, conscientious

38. Cf. Raz 1986: 415f. criticized by Soeteman 1992: 184-185.

39. Cf. Van der Burg 1993.

40. This is the argument given by Dworkin 1985: 233. However, whereas Dworkin uses the argument to exclude any particular conception of the good from the state's concern, we only exclude a particular conception of the good life. It is a ridiculous form of neutrality that does not allow the state to buy a Rembrandt instead of some dilettante's painting, because neutrality bars the state from making this type of value-judgments.

41. Cf. Kymlicka's argument for special rights for cultural minorities.

objection and legal moralism. At the same time, because it is only a derivative and *prima facie* norm, narrow neutrality doesn't have the sometimes almost absurd implications of wide neutrality that would exclude acting on value-judgments regarding art and nature.

One might even say that there are five neutrality norms, one for each of the five aspects. An important consequence is that this type of (communitarian) liberalism is not merely a second order morality: a morality that offers guidance when moralities conflict.⁴² It is partly a second order morality, because it tells us something about which moral opinions may not be grounds for a decision and also about who is to take certain decisions, but liberalism is also a first order morality, because it does not avoid value judgments regarding contents, implementation, and effects of the decision.

Most modern liberals, however, focus on neutrality of procedure and either implicitly or explicitly reject neutrality of outcome.⁴³ Of course this is a more elegant solution: instead of five *prima facie* norms there is only one. Why should we hold that narrow neutrality applies to each of these aspects, thus making normative theory highly complex?

The reason is that we should not focus on ideal theory but on the real society in which we live and that therefore we should not focus on the procedure in isolation, but on the process as a whole.⁴⁴ Concentrating on procedure alone neglects important aspects. Although a procedure is to be valued as an end in itself, it is also a means to an end. Completely omitting the outcome-aspects from evaluation would only be justified if the procedure automatically leads to acceptable results.

The latter assumption seems implicit in the theories of both Rawls and Dworkin.⁴⁵ They defend equality of resources because it leads to just outcomes. Perhaps initially one might be attracted to equality of outcomes, but equality of outcomes would mean that those who chose more expensive life-styles would be subsidized by those who chose more modest life-styles. This would be unjust. People should be held responsible for their own choices. Therefore we should accept neutrality of procedure (or, more precisely, equality of resources) because then everyone will bear the costs of expensive choices herself.

This seems a correct argument, but it is only so in an ideal society. In real society the argument is invalid, because certain assumptions necessary to the argument are far from correct in real life.⁴⁶ The argument assumes that people can be held responsible for their choice of ways of life. But this is not true or only marginally true in most cases. Can we seriously hold that in Western societies the fact that some people are university professors and others blue-collar workers is a result of free choice? Even in the most free and egalitarian societies many life-style choices are not free in the relevant sense. Although the state should promote the development of personal autonomy and responsibility, we should not mistake the ideal for real. Many important decisions that determine a person's life are not sufficiently free to let the full weight of the consequences bear on that person.

42. As Den Hartogh 1990 has suggested.

43. Kymlicka 1989b: 96-7 n.2.

44. Cf. Selznick 1992: 328-333. Wolfe 1989: 245 calls this process-oriented approach a sociological approach. In as far as this implies that sociologists focus on reality instead of ideal theory it is correct; in this respect the sociological approach, however, should be an intrinsic element of the normative approach of political philosophy.

45. Kymlicka 1989a: 885; Dworkin 1985: 192-3 and 206; Rawls 1972: 94.

46. This is acknowledged by Dworkin 1985: 195 and 207. Among the liberal philosophers, Dworkin is one of the most realistic in addressing concrete problems in our society. This may explain why his stances on neutrality seem to be in constant revision and are quite complex; he is trying to develop a theory that adequately deals with complex reality.

The Dutch debate on scarce resources in health care presents a nice example of the problems that arise when we try to implement the idea of responsibility for personal choices. Except for a few extreme cases like ski-accidents, almost no examples could be found where categories of health care problems could be traced to free and responsible choices in a relevant way. Even those who, in the theoretical debate, defend the idea of personal responsibility, cannot devise an acceptable system of criteria to implement it, for instance by excluding certain groups of patients from health care or by having them pay more. Considerations of justice directly focusing on the effects of a distribution system are thus necessary to construct a just system.

Not only does reality fall short regarding the ideal of free and autonomous choice but it also falls short regarding the ideal of a good procedure. Existing democratic procedures don't guarantee (nearly) perfect procedural justice, as the argument for neutrality of procedure implicitly presupposes. Neutrality of procedure is justified by most liberals because it is supposed to lead to just outcomes; because reality isn't that perfect, we should consider the outcomes as well.

A further reason to reject a narrow focus on neutrality of procedure is that its results are less acceptable for goods that cannot easily be measured, exchanged and compromised. Minority interests in cultural autonomy, or the right to live according to one's own sexual preferences, are even in ideal theory not really safe because they can be simply overruled by a majority vote. In our society, with its at least partly unjust procedures, the claims of minorities to non-material goods are the first victims of the deficiencies of the procedure. By focusing on the full process and on each relevant aspect of it, we will usually have stronger and more sophisticated arguments to protect minorities.

The conclusion may be that the focus on ideal theory has led liberalism astray. In non-ideal theory, neutrality of procedure is an unwarranted limitation of narrow neutrality. More attention for those aspects in which reality falls short of our ideals means that we cannot expect simple solutions or simple theories. Narrow neutrality must therefore be held to apply to all the relevant aspects of the political process in their own right. This means that there are five separate, *prima facie*, norms of narrow neutrality.

6. *Conflicting principles*

The implications of these five norms of neutrality sometimes conflict. Although it complicates practical decision-making, this is not a theoretical problem. Conflicts between *prima facie* principles are familiar in applied ethics. *Prima facie* norms of neutrality may also conflict with other political norms. Neutrality towards dog-owners may be overruled by the interests of environmental protection or nuisance control. Human autonomy and moral plurality are important political values, but not the only ones.

An interesting problem occurs when individual conceptions of the good life fundamentally (and not just accidentally) contradict liberal conceptions of the good or of the good society. An example is a person who believes in theocracy or in a racist society and considers the realization of this a central project in her life. Should a democratic state be neutral towards these conceptions as well? Most liberals deny this and somehow try to avoid this conflict by limiting the domain of neutrality. One method has been to argue that the state should be neutral only towards those conceptions of the good life that are minimally acceptable, that

meet a threshold standard.⁴⁷ A second method is by allowing only rational conceptions of the good life or rational conceptions of goods.⁴⁸ The third method, often combined with the second, is the priority of the right over the good: only those conceptions of the good are allowed that are compatible with the principles of justice.⁴⁹

All these methods fail to appreciate the real problem. The theocrat's conception of a good life is simply barred as inadmissible. This conceals the underlying conflict instead of addressing it. We should better construe the problem differently. The domain of neutrality should include all citizens' conceptions of the good life, regardless of their contents. There are two reasons for this broad domain of neutrality. The first is that a violation of someone's autonomy is, *prima facie*, always a wrong — although in many cases this wrong may be justifiable. Restricting the domain of acceptable conceptions implies that the government treats some citizens as unequal, because their conceptions are considered intrinsically inferior. Perhaps they are irrational, prejudiced, or stupid — but the fact is that they happen to be who they are and as such should be taken seriously. The second reason is that the state may be wrong — and, as history shows, has often been wrong — in judging a certain way of life as below a threshold. The state has often erred in cases like sexual behavior or political and religious opinions. Why then should we expect that it will never do so again, once we allow it and even expect it to make this type of judgment?⁵⁰

This reconstruction of the problem will seldom make a difference for the decision to be made. The state cannot allow discrimination against women or gays, nor can teachers be expected to give equal attention to theocratic or fascist theories. In the clash between principles of non-discrimination or democracy on the one side and narrow neutrality on the other, the latter often has to yield. But sometimes it will make a difference, especially when the acts following from one's conception of the good life consist in speech or related activities. An example might be a country with compulsory voting, where some women refuse to vote on religious grounds. The conflict in this case is better addressed if we extend the domain of neutrality to their conception of the good life and not simply exclude the latter as conflicting with the principles of justice. The principle of democratic equality of men and women clashes here with liberal neutrality. Narrow neutrality produces a strong argument against prosecuting these women, and against prohibiting a party that defends this position.⁵¹

More important is that broadening the domain of neutrality makes a difference to the political process as a whole. The value-conflict is at least acknowledged, which is a first condition to address it properly. If there are prejudices, biases and undemocratic opinions in society, they will not disappear by denying their existence. The value conflict should be addressed in an open political debate; only then do we give due respect to all citizens. In this debate there are three possibilities. The first is that what was taken as a requirement of justice or of the good society in general, cannot be defended as such. Perhaps the traditional idea that monogamous marriage is a cornerstone of the good society is not defensible at all; in that case neutrality should be a reason to award other ways of life equal legal status. This progressive realization of the demands of justice would not have been possible if homosexual or polygamous life-styles had been excluded beforehand as demeaning. The second

47. Raz 1986: 133; Selznick 1989: 511.

48. Rawls 1972: 399 basically defines the good as rationally desirable.

49. Rawls 1972: 396; Rawls 1988: 251 and 262.

50. Jacobs 1992: 38 rightly criticizes Raz' position (and, I would add, every position that restricts the domain of neutrality) as bearing the germs of intolerance.

51. This position is defended by the SGP in the Netherlands. A substantial part of its female supporters refuse to vote.

possibility is that 'deviant' citizens get convinced that their conception of the good life as a life based on discrimination should be (partly) amended. This is what the state may hope for, and this is what we may expect to happen if we really believe in the force of our arguments for the liberal-democratic conception of the good society. The third possibility is, of course, that there is no change in opinions, but then at least there has been a serious effort to bridge the gap and to take all citizens seriously.

7. The crucifix - a neutral symbol?

We now may summarize the argument so far. The state cannot and should not be neutral towards conceptions of the good society or towards conceptions of goods. The real controversy is whether the state can and should be neutral towards conceptions of the good life. We have argued that, if we accept equal concern and respect as a basic principle of political theory, then we may derive a *prima facie* norm of neutrality towards conceptions of the good life. In this respect we defend a rather restricted form of neutrality.

This abstract theoretical analysis may be illustrated with an example. There is probably no other controversial court case in which the idea of neutrality is so central as the recent decision of the German Constitutional Court on the crucifix in Bavarian schools.⁵² In this decision, the Court declared the Bavarian legal obligation for schools to put on a crucifix in every classroom unconstitutional. The controversy on neutrality focuses on two themes: how the constitutional norm of neutrality should be interpreted, and whether the crucifix can be regarded as a neutral symbol.⁵³ Our theory of neutrality may help to clear away some of the confusion. In the public and legal discussion, two spheres in which the crucifix is a symbol are often fused but should be distinguished: that of the good life, and that of the good society.

The first main line of argument of the opponents of the Court's decision can be formulated in terms of an active neutrality on the level of the good life: They argue that schools should actively support different religions, though this has to be done in a neutral way. In their view, the crucifix should be seen as a "Symbol des konfessionsübergreifenden christlichen Glaubens" and as "Sinnbild des Leidens und der Herrschaft Christi". Therefore it can be recognized by all Christian confessions and even by non-Christians. They conclude that putting [Anbringung] the crucifix in the classroom, as a neutral symbol of various religious views and values, is an acceptable expression of this.

It is remarkable that almost no one defends a hands-off neutrality, like we might have expected in a similar debate in the US. Religious and normative matters should not be kept outside the school; they are considered essential to education. The idea of an overlapping consensus seems to be the implicit basis for drawing the line: a school should address religious matters in as far as all parents agree on it, or on the condition that dissenters have an alternative option (like in the case of the voluntary school prayer). This is an active neutrality: the state supports and respects alternative religious views on an equal footing. If all parents see the Cross as a neutral, interconfessional symbol, schools are allowed to put it in the classroom, because it symbolizes

52 Bundesverfassungsgericht, 1. Senat, Beschluss vom 15. 5. 1995 (1 BvR 1087/91). The various positions we refer to can all be found in the official documents, those of the majority and the minorities of the court, the lower court, the EKD, the German bishops conference and the Bavarian prime minister Stoiber.

53 Of course, the public and constitutional debate is broader, dealing with themes like federalism, the relation between church and state, the suggested attack on the Christian character of our society. We will only focus on the neutrality issue as such.

fundamental religious dimensions of our life. In such a situation, it may be called a neutral symbol. So far, all parties agree and have a common concept of neutrality.

The controversy now hinges on the question whether the crucifix is also a neutral symbol in general, and acceptable or at least tolerable for those parents that are not Christian. The Bavarian prime minister and the Court minority seem to think that the Cross can be the central symbol of Christianity for some, especially during school prayer and religion lessons, and merely a general symbol of human values and the 'abendlaendisch-christliche Tradition' for others. This argument is unconvincing and insensitive to the feelings of minorities. As the majority correctly points out, if, for us, the Cross is a meaningful symbol referring to our religious convictions and tradition, it cannot be a neutral symbol for others - they know that it is the central symbol of Christianity.⁵⁴ Moreover, we cannot deny that to many citizens the Cross has rather been a symbol of intolerance, injustice and power, because Christianity has so often not lived up to its own professed ideals (and still doesn't do so, just think of former Yugoslavia). We need only mention Jews, gypsies, gays and lesbians, non-believers or members of various Christian or non-Christian sects and religious movements, against whom the religious doctrines that the Cross symbolizes were used to legitimate discrimination, injustice, exclusion and sometimes even worse. Sad as it may be, this has been the reality of the Cross for many citizens. For them, it is divisive, rather than neutral and binding, it is a symbol of exclusion and injustice. It is a remarkable insensitivity of the opponents of the decision that they don't acknowledge this negative side of the Cross as a symbol and can merely think of it as a positive symbol that can only be offensive to psychopaths.

Our conclusion regarding neutrality toward conceptions of the good life must be that the Court's decision is a very balanced compromise that fits well with our suggestions. Active support for values and for religious and non-religious views of life can be defended. If all parents agree that the Cross is for them a positive symbol, they may decide to put it in the classroom. But if they are not unanimous in this respect, we cannot expect the dissenters to accept that their children are educated 'under the Cross'. A legal obligation for the schools to do so, even goes much further, and is therefore in flagrant violation of the neutrality-principle.

The second main line of argument of the opponents of the decision can be formulated as follows: 'The good society is characterized by 'abendlaendisch-christliche Werte'; the state and public schools should actively promote those values; the crucifix symbolizes those values; therefore, a crucifix in the school should not only be tolerated but should even be promoted by the state.' In terms of our analysis, this is an argument for active non-neutrality towards conceptions of the good society.

It is interesting to see that, here as well, nor the Court, nor its defenders or critics, suggest that the state or the schools should be neutral in the sense of hands-off neutrality towards what is called 'abendlaendisch-christliche Werte'. Towards conceptions of the good society the state need not be neutral; promoting values like justice and tolerance is a proper task for the state.⁵⁵ No one seriously proposes that the state should abstain from promoting these values or from

54 Those opponents who think the Red Cross is such a neutral symbol of general values like charity, should realize that the Red Cross is based on the Swiss state flag, and that even despite this neutral background, many countries have replaced the symbol with their own religious symbols, like the Red Crescent. When in Islamic countries or Israel even the Red Cross is considered a controversial symbol, is it not much more likely that in our countries Jewish or Islamic citizens will think it highly offensive when they are educated under the crucifix?

55 However, speaking from a Dutch context, we would hesitate calling this 'abendlaendisch-christlich', because this neglects the important traditions of especially Judaism and humanism that have also been highly formative for the values of our culture.

teaching our cultural tradition that has been so strongly influenced by Christianity. Once we distinguish between different levels of neutrality we can see that, at this fundamental level, there is more consensus than most parties to the debate seem to think. The controversy hinges on a different point: whether the crucifix is a proper symbol for those values.

Of course, for most of the Christians it is, because for them it stands for what is valuable in the Christian tradition.⁵⁶ According to the Court majority, however, it is not a neutral, generally acceptable symbol for 'Christian-humanist' values, on the same grounds as mentioned above. A symbol that is not shared by some members of the community or is even offensive to them, should not be used. Firstly not, because it is not an adequate symbol if it is not understood by all in the same positive way. But more fundamentally, it is not acceptable because it violates neutrality with respect to conceptions of the good life. The neutrality norm can be used here as a critical standard: a suggested common symbol that is primarily expression of a religious conviction violates neutrality, even if it has a broader meaning as well.

We should conclude, therefore, that, on the one hand, the state should actively support what we would prefer to call 'Christian-humanist' values but that, on the other hand, because the Cross is not for everyone a symbol for those values, its use should not be obligatory. If, however, in a certain community, the Cross is a positive symbol for everyone, it may be decided to keep it in the schools. That is exactly what the Court allows: a legal obligation is void, but a unanimous decision of the parents is still permitted.⁵⁷

Our conclusion may be clear. We think that the Court has delivered a very nuanced decision, based on a good understanding of what neutrality should be and what it should not be. It is not a hands-off neutrality towards conceptions of the good life, but a very active and supportive attitude that recognizes the importance of religious and other beliefs. Neither is it a neutral view regarding conceptions of the good society; it supports promotion of Christian-humanist values. It only demands that the symbol chosen for these values is neutral and not offensive to minorities. In a pluralist society, this is a wise decision.

8. *Conclusion*

In this article we have suggested a new approach to the neutrality debate. Neutrality is a valuable component of the liberal tradition. It may be an essential contribution to social peace in a pluralist society and it protects many of the traditional liberal freedoms. But neutrality should not be an obstacle to an open public debate or to an active role of the state in dealing with urgent social problems. The theory of neutrality we have outlined above accounts for cherished elements of the liberal tradition, but is not vulnerable to the serious communitarian critiques of neutrality.

Neutrality should in one respect be restricted: it can only be a *prima facie* derivative standard and should only apply to conceptions of the good life. Even with these restrictions it is of great practical value, though it will primarily be a standard of criticism rather than the foundation for theory-construction. In a second respect neutrality is a very broad standard: it applies to all aspects of the political process.

⁵⁶ Although for many of them, it is rather the Cross than the crucifix which is an important symbol - in the Netherlands, the crucifix is definitely only a Catholic symbol.

⁵⁷ Even so, there is still a major problem with this compromise: someone who takes offense to the Cross will, as the result of expressing his dissent, often be socially ostracized. Theoretically, it may be a good solution, but it ignores the problems of a minority living in a small community.

The result may seem an extremely complex theory of neutrality. If one expects the neutrality thesis to justify simple solutions and clear boundaries of state power, this may be a disappointment, but we would hold that, in the real world, such simplicity is unwarranted. Idealizing simplifications may be important in the theoretical debate, but once we try to develop a political theory that does justice to political reality, complexity is unavoidable. Only such a complex theory of neutrality can be of practical use in addressing the problems that states in modern pluralist societies have to cope with. And only such a complex theory may hope to combine the valuable elements of the liberal traditions and the communitarian critiques.

Literature

Barry, B. (1965), *Political Argument*, London: Routledge & Kegan Paul.

Brandt, R.B. (1979), *A Theory of the Good and the Right*, Oxford: Clarendon.

Burg, W. van der (1991), *Het democratisch perspectief. Een verkenning van de normatieve grondslagen der democratie*, (diss. Utrecht) Arnhem: Gouda Quint.

Burg, W. van der (1992), 'Equality versus religious freedom', *Archiv für Rechts- und Sozialphilosophie* 78(1992), 211-218.

Burg, W. van der (1993), 'De gele oormerken, of: de betekenis van incoherenties in ethiek en recht', *Rechtsfilosofie en Rechtstheorie* 22(1993)1, 37-50.

Dworkin, R. (1978), *Taking Rights Seriously*, Cambridge, Mass.: Harvard University Press.

Dworkin, R. (1985), *A Matter of Principle*, Cambridge, Mass.: Harvard University Press.

Dworkin, R. (1989), 'Liberal Community', *California Law Review*, 77(1989)3, 479-504.

Dworkin, R. (1990), *Justice and the Good Life*, (The Kindley Lecture) University of Kansas.

Galston, W.A. (1991), *Liberal Purposes. Goods, virtues, and diversity in the liberal state*, Cambridge: Cambridge University Press.

Goodin, R.E., and A. Reeve (eds.) (1989), *Liberal neutrality*, London: Routledge.

Hartogh, G. den (1990), 'Het Liberalisme van Joseph Raz', *Recht en Kritiek* 16(1990)2, 155-169.

Jacobs, F.C.L.M. (1992), 'Inhoud en rechtvaardiging van de liberale moraal', in: A.W. Musschenga en F.C.L.M. Jacobs (eds.), *De liberale moraal en haar grenzen*, Kampen: Kok, 21-47.

Kymlicka, W. (1989a), 'Liberal Individualism and Liberal Neutrality', *Ethics* 99(1989), 883-905.

Kymlicka, W. (1989b), *Liberalism, Community and Culture*, Oxford: Clarendon.

Lijphart, A. (1968), *The Politics of Accommodation. Pluralism and Democracy in the Netherlands*, Berkeley, University of California Press.

Marneffe, P. de (1989), 'Liberalism, Liberty, and Neutrality', *Philosophy and Public Affairs* (1989), 253-274.

Musschenga (1991), 'Liberale neutraliteit en de rechtvaardiging van milieubehoud' in: W. Zweers (ed.) *Op zoek naar een ecologische cultuur. Milieufilosofie in de jaren '90*, Baarn: Ambo, 161-169.

Musschenga, A.W. (1992), 'Liberale neutraliteit of politiek van het goede leven', in: A.W. Musschenga en F.C.L.M. Jacobs (eds.), *De liberale moraal en haar grenzen*, Kampen: Kok, 239-261.

Nozick, R. (1974), *Anarchy, State, and Utopia*, New York: Basic Books.

Postema, G.J. (1987), 'Collective Evils, Harms and the Law', *Ethics* 97(1987), 414-440.

Postema, G.J. (1992), 'Public faces - private places: liberalism and the enforcement of morality', in: A.W. Musschenga, B. Voorzanger and A. Soeteman (eds.), *Morality, worldview and law*, Assen: Van Gorcum, 153-175.

Rawls, J. (1972), *A Theory of Justice*, Oxford: University Press.

Rawls, J. (1988), 'The Priority of Right and Ideas of the Good', *Philosophy and Public Affairs* 17(1988), 251-276.

Raz, J. (1986), *The Morality of Freedom*, Oxford: Clarendon.

Selznick, P. (1989), 'Dworkin's Unfinished Task', *California Law Review*, 77(1989)3, 505-513.

Selznick, P. (1992), *The Moral Commonwealth*, Berkeley: University of California Press.

Soeteman, A. (1992), 'Liberal moralism in law', in: A.W. Musschenga, B. Voorzanger and A. Soeteman (eds.), *Morality, worldview and law*, Assen: Van Gorcum, 177-189.

Waldron, J. (1989), 'Legislation and moral neutrality', in: R.E. Goodin and A. Reeve (eds.), *Liberal neutrality*, London: Routledge, 61-83.

Waldron, J. (1992), 'Minority Cultures and the Cosmopolitan Alternative', *University of Michigan Journal of Law Reform* 25(1992) 3 & 4, 751-793.

Wolfe, A. (1989), *Whose Keeper? Social Science and Moral Obligation*, Berkeley, University of California Press.