Freedom of Religion and State Neutrality in the Educational Environment: a Path through the Jurisprudence of the European Court of Human Rights

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XVI ciclo – a.a. 2013/2014
To my family
Ratione nihil est in homine divinius.

Cicero, De natura deorum
CONTENTS

FOREWORD .................................................................................................................. 8

INTRODUCTION ........................................................................................................... 11

Chapter 1 ...................................................................................................................... 18
FREEDOM OF RELIGION AND THE RIGHT TO EDUCATION UNDER THE ECHR: A PREAMBLE. ................................................................. 18

Abstract ....................................................................................................................... 18

1.1. The Genesis of the Protection of Freedom of Religion under the ECHR: A Smooth Drafting ............................................................................................................ 19

1.2. The Drafting Process of the Right to Education: A Highly Debated Issue ........ 25
   1.2.1. The First Work Session on the Right to Education (August 1949 – November 4, 1950) ...................................................................................................................... 25
   1.2.2. From the Convention to the First Protocol .................................................... 28

1.3. Education and Religion: The Most Sensitive Issues ......................................... 32

1.4. From the Travaux Préparatoires to the Present Jurisprudence on Article 9 and Article 2, Protocol No. 1 in School-Church Relationships ............................................. 34
   1.4.1. The Seminal Case Law of the ECtHR Jurisprudence on Article 9 and Article 2, Protocol No. 1 ............................................................................................................. 38
   1.4.2. Kokkinakis v. Greece The First Serious Attempt by the Court of Strasburg to Apply Article 9 ............................................................................................................. 43

1.5. Freedom of Religion and Its Legitimate Limitations ......................................... 47

1.6. Does Secularism Allow a Wider Margin of Appreciation for States? ............ 52

Chapter 2 ...................................................................................................................... 58
ONE STATE, MANY BELIEFS .......................................................................................... 58

Abstract ....................................................................................................................... 58

2.1. The Theoretical Side of the Right to Protect Freedom of Religion .................... 59

2.2. The New Liberalism Perspective: Being Disengaged from Any Personal Convictions ...................................................................................................................... 60

2.3. Where is the place of citizens’ beliefs in Rawlsian liberalism? ......................... 65
2.4. Dworkin: Two Ways to Face (And Sort Out?) the Separation between Ethics and Politics ................................................................. 68
2.5. Sandel’s Response to Rawls: Is It Utopian to Speak about Common Good in a Modern Society? ...................................................... 75
  2.5.1. Rights and the Good life ........................................................... 76
  2.5.2. The Concept of Public Reason .................................................. 77
2.6. A Step Forward in Facing Moral and Religious Diversity: Charles Taylor’s New Secularism .......................................................... 83
  2.6.1. Neutrality and Secularism: Two Concepts Rooted in the Enlightenment’s Crucial Move .......................................................... 85
  2.6.2. The Modern Vision of Moral Order and the New Place for Religion ........... 89

Chapter 3 ............................................................................................................. 94
THE HEADSCARF DEBATE IN SCHOOLS AND UNIVERSITIES ACROSS EUROPE ......................................................................................... 94

Abstract ............................................................................................................... 94
3.1. When the Islamic Religion Is a Minority: The French Controversy ............ 95
3.2. The Ban of the Headscarf in French State Schools: Did the ECtHR Take a Step Back? .................................................................. 101
3.3. The Headscarf Debate in Turkey ............................................................. 105
3.4. Turkish Cases before the European Commission and the Court on Human Rights .. 107
3.5. The Dahlab Case: a Threat to Swiss Neutrality ....................................... 113
3.6. The UK: A Secular State within the Boundaries of an Established Church ...... 118
  3.6.1. The Muslim Headscarf against the School Uniform Policy: The Begum Case .. 122
  3.6.2. Post Begum: The Approach of the High Court in the Case of Wearing the Niquab at School .................................................. 126
  3.6.3. The Importance of Watkins-Singh .................................................. 128
  3.6.4. The Azmi Case: Discrimination in Employment ................................ 132
3.7. Conclusion ................................................................................................. 135

Chapter 4 ............................................................................................................. 140
THE STRUGGLE BETWEEN PARENTS’ RIGHTS AND SCHOOLS’ DUTY OF NEUTRALITY ................................................................................. 140

Abstract ............................................................................................................... 140
4.1. A Controversial Issue: Religion as a School Subject ............................... 141
  4.1.1. Folgerø and the Defective Opt-out Policy: Is This an Excessive Interference in the National Arena on ECtHR’s part? .................. 145
  4.1.2. Post Folgerø: Towards a Less Strict Scrutiny Approach on ECtHR’s Part ...... 150
4.2. Compulsory Sex Education Classes in State Schools: Denmark and Germany on Trial ...........................................................................................................................................................................157
4.3. The Presence of Crucifixes on the Walls of Italian Classrooms: A Human Rights Challenge ...........................................................................................................................................................................162
  4.3.1. The Lautsi Case: From the National Jurisdiction to the Chamber of the ECtHR 165
  4.3.2. The Grand Chamber’s Corrections ...........................................................................................................................................................................168
4.4. Is the Naked Wall the Best Expression of the Neutrality of the State? 170
4.6. Conclusion ...........................................................................................................................................................................................................................................178

Chapter 5 ...........................................................................................................................................................................................................................................183
PROTECTING TEACHERS’ RIGHT TO RELIGIOUS FREEDOM IN THE WORKPLACE ...........................................................................................................................................................................183

Abstract ...........................................................................................................................................................................................................................................183
5.1. Does the ECtHR Still Consider the Right to Resign the Best Guarantee of Freedom of Religion? ...........................................................................................................................................................................184
  5.1.1. The ECtHR’s Latest View on the Right to Resign: Eweida and Others v. the UK ...........................................................................................................................................................................187
5.2. For the First Time, a Dismissal is Considered to Have Breached Convention Rights: Vogt v. Germany ...........................................................................................................................................................................191
5.3. The ECtHR and the Italian National Courts: Two Different Concepts of the Neutrality of the State When the Employer Is a ‘Religion Oriented’ University ...........................................................................................................................................................................193
5.5. The ECtHR’s Hands-off Approach towards the Decisions of Religious Authorities in Fernàndez Martinez v. Spain ...........................................................................................................................................................................201
5.6. Is the ECtHR Moving towards the ‘Ministerial Exception’ Suggested by the U.S. Supreme Court in the Hosanna-Tabor case? ...........................................................................................................................................................................205
5.7. Conclusion ...........................................................................................................................................................................................................................................208

CONCLUSION ...........................................................................................................................................................................................................................................211

BIBLIOGRAPHY ...........................................................................................................................................................................................................................................219
FOREWORD

Freedom of religion has long been regarded as a cornerstone of a free and democratic society, and yet the place and meaning of religion in the public sphere has become progressively contested and is legally debated.

In the European Convention on Human Rights (ECHR), the key guarantees of freedom of thought, conscience, and religion or belief are found in two provisions. First, Article 9, which confers protection for an individual’s core belief system, and protection of the right to manifest beliefs either individually or with others, in both the private and the public sphere. The case law clarifies that State authorities must abstain from taking action which would interfere with thought, conscience and religion. Moreover, in certain circumstances they may also be required to take positive actions to support and to protect these freedoms. The second provision, Article 2 of Protocol No. 1, guarantees these freedoms in the context of the right to education. It protects the right of each individual to have access to the public education system, and it protects the right of parents to raise their children according to their religious and philosophical beliefs, thus impeding indoctrination by the State.

The range of issues that may arise under both these Articles is wide. For instance, should the display of religious symbols be prohibited in State buildings? Is it contrary to religious freedom to establish a State Church? Is it permissible to forbid the wearing of religious symbols in public spaces? Can pupils opt-out from mandatory religious classes because they conflict with their parents’ religious and philosophical views? Such questions can – and do – arise on a frequent basis in the political debate. They may also be posed in legal proceedings in domestic legal systems where the resolution of such challenges by the national courts requires a clear awareness of standards established under ECHR provisions at the international level.

The international expectations set by the ECHR must also be weighed against the fact that each country has its unique history and tradition of State-Church relations. Differences in these histories and traditions have resulted in different national policies. Such dissimilarities
include, among others, the study of religion at school, the wearing of religious symbols in the public sphere, and the duty of the employer to accommodate employees’ religious requests.

The explicit relationship between religion and the State is another difference based on national history and religion. Some European States are expressly founded upon the principle of secularism (or laïcité), and require a sharp separation between State institutions and its representatives and religious bodies. Other States’ domestic Constitutions specifically recognize a particular denomination as the ‘established’ Church of the State. The latter situation need not be incompatible with freedom of religion if only adequate provisions are implemented in order to protect individual beliefs and accommodate other faiths. Cultural and religious diversity should be seen as a matter of enrichment rather than division.

Under this scenario the essential mission of the Council of Europe is to supervise each Member State so that they protect the freedom of religion of their citizens in accordance with the minimum level of guarantee of the fundamental rights and liberties enshrined in the ECHR. In particular, “the State’s duty of neutrality and impartiality, as defined in the Court’s case-law, is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs”\(^1\).

One point worthy of reflection is suggested by Sir James Munby, President of the Family Division of the High Court of Justice of England and Wales. In a recent address delivered at the Law Society’s annual Family Law Conference, he argued that in multicultural, multi-faith, relativist, pluralist states, only secularism can provide justice that is neutral. In other words, only that which is secular can be truly just: “The starting point of the common law is thus respect for an individual’s religious principles, coupled with an essentially neutral view of religious beliefs and a benevolent tolerance of cultural and religious diversity. […] A secular judge must be wary of straying across the well-recognized divide between Church and State”\(^2\).

This clearly shows how common it is to use conceptions of State neutrality to characterize the obligations imposed on governments by national and international guarantees of religious freedom. It is worth noting, however, that while the concept of State neutrality helps capture the essence of legal understandings of religious freedom, ‘State neutrality’ is itself an elusive concept.

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It is often said that the State should be neutral in matters of religion. However, this definition can have different meanings. Of these, probably the least controversial definition of neutrality is the duty of state to act impartially, without favouring one religion or belief over the others, and in a non-discriminatory way. But what does neutrality really mean? On what is grounded? Is neutrality a really neutral ideal? These questions reveal that the discussion of religious freedom leads to the realm of the theoretical and the philosophical.

Commonly, two different concepts of neutrality dominate the discussion. On the one hand, there is the idea of inclusive neutrality. Inclusive neutrality means that religion can have a place in the public sphere. Public institutions can maintain neutrality by providing services, in a manner that includes all different religions and views. On the other hand, exclusive neutrality makes a wall of separation between the private and public sphere, narrowing the freedom of religion in the former. Proponents of exclusive neutrality often associate neutrality with secularism. Questions have been raised at many different levels, from the local and specific (should the uniform code at a particular school allow girls to wear a headscarf?) to the broad and abstract (to what extent should religion be permitted a voice in the public square in liberal societies?).

In consideration of this multifaceted context, this work proposes that, among many current debates on freedom of religion, the question of the place of religion in public education is lead to a thoughtful discussion of the issues surrounding religious freedom. The ideals promoted within the State’s educational system can reflect the conception of State-Church relationships held by governments. For this reason, schools and universities are an area through which the State reveals its attitude towards religion.

Finally, the author strongly suggests that the research method appropriate to these questions must include both law as a vital element and insights from philosophy. Such insights provide a theoretical framework, which reflects the contemporary philosophical approach to the protection of religious freedom in Western society.

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INTRODUCTION

Abstract

The aim of this work is to evaluate the debate surrounding the neutrality of public spaces in relation to religious freedom in light of the new liberalism advocated by John Rawls and Ronald Dworkin, and the objections raised by Michael Sandel and Charles Taylor.

In particular, I intend to point out why and how this theoretical debate is reflected in current case law, and will address the most important judgments delivered in recent years by the European Court of Human Rights regarding the protection of freedom of religion in the school environment. My analysis focuses in particular on uniform policies, religious sexual and ethics education and related opt-out policies, and, finally, towards the issues that may arise when a teacher’s religious duties conflict with a school’s ethos. The findings of this study suggest the importance of the concept of neutrality in assessing the place of religion in the public sphere. In addition, analysis of case law reflects the urgent need to give a true meaning to that notion, both from a theoretical and legal point of view.

Overview of the Chapters

This work develops three different levels of analysis.

The first level presents the historical and jurisprudential context in which the current interpretations of Article 9 (freedom of religion) and Article 2, Protocol No.1 (right to education) of the ECHR take place. The Chapter 1 provides an examination of the travaux préparatoires, pointing out many issues surrounding the current text. In particular, the preparatory works make it possible to retrace the original intent of the above provisions in order to better understand both the different positions of the Member States of the Council of Europe held during the drafting process and the seminal questions addressed. This analysis is

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4 On February 14, 2013, during this writing, Ronald Dworkin passed away.
also supported by the examination of the first judgments, which have made up the present jurisprudence on this topic.

In fact, the ECHR as a ‘living instrument’ is like a tree. A tree has a life of its own, but it can only grow and develop within its natural limits. It is not an unstoppable beanstalk, which is growing thanks to a magical bean. To take the analogy a step further, if a person is interested in studying only the leaves of a tree, he or she must be familiar with the biology of trees in general in order to understand why the leaves have that shape and colour, what is their function, why they differ from tree to tree, etc.

In particular, this analysis reveals the need to address more closely the issue of Church-State relations, which are different among the member States of the Council of Europe. Furthermore the judgments taken into account have identified the relationship between Church and State in different ways and with different terms. The analysis of this relationship explores the need to assess the meaning and origin of these different terms, such as ‘laicism’, ‘secularism’, ‘neutrality.’

The second level of analysis addresses these questions from a theoretical standpoint. Despite the textual silence, the Chapter 2 argues that the concept of State neutrality is becoming increasingly prominent in the Convention jurisprudence on religious freedom. This issue is particularly relevant for the liberalism perspective, which emerged as a solution to the religious conflicts of the sixteenth and seventeenth centuries, during which Europe aspired to universality and cosmopolitanism. In recent years the re-emergence of religion as a controversial issue has raised questions for the classic liberal solutions. As Rawls notes, “historically one common theme of liberal thought is that the state must not favour any comprehensive doctrines and their associated conception of the good. But it is equally a common theme of critics of liberalism that it fails to do this and is, in fact, arbitrarily biased in favour of one or another form of individualism.”

The Second Chapter therefore starts from the Rawlsian new-liberalism perspective, which excludes moral and religious ideas from a political concept of justice. Under this schema, religious, philosophical and moral views, defined as comprehensive doctrines, cannot interfere in the State’s decisions because there is no common ground among citizens on these ‘personal’ issues. At the same time, however, Rawls thinks that there are some basic principles on which all reasonable citizens may agree. One of these is the principle that the

6 Rawls, Political Liberalism..., p.190.
State should be neutral. A neutral State regards all comprehensive doctrines as a private matter, and its law and policies cannot take a position about what kind of life it is worthwhile to lead. Hence, comprehensive doctrine need not be removed but, by avoiding them, Rawls proposes that the State can side-step religious and philosophical contradictions in the hopes of ensuring a common basis and a stable overlapping consensus.

In a slightly different way from Rawls, Dworkin is regarded as an advocate of liberalism prospective called liberal ethics. In particular, Dworkin argues that the government’s role should not be that of superimposing a specific conception of the good life, but rather that of assuring the ethical independence of all individuals and the chance for everyone to achieve his own ideal of well being. Neutrality, then (and here some of Dworkin’s examples come to our aid) means freedom to pursue one’s conception of the good.

Is it really possible for the principle of justice to be neutral with respect to the plethora of competing moral and religious convictions that the citizens of a State may hold? Sandel’s own criticism of Rawls moves in this direction. Sandel points out the moral and political costs of keeping religious convictions split from the public realm. Taylor, similarly, provides a clearly reasoned and articulate response to those who believe that the religion in itself is the central problem in our society. In fact, he points out that a *secularist regime* has to be conceived not primarily as bulwarks against religion, but to secure three basic goals. These can be classified generally in the three categories of the French Revolutionary trinity, reviewed in the light of a contemporary society that is shaped by different comprehensive doctrines. This means the necessity not to incarnate again the Jacobin spirit animated by the ideal of individual autonomy as a supreme value but, conversely, to maximize the basic goals of liberty and equality since a modern democratic State demands a ‘people’ with a collective identity.

Coming back to the legal perspective, two main questions arise. First, what follows from the principle that governments should neither favour nor disfavour individuals on the basis of judgments about the intrinsic worth of their religious views and practices, neither preferring one religious viewpoint over another, nor religion over non-religion? Second, what does it mean to say that “the substantive moral discourse is not at odds with progressive

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public purposes, and that a pluralist society need not shrink from engaging the moral and religious convictions its citizens bring to public life.\footnote{M. Sandel, Public Philosophy. Essays on Morality in Politics (Cambridge: Harvard University Press, 2005), p. 5.}

This leads the reader to the third level of the analysis, which not only includes, but also combines the two aforementioned.

As said before, the difficulties and contradictions surrounding the idea of State neutrality and impartiality are particularly evident in relation to the educational field. In fact, these tensions have given rise to a growing number of Convention challenges. In this regard, the Chapter 3 examines ECtHR cases related to the wearing of the Muslim veil in the educational environment as well as prominent UK national cases dealing with the same question. The forthcoming analysis seeks to highlight the common liberal themes articulated in those cases as well as the different national ‘idioms’ in which this issue has appeared. In all the decisions considered in this chapter, headscarf controversies have occurred in the public schools, although with significant differences. The issue in France and Turkey was the right of pupils and university students to wear a headscarf (and other visible religious symbols). This reflects, on the one hand, the idea that the State has to function as a ‘republic sanctuary’, staying clear of religion and ethnicity; on the other hand, there is also the need to prevent any potential religious conflicts, which can undermine peaceful coexistence among citizens. Conversely, in Switzerland, the right of a teacher to wear a veil was at stake. Here the main point addressed by the Court of Strasbourg is the fact that public school teachers in that country are considered as civil servants. Their primary task is to endorse the principles promoted by the State instead of their personal ‘views’. Finally, the British position on this issue shows a State’s hand-off approach. This is reflected in the fact that the responsibilities to provide uniform policies that accommodate pupils’ religious requirements are completely left to schools since there are no national rules on this matter.

This short sketch shows that, while the formal tests adopted by the Court set a very high bar for States that seek to limit the rights of those within their jurisdictions. In practice, the rights of minority religions in many European States have been routinely limited and the Court has not condemned such limitations. There are two primary reasons for this. The first reason concerns the wide margin of appreciation allowed to member States (perhaps without a proper Strasbourg’s strict scrutiny) where, in particular, the principle of laïcité or secularism is enshrined in the national constitution (see France, Turkey and, in a different way, Switzerland). The second reason lies in a progressively more clear distinction in
European societies between public and private. As Rawls reminds as in *Political Liberalism*, in the private sphere one may be a believer but in the public sphere one becomes a citizen engaged in ‘public reasoning’, which is abstracted from personal moral and religious views.

The *Chapter 4* shifts the focus from Article 9 to Article 2, First Protocol of the ECHR. In fact, the latter provision becomes the centre of the debate when religious freedom concerns the right of parents to raise their children according to their religious or non-religious views.

In particular, this chapter outlines the meaning both in theory and in practice of the ‘duty of State neutrality’ in the context of religious, sexual and civil classes run in public schools. The approach is always through the lens of the ECtHR’s judgments. *Folgero and Others v. Norway* and *Zengin v. Turkey* show the Court engaging in a strict scrutiny of religious education arrangements in order to verify the adequacy of the opt-out policies. Whereas in two later judgments (*Grzelak v. Poland* and *Appel-Irrgang and Others v. Germany*) the Court seems to have a less interventionist approach, which leaves much more room for the State’s margin of appreciation. Of course the only limit that the State must not overstep is the prohibition of indoctrination.

In this section also the well-known *Lautsi* case is taken into account. It addresses the display of the Christian crucifix on the wall of Italian State schools and not active teaching as addressed in the above cases. Its importance is related to the fact that, for the first time, the Grand Chamber of the Court of Strasbourg has overturned the increased emphasis on neutrality entailing geometrical equidistance of the State from all religions, which characterized the other decisions. In particular, Judge Power in his concurring opinion clearly argued that a preference for secularism over alternative religious and philosophical views is not a neutral option but is itself an ideology among others.

Finally, the *Chapter 5* considers the position of teachers in regards to right to freedom of religion at work. Of course this is a huge issue, which involves the protection of other fundamental rights, such as the right to freedom of expression, to private life and to association. For this reason it can be tackled from many perspectives. It primarily involves a balancing of rights, however, and this balance is a special consideration in this analysis of the ECtHR’s decisions. The standard view of the Court from the beginning has been that Convention rights do not apply in the context of work, as the Convention does not cover access to employment. In particular, the right to resign was seen as a sufficient guarantor to protect the *forum internum* aspect of freedom of religion. This is clearly showed by the
Ahmad case, where a teacher was not allowed to change his working hours in order to attend the local mosque for mandatory observances.

However such an approach is unduly restrictive when the protection of the forum externum or the freedom to manifest religion is at stake. The fact that a dismissal can be a breach of a Convention right was recognized for the first time in Vogt v. Germany, where a teacher who took part in extremist political activities was fired. Here the ECtHR found a violation of her freedom of expression.

Things do not spin so smoothly when the employer is a Church. In the latest case Fernández Martinez v. Spain, the Court in its judgment held that the principal question to be answered was whether the State should give precedence to the applicant’s right to privacy over the rights of the Catholic Church under Articles 9 and 11 (freedom of association) of the ECHR. This judgment is also particularly relevant because the Court took a step back from entering into religious disputes. A very different position was taken in the earlier case Lombardi Vallauri v. Italy where the Catholic University of Milan refused to employ a lecturer who had not been approved by the Ecclesiastical authorities. Here Articles 6 (right to a fair trial) and 11 (freedom of expression) of the ECHR are at stake. In this case, the Court focused in particular on procedural issues. It found not only that the Italian deference to religion failed to protect the applicant’s rights, but it also indirectly showed its disagreement with the Concordat provision between Italy and the Holy See.

Viewed together, these last three chapters offer a unique panorama of the ECHR’s case law regarding the place of religion in public schools. They also deal with the corresponding philosophical and legal insights – showed in the first two chapters – which are often hidden in the jurisprudence both at the national and international level.

**Materials**

In regards to the legal standpoint, the main primary sources of material that are drawn upon in this work are the travaux préparatoires on the Article 9 and Article 2, Protocol No.1 of the European Convention on Human Rights. Secondly, a case study approach was used to deal with the concrete issues that can arise when the freedom of religion and the right to education are at stake in the public schooling environment. In particular I took into account the judgements and decisions delivered by the Commission and the Court of Strasbourg. Hence the States involved in this study are Denmark, France, Germany, Greece, Italy,
Poland, Norway, Spain, Switzerland, Turkey and the UK. The position of the member States can be seen through the analysis of the case law of the Council of Europe, which often refers to the law of the respondent State in their decision. This means that this work did not provide a whole overview of the State-Church relations held by each nation, but only the position held on the specific issues examined by the judges of Strasbourg. Since there are no UK cases pending or already delivered by the Court on the protection of freedom of religion in the educational environment, I examined the most important national judgments in order to pinpoint the British position on this subject.

Passing to the theoretical overview, the primary sources of material are the original works of the philosophers whom I took into account. It was also essential to analyse and synthesize the research literature and commentary works in this field, as well as in the legal one.

Finally, I am extremely grateful to my supervisors who have always pushed me into sharing my thoughts, ideas, and results in public, in order to check the validity of my assumptions. For this reason, I believe that informal meetings, public conferences, seminars and classes have been indispensable opportunities to develop the arguments in this work from both methodological and rational standpoints.
Chapter 1

FREEDOM OF RELIGION AND THE RIGHT TO EDUCATION UNDER THE ECHR: A PREAMBLE.

Abstract

This Chapter examines the scope and content of freedom of thought, conscience and religion, and the right to education as guaranteed by Article 9 and Article 2, Protocol N.1 of the European Convention on Human Rights and as interpreted in the case law of the European Court of Human Rights. The first part offers an analysis of the travaux préparatoires of Article 9 and Article 2, Protocol N.1 in order to lay the foundation for their interpretation and application. Afterwards the discussion of certain key cases found in the jurisprudence helps to clarify that the text of the Convention functions as a starting point for an understanding of the guarantee. An awareness of relevant jurisprudence is vital. In particular, the 1993 case ‘Kokkinakis v. Greece’ was the first serious attempt by the Court of Strasburg to apply Article 9. Before that there were mainly two relevant cases, both decided in the light of Article 2 of the First Protocol – ‘Kjeldsen, Busk Madsen and Pedersen v. Denmark’ related to conscientious objection to sex education in school, and ‘Cambpell and Cosans v. UK’, which dealt with corporal punishment on a teacher’s part. An analysis of Kokkinakis suggests, first of all, that the protection of freedom of religion can be considered as obligation of results. While a particular result must be achieved, there is a choice of means, which may differ from one State to another. Secondly, freedom of religion as a human right “do[es] not require states to adopt the highest level of protection, as long as what they do is ‘good enough.’”9 Finally, while these two forms of ‘State discretion’ seem acceptable, the third form of discretion, the margin of appreciation, seems to lead to more disagreements. What, then, is the effect of the margin of appreciation doctrine when there are Church-State tensions? In justifying this wide margin of appreciation, the Court seems to focus on the fact that there is no common European standard relating to the delicate question of relations between Church and State. Several judgments give the impression that the Court does not

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want to distance itself from the positions of the national courts. From the case law it is also evident that the concepts of secularism and State neutrality are intrinsically related to the decisions pertaining to Church-State relations. The Court of Strasbourg considers these concepts to be in line with a democratic society and the values underlying it. Differences about the nature of State neutrality are also obvious and clearly highlighted by several decisions concerning education.


Immediately after the end of the Second World War, in his famous “Speech to the academic youth” held at the University of Zurich in 1946, Sir Winston Churchill advocated the ‘United States of Europe.’ He urged Europeans to turn their backs on the horror of the past and look to the future, saying:

I wish to speak to you today about the tragedy of Europe. […]

If Europe were once united in the sharing of its common inheritance, there would be no limit to the happiness, to the prosperity and glory which its three or four hundred million people would enjoy. Yet it is from Europe that have sprung that series of frightful nationalistic quarrels, originated by the Teutonic nations, which we have seen even in this twentieth century and in our own lifetime, wreck the peace and mar the prospects of all mankind. And what is the plight to which Europe has been reduced? Some of the smaller States have indeed made a good recovery, but over wide areas a vast quivering mass of tormented, hungry, care-worn and bewildered human beings gape at the ruins of their cities and homes, and scan the dark horizons for the approach of some new peril, tyranny or terror. […] Yet all the while there is a remedy which, if it were generally and spontaneously adopted, would as if by a miracle transform the whole scene, and would in a few years make all Europe, or the greater part of it, as free and as happy as Switzerland is today. What is this sovereign remedy? It is to re-create the European Family, or as much of it as we can, and provide it with a structure under which it can dwell in peace, in safety and in freedom. We must build a kind of United States of Europe. In this way only will hundreds of millions of toilers be able to regain the simple joys and hopes which make life worth living. The process is simple. All that is needed is the resolve of hundreds of millions of men and women to do right instead of wrong, and gain as their reward, blessing instead of cursing”.

The European unity mentioned by Churchill was finally achieved through “an act of faith in the European family and an act of oblivion against all the crimes and follies of the past.”11 This achievement is the European Convention on Human Rights (ECHR).

The Convention was signed in Rome on November 4, 1950 and entered into force on September 3, 1953. First published between 1961 and 1964 for use by governments, the Commission, and the Court, and nowadays available online and in the Travaux Préparatoires edited in 1973, this uneasy work on the protection of human rights was surely the greatest achievement of the Council of Europe.

It is clearly recognized that the ECHR is to be interpreted in accordance with Article 31 of the Vienna Convention on the Law of Treaties, which provides that treaties are to be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”12 Moreover, according to Article 32, preparatory materials are to be examined in order to “confirm the meaning resulting from the application of Article 31.”13 They are also to be examined in order to determine the meaning where such an interpretation is “ambiguous or obscure” or “leads to a result which is manifestly absurd or unreasonable.”14 For this reason, it is extremely useful to examine the travaux préparatoires of Article 9 (Freedom of thought, conscience and religion) and Article 2 of the First Protocol (Freedom to education) in order to support their interpretation and application. We will see, however, that these preparatory works tend to highlight the problems surrounding the texts, rather than resolving them.

11 Ibid.
12 It reads as follows:
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.
13 It reads as follows:
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifest absurd or unreasonable.
14 Ibid.
The Committee of Ministers (CoM) and the Consultative Assembly (CA) were the main actors in drafting the Convention and its First Protocol. Generally speaking, “the Consultative Assembly, composed of parliamentarians of both governmental and opposition parties of each member state, favoured a comprehensive system of guarantees, including an extensive list of rights to be protected.”\(^{15}\) In contrast, the CoM was more conservative in its view of which rights should be included in the Convention.

The process of drafting was very complex. It was guided, in part, by Mr Pierre-Henry Teitgen, Sir David Maxwell-Fyfe, and Professor Fernand Dehousse, and supported by the European Movement. They produced both a draft of the European Convention on Human Rights and a draft Statute of the European Court of Human Rights. These were submitted to the CoM on July 12, 1949. Afterwards, on August 9, 1949, the CoM decided not to include anything connected to human rights but to forward this issue to the first meeting of the CA.\(^{16}\)

The CA held its first session in August 1949, and it then discussed the issue of which rights ought to be included in the list of fundamental rights. In the fifteenth sitting of the Assembly held from the 5\(^{th}\) to the 8\(^{th}\) of September 1949 Mr Teitgen (France), the rapporteur, reported to the CA about the deliberations in the Legal Committee on that issue. The Committee’s starting point was the agreement that “only those essential rights and fundamental freedoms could be guaranteed which are […] the common denominator of our political institutions, the first triumph of democracy, but also the necessary condition under which it operates.”\(^{17}\) For this reason, the Committee experienced serious controversy regarding the inclusion of ‘family’ rights, which are represented by the freedom from all arbitrary interference in family life, the right to marry and found a family, and the prior right of parents to choose the kind of education to be given to their children. In fact, the main point of the objections was that “in these cases no rights regarded as essential for the functioning of democratic institutions were at stake, so that it was preferable to exclude them from the guarantee and to limit the latter solely to essential rights.”\(^{18}\) However, this argument did not prevail because of the memory of racial restrictions on the right of marriage and the forced regimentation of children and young people planned by the totalitarian regimes in the recent past.

The Committee therefore listed twelve basic civil and political rights, which it proposed should be guaranteed.\(^{19}\) Looking at the list, it is evident that the selection of these rights was influenced and connected to the Universal Declaration of Human Rights (UDHR), adopted by the General Assembly of the United Nation in December 1948. On this point Mary Ann Glendon, a Professor of Law at Harvard University who writes and teaches in the field of human rights, comparative constitutional law and political theory, identifies two different ways of thinking and speaking about human rights. In fact, she has shown that contemporary public debates, regarding mainly freedom and rights, generally make use of either the ‘libertarian’ or ‘dignitarian’ modes of discourse, which can be a way to understand the similarity between the UDHR and the ECHR.

While the libertarian approach is prominent within the Anglo-American sphere, “the dignitarian mode is characteristic of post-World War II continental European constitutions and of the UN’s human rights documents.”\(^{20}\) The main point of contrast can be briefly summarized as follows: “Libertarian rights discourse is grounded in the notion that we have ‘certain inalienable rights’ that government must respect; in fact it implicitly confers its highest priority on freedom from governmental constraints. […] In dignitarian systems, by contrast, rights tend to be formulated so as to make clear their limits, and their relation to one another, as well as to the responsibilities that belong to citizens and the state. Charters in this tradition, such as the Universal Declaration, typically ground human freedom in innate human dignity, as well as in inalienable rights.”\(^{21}\) Hence, it is evident that both the UDHR and the ECHR aim to safeguard the dignity of each person from the State’s imposition. This means that they aim to protect fundamental rights and limit government intervention. The right to freedom of religion and the right to education clearly show the practical implications of the dignitarian mode of discourse. In particular, the preparatory works on both these

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\(^{19}\) The list of fundamental rights is worded as follows, with the corresponding Articles of the Universal Declaration indicated in brackets:


\(^{21}\) Ibid., p. 5.
Articles are focused on balancing the role played by the ECHR in protecting citizens’ rights without being paternalistic with respect to the States’ traditions.

It has already been stated that Article 9 guarantees the freedom of thought, conscience and religion. We will now discuss the preparatory works about it, which influenced and formed the foundation for the Article in its current form. Article 9 is currently worded 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 and private, 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, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 18 of the Declaration of the United Nations reads:

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 teaching, practice, worship and observance.

All rights protected by the Universal Declaration are subject to general limitations stated in Article 29 (2), which provides that:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Regarding these texts, in the report presented by Mr Teitgen, on behalf of the Legal Committee, on August 30, 1949, it was clarified that the aim of the Committee was to protect citizens “not only from ‘confessions’ imposed for reasons of State, but also from those abominable methods of police enquiry or judicial process which rob the suspected or accused person of control of his intellectual faculties and of his conscience.”22 This was the reason why Mr Ungoed-Thomas’ (United Kingdom) proposal to introduce the freedom of thought and conscience along with the freedom of religion was welcomed. It was hoped that the

introduction of freedom of thought and conscience would guarantee the protection of the convictions of non-believers.

During the first meeting of the Committee of Experts on Human Rights, held on February 8, 1950, several issues arose in connection to Article 9 (2). In particular, these issues involved the limitations to be imposed on the freedom of religion. Some countries, in fact, were worried that such article could undermine their status quo instead of being a guarantee. The solution to that dilemma was the introduction of the broad-minded sentence “in a democratic society,” which was borrowed from Article 29 of the Universal Declaration, in order to define the criteria of the restrictions. In addition the paragraph, which had caused these concerns, was deleted. The concerns about this article had arisen from Turkey’s apprehension regarding the impact of these rights on its system of laïcité that being challenged by Islamic fundamentalism. In addition, Sweden had wanted to maintain the Lutheran Church as its national Church without any sort of interference. Therefore, they proposed to add the following paragraph to Article 9 (2), which was worded as follows: “Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in the interests of public safety, or morals, or for the protection of the rights and freedoms of others, provided that nothing in this Convention may be considered as derogating from already existing national rules as regards religious institutions and foundations, or membership of certain confessions.”

By contrast, the representative of the Netherlands asked for the deletion of that paragraph. He argued that it would appear to be a contradiction between the provisions stated in Article 9 (1) and those in Article 9 (2). Moreover, since this reservation related only two countries (Turkey and Sweden), it could be removed from the written text but interpreted as meaning the collective responsibility of the signatories for exceptional situations.

Finally, there were several proposals regarding the inclusion of the rights of parents to determine what kind of religious education a minor should receive. However, “while there was general agreement that religious education should not be imposed upon the minor against the will of the parents, it was thought that the proper place for such a provision would be in an article on education.” This topic will be examined below.

Eventually, on the November 4, 1950, the Convention was signed in Rome.

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23 Ibid., p. 10.
24 Ibid., p. 22.
1.2. The Drafting Process of the Right to Education: A Highly Debated Issue

From the beginning of the work of drafting the ECHR, religious freedom was seen, without any doubt, as a fundamental right for every democratic society. It is not just one right among others; it is the mother of all rights. When a State recognizes religious liberty, it consequently allows people the right to worship an authority higher than the State. In fact, every totalitarian regime makes war on religion precisely because it cannot abide any god besides itself. This is why the greatest guarantee of limited government is the right to freedom of religion. At the same time, however, where social and economic rights were at stake, there was a great deal of debate concerning the inclusion and wording of guarantees of religious freedom. One of the most controversial rights was the right to education, which ultimately did not find its place in the Convention signed in Rome in November 1950. Interestingly, the debate surrounding the right to education was centered on questions of religion, and it is to this debate that we now turn our attention.25

It is possible to identify two main sessions of discussion relating to this article. The first one lasting almost two years (from August 1949 to November 1950), occurred when all the actors of the Council of Europe were involved in the drafting of the Convention. The discussions relating to the right to education concluded with the decision to refer the right to education to the Council’s legal experts for further study. The second main session occurred in March 1952, and it was during this session that the First Protocol of the Convention was drafted and eventually signed.

1.2.1. The First Work Session on the Right to Education (August 1949 – November 4, 1950)

As we have seen above, during the first session (August-September 1949) the CA discussed which rights should be included in the list of fundamental rights.

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There was great uncertainty whether the right to education should be included. The main point of the discussion was to establish a common understanding on the essential value of the right to education. It was asked why protection of the right to education is necessary in order for a democratic society to function well. What the best perspective from which to look at that right? Was it better to protect the right of parents to choose their children’s education or to protect the rights of children to be educated?

Because these questions remained unanswered the participants in the first session agreed with Lord Layton’s proposal to exclude that right from the competence of the Court. Therefore the Recommendation adopted by the Assembly on September 8, 1949 did not contain any provision corresponding to Article 2 of Protocol No. 1.26

With respect to the question of education, the Assembly was split in two different positions. On the one side, Lord Layton (United Kingdom) proposed to delete family rights from the agenda for two reasons. First he suggested that, in order to shorten the debate and sign the Convention as soon as possible, “the list of rights should be limited to the absolute minimum necessary to constitute the cardinal principles for the functioning of political democracy.”27 Second, because education was still a highly discussed topic in many countries, such as the United Kingdom, he believed that it would be extremely difficult to find a homogeneous approach to that issue among the member States of the Council of Europe.

On the other side, Mr De La Vallee-Poussin (Belgium), supported in particular by Norway, Ireland, Italy and Netherlands, stressed the importance of the prior right of parents to choose the kind of education to be given to their children in order to avoid any sort of educational totalitarianism. They were opposed by France, which proposed a new version of Article 11, in which the right of parents to choose their children’s education was replaced by “the right of every child to have access to culture, to be brought up in atmosphere of freedom and according to methods which do not impose any doctrine or dogma upon him.”28

Given these different perspectives, during its meeting November 5, 1949, the CoM, having examined this Recommendation, decided to invite each of the member States to

26 See §1.2.2.
28 Ibid., p. 16.
appoint a qualified person to be a member of a Committee of Experts that would be responsible for drawing up a draft Convention to be discussed by the CoM.29

Since most of the issues were political in nature, the Committee preferred to leave them to the Ministers. At the same time, however, it also decided to draw their attention to the importance of the right in question. “It was felt that the totalitarian regimes had a tendency to interfere with the right to own property as a means of exercising illegitimate pressure on its nationals and they also sought systematically to expose the children to their ideological propaganda, by depriving them of the rightful influence of their parents.”30

During the second Session of the CA (August 7-28, 1950) the Assembly again debated the right to education, which read as follows:

All persons are entitled to education. The responsibilities assumed by the State with regard to education may not encroach on the right of parents to ensure the spiritual and moral instruction of their children in accordance with their own religious and philosophical beliefs.31

At that point, the majority of the Assembly was of the opinion that the right to education should be included in the Convention; nevertheless, there were objections.

On the one hand, Mr Roberts (United Kingdom) argued that this right could give rise to difficulties of interpretation, in particular because it could be hard for member States to strike a fair balance between this paragraph and national provisions on this matter. On the other hand, Mr De Valera (Ireland), supported in particular by France, Belgium and Netherlands, believed that the wording of the right to education looked quite ‘secularist’ because “it safeguards parents from interference by the State with the religious education which they may wish to give to their children; but in many States there are large sections of the population who desire something more than that.”32

Then, Sir Maxwell-Fyfe (United Kingdom) made clear the position of the Legal Committee, saying that the main object of this Article was “to meet what we all know was a terrible aspect of totalitarianism, namely, that the youth of the country were brought up so much under the dogmatic teaching of totalitarianism by the agencies and para-agencies of the State that it was impossible for their parents to bring them up in their own religious and

30 Ibid., pp. 18-20.
philosophic beliefs.” Therefore, the Assembly voted for the inclusion of the article of the right to education (and of the right to own property) in the Convention test, giving the CoM the chance to debate again on this point.

The day before the Convention was signed, the CoM attended the last meeting. In that circumstance Sir Maxwell-Fyfe, informed that the CA would be very disappointed if the Committee had not added the controversial right to the Convention. However, the CoM opted for deleting them because, as Mr Davies (United Kingdom) highlighted, “the British Government would find it very difficult at that stage to accept the amendments of the Assembly,” therefore it would be much more preferable to sign the Convention without these two rights than not sign it at all. At this time, all the members felt strongly that the British signature of was of great importance, and so the Convention was signed, without these rights, on November 4, 1950.

1.2.2. From the Convention to the First Protocol

Between August 1950 and the signing of the Protocol on March 20, 1952, different texts were discussed and different views were expressed. The following table shows the four drafts, with the fourth being the present text:

<table>
<thead>
<tr>
<th>Text of the CA (August 1950)</th>
<th>Text of the CoM (August 1951)</th>
<th>Text of the CoM (November 1951)</th>
<th>Text of the CA (December 1951)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Every person has the right to education. The function assumed by the State in respect of education and of teaching may not encroach upon the right of parents to ensure the religious and moral education and teaching of their children</td>
<td>No person shall be denied the right to education. In the exercise of any functions which it may assume in relation to education and to teaching, the State shall have regard to the right of parents to ensure the religious education of</td>
<td>No person shall be denied the right to education. In the exercise of any functions which it may assume in relation to education and to teaching, the State shall have regard to the right of parents to ensure the religious education of</td>
<td>No 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</td>
</tr>
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</table>

33 Ibid., p. 93.
34 Ibid., p. 97.
35 Ibid., p. 100.
The Committee of Experts met three times – in February, April, and June 1951 – and the first question addressed was whether the right to education should be stated positively or negatively. Only during the second meeting of the Committee of Experts did majority of the delegations approve the negative version of the right to education. This option (supported by the British, Danish, Norwegian and German delegations) avoided any impositions on governments regarding the obligation to take effective measures to ensure that anyone could receive the kind of education he desired.\(^\text{36}\) Conversely, stating the right to education positively as the text of the Consultative Assembly suggested (supported by the Belgian Government and other delegations), meant to point out a sort of State obligation to ensure this right.\(^\text{37}\) In particular, the Swedish delegation “took the view that the positive formulation implied an obligation for the State to furnish education to all children not in receipt of private education.”\(^\text{38}\)

The second question on which the Committee was divided was whether the Convention should ensure the right of parents to choose only the religious education or the whole education of their children. All the delegations, with the exception of the Belgian one, agreed at the first meeting on the first alternative.

The final issue, connected with the previous one, regarded the use of the word ‘creeds’ instead of ‘philosophical convictions.’ This change was made for two reasons. First,

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\(^{36}\) Text proposed by the Government of the United Kingdom: “No person should be denied the right to education. In the exercise of any function which the State may assume in relation to education and to teaching it shall have regard to the liberty of the parents to ensure the religious education of their children in conformity with their own convictions” \(\text{(Traveaux Préparatoires, Vol. VII 1975, p. 194).}\)

\(^{37}\) Text proposed by the Belgian Government: “Every person has the right to education. Parents have the right to ensure the religious education and the teaching of their children in conformity with their own religious and philosophical convictions. The State in the organisation of public instruction shall respect this right of parents and shall take the necessary measures to ensure its effective exercise” \(\text{(Traveaux Préparatoires, Vol. VII 1975, p. 196).}\)

the Assembly text could mean that “parents whose ‘philosophical convictions’ are fundamentally opposed to the conceptions of democracy and human rights would have the right to educate their children in the same beliefs.” Second, at least one State had legislation that allowed parents to educate children according to their creeds, but if parents did not belong to any specific religion, then the State had the duty to bring up children in the State religion.

Ultimately, the draft passed through the CA, and in August 1951 the CoM approved the second draft of Article 2 of the First Protocol.

The opinion of the Legal Committee, held in October 1951 on this Article, added fuel to the fire. In fact, comparing this text with the one adopted by the Assembly, the Committee noted: firstly, that the sentence ‘have regard to’ did not mean a secure supervision; secondly, that if the right to education was regarded only as a religious matter then this would “undoubtedly be interpreted in the majority of States as an appreciable retreat, which it […] would be difficult to accept, from the traditional conception of freedom of education.” Finally, the protocol spoke only of respect of religious convictions (creeds) in order to avoid the spread of any doctrines opposed to democratic societies. This last concern was also expressed with regard to other freedoms; hence a general clause, which limited acts against the principles stated in the Convention, was included. For all these reasons, the Committee proposed replacing Article 2 with the last draft.

In the light of the debate up to this point, what is most evident is that, after two years of constant work, the main point of the argument was still the nature of the right to education. Why should that right include the right of parents to bring up their children according to their philosophical convictions? Was it a right tailored only for religious parents? Why should the State avoid interfering with parents’ right to educate their children? These questions still needed to be answered.

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39 Ibid., p. 152.
40 Ibid., p. 155.
41 Article 17 ECHR:
   “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention”.
42 However, during a meeting of Ministers’ Advisers in November 1951, another possible means of coming to an agreement was suggested. It was proposed that it might be easier to come to a shared opinion on the right of education by reverting to the text of this Article in the form in which it had been approved by the Ministers’ Advisers in July 1951 (the third draft). On that occasion, in fact, the Article had been discussed because it complied with the desire expressed by France and Belgium to safeguard Church-schools, but, since Turkey did not accept this amendment, it could only accept the protocol with a reservation. The advisers agreed that the text should now be submitted to the governments in the hopes that it would be signed at the next meeting of ministers. Italy then suggested that the text be sent back to the assembly for its opinion before it was signed.
During the CA held in December 1951, the Assembly insisted that the text of Article 2 should be reinstated following the three points, which the Legal Committee had suggested in October. They likewise insisted that the need to answer the above questions was of the greatest importance in order to vote with awareness.

Mr Schmal (Netherlands), through his reflections, went to the heart of the debate:

The respect of the individual is the basis of the Western conception of the State and of society. That is why I venture to ask whether it is not natural and elementary that it should be the parents, first and foremost, who are responsible for the education of the children that they have brought into the world. […] If the State, in one form or another, has the monopoly of primary education, this right of the parents […] is in danger. […] As for the fundamental right of parents, all things considered, one point only is important: to make it possible for parents to refuse the compulsory education offered by the State if it is contrary to their conscience. It is no use saying that in any particular country where the State school is compulsory, some provision, relatively modest, is made for religious instruction. […] Such a thing is merely the minimum concession that could be made by a rationalist age.43

At this point, the majority insisted on the replacement of the word ‘creeds’ with the words ‘philosophical convictions’ because, as Mr Pernot (France) said, “we desire that the father and mother of a family may be able to mould the souls of their children in accordance with their own convictions [religious or philosophical], for there is nothing dearer to a father than the souls of his children.”44 On the other side, one objection put forward by a number of representatives regarded the vagueness of the expression ‘philosophical convictions.’ On this issue, Mr Taitgen recalled that the fundamental aim of the right to education was “to protect the right of parents in the field of education and teaching against the danger of nationalisation, absorption, monopolisation, requisitioning of young people by the State – irrespective of whether they have religious convictions or merely the philosophical convictions of traditional humanism.”45 At the end of the debate, the final draft passed with 73 ‘ayes’ and 23 abstentions.

The final stages of the negotiations are inadequately documented. Essentially, at its meeting in Paris on March 20, 1952, the CoM decided to sign the text and no States made

any reservations. The Protocol came into force on the May 18, 1954 after ten ratifications had been deposited.46

1.3. Education and Religion: The Most Sensitive Issues

Reading the preparatory works on both Article 9 and Article 2 of the First Protocol, it is clear that the right to education was the most difficult topic to reach agreement. It is likewise clear that, in having attempted to reach agreement on this topic, the CoM had bitten off more than it could chew.

As Wahlström has pointed out, there are at least four main issues on which the debate was focused. First of all, the travaux préparatoires illustrates that the basic bone of contention was the role of the State in a democracy.47 At that time, Europe had recently experienced the terrible effects of totalitarian regimes and two World Wars, all of which had brought the States to their knees. Hence, the Council of Europe was intended to restore and protect democracies having a membership based on the European Convention on Human Rights. However, “there was certainly the fear of an oppressive state controlling people’s lives.”48 This fear, for instance, was also shown by the frequent disagreements among the members of the Consultative Assembly over the right to be included, whether the rights should be defined or just enumerated, and whether the Court was necessary. As Gordon notes,

Socialist members argued that economic and social rights as well as political and civil rights should be included in the Convention. They felt that it would be possible for an undemocratic government virtually to destroy the freedom of the individual by disregard for economic and social rights. While the other members of the Assembly agreed that economic and social rights were important, they found them extremely difficult to enforce. In the interests of putting a convention into force quickly, they felt that only those rights on which all agreed should be included.49

46 Denmark, Iceland, Ireland, Luxemburg, Netherlands, Norway, Sweden, Saar, Turkey and United Kingdom.
A second area of disagreement within the Assembly arose between British members and Continental ones. This debate was concerned with whether simply to enumerate fundamental rights, as they are listed in the Universal Declaration of Human Rights, or to precisely define them. On the one hand, Continental members argued that the rights and freedoms to be guaranteed were timeless because they had been accepted after long usage by many democracies. On the other hand, British representatives, on the ground of their unwritten constitution and the constitutions of their colonies, claimed that it was necessary to consider precise definitions of each fundamental right. In fact the United Kingdom was extremely anxious to limit its commitment to the ECtHR. Moreover, in drawing up constitutions for former British colonies, it “had adopted the policy of including precise human rights provisions based on the British Constitution, since it could not be expected to rely exclusively on a supposedly common cultural background, but should have a clear indication of its future evolution.”

Finally, without many difficulties, the Assembly opted for the British view of precise definition.

Another debated issue was religion. In particular, the two focuses of the discussion were the limitations of Article 9, and its connection with the right to education. Both these questions were based on the ground of religious freedom, and whether ‘religious freedom’ meant merely ‘freedom to profess a religion,’ or if it also meant ‘freedom from any religions,’ and, therefore, freedom to pursue other philosophical convictions. Most of the continental European countries, such as Italy and Netherlands, but also Ireland, argued for the protection of the former concept of religious freedom. Consequently, they likewise argued in favour of the right of parents to choose a religious education for their children, and thereby prevent any sort of State brainwashing. From their point of view, a secular education could not be enough. Other representatives, particularly the British, preferred to change the right of parents in the educational area into the right of children’s free access to culture. The Council of Europe decided that the Convention should contain a compromise. The right of parents to choose their children’s religious education would be extended to philosophical convictions because, on the one hand, it was necessary to prevent any sort of State influence on young people, as happened during totalitarian regimes. At the same time, it was determined that it was likewise essential to guarantee this right to parents who did not belong to any religion.

50 Ibid., p. 806.
51 For further analysis, see Chapter 4.
Despite the contrast between ‘religious and philosophical convictions’ of parents within the preparatory work on the European Convention on Human Rights, the concept of education, its aim, and its content were not questioned, but rather taken for granted during the debates in the Consultative Assembly between 1949 and 1952. The reason for this was that the framework of most of the discussions did not actually concern education, but rather “the relation between the state and religion, or where to draw the line between the public and the private.”\textsuperscript{52}

1.4. From the Travaux Préparatoires to the Present Jurisprudence on Article 9 and Article 2, Protocol No. 1 in School-Church Relationships

As Ronan McCrea has pointed out, “the jurisprudence of the ECHR is of major importance not merely to the regulation of religious freedom but also to the relationship between religion and the state in contemporary Europe.”\textsuperscript{53} The genesis of this right, and the present debate on this issue, make clear that there is no uniform approach by member States when it comes to their own relationships to religion. Moreover when educational issues are at stake, Article 9 is often taken in conjunction with Article 2 of the First Protocol. This link between Article 9 and Article 2 will now be examined from a jurisprudential point of view. Further analysis will show that many of the issues raised during the drafting process of the ECHR are still alive in the present jurisprudence. In particular, it is in the case law that we can see how concerns about the religious freedom and the right to education have had ‘practical’ implications.

Through an analysis of the wording of Article 9, it is possible to identify the issues which national governments have had to face. These include the Church-State relationship, the place of religious symbols in the public sphere, compulsory sexual education in the schools, freedom of religion in the employment environment, exemptions to the duty to undertake military service, the building of new places of worship, etc. However, though each


\textsuperscript{53} R. McCrea, \textit{Religion and the Public Order of the European Union} (Oxford: Oxford University Press, 2010), p. 120.
government must face these issues, it is likely that all States do not share a common understanding of which solutions to the above issues are best.

Let’s start with Article 9, which provides that:

(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 and private, 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, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Thus, Article 9 recognises that freedom of religion has both an individual and a collective dimension. The right to religious freedom includes the right to manifest religion ‘either alone or in community with others.’ This means that the right to religious freedom extends to religious groups as well as to religious individuals.

The first part of the Article defines religion as an individual right in its pure form (the *forum internum*), which is an absolute right under the Convention. This means that the State cannot limit or prohibit citizens from having or changing inner thoughts and beliefs. The purpose of this part is to prevent any kind of State indoctrination. Neither the Court nor the Commission has set out what is meant by this term in any detail, but both have used the standard recital that “Article 9 primarily protects the sphere of personal beliefs and religious creeds, i.e. the area which is sometimes called the *forum internum*.”54 Therefore “the internal dimension of religion or belief is considered to be at the core of religious freedom. Yet the implications of this are unclear. At the most basic level, it could be considered simply the right to hold opinion silently […] without interference by the State.”55 It is evident that at this level the right is almost impossible to breach. It has been observed that “one can further explain the wide realm of protection that is theoretically accorded to the *forum internum* along with the lack of any practical application by the international system because the *forum internum* is an internal realm of consciousness. Hence infringement is difficult to demonstrate and the practical applications appear rather limited.”56

On the other hand, the second part of Article 9 deals with the limitations on religious freedom; hence, in this part, religious freedom is no longer an absolute right. This part of the

54 *C v. UK*.
Article provides limits to the protection of thought, conscience and religion in the public sphere (the *forum externum*), where clashes with the ‘right of others’ and the State’s conception of religion may occur. However, any restriction that is applied to the manifestation of one’s religion or beliefs must be ‘necessary in a democratic society.’ Thus, only weighty considerations allow State interference with religion, according to Article 9.

The other significant protection of freedom of religion in the Convention is Article 2 of the First Protocol. This Article provides that:

> No 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.

As we have just seen, during the drafting process many complex legal issues arose with respect to this Article. Certain States were reluctant to adopt a positive version of this right while others wanted more guarantees implied in the provision. The result was that there was no obligation upon States’ parties to have a State system of education or to subsidize private schools or universities or other higher educational institutions. Another controversial topic was the inclusion of other beliefs alongside religious convictions in order to assure that children could be raised as atheist or agnostics. However, “at the heart of the debate was the issue of how and to what degree are the rights of parents to be safeguarded when the state is necessarily assuming major responsibility for education?”

The general content of Article 2, First Protocol was specified in connection with one of the first cases which the Court had to determine: the *Belgian Linguistic Case (No. 2)*, which states that the right to education is not an absolute right, but is subject to regulation by the State although the limitations of this right must not damage its essence and effectiveness. The case concerned a group of French-speaking Belgian parents who claimed the right of their children to be educated in French. The Commission analysing the wording of this article emphasised that “the first sentence of Article 2 of the First Protocol, despite its negative wording, embodies the right of everyone to education. It is a right whose scope is not defined or specified in the Convention and whose content varies from one time or place to another, according to economic and social circumstances.”

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58 *Case “relating to certain aspects of the laws on the use of languages in education” in Belgium v. Belgium.*
59 Ibid., §2.
second sentence of Article 2, the Commission, in the light of the preparatory works, pointed out that the cultural and linguistic preferences of parents do not fall within ‘religious and philosophical convictions.’ Accordingly, the Court did not find any violations of the right to education in that circumstance.

More recently, in *Ali v. Head Teacher and Governors of Lord Grey School* Lord Bingham summarised with great clarity the meaning of the right to education, saying that

There is no right to education of a particular kind or quality, other than that prevailing in the state. There is no Convention guarantee of compliance with domestic law. There is no Convention guarantee of education at or by a particular institution. There is no Convention objection to the expulsion of a pupil from a educational institution on disciplinary grounds, unless (in the ordinary way) there is no alternative source of state education open to pupil […]. The test, as always under the Convention, is a highly pragmatic one, to be applied to the specific facts of the case: have the authorities of the state acted so as to deny to a pupil effective access to such educational facilities as the state provides for such pupil?\(^\text{60}\).

Hence, the Convention implies a fair balance between the general interests of a member State and the right to access existing educational establishments always *respecting* the religious and philosophical convictions of parents. This is perfectly in line with the observations made by Mr Renton (United Kingdom) during the last meeting of the Consultative Assembly in 1951, before the signature of the First Protocol. In fact, he argued

I agree that the word ‘respect’ creates a strong obligation, but it does not, in my opinion create much more than an obligation upon the State to adopt a sympathetic attitude. It certainly does not compel the State to do anything positive. At the most, it seems to me it creates an obligation upon the State – which in the circumstances is likely to turn out to be merely a moral one – not to do anything which might conflict with the parents’ right to ensure that their children’s education and teaching conform with their own religious and philosophical convictions. […] I go so far as to say that when, in some vague way, the State is instructed to respect the philosophical rights of the parents, the State might even be asked to place limitations upon the education of the children, which would be quite unphilosophical. If I may give an example, there are some parents who are vegetarians, and they may think that that is a philosophical matter. Is the State obliged to teach the children of those parents that they also must be vegetarians? I think we can exaggerate the prudence of parents. There are parents in my constituency at home who do not believe that their children should stay on an extra year at school, or after age of 14. Should parents’ view in

that matter be respected? Is that to be regarded as a philosophical

From the drafting process to the present, it is evident that the Court has to deal with
each concrete case in order to assess a fair balance between the right of parents to educate
their children without State’s interference and the State’s duty to limit that right in some
circumstances.

On this point, \textit{Campbell and Cosans v. UK} is significant. In this case, school
discipline was maintained by corporal punishment over the parents’ objections in breach of
Article 2. The Court decided that the parents’ objections were ‘philosophical’ because they
attained the required “level of cogency, seriousness, cohesion and importance.”\footnote{Case of Campbell and Cosans v. UK, §36.} Moreover
the ECtHR stated that “whilst the adoption of the policy referred to clearly foreshadows a
move in the direction of the position taken by the applicants, it does not amount to ‘respect’
for their convictions. As is confirmed by the fact that, in the course of the drafting of Article
2 (P1-2), the words ‘have regard to’ were replaced by the word ‘respect’ […] the latter word
means more than ‘acknowledge’ or ‘taken into account’; in addition to a primarily negative
undertaking, it implies some positive obligation on the part of the State […]. This being so,
the duty to respect parental convictions in this sphere cannot be overridden by the alleged
necessity of striking a balance between the conflicting views involved.”\footnote{Ibid., §37.}

Next we will examine the leading cases on Article 9 and Article 2, Protocol No. 1 in
order to illustrate more clearly the evolution of the jurisprudence until now. The cases taken
into account are not always directly connected to the educational environment, but they are
crucial to understanding the reasoning of the ECtHR in the judgments pertaining to our main
interest.

1.4.1. The Seminal Case Law of the ECtHR Jurisprudence on Article 9 and Article 2,
Protocol No. 1

Showing the milestone cases of the ECtHR jurisprudence on these two articles can be
helpful in identifying how the standard theoretical outlook has been dealt with in 43 years of
work of the Court, particularly regarding the manifestation of religion and belief in connection with the right to education. The purpose here is not to give an exhaustive view of each case (this is the aim of further chapters), but to show the peculiarity of some judgments, and their implication in the development of the jurisprudence on Article 9 and Article 2, Protocol No.1.

For many years, the Court of Strasbourg paid little attention to issues related to the freedom of religion. Until 1993, with *Kokkinakis v. Greece*, the first case where the Court found a violation of Article 9, there were mainly two relevant cases, both decided in the light of Article 2 of the First Protocol. The first case, *Kjeldsen*, related to conscientious objection to sex education in school,64 and the second, *Cambpell and Cosans*, dealt with corporal punishment on a teacher’s part.65 Since 1993, the ECtHR has dealt more frequently with issues concerning freedom of religion. There are two historical reasons for this: the development of the *Arrowsmith’s doctrine* and the fall of the Berlin Wall.

At the beginning of its work, the Court of Strasbourg was extremely strict in dealing with the manifestation of religion, and in identifying what issues fell within this provision. In particular, religious dress and symbols were controversial matters because it was not clear to the European Commission whether they should be considered as manifestations of religion and belief and, if so, in what circumstances. Therefore, in the 1980s the so-called *Arrowsmith’s doctrine* began to develop. *Arrowsmith’s doctrine* recalled the judgment of *Arrowsmith v. the UK*, in which the applicant was a pacifist handing out flyers to soldiers in the hopes of preventing them from going to Northern Ireland.66 While she could prove her pacifist beliefs, she was not able to show that handing out leaflets was a legitimate manifestation of her beliefs, and not just an act motivated by her pacifist view. Therefore the Commission found that Article 9 ECHR covered the applicant’s belief but not her ‘practice’ because it expressed political opinions about a particular situation.

The test for this case focused upon whether a particular manifestation was necessary in order for someone to practice his religion, in contrast to circumstances in which the behaviour in question was simply inspired by religious views. In fact not every act which is motivated by religion must be considered a ‘manifestation.’ At the same time, however, as Carolyn Evans has pointed out, “one of the issues that a necessity approach raises is whether behaviour that is merely encouraged or permitted by a religion but not required by it is

64 *Case of Kjeldesen, Busk Madsen and Pedersen v. Denmark.*
65 *Case of Campbell and Cosans v. UK.*
66 Application No. 7050/75.
protected under Article 9(1)."67 One answer to this question can be that such behaviour should not be protected because it is not the link between action and belief is not strong enough to demonstrate that the action is a ‘practice’ under Article 9. However, there is more. Saying ‘direct link’ does not necessary mean that the religious act has to be a mandatory requirement of a specific religion. Rather, the action must satisfy two tests. First, the belief must “attain a certain level of cogency, seriousness, cohesion and importance.”68 Second, the belief itself must be one which may be considered compatible with respect for human dignity.69 For instance, in Eweida and Others v. the UK, which concerned the wearing of a cross, the Court of Strasbourg found a violation of Article 9.70 Even though wearing the cross is not dogma for Christians, a violation was determined to exist because the national courts had not performed the balancing exercise between the right of the applicant to manifest her religion at work and the right of the employer to pursue a certain corporate image.

However, in some cases the Commission has changed the nature of the Arrowsmith necessity test. For instance, in Karaduman v. Turkey the Commission did not focus on whether Islam required wearing the headscarf and prohibited removing it for a photograph.71 In that circumstance, in fact, the applicant was a Muslim girl who was forbidden to receive her degree because she refused to submit a certificate with an identity photograph without wearing her headscarf. The Commission took the view that “the rules applicable to identity photographs to be affixed to degree certificates, although they do not form part of the ordinary disciplinary rules governing the daily life of universities, do form part of the university rules laid down with the aim of preserving the ‘republican’, and hence ‘secular’, nature of the university, as the Turkish courts which gave judgment in this case held.”72

It should be noted that in the years of these cases, each State was dealing with the process of secularisation. In light of this fact, the Court and the Commission hoped to avoid interfere in the first steps of these States’ self-awareness on this crucial topic.73

68 Case of Campbell and Cosans v. UK, §36.
69 Ibid., §36.
70 Application Nos. 48420/10, 59842/10, 51671/10 and 36516/10. See also § 5.1.2. for a detailed analysis of the case.
71 Application No. 16278/90. See Chapter 3 for a detailed analysis.
72 Idem.
The second reason for the increased number of cases on religious freedom since 1993 is the fall of Berlin Wall in 1989. This was a fundamental turning point for the Council of Europe. Many post-communist countries decided to take part in this international organisation, as they addressed for the first time certain fundamental issues, including the relationship between State and religions.⁷⁴ Thus, the Court could show them a possible way to deal with Article 9 through its judgments on cases pertaining to religious freedom.

In these circumstances, Greece was the leading actor in the first decisions in Kokkinakis, Valsimis and Efstratious. These cases concerned individuals who belonged to Jehovah’s Witnesses and who alleged violations of the manifestation of freedom of religion in connection to proselytism and opting out of school activities. All these judgments suggested to member states the need to be more respectful of religious minorities. Following this line, Valsamis’s dissenting opinion began to show the strictness of the Arrowsmith’s doctrine stating, “[applicants’] perception of the symbolism of the school parade and its religious and philosophical connotations has to be accepted by the Court unless it is obviously unfounded and unreasonable.”⁷⁵ On this occasion, the Court emphasised that a balance must be achieved in order to ensure a fair and proper treatment of minorities, and to avoid any abuse of a dominant position.

Taking into account this change, and following the reasoning of Martinez-Torròn we can highlight four important leading principles concerning the Court’s jurisprudence in this field from 1993 to present. The first principle regards the specific role of freedom of religion in guaranteeing the protection of pluralism within democratic societies. It is necessary to distinguish between “freedom of religion and belief, on the one hand (Article 9 ECHR), and freedom of expression, on the other hand (Article 10 ECHR). While the latter refers to the ‘freedom to hold opinions and to receive and impart information and ideas without interference,’ the former includes also the freedom to express one’s beliefs through practical conduct […] including the right to proselytize. Thus, in comparison with Article 10 ECHR, Article 9 ECHR offers a higher protection.”⁷⁶ However, not all ideas that qualify as

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⁷⁴ In contrast to the small group of fourteen like-minded Western European countries that shared much of their legal and political culture, there is now much diversity among the 47 member states that currently compose the Council of Europe.

⁷⁵ Valsamis v. Greece (Application No. 21787/93), Joint dissenting opinion of Judges Thór Vilhjálmsson and Jambrek.

convictions fall under the protection of Article 9 because they must attain “a certain level of cogency, seriousness, cohesion and importance.”

The second principle concerns the internal dimension of religious freedom. Even though the manifestation of one’s religion and belief that pertains to the external dimension can be limited, the internal dimension to hold and change the religion or belief of one’s choice is an absolute right and cannot be restricted. Many consequences derive from it. The most serious of these is that “the State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents’ religious and philosophical convictions. That is the limit that must not be exceeded.”

The third principle highlights the principle of the autonomy of churches and religious groups. One important consequence of this principle is that “churches must be free from State or other interference when conducting their own affairs.” Following this reasoning, churches are free to appoint their religious leaders and to select employees according to religious criteria. In the last years this latter aspect has generated an interesting case law, especially when religious autonomy faces the controversial issues between the rights of churches’ employees under State labour law. For instance, in its recent judgment in Fernandèz Martinez v. Spain the ECtHR held that the main question was whether the State should give more weight to the applicant’s right to respect for his private life over the right of freedom of religion, which protects the Catholic Church. This case concerned a priest who was also a teacher of Catholic religion in a public school; the bishop of Cartagena did not renew its contract because of his disagreement with the Church on fundamental issues, like abortion, divorce, and sexuality.

The fourth and last principle that there should be “no individual and group discriminations.” This principle is always applied in connection to the margin of appreciation doctrine. This comes up particularly in cases related to the presence of religious symbols in the educational environment. For instance, in Leyla Sahin the Court adopted a restrictive view of equality in order to justify a wide margin of appreciation allowed to Turkey. In that circumstance, a Muslim student was forbidden to wear the headscarf at Istanbul University because it could threaten the peaceful coexistence of students belonging

77 Campbell and Cosans v. UK, §36.
78 Kjeldsen, Busk, Madsen and Pedersen v. Denmark, §53. See Chapter 4 for a detailed analysis.
82 Leyla Sahin v. Turkey (Application No. 44774/98). See Chapter 3 for a detailed analysis.
to different religions and it could evoke the fundamentalist views of Islamic religious groups, which had been suppressed in the recent years by the Turkish government. Similarly, in *Dahlab v. Switzerland* the Court defended the right of Swiss authorities to prevent state primary school teachers from wearing the Islamic headscarf in order to guarantee the neutrality of the educational system.\(^{83}\)

Following this reasoning, in *Lautsi v. Italy*\(^{84}\) “the Court’s sensitivity to the impact on the rights of religious minorities of the presence of religious symbols in state institutions led it to restrict the right of states to promote particular religions in the context of state school system.”\(^{85}\) At this time, the Italian government appealed to the Grand Chamber, which overruled the judgment of the Chamber of the Second Section. As we will examine later, one reason for this change was the different application, actually the application, of the margin of appreciation doctrine in accordance with the view that the applicant’s subjective perception is not in itself sufficient to establish a breach of Article 2 of the First Protocol. In fact, remaining at a merely statistical level, the first judgment mentions just three times the wording ‘margin of appreciation,’ while in the second judgment we find that sentence twenty-four times. From a more substantial point of view, the judgment delivered by the Grand Chamber states that “the Government […] explained that the presence of crucifixes in State-school classrooms, being the result of Italy’s historical development, a fact which gave it not only a religious connotation but also an identity-linked one, now corresponded to a tradition which they considered it important to perpetuate.”\(^{86}\)

### 1.4.2. *Kokkinakis v. Greece*: The First Serious Attempt by the Court of Strasburg to Apply Article 9

As we have seen, Article 9 ECHR makes a clear distinction between the right to hold and change religious beliefs, which is an absolute right, and the right to manifest religious beliefs, which can be limited.\(^ {87}\) The case *Kokkinakis v. Greece* was the first serious attempt by the Court of Strasburg to apply Article 9.\(^ {88}\) In particular the aim of the Court was to check

\(^{83}\) *Dahlab v. Switzerland* (Application No. 42393/98). See Chapter 3 for a detailed analysis.

\(^{84}\) *Lautsi v. Italy* (Application No. 30814/06), Court (Second Section). See Chapter 4 for a detailed analysis.


\(^{86}\) *Lautsi and Others v. Italy* (Application No. 30814/06), §67.

\(^{87}\) See §1.4.

the balancing test applied by the Greek courts between the applicants’ right to manifest their religion through proselytism, and the protection of the rights and freedoms of others.

The applicants, Mr and Mrs Kokkinakis were two Jehovah’s Witnesses who were arrested because they engaged in a discussion with Mrs Kyriakaki, an Orthodox Christian, at her home while they were proselytising their religion. After that Mrs Kyriakaki’s husband, a cantor in the Orthodox Church, called the police, and the applicants were arrested and accused of proselytism. Lasithi Criminal Court found Mr and Mrs Kokkinakis guilty of proselytism on the basis that they “attempted to proselytise and, directly or indirectly, to intrude on the religious beliefs of Orthodox Christians, with the intention of undermining those beliefs.” In this respect it is important to emphasize that the Greek Constitution recognizes the Orthodox Christian faith as the ‘prevailing’ faith of the country, while guaranteeing freedom of religious belief for all.

With regard to this circumstance, the majority of the Court held that there was a breach of Article 9 since the interference with Kokkinakis’ freedom of religion was not necessary. In fact, the Court described freedom of religion, conscience, and belief as “one of the foundations of a ‘democratic society’ within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheist, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.”

Two important conclusions can be drawn from this opinion of the Court: first, the importance of guaranteeing the freedom to manifest religion in the public sphere, and, second, the individual autonomy to belong consciously to a religion.

In regards to the first topic, we can identify two arguments related to the justification of freedom of religion. On the one hand, the majority maintained that freedom of religion is the guarantor of a pluralistic society where the State cannot undermine the freedom to manifest and hold beliefs which belong to citizens’ personal consciences. But, at the same time, the manifestation of inner beliefs cannot destabilise the peaceful coexistence among people. For this reason, the Court argued that there is “a radical difference between bearing witness and proselytism that is not respectable,” and it agreed with the Government about the fundamental need to ensure peaceful enjoyment of the personal freedoms of all citizens.

89 Ibid., §9.
90 Ibid., §31.
91 Ibid., §30.
Given that, the Court wanted to pursue a fair balance of personal rights in which it is necessary “to accept that others’ thought should be subject to a minimum of influence otherwise the result would be a ‘strange society of silent animals that [would] think but… not express themselves, that [would] talk but… not communicate, and that [would] exist but… not coexist.”

On the other hand, it is really interesting what Judge Martens pointed out in his partly dissenting opinion. First, he sustains that it is not a criminal offence to attempt to induce someone to change his religion or belief. Following his reasoning, the State cannot interfere in the ‘conflict’ between proselytiser and proselytised because the respect for human freedom implies that each citizen can determine his fate in the way he prefers. Moreover, the State, being obliged to guarantee neutrality in religious matter, “lacks the necessary touchstone and therefore should not set itself up as the arbiter for assessing whether particular religious behaviour is ‘proper’ or ‘improper.’” Second, he argued that tolerance demands that free argument and debate should be crucial. Finally, he remarked that under the ECHR all religions and beliefs are equally important.

Taking this last reflection into account, we can now analyse the second important topic drawn out by the Court: the individual’s self-government in relation to his religious views. Mr Kokkinakis did not consider it necessary to limit his right to speak when he came to discuss religion with his neighbour, an adult woman with intellectual abilities. As Judge Martens’ opinion illustrates, the strongest liberal view argues that a person is in control of his own beliefs and that it is impossible to coerce someone to change his beliefs, if he is a truly and capable believer. In his concurring opinion Judge Pittiti maintained a similar but less strong view, which highlights that “believers and agnostic philosophers have a right to expound their beliefs, to try to get other people to share them and even to try to convert those whom they are addressing. The only limits on the exercise of this right are those dictated by respect for the rights of others where there is an attempt to coerce the person into consenting or to use manipulative techniques.”

In this judgment, the Court gave greater importance to freedom of conscience than to the freedom to choose follow a belief without any ‘interference,’ stating that the measures taken at national level by the Greek Government were justified in principle, but not

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92 Ibid., §43.
93 Ibid., Judge Martens Partly dissenting opinion.
94 Kokkinakis v. Greece, Judge Pettiti Concurring opinion.
proportionate. This raises the question, what is the proper difference between these two ways of looking at freedom of religion?

On this point, Sandel, in his essay titled Religious Liberty, depicts the distinction between freedom of conscience and freedom of choice and, to do that, he explains the meaning of the “voluntarist justification of neutrality.” According to this theory the government “must be neutral on questions of the good life in order to respect persons as free and independent selves, capable of choosing their ends for themselves.” In this respect, religious beliefs concerning questions of the good life are worthy of respect, not in virtue of what they are beliefs in, but rather in virtue of being the product of free and voluntary choice. Following this reasoning, Sandel points out that in contemporary liberalism, freedom of religion serves the broader scope of safeguarding individual autonomy, but he also points out that “protecting religion as a lifestyle, as one among the values that an independent self may have, may miss the role that religion plans in the lives of those for whom the observance of religious duties is a constitutive ends, essential to their good and indispensable to their identity.” This argument echoes Judge Martens’ opinion and, more generally, the Court’s tendency to assimilate freedom of religion to freedom in general, in order to endorse its aspiration to neutrality.

Obviously, the right to freedom of religion, conscience, and belief includes the freedom to change religions or beliefs, and this right is reinforced by duties in constitutional and criminal law. The importance of the protection of the freedom of choice, as Krishnaswami noted, lies in the fact that “freedom to maintain or to change religion or belief falls primarily within the domain of the inner faith and conscience of an individual. Viewed from this angle, one would assume that any intervention from outside is not only illegitimate but impossible.”

Hence, a consequence of considering freedom of conscience as freedom of choice is to make the core principle of the former more vague. The freedom of conscience has its foundation not simply in the subjective attitude of the person; rather, it deals with his intimate nature. The individual has the ability to look for truth following a path, which can be a particular religion or a philosophical conviction, and, in this regard, he has the capacity to

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96 Ibid., p. 598.
97 Ibid., 611.
choose what is good for him and reject what does not correspond to his conception of good. For this reason, religious freedom, as a requirement of personal dignity, is the cornerstone of the structure of human rights. As the House of Lords argues in one of its judgments, “religion and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality. In a civilised society individuals respect each other’s beliefs. This enables them to live in harmony. […] This freedom is not confined to freedom to hold religious belief. It includes the right to express and practice one’s beliefs. Without this, freedom of religion would be emasculated.”

1.5. Freedom of Religion and Its Legitimate Limitations

A key principle of Strasbourg jurisprudence is that States must not interfere with the manifestation of religion. Following this argument, Malcom Evans identifies Kokkinakis’ crucial point as balancing the right of the proselytiser to practice his religion against the right of the State to protect citizens from unwanted challenges to their beliefs. As Judge Martens argues, “it is not within the province of the State, to interfere in this ‘conflict’ between proselytiser and proselytised. Firstly, because – since respect for human dignity and human freedom implies that the State is bound to accept that in principle everybody is capable of determining his fate in the way that he deems best – there is no justification for the State to use its power to ‘protect’ the proselytised […]. Secondly, because even the ‘public order’ argument cannot justify use of coercive State power in a field where tolerance demands that ‘free argument and debate’ should be decisive. And thirdly, because under the Convention all religions and beliefs should, as far as the State is concerned, be equal.” This circumstance highlights that someone will always perceive a violation of his right. As a result, one issue that needs to be addressed is the circumstances in which the Court of Strasbourg strikes a fair balance of interests.

101 Kokkinakis v. Greece, Judge Martens Partly dissenting opinion.
Of course, the question is not simple. Mr Kokkinakis, in sharing his religious beliefs with his neighbour, had certainly aimed at undermining her faith, but this was what his own faith required of him. The reasoning of the Court followed the steps pointed out by Article 9, which literally states that an interference is contrary to such provision unless it is “prescribed by law,” directed at one or more of the legitimate aims and “necessary in a democratic society” for achieving them. Using again Kokkinakis as a leading case, let us explain the meaning of the three steps through which the Court determines whether there is any permissible interference with Article 9.

First, all States agree that limitations on the right to manifest religion must be “prescribed by law.” The purpose of this requirement is to ensure that rights and freedoms are not restricted except by due process of law. In fact, the law should be sufficiently clear to allow citizens to govern their conduct such that they can avoid the exercise of arbitrary action. Nevertheless, in most of the cases in which the applicant complains that a restriction was not really prescribed by law, there has been a law of some kind regulating the area, but it suffered from insufficient clarity. In fact, the Court of Strasbourg, in Kokkinakis argued, “the wording of many statutes is not absolutely precise. The need to avoid excessive rigidity and to keep peace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague.”102 However it is a duty of the national authorities and, in particular, the courts, to interpret and apply domestic law. Therefore, as Carolyn Evans has pointed out, even when the Court clearly had concerns about the scope and potential for abuse of a law, it still refused to consider the issue of whether the restriction of religious freedom was prescribed by law. The reason for this is that “the applicant, by raising the issue, was trying to question the very law itself and the Court was reluctant to deal with this issue.”103

Secondly, regarding “legitimate aims,” national courts are of the same mind that a restriction on the right to manifest religion ought to serve a legitimate purpose. Here again, the interference must not be arbitrary. The interests of public health, safety, order, morals, and the rights of other citizens, have all made their appearance in the jurisprudence of the States of Europe. This can be illustrated briefly by the case Dogru v. France. The applicant, a Muslim girl, had been excluded from secondary school because she refused to remove her headscarf during her physical education class. The Director of Education sustained this decision because the school’s internal provisions demand the duty to attend classes regularly,

102 Ibid., §40.
the requirements of safety, and the necessity of dressing appropriately for sports practice. Therefore, “having regard to the circumstances of the case and the terms of the decisions of the domestic courts, the Court can accept that the interference complained of mainly pursued the legitimate aims of protecting the rights and freedoms of others and protecting public order.” At the same time, the Court in Kokkinakis argued that “a fair balance of personal rights made it necessary to accept that others’ thought should be subject to a minimum of influence.”

It is evident that the exercise of religious freedom gives rise to a range of potential conflicts, particularly with respect to the rights and freedoms of others. The European Court in these cases seems to be taking one of two possible approaches to “the rights and freedoms of others.” In the first approach, the provision is narrowed only to coercion and other forms of interference with the forum internum; in the second, the Court of Strasbourg admits further scope to “the rights and freedoms of others” within boundaries that are not easy to predict. Assuming that in Kokkinakis the proselytism in question is such as to impair the freedom of religious choice of the person proselytised, the “rights and freedom of others” would be the right to be free from coercion impairing free religious choice. On the other hand, regarding the prohibition against wearing a religious symbol in a school, the protection of order and rights and freedom of others means the compliance by pupils with the duty to wear clothes suitable to and compatible with the proper conduct of classes, both for safety reasons and on public-health grounds. However, it is really difficult to understand what it might be at stake when the “rights and freedoms of others” are invoked. Especially in judgments like these, where the case of proselytism is not coercive in itself or the pupil’s conduct is not motivated by the manifestation of religious fanaticism.

Finally, any limitation of freedom of religion must be “necessary in a democratic society,” which means that it is not sufficient for the State to interfere with the applicant’s rights merely to achieve a legitimate aim. The Court ought to be satisfied with the restriction and consider the necessity of the limitations given the circumstances this involves. Necessary, in fact, means that there must be a particular demanding social need. In interpreting this requirement, the Court looks at whether a law or its application in a particular case is proportionate, and it always takes into account that the fact that States have

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104 Dogru v. France, Application No. 27058/05, §60.
105 Kokkinakis v. Greece, §43.
a ‘margin of appreciation’ in determining whether a particular restriction is required in the given circumstance.

In *Dogru v. France* the Court pointed out that the State’s role is to be “the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers that the State’s duty of neutrality and impartiality is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs and that it requires the State to ensure mutual tolerance between opposing groups.” With these premises, we can approach the Court’s argument in *Kokkinakis*. In their reasoning, the Greek courts established the applicant’s vulnerability without specifying in what way the accused has attempted to force her neighbour to change her belief. As the Court says, “none of the facts they set out warrants that finding. That being so, it has not been shown that the applicant’s conviction was justified in the circumstances of the case by a pressing social need. The contested measure therefore does not appear to have been proportionate to the legitimate aim pursued or, consequently ‘necessary in a democratic society… for the protection of the rights and freedoms of others.’”

The evidences from this analysis suggest that, first of all, the protection of freedom of religion can be considered as an obligation of results. Of course, a particular result needs to be achieved, but there is a choice of means, which differs from one State to another. Secondly, freedom of religion as a human right “do[es] not require states to adopt the highest level of protection, as long as what they do is ‘good enough.’” Finally, while these two forms of ‘State discretion’ look acceptable, the third form of discretion, the margin of appreciation, seems to give rise to more disagreements. Such disagreements reveal the tension involved in finding a fair balance between national courts, the ‘internal supervisors’ and the Court of Strasbourg as the ‘external’ one. In fact, the exact parameters of state obligations differ between countries because of the different historical and cultural background. Consequently, a measure of flexibility is essential and it is important to leave some discretion to States in order to determine what is needed in their particular context, the so-called ‘subsidiarity’ of the ECtHR. However, this need for flexibility reveals a further tension: namely that the margin of appreciation that allows national courts to determine when

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108 Ibid., §62.
a limitation of a human right is allowed or when there is a breach of it could imply “a reduction of the level of scrutiny or the intensity of review by the Court itself. Indeed, the margin of appreciation is not always equally extensive or wide.”¹¹¹

As a consequence, it must be asked what role is played by the margin of appreciation doctrine when there are Church-State tensions.

On the one hand, the need for a wide margin of appreciation means that Church-State relations refer not only to the separation between churches and State, but also pertain to the content of State policy and the duty of State neutrality. On the other hand, “the importance of the freedom of religion seems to call for a strict scrutiny of the implications for this fundamental right of choices pertaining to Church-State relations” as a cornerstone of a democratic society.¹¹² However, the Court seems to focus on the fact that there is no common European standard relating to the delicate question of relations between Church and State in order to justify granting states a wide margin of appreciation. Several judgments give the impression that the Court does not want to distance itself from the positions of the national courts. Cases concerning the prohibition against wearing headscarves in the educational area are clear examples of that. In fact, Strasbourg is always in line with the State’s judgments, because, as the Court argues in Leyla Sahin, “where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance […]. This will notably be the case when it comes to regulating the wearing of religious symbols in educational institutions, especially […] in view of the diversity of the approaches taken by national authorities on the issue.”¹¹³ At first glance, this can be argued to be an ‘abdication’ of the Court’s supervisory role, or, in a sense, a way through which it can be unbiased by not taking a position. On the contrary, however, “by leaving the states a wide margin of appreciation and thus ‘refusing’ to take a position in controversial matters, the Court actually does take a position” because it supports a particular way of thinking.¹¹⁴

¹¹¹ Ibid., p. 65.
¹¹² Ibid., p. 71.
¹¹⁴ K. Henrard, A Critical Appraisal of the Margin of Appreciation Left to States Pertaining to Church-State Relations under the Jurisprudence of the European Court of Human Rights., p. 75.
1.6. Does Secularism Allow a Wider Margin of Appreciation for States?

Secularism is arguably intrinsically related to the choices made pertaining to Church-State relations, and, according to the Court of Strasbourg, it is in line with a democratic society and the values underlying it. Differences about the nature of State neutrality are also obvious and clearly highlighted by several decisions concerning education. Moreover the jurisprudence of the ECtHR seems to indicate that when a State assumes secularism as a constitutional value, this will require an even broader margin of appreciation for that State concerning its Church-States relations. For instance, as we have previously seen in Leyla Sahin, the Turkish Republic was founded on the principle that the State should be secular. This principle has a constitutional status because of the history of the country and the features of Islam compared to other religions. This means that secularism is an essential condition for Turkish democracy, and it is the guarantee of religious freedom and equality before the law. Moreover the Turkish Constitutional Court points out that “freedom of religion, conscience and worship, which could not be equated with a right to wear any particular religious attire, guaranteed first and foremost the liberty to decide whether or not to follow a religion. It explained that, once outside the private sphere of individual conscience, freedom to manifest one’s religion could be restricted on public-order grounds to defend the principle of secularism.”\(^{115}\)

French secularism is regarded as one of the cornerstones of republican values as well. On July 13th 2010 France’s Assemblée Général, following Belgium, voted to ban the wearing of facial veils (burqa and niqab) in public space. This law on the Muslim veil follows the previous act of the March 15, 2004 n. 2004-228, known as the “Law on Secularism”, regulating, in accordance with the principle of secularism, the wearing of highly noticeable religious symbols (Islamic veil, Christian cross, Jewish kippa and Sikh turban) in State primary and secondary schools. It does not apply to State universities. In the cases mentioned above Dogru v. France and Kervancy v. France\(^ {116}\) the applicants appealed to the Court of the Human Rights against the Conseil d'Etat judgment which held that wearing a veil as a sign of religious affiliation is incompatible with the proper conduct during physical education and sport classes and, at the same time, interferes with order in a public school. The Court pointed

\(^{115}\) Leyla Sahin v. Turkey, §39.
\(^{116}\) Kervancy v. France, Application No. 31645/04.
out that in France, like in Turkey (see Leyla Sahin) or in Switzerland (see Dahlab\textsuperscript{117}), secularism is a constitutional principle. In the case Dahlab v. Switzerland, the Court of Strasbourg upheld the Government’s right to require a teacher, who had recently converted to Islam, to remove her headscarf because the denominational neutrality in State schools could be undermined by a “powerful religious symbol.”\textsuperscript{118} Moreover, in the Government’s view “where an applicant was bound to the State by a special status, the national authorities enjoyed a wider margin of appreciation in restricting the exercise of a freedom. As a teacher at a State school, the applicant had freely accepted the requirements deriving from the principle of denominational neutrality in schools. As a civil servant, she represented the State; on that account, her conduct should not suggest that the State identified itself with one religion rather that another.”\textsuperscript{119} Therefore an attitude which failed to respect the State’s requirements for its civil servants is not covered by the freedom of religion, and it would not even fall within the scope of the protection of Article 9 of the Convention.

In this instance, Court of Strasbourg “went along with the Government as it attached special weight to the alleged goal of safeguarding secularism as legitimate aim for the limitation of a fundamental right.”\textsuperscript{120} In fact, since the principle of secularism is the paramount consideration underlying the ban on the wearing of religious symbols in Turkish universities, in Sahin the Court argues “it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn.”\textsuperscript{121}

Ringelheim draws our attention to the fact that the principles derived by the European Court from religious freedom, in this case, neutrality, secularism and autonomy, are strictly connected with the classic views of liberal thought regarding State-religion relationships. In particular, Rawlsian liberalism is often said to posit that the State should be neutral with respect to the various conceptions of the good life, in particular religious conceptions, the citizens may hold.\textsuperscript{122} Such neutrality is viewed as necessary to guarantee the freedom of citizens to pursue their own conception of the good life, and the State should use

\textsuperscript{117} Dahlab v. Switzerland, Application No. 42393/98.
\textsuperscript{118} Ibid., §2.
\textsuperscript{119} Idem.
\textsuperscript{120} K. Henrard, A Critical Appraisal of the Margin of Appreciation Left to States Pertaining to Church-State Relations under the Jurisprudence of the European Court of Human Rights., p. 76.
\textsuperscript{121} Leyla Sahin v. Turkey, §116.
\textsuperscript{122} See Chapter 2 for a wide explanation of this concept.
proportionate means (e.g. banning the headscarf in State school or university) to achieve this aim.\textsuperscript{123}

This conceptual framework used by the Court as a guide to understand Article 9 tends to suppose that there is more than a respective autonomy between State and religious communities. In other words, “the Court seems to have imported a strong duty of state neutrality-through-separatism that cannot be found in the Convention text.”\textsuperscript{124}

Ringelheim identifies two problems that can arise from the aforementioned framework. On the one hand, it is not perfectly clear whether this ideal of a “wall of separation” reflects reality. On the other hand, from a normative viewpoint, it is still controversial among the States whether it is necessary to exclude religion from the public domain in order to achieve State neutrality.\textsuperscript{125}

In the light of this theoretical underpinning, and the case law, what is the ‘practical’ position held by the ECtHR?

One possible answer is that “the large discretion it often recognizes to the national authorities in such cases [pertaining headscarf in education] is symptomatic of its difficulty in dealing with them.”\textsuperscript{126} Of course, the aim of Strasbourg judges is to guarantee pluralism and, at the same time, to ensure State neutrality and equal rights for all without overcoming the personal identity of citizens. However, sometimes it seems as if the Court barricades itself behind the margin of appreciation doctrine, and misses the core aims of Article 9. In this respect, it is fundamental what Dworkin says in \textit{Taking Rights Seriously}: “Government must treat those whom it governs with concerns, that is, as human beings who are capable of suffering and frustration, and with respect, that is human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived.”\textsuperscript{127} This is not meant to be a hymn to individual autonomy, but rather a philosophical rationale for the right to religious freedom. In other words, Dworkin is referring to the concept of the inviolability of human dignity. Missing this crucial point inexorably causes the Court to use the margin of appreciation in a weak way, as the case of \textit{Leyla Sahin} shows us.

\begin{flushright}
\textsuperscript{125} J. Ringelheim, \textit{Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory?}, p. 293.
\textsuperscript{126} \textit{Ibid.}, p. 306.
\end{flushright}
In this judgment, the margin of appreciation doctrine “was to diminish critically the rigor with which the Court addressed the question of whether the State’s action was ‘necessary in a democratic society’ in her particular case.” \(^{128}\) The majority accepted the Turkish argument that preventing the medical student from wearing a headscarf meant simply respect for the principle of secularism on which the State’s constitution is grounded. Judge Tulkens, the only dissentent, pointed out that there were two factors that the Court did not take into account in consenting uncritically to a wide margin of appreciation.

First, the majority appealed to the lack of a European consensus on the regulation of religious symbols worn in educational institutions to allow this wide margin of appreciation. However, “the comparative-law materials do not allow of such a conclusion, as in none of the member States has the ban on wearing religious symbols extended to university education.” \(^{129}\) Second, the margin of appreciation doctrine should go hand in hand with European supervision. But this kind of supervision seems quite absent in this case despite the fact that it is extremely significant for the implications to the right religious freedom guaranteed by the ECtHR. Therefore, Judge Tulkens argued that “[it] is not merely a ‘local’ issue, but one of importance to all member States. European supervision cannot, therefore, be escaped simply by invoking the margin of appreciation.” \(^{130}\)

However, against this background the Court dismissed the applicant’s complaint, allowing the purpose of the restriction to preserve the secular character of the educational institutions. Furthermore, Strasbourg judges said that it would be “unrealistic to imagine that the applicant, a medical student, was unaware of Istanbul University’s internal regulations restricting the places where religious dress could be worn or had not been sufficiently informed about the reasons for their introduction.” \(^{131}\)

At this point it would be interesting to focus on a State, such as the United Kingdom, where secularism is not a constitutional principle, and to look at the way in which the margin of appreciation doctrine is implemented by the national authorities. However there have been no cases brought to ECtHR by this Member State regarding the wearing religious items in the schools.


\(^{129}\) Leyla Sahin v. Turkey, Judge Tulkens dissenting opinion, §3.

\(^{130}\) Idem.

\(^{131}\) Ibid., §160.
Perhaps something along these lines can be presumed from the case of Shabina Begum judged by the House of Lords in 2006.\textsuperscript{132} This case concerned a school’s uniform requirements for girls belonging to the Muslim religion. The school refused to allow a Muslim girl to wear the \textit{jilbab} (a long loose-fit coat) instead of the \textit{shalwar kameeze} (loose and baggy trousers with a long tunic), approved by the school’s governing body and various Muslim religious authorities. Therefore the school decided not to admit her whilst wearing the \textit{jilbab}. The House of Lords stated that there was no breach of Article 9 because she had the opportunity to attend other schools where the \textit{jilbab} was permitted, as she did after the school’s denial. Article 9, in fact, does not require that one should be allowed to manifest one’s religion at any time and place of one’s own choosing. Interestingly, Lord Hoffmann compared the application of the margin of appreciation doctrine between this case and \textit{Leyla Sahin’s} one. On the one hand, in the latter case, the Court felt entitled to allow a wide margin of appreciation since Turkey has a national rule about headscarves in order to comply the principle of secularism enshrined by its Constitution. On the other hand, in the former judgment Lord Hoffmann pointed out that, since the United Kingdom lacks national rules on these matters, “parliament has considered it right to delegate to individual schools the power to decide whether to impose requirements about uniforms which may interfere with the manifestation of religious beliefs.”\textsuperscript{133}

Clearly, the concept of the margin of appreciation has, as such, no application by national courts in implementing the Convention rights. Although, in a broad sense, “it is for the courts of the United Kingdom to decide how the area of judgment allowed by the margin should be distributed between the legislative, executive and judicial branches of government.”\textsuperscript{134} Hence, following this reasoning, the House of Lords in \textit{Begum} applies the principles of \textit{Sahin} because it states that the justification must be found at the local level, and that a local area of judgment, comparable to the margin of appreciation, must be allowed to schools.

To sum up, it is clear that the margin of appreciation doctrine has great importance for both national Courts and the Court of Strasbourg when sensitive issues are at stake. This doctrine allows each State to pursue its cultural tradition, avoiding any homologation. However, the high percentage of decisions of inadmissibility or non-violation of Article 9, regarding the prohibition of wearing religious symbols in schools in Turkey and France (the

\textsuperscript{132} \textit{R (on the application of Begum (by her litigation friend, Rahman)) v. Headteacher and Governors of Denbigh High School}, [2006] UKHL 15.

\textsuperscript{133} \textit{Ibid.}, §62.

\textsuperscript{134} \textit{Ibid.}, §63.
only two member states whose Constitutions protect the principle of secularism) seems to indicate that “the Court and the Commission therefore tend to be very narrow in their approach to what constitutes a manifestation of religion or belief. While practices such as worship and proselytism are considered essential to religious life by the Commission and thus manifestations under Article 9, other practices, such as the wearing of religious clothing, are treated as less important. Conscientious actions based on religion or belief but in breach of general and neutral laws, have almost never been held to be manifestations of a religion or belief.”\(^{135}\)

At this point, there is a question of how far judgments should be tailored to variable situations. As Roger Trigg argues, “if religious liberty is to mean anything, it cannot be given radically different interpretations depending on where you are. The needs of human nature remain constant.”\(^ {136}\)


Chapter 2

ONE STATE, MANY BELIEFS

Abstract

The aim of this Chapter is to provide a theoretical framework that will highlight mainstream contemporary philosophical thought concerning the protection of freedom of religion in the Western society. The perspectives of new liberalism have a significant effect on the protection of religious freedom by providing sophisticated political theories that serve as a 'philosophical justification' for excluding religion from the public sphere. This Chapter will compare the positions of Rawls and Dworkin (advocates of this liberalism) with the views of Sandel and Taylor (their opponents), with respect to the question of the function of religion in the public sphere. The starting point for this study will be the Rawlsian liberalism of 'A Theory of Justice.' In this work Rawls shows a new contractarian approach that is focused on a theory of social justice. His approach is carried out as a comprehensive theory that includes a moral doctrine of justice. On the other hand, however, in a subsequent work titled 'Political Liberalism,' he presents a new liberal perspective explained only by political categories that exclude both moral ideals and religion from the public sphere. By avoiding them, Rawls hopes to ensure a common basis for a stable 'overlapping consensus.' Conversely Dworkin, takes a different approach to liberalism. In Dworkin’s approach, called liberal ethics, he proposes that the neutrality of government means that it should not superimpose a specific conception of a good life. Rather, it should assure the ethical independence of all individuals and the chance for everyone to achieve his own ideal of well-being. Since this liberalism is tolerant and neutral among the different comprehensive doctrines, a liberal ethics should not have a substantive character but it must be abstract. This means that the State should not embrace one religion or particular set of moral ideals, but throughout its politics it must allow each person to pursue what matters to him. On the other side, Sandel calls for politics to put greater emphasis on citizenship and community, and to addresses questions of the good life more directly. If a just society requires a strong sense of community, it must find a way to cultivate in citizens a dedication to the common good. It cannot be indifferent to the attitudes and dispositions that individual citizens bring to
public life. In addition, Taylor, in his last work ‘A Secular Age,’ provides a clearly reasoned and articulate response to those who believe that religion in itself is the central obstacle to society achieving a common agreement about what matters. In a society where there is no common consensus about religious and moral views, the State must avoid any kind of preference. It must remain ‘neutral,’ but it has to look for an ‘overlapping consensus’ among citizens about basic political principles. According to Taylor, this implies that the State should adopt a position of neutrality not only toward religions, but also towards the different philosophical conceptions that stand as the secular equivalents of religion. Moreover, this must be done without replacing religion with a comprehensive secular philosophy as the foundation of the State’s actions. In fact, there is the constant temptation to make secularism equivalent to religion, taking pride in its neutrality or indifference regarding religion. Taylor, then, shows that this happens because in contemporary society the belief in God is understood as one option among others. Hence religion has come to be regarded as a question of simple choice, and it is no longer regarded as something connected to the search for truth or something connected to human dignity.

2.1. The Theoretical Side of the Right to Protect Freedom of Religion

To understand the shift towards a multi-religion society that characterized the twentieth century, it is necessary to look backwards to the fourth century. The Edict of Milan in 313, which established religious toleration for Christianity within the Roman Empire acted as man’s initium libertatis. It granted all persons the freedom to believe in any creed, and it guaranteed legal rights to Christians. With this edit, present notions of religious freedom and State neutrality clearly emerged for the first time in European history. Since that time, however, granting rights to religious minorities has always been in the context of a strong religious majority and has likewise tended to be in the context of belief in something that transcends human beings.

Since the twentieth century that paradigm has completely changed. One cause of this has been immigration, which represents one of the most complex challenges for European countries. Immigration is linked to the phenomena of globalization and multicultural societies. Hence it is no longer possible for privileged a religious majority to take its outlook for granted when confronted with religious differences. Another cause has been the development of technology. Technological society tends to expel the religious sense through ‘rampant’ secularization. On this point, the perspective of new liberalism has an important role. It provides a ‘philosophical justification,’ through sophisticated political theories, whose purpose is to minimize the effect of religion on the public sphere. Liberalism is one of the
most commonly used concepts in politics and law. This is problematic, however, because its very definition varies widely depending on which theorists, countries, and time periods are discussed. Our attempt is not to explain or reconcile the myriad understandings of liberalism, but rather to compare the ideas of certain theorists with the contemporary debate surrounding the function of religion in the public sphere.

It should be noted that the different liberalisms do not always address the role religion plays in our society directly, but they deal with the principles of justice and human rights in a way that reveals a narrow attitude towards the issue of religious freedom. It is also important to distinguish between this kind of theoretical work and a study of judicial behavior, especially because one could make the argument that knowledge of a judge’s philosophical views leads inevitably to predictable outcomes in judicial decisions. In fact, it is essential to bear in mind that theoretical conceptions are not identical to the legal conceptions and decisions, even though the philosophical concepts that influence society can help to illuminate the reasons behind certain legal decisions. As McCrudden argues, “it is wrong to assume that a particular philosophical position on human rights is necessary adopted in the legal understanding. All this is to say that the legal understanding of human rights is much more nuanced, much more fluid and much more situation-specific than it is being given credit for in some religious circles.”

2.2. The New Liberalism Perspective: Being Disengaged from Any Personal Convictions

Liberalism, from Latin liberalis, is the belief in the importance of liberty and equal rights. Since the seventeenth century, many philosophical liberal doctrines have been developed arguing that freedom is normatively basic, and that onus of justification is therefore on those who would limit freedom. As John Locke argued, “men being […] by nature all free, equal, and independent, no one can be put out of this estate, and subject[ed] to the political power of another, without his own consent. The only way whereby any one divests himself of his natural liberty and puts on the bonds of civil society is by agreeing with

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other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another.” Consequently, a central question of liberal political theory is whether political power can be justified.

A possible answer to this question was suggested by the social contract theory, whose first and full exposition and defence given by Thomas Hobbes. For Hobbes, the necessity of an absolute authority, in the form of a Sovereign (or Leviathan) who would limit the freedom of men, followed from the utter brutality of the State of Nature. After Hobbes, Locke and Rousseau are the best-known proponents of this theory, which has influenced morality and politics throughout the history of the modern West. According to Locke, the State of Nature is no longer a state of war, but has become a state of freedom in which people conditionally transfer some of their rights to the government in order to ensure a peaceful coexistence. For Rousseau, the idea of social contract was necessary in order for legislators to decide on laws that achieved justice and the common good of citizens. In the twentieth century, John Rawls constructed what is perhaps the most abstract version of social contract theory, opening the doors to the new liberalism perspective that we will discuss, along with that of his most prominent follower, Ronald Dworkin.

The Rawlsian liberalism of *A Theory of Justice* (*TJ*) shows a new contractarian approach more focused on a theory of social justice, and carried out as a comprehensive theory. In this approach, a moral doctrine of justice is not distinguished from a strictly political concept of justice. However, in his next work, entitled *Political Liberalism* (*PL*), he highlights a new liberal perspective explained only by political categories. This new liberalism therefore excludes moral ideals. Our aim is to understand what is at stake in this change of perspective.

The aim of *TJ* is to present a conception of justice that brings the social contract theory to a higher level of abstraction. The main idea in *TJ* is that the principles of justice for the basic structure of society are the object of original agreement instead of being determined by a particular form of government. These principles are ones that free and rational individuals in pursuit of their own interests would accept in an initial position of equality (behind the hypothetical situation of a veil of ignorance). These principles thereby define the original terms of their association, e.g. the principle of average utility. This way of regarding these principles of justice is properly called *justice as fairness*, because it expresses the idea

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that the principles of justice are agreed to in an initial situation that is fair in that it avoids situations in which personal advantages, benefits and outcomes can prevail. Unlike the previous theories of the social contract, which only wanted to provide a rational justification for the power of the State, Rawls proposes a model of a fair society in which each person has an inviolability founded on justice that even the welfare of society as a whole cannot override.\(^{140}\)

Given this background, one soon realizes that the problem of choosing principles of justice is crucial and that they must correspond to the values of abstractness and well-ordered society since citizens will have different conceptions of the good. For this reason, Rawls’s aim is to assess a range of things, called ‘primary goods,’ that are important for each person, regardless of his own conception of the good.

After a detailed description of the original position of equality (a kind of Lockean State of Nature), and an explanation of why the principle of utility is incompatible with the conception of social cooperation among equals for mutual advantage, Rawls concludes with a final statement of the two principles of justice for institution.\(^{141}\) These two principles will form the foundation of his new social contract. The first principle is the ‘principle of equal liberty,’ and the second endorses the ‘difference principle’ and the ‘principle of fair equal opportunity.’ Rawls writes that

\begin{enumerate}
\item Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.
\item Social and economic inequalities are to be arranged so that they are both:
\begin{enumerate}
\item to the greatest benefit of the last advantaged, consistent with the just savings principle, and
\item attached to offices and positions open to all under conditions of fair equality of opportunity.\(^{142}\)
\end{enumerate}
\end{enumerate}

The first principle provides for one primary good: liberty. The second principle is divided in two other sub-principles. Rawls proposes that the departure from the institutions of equal liberty, required by the first principle, cannot be justified by greater social and economic advantages, and he argues that the distribution of income ought to be committed

\(^{140}\textit{Ibid.},\ p.\ 3.\)
\(^{141}\textit{Ibid.},\ p.\ 302.\)
\(^{142}\textit{Ibid.},\ p.\ 60.\)
with both the liberties of equal citizenship and equality of opportunity. For instance, Rawls assumes that the most important social primary goods are rights and liberties, powers and opportunities, income and wealth. At a hypothetical starting point, these are distributed equally to all citizens (first principle). Now it is possible that some kinds of inequalities are permissible in order to improve everyone’s position (second principle). But the serial ordering of principles avoids this circumstance since it expresses a preference among primary social goods.

Is the possibility of an agreement upon these two principles between all citizens realistic or just utopian?

Rawls underlines that each of TJ’s arguments “relies on a premise the realization of which its principles of justice rule out.” This premise points out that in a well-ordered society of justice as fairness, citizens hold the same comprehensive doctrine, like a pre-comprehensive structure. It seems to be an agreement (a sort of ‘contract’) signed by all the citizens in an abstract situation of equality, behind the so-called ‘veil of ignorance.’ The word “contract,” in fact, “suggests this plurality as well as the condition that the appropriate division of advantages must be in accordance with principles acceptable to all parties.”

On this point, Dworkin, in his work titled Foundations of Liberal Equality, edited prior to the publication of PL, underlines how these two principles define a particular conception of liberalism. He notes that “they provide an interpretation and refinement of the unrefined liberal predispositions” and “they state comprehensive standards for the use of coercive political power.” Rawls, through these two principles, shows a political perspective that orders equality, liberty and tolerance in a systematic way. In particular, his concept of justice as fairness starts from the idea that society is to be conceived as a fair system of cooperation. Thus, it can be argued that his conception of justice develops a conception of the person that is adapted to correspond to this idea of justice. Then, how are the fair terms of cooperation to be determined? As Rawls argues in Justice as Fairness, “the fair terms of social cooperation are conceived as agreed to by those engaged in it, that is, by free and equal persons as citizens who are born into the society in which they lead their

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143 Ibid., p. 61.
144 Ibid., p. xli.
145 Ibid., p. 12.
146 Ibid., p. 16.
lives.” However, this agreement needs to be achieved under specific conditions, which situate free and equal persons fairly. Therefore, the original position, namely the veil of ignorance, is this point of view.

Through this abstract original position, where contingent advantages and accidental influences should not influence an agreement on the principles which are to regulate the institutions of the basic structure itself, any agreement cannot be vicious. In other words, since this situation is utopian, what is its meaning? The Rawlsian answer is implicit in what has already been said:

It is given by the role of the various features of the original position as a device of representation. Thus, that the parties are symmetrically situated is required if they are to be seen as representatives of free and equal citizens who are to reach an agreement under conditions that are fair. [...] It [the original position] describes the parties, each of whom are responsible for the essential interests of a free and equal person, as fairly situated and as reaching an agreement subject to appropriate restrictions on what are to count as good reasons.149

From this idea flows the political conception of the person as citizen. According to Rawls, one of the main characteristics of free citizens is that they conceive of themselves, and of one another, as having the moral power to conceive the good. This means that

as free persons, citizens claim the right to view their persons as independent from and as not identified with any particular conception of the good, or scheme of final ends. Given their moral power to form, to revise, and rationally to pursue a conception of the good, their public identity as free persons is not affected by changes over time in their conception of the good.150

Does this mean that it is also required that citizens, as such, disengage from any personal perspective on important political decisions?151 As Dworkin says,

liberalism apparently asks us to ignore instincts and attitudes on political occasions that are central to the rest of our lives. [...] It asks us to put our most profound and powerful convictions, about religious faith and moral virtue and how to live, to sleep. Liberalism therefore seems a politics of ethical and moral schizophrenia; it seems to ask us to become, in and for politics, people we cannot recognize as ourselves, special political creatures wholly different from ordinary people who

149 Ibid., p. 401.
150 Ibid., p. 405.
151 When we speak about “personal perspective” we are referring to a plurality of reasonable comprehensive doctrines, including the religious, philosophical, and moral. For a deeper explanation see §2.3.
decide for themselves, in their ordinary lives, what to be and what to praise and whom they love.152

As Dworkin points out, only a zombie could be neutral about what is the meaning of good life, and only a monster would find no more demand in the pain of his child than in the cry of a stranger.

2.3. Where is the place of citizens’ beliefs in Rawlsian liberalism?

Dworkin’s perspective facilitates the shift in focus from TJ to PL by offering a view of society that is more realistic than the one that Rawls presents in PL.

By moving away from TJ’s doctrine of justice as fairness, the idea of the person is transformed. Specifically, the idea of the person as an individual having a moral personality and a capacity for moral agency is transformed into the idea of the citizen whose political attitude is detached from his own moral doctrines. In fact, in PL the person is seen rather as a free and equal citizen, the political person of a modern democracy with the political rights and duties of citizenship, and standing in political relation to other citizens.153

On this point, Rawls himself faces the issue of realism: justice as fairness defined in TJ seems too abstract and utopian when applied to the real situations of modern societies. Indeed, modern democratic society is characterized not simply by a pluralism of comprehensive religious and moral doctrines, but the fact that sometimes these doctrines are incompatible each other. For that reason, in PL Rawls shifts his focus to this fundamental question: “How is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?”154

Through this crucial question we can identify two important concepts that now will guide our analysis of the aims of PL: stable society, and reasonable doctrines.

152 Dworkin, Foundations of Liberal Equality..., p. 15. In Dworkin’s works, the term “moral standards” means how we ought to threat others and “ethical standard” mean how we ought to live ourselves.
153 Rawls, Political Liberalism..., p. xliii.
154 Ibid., p. 4.
Rawls insists that maintaining a ‘stable society’ is a key problem for PL because a society cannot be stable over the time if it lacks respect for different groups. As Nussbaum highlights “stability is, then, a moral notion: it involves not merely the persistence of a set of political arrangements, but the persistence of a respect embodied both in institutions and in the attitudes of citizens who support them.”

Stability involves two different questions. The first one is “whether people who grow up under just institutions […] acquire a normally sufficient sense of justice so that they generally comply with those institutions.” The second question is how it is possible that a political concept of justice generate principles, which all doctrines will freely affirm without State coercion.

To address the first question, Rawls makes use of moral psychology, arguing that citizens growing up under just institutions develop a sense of justice sufficient to render stable the institutions themselves. The second question is addressed through use of the concept of overlapping consensus. We will now develop that notion.

In order to explain the deep meaning of this kind of consensus, and in the hopes of avoiding any misunderstanding, Rawls presents four possible objections to the idea of a social unity founded on consensus.

First, he shows how an overlapping consensus is different from a *modus vivendi*. The latter describes an apparent social unity founded on contingent circumstances and a fortunate convergence of interests. As such, it is similar to a treaty between two States. On the other hand, an overlapping consensus is grounded on moral bases: “All those who affirm the political conception start from within their own comprehensive view and draw on the religious, philosophical, and moral grounds it provides.” This is connected to the idea of stability because citizens affirm their political view *within* their deep political conception that, according to Rawls, the consensus should be stable with respect to changes in the distribution of power among views.

The second objection raises the question of whether the idea of an overlapping consensus on political conceptions of justice implies skepticism or indifference to comprehensive doctrines.

Rawls responds to this objection by proposing to avoid affirming or denying any particular comprehensive religious, philosophical, or moral views, or their associated theories.

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of truth and values. He seems to shift the focus to an agreed foundation for the public justification of matters of justice, by which citizens could look at their convictions without perceiving contradictions. In fact, “citizens may within their comprehensive doctrines regard the political conception of justice as true, or reasonable, whatever their view allows.”

Comprehensive doctrines need not be removed but, by avoiding them, Rawls tries to sidestep religious and philosophical contradictions, hoping to ensure a common basis for a stable overlapping consensus. Since “for many the true, or the religiously and the metaphysically well-grounded, goes beyond the reasonable. The idea of an overlapping consensus leaves this step to be taken by citizens individually in line with their own comprehensive view.”

Rawls’s responses to the first two objections lead to a resolution of the third objection, which asks: since the overlapping consensus is not a modus vivendi, should a political conception be general and comprehensive?

Rawls argues that a political conception can be seen as part of a comprehensive doctrine, but that it is not its direct consequence. The crucial point in the Rawlsian theory is that a liberal political conception is so wide that it assures to all citizens the protection of basic rights. In fact, “faced with the fact of reasonable pluralism, a liberal view removes from the political agenda the most divisive issues, serious contention about which must undermine the bases of social cooperation.”

The last objection asks if an overlapping consensus is utopian. In order to best answer to this last difficulty, Rawls explains how it is possible to achieve a stable constitutional consensus and how a stable consensus can then become an overlapping consensus.

At first glance, the constitutional consensus on the liberal principles of justice seems to be just a modus vivendi, adopted into a constitution. It tends to shift aside the focus on citizens’ comprehensive doctrines, because the principles of a liberal constitution become the common ground for moderating political conflict and achieving a constitutional consensus. What are, then, the forces that push a constitutional consensus towards an overlapping consensus? Rawls, in the process of moving from a constitutional consensus to an overlapping consensus, has supposed that “the comprehensive doctrines of most people are not fully comprehensive, and this allows the scope for the development of an independent allegiance to the political conception that helps to bring about a consensus.”

This loyalty between citizens allows them to act in accordance with constitutional arrangements since

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158 Ibid., p. 150.
159 Ibid., p. 153.
160 Ibid., p. 157.
161 Ibid., p. 168.
they have a reasonable guarantee “based on past experience” that others will also comply. This process increases social trust and this arguments serves as Rawls’s reply to the objection that his idea of overlapping consensus is utopian.

Thus, Rawls assumes that a stable society requires the presence of a common and widely held political conception. Because there is no comprehensive or moral doctrine that is capable of achieving exclusive agreement, the political conception must reflect an accommodation of interests between a diversity of conflicting comprehensive doctrines. Hence, the problem of stability is not a problem of compelling citizens to share in a conception that their doctrines might reject. Rather, as a liberal political conception, justice as fairness aims to generate its own support by addressing each citizen’s reason. But justice could just become a puzzle of distinct motivations.

As Ed Wingenbach has pointed out,

we no longer live in a society in which a single comprehensive conception of the good can gain the support of all members of a society. Rawls’s fear seems to be that the lack of certainty endemic to the pluralism of modern democratic society inevitably leads to a lack of stability; therefore we should, in the name of order, ignore the ambiguities of modern democracy and replace this with a conception of politics and reason which re-establishes certainty, predictability, and clear answer to political questions.162

2.4. Dworkin: Two Ways to Face (And Sort Out?) the Separation between Ethics and Politics

Dworkin is regarded an advocate of liberalism, but, as we have highlighted above, his liberalism is slightly different from Rawls’s. Dworkin maintains that it is central to liberalism that government should treat citizens as equals and it cannot prefer one conception of the good life over others. Because citizens disagree in their conception of well-being, the government fails to fulfil its assurances of equality if it prefers one conception to another. In order to avoid the ‘moral schizophrenia’ ascribed to Rawls, Dworkin promotes a new way to achieve State neutrality. Rather than being taken as an axiom, he says, neutrality should

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instead be regarded as a theorem. This means that neutrality is not an a priori or an assumption taken for granted, but that it is the result of State policy.

Thus, Dworkin introduces an important distinction between two strategies for achieving the reconciliation between the personal perspective and the political one. The first strategy is called the strategy of discontinuity; the second is the strategy of continuity. Understanding the difference between these two strategies is crucial to understanding which political theory forms the foundation for a State’s idea of democracy.

The first strategy, the strategy of discontinuity, argues that the two perspectives, personal and political, are compatible because the latter perspective is considered artificial. It is, in fact, “a social construction whose purpose is exactly to provide a perspective that no one needs regard as the application of his full ethical convictions to political decisions, so that people of diverse and conflicting personal perspectives can occupy it together.”

Therefore the political perspective flows from the personal one, because people with different personal convictions have reason to participate in the joint project of constructing an artificial political point of view. This means that there is an agreement similar to the kind that characterizes a commercial contract. The terms of a commercial contract, in fact, do not necessarily represent the personal substantive views of both partners. The contract merely functions as an artificial ground for the arguments and claims between the parties. Dworkin emphasizes the contractarian theory since he associates Rawls’s turn to the political with this kind of strategy.

At the same time, however, the strategy of continuity means that liberalism is continuous with the best personal ethics and with the idea of the good life. Through this theory, Dworkin tries to construct liberal ethics as an ethical ground of his conception of liberal equality. The heart of his argument is that most people’s ethical insights are best explained by a view of ethics that focuses not on the consequences but on the challenge of living wisely (challenge model).

Since liberalism aims for tolerance and neutrality with respect to the different comprehensive doctrines, a liberal ethics should not have a substantive character but must be abstract. It does not stipulate what a good life is like, but describes fair political and economic structures within citizens can make their own decisions about what it means to live a good life.

From the beginning, the contractarian discontinuity strategy presupposes ethical neutrality as a methodological axiom. The continuity strategy, on the other hand, “hopes to arrive at neutrality in the course of rather than at the beginning of the argument, as a theorem rather than as a methodological axiom.” But what exactly does liberal ethics mean? Before answering this question, we will first highlight two models of the good life. These models were shaped by Dworkin and are connected to the two strategies described above because the concept of ethics described by the author indicates first how someone ought to live himself, and what this means for leading your own life.

The strategy of continuity necessitates a (liberal) ethics on which to build a (liberal) politics, in other words it requires an account of the good from which to derive principles of right. The strategy of discontinuity, on the other hand, attempts to drive a sharp wedge between the good and the right because comprehensive doctrines should be detached from the political scenario since the beginning. According to Dworkin, these various characters of ethics arise because people have different ways of conceiving the source and nature of the good life’s value. On this point, he identifies two models of value for ethics: the model of impact and the model of challenge.

The model of impact holds that the value of the good life depends on its consequences for the world. For instance, in line with this model, if I prefer Mozart’s works to Beethoven’s ones, then I should also think that Mozart’s life is better than Beethoven’s. Dworkin writes that “a life can have more or less value […] not because it is intrinsically more valuable to live one’s life in one way rather than another, but because living in one way can have better consequences.” Therefore, this model does not offer a good explanation for ethical aims that do not imply any direct product. On the other hand, the model of challenge adopts Aristotle’s view that the value of a good life lies in the intrinsic value of the performance of living. Just living a life is itself a performance that demands skill. It is the most important challenge we face and “our critical interests consist in the achievements, events, and experiences that mean that we have met the challenge well.”

The main difference between these models is that the model of impact connects the ethical value to something that is apparently more objective: the ‘world value’. The second model, on the other hand, allows the idea of ethical value to be independent of any other

164 Ibid., p. 22.
166 Dworkin, Foundations of Liberal Equality..., p. 54.
167 Ibid., p. 55.
168 Ibid., p. 57.
kind of value. As Dworkin points out, the latter might seem not so much a model but a truism since “living well is doing whatever counts as living well.”\textsuperscript{169} This model is, in fact, ‘ethically sensitive’ in the sense that it grows out of our internal lives since it requires a personal response to the full particular situation. At the same time, however, it does not imply that any kind of life is a good life. There are ‘parameters’ and ‘limits’ through which a person can say what a ‘good life’ means.

Living well includes defining what the challenge of living, properly understood, is, just as painting well includes sensing which aspects of the artist’s overall circumstances define the right tradition for him to continue to defy. We have no settled template for that decision, in art or in ethics, and no philosophical model can provide one, for the circumstances in which each of us lives are enormously complex. They include our health, our physical powers, our tenure of life, our material resources, our friendship and associations, our commitments and traditions of family ad race and nation, the constitutional and legal system under which we live, the intellectual and literary and philosophical opportunities and standards offered by our language and culture, and thousands of other aspects of our world as well. Anyone who reflect seriously on the question which of the various lives he might lead is right for him will consciously or unconsciously discriminate among these, treating some as limits and others as parameters.\textsuperscript{170}

In short, ethical value is not transcendent, but depends on a combination of personal parameters and limitations. Many of those parameters are normative in that they assess how a situation should be. This means that our lives can go badly not because we fail to respond properly to a circumstance, but because the circumstance itself is the wrong one. For instance, if we think that a good life should last long (parameter) and someone dies young (wrong circumstance), this implies that this young person has been deprived of the chance of living a fully good life (because he has been deprived of certain challenges he ought to have faced). Certainly these central elements of the challenge model are highly controversial, but we reserve criticism for we have completed this description of ‘liberal ethics.’

As we shall to see, this theory of justice is constructed in order to be continuous with the challenge model of ethics. Now we will delve into four key points necessary to understanding this model and what government should be.

First of all, Dworkin defines liberal ethics as a resource-based conception of justice. He writes that “it holds that justice is measured in the resources people have, not the welfare\textsuperscript{169} Ibid., p. 58.
\textsuperscript{170} Ibid., p. 67
or well-being they achieve with those resources.” ¹⁷¹ In a challenge model, it does not make sense to suppose that well-being is competitive, or that it should be divided a-priori between citizens, because your living a good life in no way reduces my chances of doing so. On the other hand, part of the challenge lies in discovering what it means to lead a good life, and nobody can make that choice for another. The proper role of government, then, consists in providing a background against which people can determine their roles and respond well to the circumstances of their lives. As Dworkin says, that formula leaves open the question, “of how far it is appropriate for government to educate citizens in the variety and competing virtues of lives open to them, or to keep alive, by subsidy or other support, forms of life in which other people have found great value.” ¹⁷²

The second key point insists that liberal ethics requires an equal share of resources among citizens. This means not only that a properly good life should not contain unjust acts, but also that it should not draw upon unjust shares of resources. ¹⁷³ Liberal equality, the political side of the liberal ethics, holds that a just distribution of resources is achieved only when the resources that different people control are equal in their opportunity cost – that is, the value they would have in the hands of other people. Dworkin images an auction in which each person has got the same amount of money and can buy what she wants. The economist’s envy test should be a test for ideal equality. Equality is perfect when no member of the community envies the total amount of resources under the control of another citizen. Therefore what people achieve equally is something that pertains to morality in that they have properly chosen their goods. ¹⁷⁴

This point is different from what Rawls calls the ‘thin’ theory of good. According to the ‘thin’ theory, people at the ‘original position’ need an equal amount of primary goods and, through the difference principle, all agree that the more primary goods someone has, the more easily he achieves his idea of the good life. Therefore the problem is not to share the same amount of goods. Justice is not a compromise among interests because “the challenge view supports equality of resources directly, as flowing from people’s sense of their own best interests critically understood.” ¹⁷⁵ Equality does not mean equal distribution, but rather

¹⁷¹ Ibid., p. 93.
¹⁷² Ibid., p. 98.
¹⁷³ The resources that people control are of two kinds: personal (qualities of mind and body) and impersonal (parts of the environment, e.g. land, houses etc.). The equal distribution of resources regards impersonal resources.
¹⁷⁵ Ibid., p. 103.
means giving the chance to citizens to assume the challenge of living that is compatible with their own character.

Ethical liberals, in fact,

cannot accept that the social and economic institutions of a community should predefine different challenges in living for different kinds of people [...]. They think that it is part of each person’s ethical responsibility to decide an ethical identity for himself – to decide for himself whether it is a parameter of his life that he is an aristocrat or talented or whether these properties are only opportunities or limitations he faces in leading a life properly define in some quite different way.176

At this point, we will turn to the third important issue of liberal ethics: the relationship between political equality and personal partiality. If equality means equality of welfare or well-being, that relationship will be inconsistent because the point is simply to share equal amounts of goods in order to have a good life. Although it is not true for the Dworkinian theory of justice, in fact, “my decision to look after my own well-being in my plans and investments, and to work for the welfare of family and friends could not on its own impair the auction achieved.”177 Suppose, for instance, a family has more children than another, and it must therefore divide its inheritance into smaller shares. Although neither family has invaded the resources properly belonging to another, the children will not have equal resources, and some will envy what others have. Certainly the government should reduce the inequality generated in that way through, for instance, a progressive taxation; however, as we have just seen, the criteria that a person is living a good life does not depend on society but only on the person herself.178 Dworkin points out that “liberal equality does not assume that people choose their belief about ethics any more than their beliefs about geography. It does suppose that they reflect on their ethical beliefs and that they choose how to behave on the basis on those reflections.”179 We can see, then, that personal choices reflect the way that a person considers a life to be the ‘good life.’ Equality is not something mathematically measured as the same amount of goods. On the contrary, it is the possibility that the government gives to its citizens of being in the right circumstances in order to carry out their life plans.

176 Ibid., p. 102.
177 Ibid., p. 104
178 Ibid., p. 106
179 Ibid., p. 108.
Finally, the last feature of liberal equality is tolerance. Tolerance requires that the government must not discriminate against any of its citizens on the basis of their ethical positions or values. Dworkin aims to address the question: “Why should people not use whatever political power they have in a democratic society to improve the lives they and others lead, according to their best judgment about what a good life is?”

The point here is that the challenge model of ethics does not discriminate among substantive ethical convictions. As we highlighted above, ethical liberals accept an account of justice that demands equality of circumstances and resources. According to this account of justice, “the law is plainly part of people’s circumstances, and circumstances are plainly unequal when the law forbids some to lead the lives they think best for them only because others disagree.” Therefore tolerance gives full force to citizens’ ethical conviction about what it means to live a good life, albeit in an abstract way. As we discovered in the challenge model, someone’s life cannot be improved against his steady conviction that it has not been.

In short, we can say that government, through the concepts of neutrality and tolerance should encourage personal responsibility and authenticity embodied by citizens’ personal choices. On this point is really noteworthy what Dworkin points out in *Justice for Hedgehogs*: “Equality of resources […] may reward qualities of productive intelligence, industry, dedication, shrewdness, or contribution to the wealth of others. But that is not its aim. It does not even suppose that these are virtues; it is certainly does not suppose that a life earning more money is a better or more successful life. It presumes only that we treat people with equal concern when we allow each to design his own life, aware that his choices will have, among other consequences, an impact on his own wealth.”

In the end, according to Rawls, a well-ordered democratic society is not a community, if by “community” we mean a society governed by a shared comprehensive doctrine. This is because only a coercive force can impose a single doctrine among citizens. Dworkin, on his part, acknowledges the fact of diversity, but he does not accept that diversity negates the idea of a political community altogether. Thus his conception allows individuals to pursue their different conceptions of the good under the umbrella of liberal ethics. This conception gives priority to individualism about life’s values, and proposes that the ‘neutrality’ of government should adhere to this kind of politics in order to guarantee order in the community. Neutrality, as we have pointed out above, has a particular meaning in this case. Governments

\[180\] Ibid., p. 41.
\[181\] Ibid., p. 115.
must not rely on any assumption either directly or indirectly. For instance, government should not prevent the use of drugs because drugs are shameful, but it can regulate citizens’ lives in other ways. It can increase taxes to finance roads and aid the poor. It can forbid drug use in order to protect the community from the social costs of addiction.\textsuperscript{183} Therefore government programmes must remain at the economic level (because it is ethically neutral?), and must not interfere directly in personal choices since such interference would violate ethical independence. But “can all human action be understood in the image of market?”\textsuperscript{184} Today, in fact, the logic of buying and selling no longer applies only to material goods but involves the whole life. Dworkin’s answer is that

when we decide that certain goods may be bought and sold, we decide, at least implicitly, that it is appropriate to treat them as commodities, as instruments of profit and use. But not all goods are properly valued in this way. The most obvious example is human beings. Slavery was appalling because it treated human beings as commodities, to be bought and sold at auction. Such treatment fails to value human beings in the appropriate way – as persons worthy of dignity and respect, rather than as instruments of gain and objects of use.\textsuperscript{185}

This example shows a broader point: turning goods into commodities sometimes corrupts the goods in question. There are moral and political questions involved, not merely economic ones. In order to resolve these questions, it is necessary to grasp the moral meaning of these goods and the proper way of ‘prizing’ them.

\textbf{2.5. Sandel’s Response to Rawls: Is It Utopian to Speak about \textit{Common Good} in a Modern Society?}

On the other side of the discussion, Sandel, a professor of Government at Harvard University, calls for a political conception that gives greater emphasis to citizenship and community, and that addresses questions of the good life more directly. He wants us to think of ourselves as citizens, not just as consumers or isolated choosers. For him, justice demands

\textsuperscript{185} \textit{Ibid.}, p. 10.}
that we ask what kind of people and society we want to be, because fair procedures alone will not suffice. If a just society requires a strong sense of community, it must find a way to cultivate in citizens a dedication to the common good. It cannot be indifferent to the attitudes and dispositions that citizens bring to public life.

In the introduction to his book, Public Philosophy, Sandel writes that, “liberals often worry that inviting moral and religious argument into the public square runs the risk of intolerance and coercion. […] Substantive moral discourse is not at odds with progressive public purposes, and […] a pluralist society need not shrink from engaging the moral and religious convictions its citizens bring to public life.”186

2.5.1. Rights and the Good life

What is at stake in the debate between Rawlsian liberalism and the view Sandel advances, especially in Liberalism and the Limits of Justice (LLJ), is “whether rights can be identified and justified in a way that does not presuppose any particular conception of the good life” and “whether the principles of justice that govern the basic structure of society can be neutral with respect to the competing moral and religious convictions its citizens espouse.”187

Why should we not bring our moral and religious convictions to bear in public discourse about justice and rights? Why should we split our personal identity as citizens and as moral persons?

Rawls answer would be that we should do so in order accommodate ‘reasonable pluralism.’ His answer is that, in fact, a liberal view removes more divisive issues from the political arena. This idea is summed up in the claim that the right is prior to the good and, for this reason, Sandel calls this kind of liberalism “deontological.” The priority of the right over the good means two things: first, that no one’s individual rights may be subordinated to the common good, and, second, that the derivation of these rights cannot make use of any particular conception of the good life.188

In *PL*, Rawls also remarks, that the priority of the right over the good does not presuppose any particular conception of the self. Here, Rawls wants to give a practical solution to the familiar fact that citizens usually disagree about the idea of good. To him, the most reasonable solution seems to be to find an agreement on principles of justice that are neutral with respect to moral and religious controversies. But does Rawls’ ‘practical response’ really avoid any relationship with the conception of the person? Should government be really morally neutral?

The political conception of the person, expressed by Rawls in *PL* and developed in his essay *The Idea of Public Reason Revisited*, is focused on the idea of public reason as a set of rules for organizing and regulating public political debate.\(^{189}\) He argues that “a citizen engages in public reason […] when he or she deliberates within a framework of what he or she sincerely regards as the most reasonable political conception of justice, a conception that expresses political values that others, as free and equal citizens might also reasonably be expected reasonably to endorse.”\(^ {190}\) When citizens deliberate, they share views and debate among reasons concerning public political questions. They assume that their opinions should be discussed and, hence, these opinions are not simply a fixed outcome of their existing private and non-political interests.

2.5.2. The Concept of Public Reason

At this point in the discussion, it should be noted that the concept of public reason is crucial because “it characterizes such citizens’ reasoning concerning constitutional essentials and matters of basic justice.”\(^ {191}\) Consequently, it implies a reasonable pluralism. Citizens are considered to be reasonable if,

\begin{quote}
when viewing one another as free and equal in a system of social cooperation over generations, they are prepared to offer one another fair terms of cooperation according to what they consider the most reasonable conception of political justice; and when they agree to act on those terms, even at the cost of their own interests in particular situations, provided that other citizens also accept those terms.\(^ {192}\)
\end{quote}

\(^ {190}\) Ibid., p. 450.
\(^ {191}\) Ibid., p. 448.
\(^ {192}\) Ibid., p. 446.
At this point, we are faced with the core issue of the Rawlsian theory of justice: the idea of ‘moral individualism.’ As Sandel points out, this doctrine does not suppose that people are selfish, but makes a claim about what it means to be free. The notion that justice should be neutral about conceptions of the good life reflects a conception of the person as someone who makes choices freely. Thus, in this doctrine, human freedom means that citizens are the authors of the only moral obligations that constrain them. If human beings are freely choosing, independent persons, unbound by any moral links antecedent to choice, then there is a necessity for a framework of rights that is neutral among ends.

As Sandel points out, the debate about the priority of the right over the good has implications for how the identity of the self is considered in the public sphere. He notes that

Asking democratic citizens to leave their moral and religious convictions behind when they enter the public realm may seem a way ensuring toleration and mutual respect. In practice, however, the opposite can be true. Deciding important public questions while pretending to a neutrality that cannot be achieved is a recipe for backlash and resentment. A politics emptied of substantive moral engagement makes for an impoverished civic life. It is also an open invitation to narrow, intolerant moralism. Fundamentalists rush in where liberals fear to tread.

Sandel identifies two kinds of ‘costs’ to liberal public reason implied in putting aside comprehensive doctrines.

First, there are moral costs. These are linked to the validity and importance of the moral and religious doctrines liberal that public reason requires us to leave behind when dealing with questions of justice. Obviously these costs vary from case to case and they are more significant among sensitive topics. For instance, “those who consider homosexuality immoral and therefore unworthy of the privacy rights accorded heterosexual intimacy could not legitimately voice their views in public debate. Nor could they act on their belief by voting against laws that would protect gay men and lesbians from discrimination.” These beliefs, in fact, could not play a part in political debate about matters of justice, since they reflect comprehensive moral and religious convictions.

Second, liberal public reason implies certain political costs. These costs are becoming increasingly common in those countries whose public discourse endorses the ideal of public reason promoted by political liberalism. In these States, “government should not affirm,

194 Ibid., p. 243.
through its policies or laws, any particular conception of good life; instead it should provide a neutral framework of rights within people can choose their own values and ends.” As Rawls argues, “even though political liberalism seeks common ground and is neutral in aim, it is important to emphasize that it may still affirm the superiority of certain forms of moral character and encourage certain moral virtues.” However, where the political discourse lacks moral resonance, the desire for a public life of larger meaning finds undesirable expressions, which assume more secular forms. For instance, an article on Obama’s health care reform (Affordable Care Act) published in Time magazine, points out what the consequences of a ‘neutral government’ are in matter of preventive services:

The Department of Health and Human Services is requiring all employers to cover contraceptives, including those that act as abortifacients, and surgical sterilization. While churches themselves are exempt, a huge swath of Catholic institutional life, from Catholic hospitals to Catholic schools, has just been told by government to practise what it does not preach. [...] Catholic hospitals, schools and charities are left with the choice of buying health plans that cover practices the Church morally opposes or paying onerous per employee fines.

In this instance, Obama’s decision shows an intrusion of secular government, with its net of rules and regulation, into something pertaining to both religion and State authority, in order to overcome the conflict between free exercise of religion and access to preventive service in the name of the ‘tutelary power’ of the administrative state. Here, it should be noted that excluding comprehensive views from the political arena does not necessarily mean the achievement of a neutral ground where the political debate is among equals. As Rawls notes, “the principles of any reasonable political conception must impose restrictions on permissible comprehensive views, and the basic institutions those principles require inevitably encourage some ways of life and discourage others, or even exclude them altogether.”

For this reason, on March 25, 2014, the Affordable Care Act challenged before the Supreme Court, where the justices heard oral arguments in Sebelius v. Hobby Lobby Stores, Inc. (13-354) and Conestoga Wood Specialties Corp. v. Sebelius (13-356). Both cases concern Christian employers who seek an exemption to the ‘contraceptive mandate.’ The case is hugely controversial and the nine justices were divided in two opposing positions that

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196 Sandel, Public Philosophy..., p. 10.
197 Rawls, Political Liberalism..., p. 194.
198 R. Lowry, Obama vs. Church, Time 179, no. 7(2012).
199 Rawls, Political Liberalism..., p. 195.
offered competing visions of horror. The Court’s three female Justices clearly saw the case from the perspective of the female employees. In fact, they asked several questions to Mr Paul Clement, the lawyer for Hobby Lobby, arguing that the employer’s religious beliefs can harm women since he is not providing the health insurance’s full package (he does not want to cover contraceptives that can harm the fetus). Conversely, the conservative Justices turned the subject away from the rights of the employees to the rights of the employer. Justice Kennedy pointed out to Solicitor General Donald Verilli, who was defending the law, that under his view, a profit corporation should be forced to pay for abortions and it would not have any standing to vindicate the religious rights of their shareholders and owners.200 A verdict is expected later this year.201

At this point, following Sandel’s argument, the question remains whether a wider public reason would sacrifice the ideals that public liberalism promotes, in particular respect among citizens who hold different moral and religious views.

Sandel identifies two kinds of mutual respect. On the one hand, there is a ‘liberal conception,’ which ascribes respect to the idea that each citizen should engage in political debate while ignoring any comprehensive doctrines. On the other hand, there is a ‘deliberative conception,’ which admits citizen’s moral and religious convictions, engaging them in the public arena, especially when they bear on important political questions. According to Sandel, this second conception of respect is more suitable for a pluralistic society because “to the extent that our moral and religious disagreements reflect the ultimate plurality of human goods, a deliberative mode of respect will better enable us to appreciate the distinctive goods our different lives express.”202

This way of thinking seems to be suggested by Rawls as well when he introduces the concept of proviso in his latest essay about public reason.203 This is an important issue that many critics have highlighted in order to show the partiality of Sandel’s criticism of the restrictiveness of liberal public reason. In The Idea of Public Reason Revisited, Rawls, in fact, discusses two aspects of what he calls the ‘wide view of public political culture.’ Both aspects indicate that it may be positive to introduce comprehensive doctrines into political discussion. In this sense, the proviso, as Rawls explains it, is a expedient that allows citizens to express their deep moral and religious convictions in public. Therefore, if someone

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200 See also the U.S. Supreme Court Oral Arguments, available on line http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-354_5436.pdf, p. 75
201 A ruling from the Supreme Court is expected by the end of the court session in late June 2014.
202 Sandel, Liberalism and Limits of Justice..., p. 218.
supports a specific choice in the political arena because of his religious beliefs, he could legiti-
mately provide those religious beliefs as the justification of his choice. However, it is important to under-
line that “the introduction into public political culture of religious and secular doctrines, provided the proviso is met, does not change the nature and content of justification in public reason itself. This justification is still given in terms of a family of reasonable political conceptions of justice.”

For instance, if we consider a highly contested political issue such as abortion rights, the outcome of votes expresses how much citizens trust in purely public political values of toleration and women’s equality for concluding that women should be free to choose to have an abortion. On the other side, as Sandel argues, the disagreement of Catholic Church over the moral permissibility of abortion is not rooted in a conception opposed to women’s dignity, but is rather based on the moral status of fetuses. In fact, according to the doctrine of the Catholic Church, human life begins at conception. Consequently, “if the Catholic Church is right about the moral status of the fetus […], then it is not clear why the political values of toleration and women’s equality, important though they are, should prevail.” This issue shows that the case of abortion rights cannot be neutral with respect to moral and religious doctrines. Liberals might argue that this engagement violates the priority of the rights over the good. However, this position cannot sustain a priori this statement: “The case for respecting a woman’s right to decide for herself whether to have an abortion depends on showing […] that there is a relevant moral difference between aborting a fetus at a relatively early stage of development and killing a child.”

Sandel’s example shows the difficulty of dealing with a politic conception of justice that tries to put aside controversial moral questions, highlighting two key points.

First, Rawls’s conception of proviso introduces comprehensive doctrines into the political debate in a purely theoretical way. In fact, according to Rawls, moral and religious issues should be always explained in terms of rights and politics. According to Rawls, citizens cannot share the core principles of their doctrines and act upon them in the public sphere, in spite of the fact that he recognizes the importance of the morality in the political field through the proviso. As Rawls is aware, the proviso gives rise to more questions, such as: when must proper political reasons be given in order to satisfy the proviso’s stipulation

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204 Ibid., p. 463.
205 I do not intend here to address the issue of abortion rights. I am using this example to show in a paradigmatic way how Rawlsian liberalism looks at society’s most contested political issues.
206 Sandel, Liberalism and the Limits of Justice..., p. 198.
207 Ibid., p. 198.
that they are given in due course? Faced with the questions his *proviso* raises, however, Rawls professes to be unable to answer them. He believes the details of how to satisfy the *proviso* “must be worked out in practice and cannot feasibly be governed by a clear family of rules given in advance.”

For example, what does woman’s equality really mean in the case of abortion rights? What is really at stake in the relationship between the right to equality and the possible conflict with the right to life expressed by the fetus? One should be careful when speaking about rights to avoid any substantial issue that requires other reasonable (and not mystical) explanations, because he could breach what a society really wants to protect with its provisions. As Quinn points out, Rawls adopts the wide view expressed in *The Idea of Public Reason Revisited* at least in part because he wants to address the concerns of some religious people that his brand of political liberalism is unduly exclusive of the religious. But there is only so far he can go in this direction while remaining loyal to his liberalism’s core aspiration to political justification to all citizens on questions of constitutional essentials and basic justice. Reasons drawn from comprehensive doctrines that divide us must ultimately be redeemed in terms of political values we share as free and equal citizens. So even after the wide view’s proviso is in place, ultimate political justification still must be in terms of shared political values and so must be conducted within the limits of public reason.

Second, Sandel’s idea of ‘common good’ claims that the good is not something imposed by government upon citizens, but rather that the justification for rights depends on the moral ends they serve. As we have seen, “rather than avoid the moral and religious convictions that our fellow citizens bring to public life, we should attend to them more directly – sometimes by challenging and contesting them, sometimes by listening to and learning from them.” The crucial point is, that if government does not want to be partial in its judgments, the neutrality strategy is not sufficient to resolve legal questions. This is because the right thing to do is always a matter of choice, each choice is made with reasons, each reason expresses some criteria, and each criterion implies a particular point of view. Therefore, if a government wants its perspective to be the most effective at addressing a specific issue, it is necessary that the person who makes the decision not put aside his moral convictions. As the abortion rights case highlights, the crucial point is not avoiding moral disagreements, but establishing a society that wants to understand the truth about any issue.

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2.6. A Step Forward in Facing Moral and Religious Diversity: Charles Taylor’s
New Secularism

As we have seen, one of the most important challenges facing contemporary societies is how to manage moral and religious diversity within the public sphere. It is quite simple to answer to this question through formulas such as the ‘separation of church and state’ and the ‘neutrality of the state.’ Moreover, when the relationship between religion and the State is at stake, it is popular to invoke the mainstream position that religion should be put aside because it could threat the impartiality of the State, especially in dealing with controversial issues such as abortion rights, stem-cell research, adoptions, same sex unions, display of religious symbols, and so on. This is because, as many politicians and individuals in general say in present debates about these hot-topics, the State’s decisions have to favour common welfare, not only one Church, and cannot infringe upon the morality of the atheist. Hence, the point seems to be that, on the one hand, he who holds a religion belief has to protect the freedom to manifest his religion in the public sphere, while, on the other hand, atheists have to protect themselves from the unwanted consequences of religion’s spread beyond private life.

Taylor, professor of Political Science and Philosophy at McGill University in Montreal, takes issue with this conception of public reason, and critiques the ways in which secularism is usually conceived, both through his work entitled *A Secular Age* (2007) and through his various commitments in Quebecoise politics. In fact, in 2007, Quebec Premier Jean Charest appointed Taylor as co-chair, with Gérard Bouchard, of a consultation commission to study the social accommodation of religious and cultural minorities in the country. During the public consultation held in the fall of 2007, Quebecers massively supported the concept of secularism, although with different meanings. The proponents of secularism often cited the main argument that “religion must remain in the private sphere,”

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212 On the 8th of February 2007, Quebec Premier Jean Charest announced the establishment of the Consultation Commission on Accommodation Practices Related to Cultural Differences in response to public discontent concerning reasonable accommodation. The order in Council establishing the Commission stipulates that it has a mandate to: a) take stock of accommodation practises in Québec; b) analyse the attendant issues bearing in mind the experience of other societies; c) conduct an extensive consultation on this topic; and d) formulate recommendations to the government to ensure that accommodation practices conform to the values of Québec society as a pluralistic, democratic, egalitarian society. Excerpt from Abridged English Report G. Bouchard and C. Taylor, *Building the Future, A time of Reconciliation*, available on line at http://red.pucp.edu.pe/ridei/wp-content/uploads/biblioteca/buildingthefutureGerardBouchardycharlestaylor.pdf.
which was only a vague statement. According to Taylor and Bouchard, this statement is subject to at least two ambiguities.

The first ambiguity lies in the fact that ‘public’ has two meanings. On the one hand, ‘public’ concerns the State and its common institutions (public institutions). On the other hand, ‘public’ can also mean open or accessible to everyone (e.g., garden open to the public). The first meaning concurs with the secular principle of the neutrality of the State with respect to religion. In this sense, it is accurate to say that religion must be ‘private.’ However, appealing to the second sense of ‘public,’ it could be suggested that secularism demands that religion be absent from public space in the broad sense, even though religions already occupy this space and, in accordance to the national and international provisions, religious groups and believers have the right to publicly display their creeds.

The second ambiguity concerns the meaning of ‘State neutrality’. On the one hand, it is clear that the secular State must be neutral with respect to all religious, and that it must not take sides with regards to religion or non-religion. However, as the report of the commission points out, “the secular, democratic State is based on a political moral code and on certain principles that are not negotiable. This is true of democracy, human rights and the equality of all citizens. When these principles come into play, the State may not remain neutral. Ideally, all citizens must share these same principles and political moral code, although their deep-seated convictions may differ.”

Liberal democracies, including Québec, all adhere to the principle of secularism, yet it is worth noting that secularism can be embodied in different systems. The work of the Commission noted four principles that support secularism. The first two define its final purposes. These are the moral equality of persons and the freedom of conscience and religion. The other two principles are expressed in institutional structures that make it possible to achieve these purposes: namely, the separation of Church and State, and the neutrality of the State with respect to religions and deep-seated secular convictions. The main issue concerning the application of these principles is that the neutrality of the State must both foster and thwart the freedom of conscience and religion of citizens. If such was the case in France, “it is perhaps because a certain conception of the neutrality of the State, sanctioned by a national tradition, was raised to the level of an ultimate purpose.” Schools are one of the principle theatres of this ambiguity. For instance, the ban of displaying religious symbols

is intended to convey the idea that religion is only a private matter, which cannot interfere with the public sphere.

Thus the requirement of neutrality must be further clarified.

2.6.1. Neutrality and Secularism: Two Concepts Rooted in the Enlightenment’s Crucial Move

It is clear that a democratic State must treat equally citizens who belong to different creeds or who define themselves as agnostic or atheist. In other words, the State must be neutral in relation to the different worldviews and conceptions of the good with which citizens identify. At the same time, however, a liberal and democratic State cannot remain indifferent to certain core principles such as fundamental human rights, human dignity, and popular sovereignty. Although, as Taylor points out, “these values are not neutral, they are legitimate because it is that they allow citizens espousing very different conceptions of the good to live together in peace.” What does Taylor mean when he says that these values are not neutral but legitimate?

In a society where there is no common consensus about religious and moral views, the State must avoid any kind of preference. It must remain ‘neutral,’ but at the same time, it has to look for an ‘overlapping consensus’ among citizens about basic political principles. According to Taylor, this implies that “the state should adopt a position of neutrality not only toward religions but also toward the different philosophical conceptions that stand as the secular equivalents of religions” while not replacing religion with a comprehensive secular philosophy as the foundation of its actions. In fact, there is the constant temptation to make secularism equivalent to religion, taking pride in its neutrality or indifference toward religions. This argument allows Taylor to make a distinction between political secularisation (laicisation) and social secularisation (sécularisation). The former means the “process by which the State affirms its independence from religion;” the latter is a sociological phenomenon embodied in citizens’ conceptions of the good and convictions of conscience.

Taylor writes that “in accordance with the argument for the State’s necessary neutrality

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216 Ibid., p. 13.
217 Ibid., p. 16.
toward conceptions of the good and convictions of conscience, the State must seek to become politically secular but without promoting social secularization.”

With that said, it is clear that neutrality on the State’s side does not impose an equal burden on all citizens. The liberal State, for instance, defends the principle that individuals are to be considered autonomous moral agents, free to define their own conception of the good life. Hence, in its schools, the State will favour the development of students’ critical autonomy. Moreover, in exposing students to a plurality of worldviews and modes of life, the democratic and liberal State makes it more difficult for parents to transmit a particular set of beliefs to their children, and even more difficult to transmit respect for tradition over individual autonomy and the exercise of critical judgment. The State’s neutrality is, therefore, not complete.

Noting when ‘operative means’ are at stake with the goal of protecting the neutrality of the State, we can better assess the complexity inherent in secularism. For instance, a Muslim teacher who wears a headscarf in class might be viewed as a derogation of the principle of neutrality in the public schools, and of the norm requiring that public institutions treat all citizens equally. Conversely, preventing the teacher from wearing a headscarf constitutes an infringement of her freedom of religion. This example shows how dealing with freedom of religion is complex, and how the viewpoint that religion is just a personal way of life leads to a poor understanding of the importance of religion in individual lives.

For this reason, Taylor, in his work entitled *A Secular Age*, addresses this issue in a comprehensive way. He includes both an historical analysis of secularism from the Middle Ages to nineteenth century, and a philosophical commitment to an affective religious belief. In this work, which is not his first treatment of this subject (look at *Modern Social Imaginaries* published in 2004), he places a great deal of emphasis on the origins of modern secularism, pointing out that these centuries created the principal basis of secularity that emerged from the twentieth century onwards. The historical analysis is strongly led by a distinction between three models of secularity, of which Taylor wants to focus on the third.

What Taylor calls ‘secularity I’ focuses on the divorce between religion and politics: “As we function within various spheres of activity – economic, political, cultural, educational, professional, recreational – the norms and principles we follow, the deliberations we engage in, generally don’t refer us to God or to any religious beliefs.”

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218 Ibid., p. 16.
‘Secularity 2’ is more personal: it consists in “the falling off of religious belief and practice, in people turning away from God, and no longer going to church.”

‘Secularity 3,’ which is Taylor’s principal interest, centres on the conditions of belief: “The shift to secularity in this sense consists, among other things, of a move from a society where belief in God is unchallenged and indeed, unproblematic, to one in which it is understood to be one option among others, and frequently not the easiest to embrace.”

The difference between contemporary societies and pre-modern ones is that the pre-modern societies were generally connected to or based on some faith in, or some notion of, ultimate reality. In contrast, contemporary societies are in general free from this relation. Moreover, religion, or its absence, is largely a private matter. Following this line with the first two understandings of secularization in mind “people often tend to think of secularity simply as the absence of religion, not something in itself. Or they think of it mainly as a strong separation of church and state – creating again a zone of absence.” Although these two conceptions of secularity are central to the standard public usage of ‘secular,’ the most original way to conceive of secularism regards its third understanding. In fact, for Taylor, secularity is not seen as a reduction in religious belief or practice, but a rather as change in the very conditions of belief. In his account, religion is becoming an ‘option’ in contemporary society, “according to which people define themselves through one orientation or another, but in either case without the kind of inevitably that would reverberate indistinctly between subjective and outward manifestation.”

To bring ‘Secularity 3’ into view, it is necessary to identify the crucial shift that occurred in the seventeenth century from a conception of an ordered cosmos to the modern conception of morality. In response to this shift, Taylor notes that “the fixation on religion as the problem is not just a historical relic. Much of our thoughts, and some of our major thinkers, remains stuck in the old rut. They want to make a special thing of religion, but not always for very flattering reasons.” Here Taylor, as Rawls did in Political Liberalism, is asking whether it is legitimate that citizens should put aside their religious views when engaged in the public arena.

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220 Ibid., p. 3
221 Ibid., p. 3
223 Ibid., p. 9.
In Rawls’s case, the point was that everyone should use a language with which they could reasonably expect their fellow citizens to agree. In Taylor’s view, Rawls suggested that “secular reason is a language that everyone speaks and can argue and convinced in. Religious languages operate outside this discourse by introducing extraneous premises that only believers can accept.”

Hence, secular reason is perceived as a ‘neutral reason’ which everyone can use to reach conclusions with which everyone can agree without introducing extra assumptions. This proposal deserves further examination.

In response to Rawls argument, Taylor points out that it originates in what one might call the Enlightenment’s myth. Taylor writes that “thus there is a version of what Enlightenment represents that sees it as our stepping out of a realm in which Revelation, or religion in general, counted as a source of insight about human affairs into a realm in which these are now understood in purely this-worldly or human terms.”

Thus, secular reason is couched as reason that can, in principle, be universally agreed upon. This is for two reasons: first, reason alone can meet this standard; second, religious language by its very nature would fail to do so. Obviously, Taylor does not agree with these two points. He suggests that they apply to a form of the moral-political domain that is one of the fruits of the Enlightenment myth that makes religion an illusion.

In his recent essay entitled Die Blosse Vernunft (“Reason Alone”), he tries to trace the rise of this illusion through two passages, which he considers partly well founded and partly grounded on illusions. The first passage originates in Cartesian foundationalism. In his Meditations, Descartes had attempted to establish secure foundations of knowledge in order to avoid scepticism. For this reason, he replaced the information provided by sense, which can be unclear, with the truths of geometry, which, he claimed, are more clear and indubitable. According to Descartes, the foundation for knowledge is his cogito ergo sum (“I think therefore I am”), and this is the most indubitable belief. Moreover, Descartes’ method to find distinct truths combined a certain starting point (particular ideas in the mind) and an infallible method (clear and distinct ideas), which together supported the concept of ‘reason alone.’ As Taylor argues, “our reasoning power is here defined as autonomous and self-sufficient. Proper reason takes nothing on ‘faith’ in any sense of the world. We might call this the principle of “self-sufficient reason.”

Very soon Descartes’ method came under attack because of the rise of a new kind of empiricism promoted by John Locke, which tracks actual

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225 Ibid., p. 49.
226 Ibid., p. 53.
228 C. Taylor, Reason Alone, in C. Taylor, Dilemmas and Connections..., p. 330
correlations found in experience. Here, empiricism found a sort of support in the second move towards the “reason alone” myth: namely, post-Galilean natural science. In a way, in the seventeenth century, the rise of this new paradigm of natural science offered a scenario, which fit perfectly with the Enlightenment myth of an unmitigated progress. It took the explanation of natural phenomena out of the Platonic-Aristotelian framework – where the Forms are the essentials of the material objects allowing humans to answer the question ‘what is that?’ – into the domain of efficient-causal relations within the universe.

According to Taylor, these two moves, and particularly the second one, have had a powerful effect on the modern imagination. For many, natural science has become the paradigm of the successful acquisition of knowledge, and it is though that this step applies somehow to the moral and political spheres.

2.6.2. The Modern Vision of Moral Order and the New Place for Religion

Taylor, in his work entitled *Modern Social Imaginaries*, explains the new vision of moral order and its role in the development of modern Western society. In particular, the changing of the ‘social imaginary’ is at stake, rather than the social theory, because with that definition he addresses something broader and deeper than the intellectual schemes people may assume about social reality in a disengaged mode. Hence, there are many important differences between the term ‘social imaginary’ and the social theory:

I speak of “imaginary” (i) because I’m talking about the way ordinary people “imagine” their social surroundings, and this is often not expressed in theoretical terms, it is carried in images, stories, legends, etc. But it is also the case that (ii) theory is often the possession of a small minority, whereas what is interesting in the social imaginary is that it is shared by large groups of people, if not the whole society. Which leads to a third difference: (iii) the social imaginary is that common understanding which makes possible common practices, and a widely shared sense of legitimacy.²²⁹

Now it very often happens that what starts as a theory held by a few intellectuals may come to permeate the social imaginary and, therefore, more or less consciously the whole of society. Taylor argues that this is what happened to the new theories of natural law, which emerged in the seventeenth century with Grotius and Locke. According to Grotius, the normative order underlying political society derives from the nature of its constitutive

members: “Human beings are rational, sociable agents who are meant to collaborate in peace to their mutual benefit.” Following this line of thought, the picture we have of society is that of “individuals who come together to form a political entity, against a certain pre-existing moral background, and with certain ends in view. The moral background is one of natural rights; these people already have certain moral obligations toward each other. The ends sought are certain common benefits, of which security is the most important.”

Locke uses this theory for the first time in order to achieve a ‘limited’ government where rights can be seriously pleaded against coercive power. Moreover “the theory of natural rights ends up spawning a dense web of limits to legislative and executive action, via the entrenched charters which have become an important feature of contemporary government.” Consequently, the presumption of equality, grounded in the idea of the state of nature where there is no hierarchical order, has been applied in many contexts such as equal treatment and non-discrimination provisions.

Now it is clear that these images of moral order, derived by a series of transformations from Grotius and Locke’s theories, are rather different from those embedded in the social imaginary of the pre-modern age. In particular, Taylor identifies two types of pre-modern moral order: the first one “is based on the idea of the Law of people, which has governed this people since time out of mind, and which in a sense defines it as a people;” whereas the other one, “is organized around a notion of a hierarchy in society which expresses and corresponds to a hierarchy in the cosmos.” In both these cases, but more clearly in the second one, it is evident that the moral order is thought to impose itself through the nature of things, not simply through an imposed set of norms. This conception of order contains, in fact, an “ontic” component, which identifies God or the cosmos as features of the world that make the norms realizable. The modern understanding of moral order is usually opposed to this one due to the assumed absence of an ontic dimension. On the contrary, argues Taylor, this component is not absent but is now a feature, which belongs to human beings.

Another way of approaching this point is to look at the relationship between reason and religion suggested in Taylor’s recent essay titled *Reason, Faith and Meaning.*
In this essay, Taylor identifies two common illusions about this relationship. These illusions include the sharp distinction between reason and faith on the one hand, and, on the other hand the popular idea of reason is something ‘disengaged.’ It is also commonly believed that the domains of formal logic, mathematics, and natural science offer the foundation for the belief in ‘reason alone’ because purely ‘logical reasoning’ seems to be the foundation of those fields. Taylor argues that this is a mistaken conclusion. He contends that we can avoid this conclusion by looking at the way in which natural science develops. He writes that “reason in this domain of natural science must include this third dimension, a creative recasting of the problem, which can’t be ‘delivered’ through a reliable pre-existing method.” In fact, to overcome anomalies generated by earlier theories, reason must have a creative component in order to acquire new insights and shift old paradigms into new ones.

When we come to ethics, political theory, social science, and the like, this method seems to be ineffective because of the difficulties of arriving at the sort of universal consensus that is at least approached in natural science. Hence, it common sense would seem to affirm that reason has to be disengaged from any personal insights if we are to come to a common agreement about human affairs. But “how do we come to understand the emotions and reactions, the sense of beauty and the good, whether of another person, or of a strange society, without drawing on our own reactions?”

The point is that reason, as we have seen regards to natural science, cannot be reduced simply to mathematical reason. The perception of the significance of human meaning must be attached to the experience of this meaning. This does not mean that we should turn simple reactions into grand truths, but rather that we deal with circumstances by taking into account both our sense of what is really important, and fundamental principles rooted in democratic society.

The powerful model of natural science has convinced many that real and true knowledge of the world needs to be ‘neutral,’ which means free from any human meaning. However, the progress of natural science itself reveals the necessity of taking human insight into account in order to change and develop new paradigms. If the development of the natural sciences requires human insight, why should social science be deprived of it? Taylor writes that

‘Neutral’ facts, by definition, can’t tell us what we should do. They can only guide us once we have espoused certain goals, in the light of which these facts can become relevant to action. But since theoretical reason cannot establish these goals, they must come from ourselves, from our de facto inclinations. A neutral world is given practical shape by the “values” that human agents project onto it.\textsuperscript{237}

We can summarize Taylor’s modern understanding of moral order and its relationship to religion though three key points. First, we see that the Enlightenment is a turning point, regarded as a turn from the darkness to the light that brought forth a new conception of reason as something disengaged from human insight. In this conception of reason, “the ‘darkness’ consists in the invoking of such strange metaphysical entities as a law which holds since time out of mind, regardless of the incompatible positive legislation which may have crept in for a time […]. The ‘light’ consists in the clear analysis of worldly reality, in which societies are nothing more than aggregations of human beings.”\textsuperscript{238} This conception of reason is the result of the great influence of post-Galilean empiricism, which was held to be the best way of achieving shared and definite truths in the field of social science.

The obvious consequence of this leads the second key point: namely, the concept of secularism, which implied a sharp divorce between religion and the public sphere. For this secularism, there is a secular reason, believed to be ‘neutral reason,’ upon which everyone can agree. In contrast to secular or neutral reason, religious reason is thought to introduce special languages and assumptions that might contradict the secular reason, and upon which it is almost impossible to find a common understanding.

Finally, the third key point is Taylor’s original and controversial conception of reason, which is based on the historical framework described above. Taylor’s analysis of how natural science develops and changes its assumptions reveals that mathematical reasoning needs to be combined with broader insights. Thus, there is a further dimension to reason that makes the human mind creative. Applying this scheme to moral issues means that human insights are necessary in order to gain more comprehensive knowledge of moral concerns. This means that the ‘ontic’ component – which connects reason with something ‘external’ from its domain – is still present in the modern moral order, although it is often identified with human features such as philosophical theories, causal-effect relationships, etc. At this point, it is easier to understand the significance of the model of ‘Secularity 3’ connected with this shift. In contemporary society, belief in God is understood as one option among others.

\textsuperscript{237} \textit{Ibid.}, p. 24.  
\textsuperscript{238} C. Taylor, \textit{Reason Alone...}, p. 342.
Hence, religion is becoming just a question of simple choice and not something entangled with the personal search for truth and, therefore, something strictly connected with human dignity.
Chapter 3

THE HEADSCARF DEBATE IN SCHOOLS AND UNIVERSITIES ACROSS EUROPE

Abstract

This Chapter examines the ways that European countries are affected by the conceptions of secularism they may hold. In particular, it deals with role that these conceptions of secularism have on schools and universities’ policies on the wearing of religious symbols. The starting point of this analysis is a comprehensive overview of the cases addressing this issue that have been brought before the European Court of Human Rights up to the present. France and Turkey are the first two countries upon which we shall focus our attention. Both States adopted secularism because of their respective historical and political experiences. The first two cases addressing the wearing of headscarves in French state schools were ‘Dogru v. France’ and ‘Kervanci v. France.’ These two cases were judged by the Court of Strasbourg in the exactly the same way. In these cases, the Court stated that health and safety reasons come before the pupils’ right to manifest their religion in school. In Turkey, ban on headscarves in the educational environment was also highly debated. In the well-known case ‘Leyla Sahin v. Turkey’ the ECtHR clarified two points: first, it recognized that each member State can take measures against extremist political movements, based on its historical experience, in order to protect a system which supports the rights protected by the ECHR; second, the Court accepted that only by supporting the principle of secularism is it possible to guarantee these fundamental rights and the protection of democracy’s values. Before the ‘Sahin’ case, the previous leading case was ‘Dahlab v. Switzerland.’ This case remains extremely important for at least three reasons. First, it defined the headscarf as a ‘powerful religious symbol,’ which can imply the act of indirect proselytism. Second, it asserted that the context in which a headscarf is worn is crucial. In this case, it was determined that a person who takes on the role of schoolteacher also takes on the role of a
‘civil servant’ who acts on behalf of the State. The duties implied by the role of teacher, and therefore also of civil servant, can mean a limitation of rights. Third, it established that the principles of secularism, religious neutrality, and gender equality are all essential principles, crucial for the judges of Strasbourg to employ in order to allow a width margin of appreciation to the member State and to meet the requirements of the fair balancing test. On this topic, it is interesting to note that the UK, a State where multiculturalism is a great challenge, has a completely different approach to the wearing of religious symbols in schools, but no judgments have yet been brought before the ECtHR. In our discussion of cases in the UK, analysis will focus on the national level of jurisdiction. A nationwide debate on the issue of headscarves in educational environments was generated by the case of Shabina Begum. In a paradigmatic way, the Begum case did not challenge the British demarche in dealing with the Islamic headscarf: that this was a matter best decided at local level by the respective school. Almost a year later, in the ‘Watkins-Singh’ case, a new different approach towards Article 9 ECHR appeared. Here, the Court emphasized the ‘visibility’ criterion of the religious symbol – a questionable criterion – to assess whether the school had erred in assessing the proportionality of its provision. Finally the ‘Azmi’ case clearly shows a basic difference between the UK, and States such as Switzerland, France, or Turkey in implementing the ideas of pluralism and coexistence among different religions in the educational environment. The British Courts’ most prominent reasons for forbidding the headscarf or other religious symbols at school are health and safety concerns and incompatibility with the school’s uniform policy. Only secondarily have British judges faced the problem of wearing headscarf or another Muslim garments in the schools in the context of the Church-State relationship.

3.1. When the Islamic Religion Is a Minority: The French Controversy

When discussing religious symbols in the public square, secularism is one of the most important concepts to explore. As we have seen, in Turkey, France, and other European countries, the banning of the headscarf in schools and universities assumes a different shape depending on how the principle of secularism is interpreted, and whether Islam is a majority or minority religion. In conceptual human rights terms, the heart of the Islamic veil debate is the question of where to draw the line between public and private. As Ryan Hill argues,

In a human rights sense, what the state need therefore consider when confronted with pluralistic contention is not which party should show toleration and which viewpoint should be given priority. Rather, it needs to decide whether or not an action places it under an obligation to intervene. This will depend on the nature of the religious adherent’s demand and how it impacts within the public domain, including its impact on the rights of others, but, for obvious reasons, much less on how it is perceived as impacting on the right holders’ own rights. The
problem is that the degree of impact depends on what we include within the public and what we include within the private spheres; that is to say where we draw the boundary and how permeable it is.239

We will begin by analysing the French attitude towards the presence of religious symbols, in particular, the presence of the headscarf in State schools.

On December 11, 1905, republicans in power abolished the Concordat that, since 1801, had regulated the relationships between the French government and ‘religious groups.’ Practically speaking, this act had the effect of diminishing the power of the Catholic Church, which had dominated France for centuries. The result of this seizure of power was the Law of Separation between Church and State that “embodies a classical ideal of liberal separation between state and religion, underpinned by an individualistic and egalitarian conception of justice as best pursued through state abstention from religious affair.”240 The aim of this law was to embody the principle of laïcité, which refers to an egalitarian sense of justice as state neutrality.

It is worth noting that this ideal was fully implemented in State schools nearly twenty years before the Law of Separation. In fact, Jules Ferry, a lawyer holding the office of Minister of Public Instruction in the 1880s, had created the modern Republican School. Through the Educational Laws he replaced the dual system of church and state schools with only state schools and lay school’s teachers, and, as Article 2 stated, “The public primary schools will hold one day free, apart from Sunday, allowing parents to give, if they wish, their children a religious education outside from school buildings. Religious education is optional in private schools.” Control of the schools, then, was central to the project of the Third Republic:

The religious neutrality of schools was achieved through the scrupulous avoidance of any reference to religion in the content of education, and the removal of any religious signs such as Christians crosses from classrooms. While this was denounced as an openly anti-religious affront by many Catholics, republicans insisted that the fact that schools refrained from either endorsing or criticizing religious values meant that they could be truly inclusive and respect the diversity of private beliefs.241

241 Ibid., p. 50.
The secular nature of school is believed to be central to the proper integration of future French citizens, and many believe that this integration depends on the neutrality of schools, which means, in short, that religion has no room in public education.

As we have seen, this process started in the nineteenth century with Jules Ferry’s Laws on Education. A century later, because of immigration, the debate about Islamic headscarf has begun, but the rhetoric has become slightly different. In fact, the application of the principle of laïcité has directly affected the individuals’ right to manifest their religion through specific symbols, such as the Islamic headscarf or the Sikh turban, worn in the public sphere.

In fact in 1994, François Bayrou, then-Minister of Education, issued a circulaire that banned the wearing ostentatious religious symbols in state schools. At the time, this was only a recommendation to action, and was not legally binding. In 2003, the President of the Republic, Jacques Chirac, set up a Commission called “Stasi Commission,” in order to reflect upon the application of the principle of laïcité. The commission’s five months of work led to the introduction of the ‘Law on Secularity and Visible Religious Symbols in Schools.’

Through this work, the Commission concluded that laïcité in the contemporary setting implied three principles: state neutrality with regard to religion, freedom of conscience, and equality in exercising religious choices. These principles are certainly valuable in themselves, but questionable in their application. For example, the Stasi Report suggested that, in order to achieve social harmony, laïcité generates a duty on the religious to adapt the public expression of their denominational characteristics by placing a self-incurred boundary on their religious manifestation. The law promulgated on March 15, 2004, states that “in primary and secondary public schools, the wearing of signs or clothes through which pupils ostensibly express a religious allegiance is forbidden.”

More recently, on September 9, 2013, Vincent Peillon, the Minister of Education, unveiled the Charter of Secularism at School, which is to be displayed in every state school in France. Its purpose is to remind French pupils of the rules of living together within the school environment and to help them to understand their meaning.

An example of the Charter as it is displayed is shown below:

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243 Ibid., §1.2.3.
La France est une République indivisible, laïque, démocratique et sociale. Elle assure l’égalité devant la loi, sur l’ensemble de son territoire, de tous les citoyens. Elle respecte toutes les croyances.

La République laïque organise la séparation des religions et de l’État. L’État est neutre à l’égard des convictions religieuses ou spirituelles. Il n’y a pas de religion d’État.

La laïcité garantit la liberté de conscience à tous. Chacun est libre de croire ou de ne pas croire. Elle permet la libre expression de ses convictions, dans le respect de celles d’autrui et dans les limites de l’ordre public.

La laïcité permis l’exercice de la citoyenneté, en conciliant la liberté de chacun avec l’égalité et la fraternité de tous dans le souci de l’intérêt général.

La République assure dans les établissements scolaires le respect de chacun de ces principes.

La laïcité de l’École offre aux élèves les conditions pour forger leur personnalité, exercer leur libre arbitre et faire l’apprentissage de la citoyenneté. Elle les protège de tout prosélytisme et de toute pression qui les empêcheraient de faire leurs propres choix.

La laïcité assure aux élèves l’accès à une culture commune et partagée.

La laïcité implique le rejet de toutes les violences et de toutes les discriminations, garantit l’égalité entre les filles et les garçons et repose sur une culture du respect et de la compréhension de l’autre.

Les enseignements sont laïques. Afin de garantir aux élèves l’ouverture la plus objective possible à la diversité des visions du monde ainsi qu’à l’étendue et à la précision des savoirs, aucun sujet n’est a priori exclu du questionnement scientifique et pédagogique. Aucun élève ne peut invoquer une conviction religieuse ou politique pour contester à un enseignant le droit de traiter une question au programme.

Dans les établissements scolaires publics, les règles de vie des différents espaces, précisées dans le règlement intérieur, sont respectueuses de la laïcité. Le port de signes ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse est interdit.

La Nation confie à l’École la mission de faire partager aux élèves les valeurs de la République.
While the first part of the charter is an adapted version of Article 1 of the Constitution, which points out the general meaning of the French principle of laïcité, the others describe the duties under which students and teachers must carry out in order to guarantee the implementation of laïcité in the schools. In particular, Article 14 reiterates, “wearing of signs or dress by which pupils overtly manifest a religious affiliation is prohibited.” This charter, combined with the point of view presented in one of Peillon’s recent books, clearly shows what is the present aim of French state schools. On this point, Peillon says

D’où l’importance de l’école au cœur du régime républicain. C’est à elle qu’il revient de briser ce cercle, de produire cette auto-institution, d’être la matrice qui engendre en permanence des républicains pour faire la République, République préservée, républicque pure, républicque hors du temps au sein de la République réelle, l’école doit opérer ce miracle de l’engendrement par lequel l’enfant, dépouillé de toutes ses attaches pré-républicaines, va s’élever jusqu’à devenir le citoyen, sujet autonome. C’est bien une nouvelle naissance, une transsubstantiation qui opère dans l’école et par l’école, cette nouvelle Eglise, avec son nouveau clergé, sa nouvelle liturgie, ses nouvelles tables de la Loi.244

Following this reasoning, Cecile Laborde points out five different but interconnected ways through which headscarves, as ostensible signs of religious belief, infringe on the neutrality and civic purpose of schools.

First, Laborde says that “Muslim headscarves introduce signs of private difference and religious divisiveness into the public sphere.”245 The wearing of the headscarf is seen as an illegitimate act of propaganda and violent proselytism. According to French government, the best way to prevent ‘dangerous consequences’ is to limit religious differences instead of accommodating them. In fact, the main purpose of state education is to create future citizens imbued with republican ethos and this mission can only be achieve if schools remain a neutral domain with no room for religion. As Taylor points out,

‘integration’ is here understood in the sense of an allegiance to a common civic identity and the collective pursuit of the common good. According to some, the interaction and cooperation among citizens required by civic integration call for the effacement or neutralization of the identity markers that differentiate citizens (including religion and ethnicity). The premise of that republican conception of integration is that the effacement of difference is a necessary prerequisite for

244 V. Peillon, La Révolution française n’est pas terminée, (Paris: Seuil, 2008), p. 17.
245 Ibid., p. 53.
integration and social cohesion. From that standpoint, schools are often portrayed as a ‘republican sanctuary.’

Second, Laborde argues that “Muslim headscarves symbolize the primacy of the believer over the citizen.” The wearing of a headscarf signifies the refusal of Muslim girls to separate their identity as citizens from their religious affiliation. A person wearing a headscarf does not embody the idea that laïcité means ethical independence from particular religious prescriptions. This position is perfectly in line with Rawls’s conception of ‘overlapping consensus.’ In fact, his political liberalism seeks to identify a set of shared political values which all citizens can endorse whatever their particular comprehensive doctrines: “For many the true, or the religiously and the metaphysically well-grounded, goes beyond the reasonable. The idea of an overlapping consensus leaves this step to be taken by citizens individually in line with their own comprehensive views.”

Third, Laborde maintains that “Muslim headscarves infringe on equality between pupils.” Since the headscarf poses a visible difference between Muslim and non-Muslim pupils, believers and non-believers, girls and boys, it violates the principle of justice as fairness. On this point, Dworkin’s distinction between the two kinds of moral commitment pursued by a liberal society can be useful in understanding the main issue at the heart of Laborde’s claim. The first commitment identified by Dworkin is called substantive commitment, which means that each citizen has views about the ends of life, what constitutes a good life and how to strive for it. The second commitment lies in the fact that, by living in a democratic society, each citizen also acknowledges a procedural commitment to deal fairly and equally with his neighbours, regardless of how he conceives his ends. Following this reasoning, Dworkin states that a liberal society, taken as a society, adopts no particular substantive view about the ends of life. In this sense, “the difference-blind and abstention neutrality of the state is fair to individuals because it treats them identically, regardless of their particular faith, identity, and affiliations.” Hence, justice as fairness means giving the same identical opportunities to pupils without any concern to their religious identity. In this sense, religion should function as one of a number of values espoused by the individual. It is a private matter that must be separated from the future citizen’s public life. As Sandel points out, “for procedural liberalism […] the case for religious liberty derived not from the moral importance of religion but from the need to protect individual autonomy; government should

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be neutral toward religion for the same reason, that it should be neutral toward competing conceptions of the good life generally – to respect people’s capacity to choose their own values and ends.”^250

The fourth argument Laborde makes for the banning of the headscarf is that “Muslim headscarves undermine the civic mission of schools.”^251 He maintains that allowing the wearing of the headscarf, and its possible exemptions from classes, such as physical education, raises the idea of a tailored school. This idea is absolutely in conflict with the aim pursued by state schools in France, which is bringing up future generations of French citizens to have a shared public identity.

Fifth, and finally, for Laborde, the meaning of laïcité as the maintenance of a neutral public sphere is expressed by the conclusion that “Muslim headscarves undermine the overall scheme of religious freedoms.”^252 It is therefore suggested that, by wearing a headscarf, Muslim pupils violate the freedom of conscience of others. At the same time however, it must be asked: What about Muslim girls’ freedom of conscience? Is this a legitimate limitation on their religious freedom? This question is particularly important because, once again, it causes us to ask questions about the core meaning of ‘freedom of conscience’ and ‘freedom of religion,’ and whether there is a strict bond between them.

Keeping these questions in mind, we will now examine ECtHR case law in order to examine how these five ways of looking at the principle of laïcité are practically embodied, and to pursue a possible answer to the question of the bond between freedom of conscience and freedom of religion.

3.2. The Ban of the Headscarf in French State Schools: Did the ECtHR Take a Step Back?

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^251 Laborde, Critical Republicanism. The Hijab Controversy and Political Philosophy..., p. 54.
^252 Ibid., p. 54.
Since 2004, eight cases regarding the wearing of headscarves in state schools have been brought before the Council of Europe because of alleged violations of Article 9 of the ECHR.

The first two cases, which were judged by the Court of Strasbourg in the exactly the same way, are Dogru v. France and Kervanci v. France. Both applications dealt with cases of Muslim girls, who, in their first years at two different state secondary schools refused to remove their Islamic headscarf during their physical education classes. Because of this refusal, the schools’ boards of education decided to expel them from their respective schools for breaching the duty of assiduity by failing to attend sport’s classes. The Court stated that the ban on wearing headscarves constitutes, in principle, a restriction of pupils’ right to freedom of religion, but contended that it had yet to be established whether it was ‘prescribed by law’ and ‘necessary in a democratic society’.

Regarding question of whether the ban on headscarves was prescribed by law, “the Court notes that the domestic authorities justified the measures in question by a combination of three factors: the duty to attend classes regularly, the requirements of safety and the necessity of dressing appropriately for sport practice.” Moreover, it recalls the opinion given by the Conseil d’Etat on November 27, 1989 specifying the legal framework relating to the wearing of religious signs in schools. On that occasion, the Conseil d’Etat observed “that the acknowledged right of pupils to express and manifest their religious beliefs on school premises could not interfere with teaching activities, the content of the curriculum or the duty to attend classes regularly, or jeopardize their health or safety, disrupt teaching activities or the teachers’ educational role, or, lastly, interfere with order in the establishment or the normal functioning of the public service.” In addressing the issue of the wearing of headscarves, the Court stated that the French government faithfully applied the principles established in the opinion of 1989.

With respect to the second parameter, the Court considers “that the State’s duty of neutrality and impartiality is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs and that it requires the State to ensure mutual tolerance between opposing groups.” Thus, the ECtHR paid particular attention to the constitutional principle of secularism as it is applied in France. Moreover, it determined that the State has

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253 Application No. 27058/05.
254 Application No. 31645/04.
255 Dogru v. France (Application No. 27058/05), §51.
256 Ibid., §56.
257 Ibid., §62.
the duty to limit the freedom to manifest one’s religion if it clashes with the rights and freedoms of others, public order, or public safety.

In applying those principles, the relevant jurisprudence, and a wide margin of appreciation, the Court, in both cases, did not find any violation of Article 9. It stated that:

[a] constitutional principle, and a founding principle of the Republic, to which the entire population adheres and the protection of which appears to be of prime importance, in particular in schools. […] An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one’s religion […]. Having regard to the margin of appreciation which must be left to the member States with regard to the establishment of the delicate relations between the Churches and the State, religious freedom thus recognized and restricted by the requirements of secularism appears legitimate in the light of the values underpinning the Convention.

With this passage, the judges of Strasbourg revealed that they had failed to deal with the central questions to be decided: how pupils’ private dress choice can threaten the secularity of public schools and, why the ban was a legitimate aim under Article 9 (2). In fact, as Hill argues,

although largely turning on the issue of health and safety, the states’ emphasis on the protection of secularism was also a key factor accepted by the Court. This the Court related to the margin of appreciation doctrine utilized to allow states considerable leeway, specifically in cases where a state’s relationship with religion is a factor. One might question how appropriate this linkage to a threat to secularism actually is, especially in such a highly underexplored issue such as the protection required under the right to religious manifestation.

The inarticulate and dismissive approach with which the Court of Strasbourg has handled these cases is also evident in 2008, when it dealt with six other cases that dealt with the wearing visible religious symbols at school.

In these cases, the applicants were Muslim girls and Sikh boys who had been expelled from French schools for wearing conspicuous symbols of religious affiliation. The pupils were enrolled in various state schools for the year 2004-2005. On the first day of school, the

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258 The Court has made many references to Leyla Sahin v. Turkey. For this reason, see the first chapter and the next paragraph.
259 Dogru v. France, §72.
262 Aktas v. France (No. 43563/08), Bayrak v. France (No. 14308/08), Gamaleddyn v. France (No. 18527/08), Ghazai v. France (No. 29134/08), J. Singh v. France (No. 25463/08), R.Singh v. France (No. 27561/08).
girls had arrived wearing Islamic headscarf, whereas the boys had worn a *keski*, an under-turban worn by Sikhs. When they refused to remove their religious symbol, they were denied access to the classroom, and were afterwards expelled from their schools because of their failure to comply with the Education Code. They alleged litigation before the ECtHR, complaining of the ban on headwear imposed by their schools, relying in particular on Article 9 of the Convention.

The Court declared the applications inadmissible, holding in particular that the interference with the pupils’ freedom to manifest their religion was prescribed by law and pursued the legitimate aim of protecting the rights and freedoms of others and of public order. It further underlined the State’s role as a neutral organizer of the exercise of various religions, faiths and beliefs. As to the punishment of definitive expulsion, it was not disproportionate to the aims pursued as the pupils still had the possibility of continuing their schooling by correspondence courses. In fact, the Court of Strasbourg, taking in account the reasoning advanced in *Dogru*, stated that

> La sanction de l'exclusion définitive d'un établissement scolaire public n'apparaît pas disproportionnée. Elle constate par ailleurs que l'intéressée avait la possibilité de poursuivre sa scolarité dans un établissement d'enseignement à distance, dans un établissement privé ou dans sa famille selon ce qui lui a été expliqué, avec sa famille, par les autorités scolaires disciplinaires. Il en ressort que les convictions religieuses de la requérante ont été pleinement prises en compte face aux impératifs de la protection des droits et libertés d'autrui et de l'ordre public. En outre, ce sont ces impératifs qui formaient la décision litigieuse et non des objections aux convictions religieuses de la requérante.²⁶³

The question now is whether this provision, entirely supported by the ECtHR, reflects the goal of civic inclusion of future French citizens in society, or whether it is, in fact, divisive.

In France, many of those who supported the ban on headscarves in State schools insisted that “they were protecting a nation conceived to be one and indivisible from the corrosive effects of communautarisme.”²⁶⁴ This term refers to the priority of group identity over national identity in the lives of citizens, a prioritization that France is fighting in the name of equality as universalism. French universalism insists that sameness is the basis of equality. This is the same idea of equality promoted by Rawls in *Political Liberalism*. The cases examined above highlight how the French government and, consequently the ECtHR,

²⁶³ *Dogru v. France*, §72.
are incorporating into their jurisprudence Laborde’s five ways of thinking about the ban on headscarves. To sum up,

Muslim headscarves were taken to be a violation of French secularism and, by implication, a sign of the inherent non-Frenchness of anyone who practiced Islam, in whatever form. To be acceptable, religion must be a private matter; it must not be displayed ‘conspicuously’ in public places, especially in schools, the place where the inculcation of republican ideals begun. The ban on headscarves established the intention of legislators to keep France a unified nation: secular, individualist, and culturally homogeneous.265

3.3. The Headscarf Debate in Turkey

Turkey lies at the crossroads of Europe and Asia, and is still waiting for full membership in the European Union. Its population of 80 million is overwhelmingly Muslim (99.8%), with a very low percentage (0.2%) of Christians and Jews.266 In 1923, after its war of independence, the Republic of Turkey was established as a secular State, and in 1937 the principle of secularism was adopted at the constitutional level. At this point it is helpful to highlight the major features of the principle of secularism adopted by Turkish Republic. In fact, as we shall see afterwards, the measures of the domestic legislature and the decisions of domestic courts are important elements of the ‘margin of appreciation’ doctrine used by the ECtHR as a crucial part of its jurisprudence in assessing whether there has been a breach of Article 9.

On this point, Article 2 of the current Turkish Constitution of 1982 reads:

The Republic of Turkey is a democratic, secular (laik) and social State based on the rule of law, respectful of human rights in a spirit of social peace, national solidarity and justice, adhering to the nationalism of Atatürk and is underpinned by the fundamental principles set out in the Preamble.

The application of the principle of secularism in Turkey was inspired by developments that occurred in Ottoman society between the nineteenth century and the

265 Ibid., p. 15.
proclamation of the Republic. In 1924, Turkey abolished the caliphate, and two years later officially abandoned the Sharia rule. Under the Education Service Act of March 3, 1924, the Ministry of Education assumed control of all schools, and religious schools were closed.

In particular, the desire to establish a society that was grounded on the principle of equality of religion and sex, and which welcomed the presence of women in public life, implied the banning of the Islamic veil with the Dress Act of December 3, 1934. The year after, the government abolished religious studies from primary and secondary schools. From Atatürk’s death in 1938 up to the 1990s, the influence of political Islam came and went, accompanied by a tumultuous transition to multiparty democracy, which was interrupted by four military coups d’État.

Since the 1980s, Turkey has faced an increasingly divisive debate on the wearing of headscarves at schools and universities. This debate led to the first piece of legislation on dress in institutions of higher education. This legislation was issued by the Cabinet on July 22, 1981, “requiring staff working for public organisations and institutions and personnel and female students at State institutions to wear ordinary, sober, modern dress. The regulations also provided that female members of staff and students should not wear veils in educational institutions.”

One motivation for this legislation lay in the Turkish political environment, which had been affected by the Cold War ideological clashes: “Social and political unrest was widespread, and universities became the loci of struggle for various ideological groups.” In the second half of 1980s, as the number of women wearing the headscarf in universities increased, there was great uncertainty regarding the significance of this religious symbol in the educational context. At this point “the government was rather reluctant to issue a law banning headscarf use in universities, worried that this would create a political backlash and influence electoral outcomes. The judiciary, with no fear of political gain or loss, was secular and opposed the wearing of headscarves, and court decisions increasingly challenged headscarf use.”

On December 10, 1988, the transitional section 16 of the Higher Education Act came into force. It provided that

Modern dress or appearance shall be compulsory in the rooms and corridors of institutions of higher education, preparatory schools,

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267 Leyla Sahin v. Turkey (Application No. 44774/98), § 36.
269 Ibid., p.18.
laboratories, clinics and multidisciplinary clinics. A veil or headscarf covering the neck and hair may be worn out of religion conviction.

On March 7, 1989, the Constitutional Court found this provision to be illegitimate because it violated Article 2 (secularism) of the Constitution and it was argued that it could be very difficult to reconcile this Act with the principle of sexual equality, which was one of the major goals of the Turkish Republic.

In fact, the Constitutional Court explained “firstly, that secularism had acquired constitutional status by reason of the historical experience of the country and the particularities of Islam compared to other religion; secularism was an essential condition for democracy and acted as a guarantor of freedom of religion and of equality before the law. It also prevented the State from showing a preference for a particular religion or belief; consequently, a secular State could not invoke religious conviction when performing its legislative function […]. In addition, in Turkey, where the majority of the population were Muslims, presenting the wearing of the Islamic headscarf as a mandatory religious duty would result in discrimination between practising Muslims, non-practising Muslims and non-believers on grounds of dress with anyone who refused to wear the headscarf undoubtedly being regarded as opposed to religion or as non-religious.”

This background makes clear the historical and modern similarities between Turkey and France. As McGoldrick points out, “both states adopted secularism as a result of their respective historical and political experiences. They both view secularism as an essential precondition for democracy. It serves to guarantee freedom of religion and equality before the law. It also requires that state education be neutral.”

3.4. Turkish Cases before the European Commission and the Court on Human Rights

Two Turkish cases have been brought before the European Commission on Human Rights challenging the ban on wearing a headscarf in the university context. The first one was

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270 Leyla Sahin v. Turkey, § 39.
Karaduman v. Turkey, which dealt with a Muslim woman enrolled at Ankara University who could not obtain her bachelor’s degree because she had supplied an identity photograph that showed her wearing a headscarf. The photograph did not comply with the University’s regulations, and therefore it was not possible to issue the certificate requested by the applicant. Ms Karaduman alleged litigation before Ankara Administrative Court, which dismissed the applicant’s appeal on two grounds: first, according to Ankara University’s regulations, all identity photographs should comply with the ‘rules on dress;’ second, the Court recalled that the circular issued in 1982 by the Higher Educational Council on dress requirements for university students “required the latter to wear clean, simple and smartly ironed clothing, to wear nothing on their hands and to have tidily cut hair.” Moreover, the Court noted that the photograph submitted by the applicant was not adequate to identify the student properly because many parts, such as ears, forehead, and neck were covered.

Afterwards, Ms Karaduman appealed this judgment to the Council of State, which dismissed her appeal. In particular, she claimed that “her identity card, her passport and her driving licence carried photographs of her wearing a headscarf.”

Having exhausted all domestic remedies, the applicant complained before the European Commission of an infringement of her freedom to manifest her religion, as protected by Article 9, and of a violation of Article 14 of the ECHR, claiming unfair and different treatment between Turkish female students and female students of foreign nationality enrolled in Turkish universities who could dress as they wished.

In its jurisprudence, the Commission recalled that Article 9 did not always protect every act motivated by religious belief. It also observed that the rules on identity photographs had been laid down with the aim of preserving the ‘republican’ and the ‘secular’ nature of Turkish universities. Following this reasoning, the Commission stated that

[...] by choosing to pursue her higher education in a secular university a student submits to those universities rules, which may make the freedom of students to manifest their religion subject to restrictions as to place and manner intended to ensure harmonious coexistence between students of different beliefs. Especially in countries where the great majority of the population owe allegiance to one particular religion, manifestation of the observances and symbols of that religion, without restriction as to place and manner, may constitute pressure on students who do not practise that religion or those who adhere to another religion. Where secular universities have laid down dress regulations for students, they may ensure that certain fundamentalist

272 Application No. 16278/90.
273 Ibid., §103.
274 Ibid., §103.
religious movements do not disturb public order in higher education or impinge on the beliefs of others.\textsuperscript{275}

Moreover, the Commission observed that degree certificates issued to students could not reflect the identity of a particular affiliation, or the adherence to a particular religion because they are only intended to certify a student’s capacities for employment purposes. It is not a document intended for the general public.

As McGoldrick points out, “the Commission’s approach is interesting in that it sees the issue as not being an interference in freedom of religion at all, rather than being an interference that had to be justified. That approach might be defensible in relation to the university certificate but is more difficult to accept in relation to the regulation of dress on a day-to-day basis.”\textsuperscript{276} The Commission made no comment on the secularist system as such, and found the application inadmissible because there was no conflict with Articles 9 and 14 of the Convention.

The second case brought before the European Commission on Human rights, \textit{Bulut v. Turkey} is very similar to the previous one.\textsuperscript{277} In brief, the Commission determined that Turkey was entitled to impose the restriction because of the majority status of the Muslim population. Because most Turkish citizens are Muslim, it was determined that the wearing of headscarves could cause unjustified pressure both upon non-Muslims and upon those Muslim who did not practice their faith.\textsuperscript{278} To sum up,

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\text{[\ldots] dans les pays où la grande majorité de la population adhère à une religion précise, la manifestation des rites et des symbols de cette religion, sans restriction de lieu et de forme, peut constituer une pression sur les étudiants qui ne pratiquent pas ladite religion ou sur ceux qui adhèrent à une autre religion. Les universités laïques, lorsqu’elles établissent les règles disciplinaires concernant la tenue vestimentaire des étudiants, peuvent veiller à ce que certains courants fondamentalistes religieux ne troublent l’ordre public dans l’enseignement supérieur et ne portent atteinte aux croyances d’autrui.}\tag{279}
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Moving to the well-known case \textit{Leyla Sahin v. Turkey}, the European Court of Human Rights encountered the headscarf controversy in the context of secular universities. In this case, the applicant alleged litigation before the Court, complaining a violation of her rights and freedoms under Articles 8 (private life), 9, 10 (expression), 14 and Article 2 of Protocol

\textsuperscript{275} Ibid., §108.
\textsuperscript{276} D. McGoldrick, \textit{Human Rights and Religion: The Islamic Headscarf Debate in Europe...}, p. 139.
\textsuperscript{277} Application No. 18371/91.
\textsuperscript{278} McGoldrick, \textit{Human Rights and Religion: The Islamic Headscarf Debate in Europe}, 140.
\textsuperscript{279} \textit{Lamiye Bulut v. Turkey} (Application No. 18783/91).
No. 1. The lower Chamber of the Court delivered its judgment on June 29, 2004, and afterwards the applicant applied to the Grand Chamber that accepted her request. The Grand Chamber gave judgment November 10, 2005.

Ms Sahin was a practising Muslim and considered wearing a headscarf to be a requirement of her religion. In 1997, she enrolled at the University of Istanbul. Although the University of Bursa allowed her to wear the Islamic headscarf, at the University of Istanbul, the headscarf was prohibited. In fact, in February 1998, the Vice Chancellor had issued a circular regulating students’ admission to the university campus in which it was stated that students wearing head coverings and students with beards should not attend any kind of activities, including lectures, tutorials and courses. The applicant refused to comply with this regulation and she protested, with other students, in an unauthorised assembly outside the deanery of her faculty. Because of this, in 1999, the Dean of the faculty began disciplinary proceedings against Ms Sahin and the other protestors. Ultimately, she was suspended for a semester, and then enrolled at Vienna University to continue her studies. In the meantime, the applicant alleged a violation of the right to manifest her religion before the domestic court and, having exhausted all national remedies, she brought her case before the ECtHR.

It is possible to analyse the reasoning of the Court from three different points of view. The view suggests that the Islamic headscarf is, in fact, a political symbol, rather than a religious one. The Court states at §35 that

In Turkey, wearing the Islamic headscarf to school and university is a recent phenomenon which only really began to emerge in the 1980s. There has been extensive discussion on the issue [...]. Those in favour of the headscarf see wearing it as a duty and/or a form of expression linked to religious identity. However, the supporters of secularism, who draw a distinction between the başörtü (traditional Anatolian headscarf, worn loosely) and the turban (tight, knotted headscarf hiding the hair and the throat), see the Islamic headscarf as a symbol of a political Islam.

It is clear that, on the one hand, the Muslim headscarf can be considered to be a mandatory religious symbol, and this was the position of the applicant; on the other hand, however, the headscarf can also be seen as a symbol of political Islam.

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281 Leyla Sahin v. Turkey, § 35.
To understand this last aspect, it is necessary to look at the Turkish context: “The Court considered the Turkish notion of secularism – which is shaped as a militant democracy clause and meant to protect the Kemalist regime from Islam – to be consistent with the values underpinning the Convention.”\textsuperscript{282} In addition, it is also necessary to consider the fact, as Susanna Mancini puts it, that Islam might constitute a threat to democracy. Mancini, notes that,

\begin{quote}
[i]n virtually none of the female Muslim clothing cases discussed above has the prohibition of the symbol been the consequence of the infringement of fundamental rights and freedom of others. The prohibition takes place because Muslim clothing are viewed as are an emblem of radical Islamist politics and the oppression of women. In other words, the symbols are prohibited on the basis that they are associated with views and ideologies that are not only at odds with, but also constitute a direct threat to, democratic values. Excluding Islamic symbols can thus be interpreted as a preventive way through which Europeans democracies defend their democratic character.\textsuperscript{283}
\end{quote}

However, if we follow Mancini and Laura De Gregorio’s reasoning, it is clear that the two considerations made above are not entirely coherent for at least three reasons.

First, the fact that some Muslims belong to fundamentalist groups does not necessarily mean that Islam as such is incompatible with democracy. Second, since there are many interpretations of Islam and its requirements, it is overly simplistic to make the assumption that headscarves signify Islamic fundamentalism. In fact, merely wearing a headscarf can in no way be automatically associated with fundamentalism. Third, “fundamental rights, such as religious freedoms, cannot be simply weighed against non-constitutional interests such as a societal interest in fighting radical expressions of religion, or even in maximizing security.”\textsuperscript{284} In this sense, the supposed equation ‘Islam-Turkey-Islamic confessional state’ is overly simplistic as well. If a state opts for a democracy that rejects radical Islam, then the target of any measures against this branch of Islam should be fundamentalist groups and not Muslims as such.

The second point of view through which it is possible to examine the \textit{Sahin} case is the view that principle of secularism is protected by Turkish constitution and, in particular, by the equation: ‘public institutions = secularism = neutrality.’

\textsuperscript{282} Leyla Sahin v. Turkey, § 114.
\textsuperscript{284} Ibid., p. 26.
The Court of Strasbourg, summarising Turkish history and background, uses the fact that “the Turkish Republic was founded on the principle that the State should be secular (laik)”\(^{285}\) as a justification for its choices in regard to the protection of this values. Moreover, the Court quotes a fragment of the Constitutional Court’s judgment delivered on March 7, 1989, which states that “secularism is the principle which offers the individual the possibility to affirm his or her own personality through freedom of thought and which, by the distinction it makes between politics and religious beliefs, renders freedom of conscience and religion effective.”\(^{286}\) In response to this argument, the following questions arise: what would really threaten the application of this principle in the university environment? What is the guarantor of neutrality in these public institutions?

The judges of Strasbourg do not address these two issues at all. Moreover, at paragraph 118 the Grand Chamber “notes at the outset that it is common ground that practising Muslim students in Turkish universities are free, within the limits imposed by the constraints of educational organisation, to manifest their religion in accordance with habitual forms of Muslim observance.”\(^{287}\) From this statement, it is clear that the Court is considering this concrete case, but is instead judging headscarves to be legitimately forbidden as they fall under the ‘constraints of educational organisation.’ The issues at stake in this case include the protection of the ‘right and freedoms of others’ and the ‘maintenance of public order’ in a country in which the majority of the population adheres to the Islamic faith. The European Court thus accepted Turkey’s two central conceptions: namely that secularism is consistent with the values of the ECHR, and that it is necessary in order to protect the Turkish democratic system. Thus, the restriction on wearing the Islamic headscarf in universities is generally considered to be a guarantor of a secular way of life because headscarves can evoke ‘extremist views.’

The final point of view through which to look at this case is the right to education. The Chamber found that no separate question arose under Article 2 of the First Protocol. However, the Grand Chamber, having regard to the special circumstances of the case, considered the right to education as separate from the complaint under Article 9. The Court stated that this right was extended to all levels of education. In fact, “while the first sentence of Article 2 essentially establishes access to primary and secondary education, there is no

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\(^{285}\) Leyla Sahin v. Turkey, §30.

\(^{286}\) Ibid., §39.

\(^{287}\) Ibid., §118.
 watertight division separating higher education from other forms of education.”  
288 On this merit, the Grand Chamber found no violation of the right to education. In connection with the reasoning made regarding Article 9, “the Court has already found that the restriction was foreseeable to those concerned and pursued the legitimate aims of protecting the rights and freedoms of others and maintaining public order [...]. The obvious purpose of the restriction was to preserve the secular character of educational institutions.”  
289 Judge Tulkens, in her dissenting opinion, was against the Court’s reasoning on this point, made ‘by analogy’ with Article 9. In particular she highlighted that

By accepting the applicant’s exclusion from the university in the name of secularism and equality, the majority has accepted her exclusion from precisely the type of liberated environment in which the true meaning of these values can take shape and develop. University affords practical access to knowledge that is free and independent of all authority. Experience of this kind is far more effective a means of raising awareness of the principles of secularism and equality than an obligation that is not assumed voluntarily, but imposed. A tolerance-based dialogue between religions and cultures is an education itself, so it is ironic that young women should be deprived of that education on account of the headscarf.  
290

In conclusion, from a wider perspective, there are two points of fundamental importance in this judgment: first, the Court recognized that each member State has taken measures against extremist political movements based on its historical experience in order to protect a system which was supportive of the rights protected by the ECHR.  
291 Second, the Court accepted that only by supporting the principle of secularism was it possible to guarantee these fundamental rights and the protection of democracy’s values. Given these considerations, the Court was entitled to allow a wide margin of appreciation under which the ban on headscarves in Turkish universities falls.

3.5. The Dahlab Case: a Threat to Swiss Neutrality

288 Ibid., §136.
289 Ibid., §158.
290 Ibid., Judge Tulkens dissenting opinion.
Switzerland is a secular federalist state. This means that “all matter of religion falls under the competence of the cantons within the limits of federal (constitutional) law. Two cantons, Geneva and Neuchatel, have clearly separated the state and religion. These are also the only two cantons that have had to deal with legal cases involving wearing of the veil.”

In Dahlab v. Switzerland the applicant was a primary-school teacher who, after two years of working at Châtelaine Primary School in the Canton of Geneva, abandoned the Catholic faith and converted to Islam. Upon her conversion, Mrs Dahlab began wearing the Islamic headscarf in class towards the end of the 1990-91 school year. She had never received any comments or complains about the headscarf from her pupils’ parents; however, in the summer of 1996, the Director General of Primary Education forbade the applicant from wearing the headscarf while teaching at school because, by wearing the headscarf, she was infringing the Public Education Act. Mrs Dahlab appealed this decision to the Geneva cantonal government, which dismissed the appeal. Afterwards, she brought her case before the Swiss Federal Court, claiming a violation of Article 9 of the ECHR, but the Court upheld the Geneva cantonal government’s decision. Eventually she lodged a claim before the ECtHR: “In conjunction with the alleged violation of Article 9 of the Convention, the applicant submitted that the prohibition amounted to discrimination on the ground of sex within the meaning of Article 14 of the Convention, in that a man belonging to the Muslim faith could teach at a State school without being subject to any form of prohibition, whereas a woman holding similar beliefs had to refrain from practising her religion in order to be able to teach.”

In addressing her case, the Federal Court considered the headscarf and loose-fitting clothes to be ‘powerful religious symbols’ indicating allegiance to a particular faith, and therefore not items comparable to aesthetic garments. Therefore the issue at stake was the wearing of a powerful religious symbol by a teacher at a State school while on duty.

The Federal Court also considered whether, in this case, the law prescribes the ban on the headscarf. Since the applicant was a teacher at a State school, she was considered a civil servant of the Canton of Geneva as well. Because “civil servants are bound by a special relationship of subordination to the public authorities, a relationship which they have freely accepted and from which they benefit; it is therefore justifiable that they should enjoy public freedoms to a limited extent only.” Moreover, section 6 of the cantonal Public Education

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292 Ibid., p. 120.
293 Dahlab v. Switzerland, §8.
294 Ibid., §3.
Act of November 6, 1940 provides: “The public education system shall ensure that the political and religious beliefs of pupils and parents are respected.” This means that the educational system observes the principles of denominational neutrality and separation between Church and State. For these reasons, the ban on the headscarf in State schools was judged to have sufficient basis in law.

In addition, the Federal Court was very careful to guarantee the protection of the public interest. On this regard, the applicant reported that there had been no complaints from parents and pupils when she started to wear the headscarf at school. Nevertheless, the Court noted that, in general, “schools would be in danger of becoming places of religious conflict if teachers were allowed to manifest their religious beliefs through their conduct and, in particular, their clothing.” Hence, in prohibiting this practise, the Canton of Geneva prevented any possible disorder that could happen in primary schools.

Finally, the Federal Court determined whether in this circumstance the ban of headscarf observed the principle of proportionality. In order to assess a fair balancing test, the Court took four factors into account: 1. the applicant’s right of freedom of religion and belief, 2. the denominational neutrality of the school system, 3. the interest of pupils and parents in not being influenced or offended in their own creeds and 4. the need for tolerance among members of different religious. After a lengthy discussion about the scope of the neutrality requirement, the Swiss Court assessed this judgement:

[...] On the one hand, [...] prohibiting the appellant from wearing a headscarf forces her to make a difficult choice between disregarding what she considers to be an important percept laid down by her religion and running the risk of no longer being able to teach in State schools. On the other hand, however, the headscarf is a manifest religious attribute in this case. Furthermore, the appellant teaches in a primary school; her pupils are therefore young children who are particularly impressionable. [...] Even if other teachers from the same school display different religious views, the manifestation of such an image of oneself appears hard to reconcile with the principle of non-identification with a particular faith in so far as her status as a civil servant means that the State must assume responsibility for her conduct. Lastly, it should be emphasised that the Canton of Geneva has opted for a clear separation between Church and State, reflected in particular by the distinctly secular nature of the State education system.

This reasoning is quite similar to the French legislative principles, which forbid the wearing of headscarves in all State schools. Moreover, in this case it is suggested that

295 Ibid., §5.
296 Ibid., §6 (emphasis added).
students see their teacher as the personification of the government’s attitude towards sensitive issues, such as religion. In the light of the Federal Court judgment, we will now examine the reasoning of the European Court of Human Rights.

In its judgment, the Court of Strasbourg essentially accepted the arguments of the Federal Court. In particular, it emphasised three factors that it identified as sources of harm to the State or its citizens. The first form of harm the Court referred to in Dahlab was that of proselytism. Since the teacher did not tell her students that she was Muslim, and did not make any attempt to encourage them to convert, “the evidence of indirect proselytism was also very weak and was based entirely upon the wearing of the Islamic headscarf.”\textsuperscript{297} Moreover, the Court did not consider at all, that neither parents nor pupils had made any complaints or comments regarding the teacher’s headscarf during the three year period she had worn it, and, moreover, there was no harm or evidence of any proselytising effect on her students.

As we have seen before, the leading case in the area of proselytism is Kokkinakis v. Greece, which involved a Jehovah’s Witness couple who were charged with a criminal offence because they tried to persuade a member of the Greek Orthodox Church to convert to their religion. Here the Court found a violation of Article 9 of the ECHR, due to the fact that simply attempting to convince someone to change his religion is not in itself a breach of religious freedom. In Kokkinakis, the judges of Strasbourg tried to state conditions under which proselytism is not protected by Article 9, distinguishing between permissible and unacceptable forms. Hence, the Court had held that special protections are needed for those who are particularly vulnerable, and when the proselytiser has a dominant position over the proselytised. In Dahlab, “both factors were present – children are generally considered particularly vulnerable to intellectual or emotional manipulation and the student-teacher relationship has an element of power that is open to being abused.”\textsuperscript{298} In looking at this concrete circumstance, however, Mrs Dahlab’s behaviour was far from being a case of proselytism based on the evidences showed above.

The second argument in favour of forbidding the headscarf was that it undermined tolerance among students and the respect of the rights and freedoms of others. This justification was very similar to what the Court stated in Sahin, but in both cases the evidence of intolerance was minimal. In fact, Ms Dahlab did not coerce her students to behave in a certain way, but by wearing the headscarf, she simply tried to be consistent with her religious

\textsuperscript{298} \textit{Ibid.}, p. 13.
beliefs. Similarly, Ms Sahin did not denigrate the religious and philosophical views of her colleagues, or of the university in general. But both the applicants were found guilty of not embodying the secularity of the State. For this reason, they were determined to be showing intolerance for other citizens.

Again, the question arises: who is the guarantor of the principle of the secularity of the State? In light of these cases, the answer might be ‘everyone who lives within its boundaries.’ In fact, the emphasis given to the role of the teacher as a civil servant, and therefore someone who acts on behalf of the State, seems to lack substance because, according to the Court of Strasbourg, being a simple student means having the same duty.

To summarize, in Dahlab, the Court expressed the view that it “appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.” In addition, in Sahin, the Grand Chamber saw no good reason to depart from the approach taken by the Chamber as follows: “When examining the question of the Islamic headscarf in the Turkish context, it must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it.”

Thus, it was determined that there was no violation of Article 9, and that the margin of appreciation allowed to Switzerland entitled the Canton of Geneva to place restrictions on the wearing of the Islamic headscarf, as it threatened the religious harmony among the pupils. On this basis, the application was declared inadmissible.

The third factor taken into account by the Court was gender equality. In regards to the potential discrimination on the ground of sex within the meaning of Article 14 of the Convention, the Court stated that:

In the instant case that the measure by which the applicant was prohibited, purely in the context of her professional duties, from wearing an Islamic headscarf was not directed at her as a member of the female sex but pursued the legitimate aim of ensuring the neutrality of the State primary-education system. Such a measure could also be applied to a man who, in similar circumstances, wore clothing that clearly identified him as a member of a different faith.

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300 Leyla Sahin v. Turkey, §115.
301 Ibid., §14.
Consequently, the Court concluded that there was no sex discrimination. This part of the application was also determined to be ‘manifestly ill-founded.’

Before the Sahin case, Dahlab was the leading international case on the headscarf issue in the educational environment. Even now, this case is still clearly important for at least three reasons. First, the headscarf has been defined as a ‘powerful religious symbol’, which can imply an act of indirect proselytism. Second, the context – a teacher in a primary school – is crucial because of the role of the teacher as a ‘civil servant’ who acts in behalf of the State, and because the duties implied by this role can mean a limitation on the teacher’s rights. Third, the principles of secularism, religious neutrality, and gender equality are all crucial in order for the judges of Strasbourg to allow a wide margin of appreciation to member States and strike a fair balancing test.

3.6. The UK: A Secular State within the Boundaries of an Established Church

The next stage in our analysis turns on the most important British cases regarding the wearing of religious symbols in the school environment. These cases are distinctive because the relationship between Church and State in the UK is really peculiar, in that both England and Scotland have an established church. Freedom of religion does not prevent there being a State church, but no one can be forced to join a church, be involved in its activities, or pay taxes to a church. In fact, the role of the State is still to encourage tolerance towards all religions and philosophical beliefs. Yet, unlike France, the UK has no principle requiring the separation of religion and State in education in the UK’s unwritten constitution.

The history of the UK has led to its having two established churches: the Church of England and the Church of Scotland. The former, an Episcopal Church, and relation to the monarchy, were established through a series of Parliamentary acts in the 1530s. This period of time, called the English Reformation, was defined by the break between the British monarchy and the Roman Catholic Church that resulted from the Pope’s refusal to dissolve the marriage between Henry VIII and Catherine of Aragon. With the Act of Royal Supremacy (1535), the King of England became the Head of the Church of England, thereby putting an end to the Pope’s authority over the English Church and establishing a national
church. The relationship of the monarchy to the Church of Scotland, a Presbyterian Church, is quite different. In fact, since 1707, the British monarch has been required by the Treaty of Union to preserve Scotland’s established Church, being just an ordinary member. Finally, in Wales, there has been no established church since 1920, and in Northern Ireland there is a sharp division between Roman Catholic and Protestant communities.

When looking at state schools in the UK, a case could be made that many of them are religious schools, even if in many cases ‘faith’ is present in a very attenuated form. Originally, the majority of those schools were voluntary schools, but there are also state-funded foundation schools and academies in which a faith-based ethos and connections with churches are evident. In fact, Balfour’s Education Act of 1902 brought voluntary schools within the State-maintained sector for funding purposes, and established the main features of the current educational system. As a general rule, maintained schools are financially supported by Local Education Authorities (LEAs), formed at the Local Government level. They follow the National Curriculum, and, since 1992, have been subject to inspection by Ofsted. LEA does not have any control over religious education that corresponds to the ethos of the school and its managers or any ecclesiastical authority to which the ethos refers.

The Butler’s Education Act of 1944 made a further distinction between voluntary aided and voluntary controlled schools, in order to meet the impoverishment state of church schools after the World Wars. At that time, voluntary aided schools had more independence in line with the 1902 Act. Two-thirds of their governors were foundation managers/governors, all staff could be appointed or dismissed with reference to their adherence to the faith of the school, and religious education was to be in accordance with the school’s ethos. This independence meant that the school was obliged to meet the costs of maintaining the structures of the school, and it was subjected of a Central Government grant. On the other hand, voluntary controlled schools were less free in appointing their staff. Only one-third of the governors/managers represented the foundation, and only one-fifth of the teachers could belong to school’s creed, but LEA paid for all costs. In practice, “Church of England schools were split fairly evenly between voluntary controlled and voluntary aided status, while the Roman Catholic Church made the Herculean effort to raise sufficient funds to secure the independence of voluntary aided status.”

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With respect to admission criteria, the equality laws, which applied to all schools, meant that faith schools cannot favor children from a particular faith, unless the number of applications exceeds the number of places available. If a religious school is oversubscribed, it is allowed to apply pre-determined admissions rules relating to the school’s faith when selecting pupils. These rules may vary from school to school but has to be clear and fair.

With the School Standard and Framework Act of 1998, a new category of schools was created under the term ‘religious designation.’ This Act distinguished religious schools from schools without any religious character. In addition to voluntary schools, this Act set up foundation schools, which are funded directly by the central government, but only a small part of these are religious schools. In 2000, the Government established academies that are self-governing. Most of these are supported by registered charities, and, for this reason, can have a religious ethos. However, even in this case, only a small percentage of academies are religious.

Looking at the population, the UK is considered to be a multicultural society that has respected and embraced cultural diversity through a policy of equal opportunities, tolerance and anti-racism. In rural areas, ethnic minorities constitute less than 10% of the whole population, while in the capital this rises number to one-third. The Muslim community is the

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306 The Department of Education has published a series of statistics concerning school and pupil numbers updated to July 12, 2012, which apply to England. Regarding the number of state-funded primary and secondary schools, their status and their religious character, the statistic reads as follow:

<table>
<thead>
<tr>
<th></th>
<th>State-funded primary schools (1)</th>
<th>State-funded secondary schools (1)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Community</td>
<td>Voluntary controlled</td>
</tr>
<tr>
<td>Total</td>
<td>9.272</td>
<td>3.547</td>
</tr>
<tr>
<td>No Religious Character</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Church of England</td>
<td>1</td>
<td>1.877</td>
</tr>
<tr>
<td>Roman Catholic Church</td>
<td>0</td>
<td>1.583</td>
</tr>
<tr>
<td>Methodist</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Other Christian Faith</td>
<td>0</td>
<td>36</td>
</tr>
<tr>
<td>Jewish</td>
<td>0</td>
<td>27</td>
</tr>
<tr>
<td>Muslim</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td>Sikh</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Other</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>

Source: School Census and Edubase
third largest religious affiliation (about 3% of the population), below the Christianity (about 70%), and people who do not belong to any religion (about 15%). The majority of Muslim children attend religious schools and according to data provided by the Association of Muslim Schools there are 154 independent Muslim primary and secondary schools and 15 voluntary aided and free Muslim schools across the country.\footnote{\textit{307}}

According to the English schooling model, it is evident that

\[\ldots\] faith schools represent a clear example of the law’s commitment to religious autonomy and neutrality outside the narrow boundaries of worship and ritual. Religious communities are free to organize themselves in a way which enables parents to satisfy their obligations to secure suitable education for their children. That provision may be independent of State funding or within the State sector. However, the terms on which faith schools exist are deeply embedded in the cultural and religious history of the United Kingdom. A principle feature of this is a clear distinction between ‘religious’ and ‘secular’ education. The commitment to protect individual conscience in respect of the former has continued, even though it has long left the pattern of nineteenth-century denominational instruction.\footnote{\textit{308}}

It is important to note that parents may opt their children out of religious education and collective worship where is present. However, Meira Levinson has suggested that this model can reveal tension between the demands placed on education by liberalism and those placed on education by democracy. On the one hand, “the liberal dimension of political liberalism privileges the \textit{private} component of individuals’ lives, attempting to shield individuals as much as possible from interference by the state, government or other secondary associations,”\footnote{\textit{309}} as Rawls puts it in \textit{Political Liberalism}. On the other hand, “the political or democratic dimension of political liberalism \[\ldots\] is concerned with the \textit{public} character of individuals’ lives, as well as with individuals’ obligations to preserve the institutions of public life.”\footnote{\textit{310}} While French and Turkish models of schooling privilege this second aspect, the English one gives much more weight to the private versus the public. According to Levinson, this system means that the UK has generated a sort of ‘divided pluralism’, which means that it has a pluralistic national community composed of a number of mutually uninterested mono-religious and mono-cultural sub-communities. In fact, she points out that “while the English model of schooling admirably fulfils political liberalism’s

\textit{\textsuperscript{307}} See also \url{http://ams-uk.org}.

\textit{\textsuperscript{308}} Rivers, \textit{The Law of Organized Religions. Between Establishment and Secularism}…, p. 266.


\textit{\textsuperscript{310}} \textit{Ibid.}, p. 334.
promise to leave citizens alone to pursue their own private conceptions of the good, it seems less successful in inculcating the public virtues needed for the maintenance of a liberal democracy.”

Therefore, the UK is distinctive not only in that it has an established Church with maintained state schools connected to this creed, but also in that the English schooling model means that all other faiths are financially supported by the State. Moreover, these schools have their own policies regarding religious symbols because there are no national rules on the matter. However, school governors must be careful to avoid racial and religious discrimination when creating the school uniform policies.

It can be argued that this system of ‘faith schools’ can conflict with the promotion of a public space and the conception of an inclusive pluralism. As Levinson argues, speaking positively about the French model, there are four possible objections to the English one. First, students cannot be taught to be tolerant and respectful of others’ cultures and traditions when attending denominational schools, because they are not exposed to them. Second, the English model conflicts with the idea of toleration, which belongs to a liberal democracy. According to the English model, in fact, it is necessary to form a sort of personal detachment from one’s own conception of the good in order to be open to the differences. But this can be difficult in schools whose purpose is to reflect the established personal aims and conceptions of the good of children and their parents.

Consequently, in English faith schools there might be an insufficient common ideal of ‘people’ and ‘public body.’ Finally, in these schools, children cannot practice civic virtues, but can only learn about them through books.

Next, we will examine some relevant national judgments in which religion and schools policies have come into conflict, in order to understand if such objections are well grounded.


The case of Shabina Begum generated a nationwide debate on the issue of Islamic headscarves in schools in the UK. This case was dealt with at each level of jurisdiction: High
Court, Court of Appeal, and House of Lords. For the purposes of our analysis, we will only examine the last judgment, while taking in account the major features of previous cases.\textsuperscript{313}

The case concerns Shabina Begum, a Muslim female pupil, who attended Denbigh High School in Luton. This school is a maintained secondary community school open to children of all faiths or none, with a high percentage of Muslim children (79%).

The school uniform for Muslim, Sikh, and Hindu girls was the \textit{shalwar kameez} and, if they wished, the headscarf. Some Muslim religious authorities, such as the local Imam, had approved this kind of uniform before it entered into force and, moreover, three of the LEA governors were also Muslim. For other students, there was a traditional school uniform. Since joining the school, Begum had worn the \textit{shalwar kameez} for two years. In September 2002, however, the pupil and her brother informed the school that she wanted to wear the \textit{jilbab} because it was more appropriate for Muslim women. The school would not allow Ms Begum to attend classes unless she wore the standard uniform. Therefore, she appealed to the High Court suing that the school had unlawfully excluded her, that it had denied access to education in breach of Article 2 Protocol 1 of the ECHR, and that it had denied the right to manifest her religion in breach of Article 9 of the ECHR.\textsuperscript{314}

The High Court dismissed Ms Begum’s appeal. The main argument was that the applicant was not excluded from the school, but she voluntarily decided not to attend it anymore. In fact, Ms Begum had a choice: either to return to school wearing the standard uniform, or to refuse to wear it knowing that if she did so the school was unlikely to allow her to attend.\textsuperscript{315}

Conversely, the Court of Appeal considered that the applicant had been excluded from the school.\textsuperscript{316} In fact, it stated that

They sent her away for disciplinary reasons because she was not willing to comply with the discipline of wearing the prescribed school uniform, and she was unable to return to the school for the same reason. Education law does not allow a pupil of school age to continue in the limbo in which the claimant found herself. It was very soon clear that she was not willing to compromise her beliefs despite the best efforts of the educational welfare officers who visited her home and the teachers at the school who tried to persuade her to return. If the statutory procedures and departmental guidance had been followed, the impasse would have been of very much shorter duration, and by one route or

\textsuperscript{313} See also Chapter 1, in particular §1.7, where we have examined the role that the margin of application doctrine played in the judgement delivered by the House of Lords in the case of \textit{Shabina Begum}.

\textsuperscript{314} \textit{R (on the application of Begum (Shabina)) v. The Headteacher and Governors of Denbigh High School [2004] EWHC 1389 (Admin)}.

\textsuperscript{315} See \textit{Begum}, High Court, §56-61.

\textsuperscript{316} \textit{R (SB) v. Headteacher and Governors of Denbigh High School [2005] EWCA Civ 199}.  

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another her school career (at one school or another) would have been put back on track very much more quickly. 317

Moreover, Brooke LJ made a sharp distinction between this case and the ECHR case law on this issue, in particular as it related to countries like Turkey and Switzerland, which have a national policy of secular education in their state maintained schools. He pointed out that, in general, the UK is very different from those states, particularly because it is not a secular state and it has no written Constitution. Additionally,

The position of the School is already distinctive in the sense that despite its policy of inclusiveness it permits girls to wear a headscarf which is likely to identify them as Muslim. The central issue is therefore the more subtle one of whether, given that Muslim girls can already be identified in this way, it is necessary in a democratic society to place a particular restriction on those Muslim girls at this school who sincerely believe that when they arrive at the age of puberty they should cover themselves more comprehensively than is permitted by the school uniform policy. 318

The school had not approached the matter in this way. In fact, “nobody who considered the issues on its behalf started from the premise that SB had a right which was recognised by English law, and that the onus lay on the school to justify its interference with that right.” 319 According to Brooke LJ, it was not for school authorities to pick and choose between religious beliefs or shades of religious belief, and, in this case, between the majority of Muslims who accepted the shalwar kameeze and a minority who believed that wearing the jilbab was mandatory. In order to give more weight to this point, Brooke LJ highlighted that “the United Kingdom is not a secular state; there is no principle of denominational neutrality in our school. […] Every shade of religious belief, if genuinely held, is entitled to due consideration under Article 9.” 320 Therefore, the Court of Appeal stated that the claimant had been excluded from the school without the appropriate procedures, and that her rights protected by Article 9 had been violated in the process.

At this point, the school appealed arguing that the High Court decision was correct, while that of the Court of Appeal was wrong. 321 In particular, Bingham LJ made effective the comparison between this case and Leyla Sahin case. He argued, firstly, that the reasoning of

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317 Begum, Court of Appeal, §24.
318 Ibid., §74.
320 Begum, Court of Appeal, §94.
321 R (on the application of Begum (by her litigation friend, Rahman)) (Respondent) v. Headteacher and Governors of Denbigh High School (Appellants) [2006] UKHL 15.
the Court of Appeal could not stand with that decision of the Grand Chamber. In particular, the school was the relevant public authority, and it was a secular school (the fact that the UK was not a secular state was true, but irrelevant), not a denominational one, where the uniform was considered to be a fundamental part of the social cohesion among pupils. Moreover, the school “had taken immense pains to devise a uniform policy which respected Muslim beliefs but did so in an inclusive, unthreatening and uncompetitive way” and, before a prospective pupil started at the school, he or she received a careful explanation of the school uniform policy.  

Secondly, he argued that the school did not exclude Ms Begum because she had effectively made a choice, which very likely implied her exclusion from Denbigh High School. In particular, Hoffman LJ underlined that

Shabina’s discovery that her religion did not allow her to wear the uniform she had been wearing for the past two years created a problem for her. Her family had chosen that school for her with knowledge of its uniform requirements. She could have sought the help of the school and the local education authority in solving the problem. They would no doubt have advised her that if she was firm in her belief, she should change schools. That might not have been entirely convenient for her, particularly when her sister was remaining at Denbigh High, but people sometimes have to suffer some inconvenience for their beliefs.  

Baroness Hale also had no doubt that the interference with the applicant’s right to manifest her religion was justified. The evidence to support the necessary justification under Article 9 (2) ECHR was as follows:

Social cohesion is promoted by the uniform elements of shirt, tie and jumper, and the requirement that all outer garments be in the school colour. But cultural and religious diversity is respected by allowing girls to wear either a skirt, trousers, or the shalwar kameez, and by allowing those who wished to do so to wear the hijab. This was indeed a thoughtful and proportionate response to reconciling the complexities of the situation. This is demonstrated by the fact that girls have subsequently expressed their concern that if the jilbab were to be allowed they would face pressure to adopt it even though they do not wish to do so. Here is the evidence to support the justification which Judge Tulkens found lacking in the Sahin case. 

This case shows how it is hard to ensure that everyone is equally respected. At the same time, it is also evident that, in conceiving the school uniform, the school had made a
great effort to meet the needs of all pupils in a multicultural society, particularly by including the requirements for Muslim girls to dress modestly. The House of Lords gave much more weight to the school’s provisions regarding the uniform because all the circumstances showed how the head teacher and governors had been very sensitive to this issue. Furthermore, thanks to some previous statistical surveys among parents and pupils, they were aware of the fact that wearing the headscarf, for many Muslim girls, was more accepted than the jilbab. This meant that they were free to express themselves in a multicultural society in a less threatening way that the jilbab would have done.

As McGoldrick points out, “the House of Lords’ decision in Begum would suggest that when public in institutions take decisions in a thoughtful, sensitive and participatory manner that seek to balance the relevant considerations, their decisions will not be interfered with lightly by the courts on human rights grounds.”

3.6.2. Post Begum: The Approach of the High Court in the Case of Wearing the Niqab at School

Just a year after the House of Lords’ decision in Begum, the High Court of Justice dealt with a similar case where a pupil (X) and a school (Y) (which was a selective girls’ grammar school) were involved in the judicial review of a headteacher’s decision to ban a pupil from wearing a full-face veil (niqab) in the classroom. Because the applicant decided not to attend the school until she could wear the niqab, the school had arranged private lessons for her, but they did not cover all the classes she would have received by regularly attending the school. Therefore, the claimant had been offered a place at another selective girls’ grammar school (Q), where she could wear the niqab. However, she did not accept this offer, and gave no reason. The applicant claimed that the school had acted unlawfully because: first its refusal to allow the pupil to wear the niqab at school constituted a breach of Article 9 of the ECHR; second, because she had a legitimate expectation that she would be permitted to wear the niqab based on the fact that her three sisters had attended the same school and had been permitted to wear it; and third, because there was no proportionate or objective justification for changing the uniform policy.

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325 McGoldrick, Human Rights and Religion: The Islamic Headscarf Debate in Europe..., p. 204.
The reasoning of the High Court of Justice answered these three main points.

Regarding Article 9 ECHR, the ratio in *Begum* helped to state that the claimant’s right to manifest her religion through the *niqab* had not been infringed by the school’s decision. Silber J reported part of the reasoning of the House of Lords’ decision in that leading case on the Muslim girls uniform to make effective his argumentation. Firstly, Lord Scott explained in *Begum* that a school rule, which did not conform to the religious beliefs of a pupil, did not constitute a breach of Article 9 “where the individual has a choice whether or not to avail himself or herself of the services of that institution, and where other public institutions offering similar services, and whose rules do not include the objectionable rule in question, are available.” Secondly, it was emphasized that Article 9 does not require that one should be permitted to manifest one’s religion at any time and place of one’s own choosing. Thirdly, as Lord Bingham pointed out in *Begum*, the Strasbourg case law showed that “there is no interference with Article 9 rights where there is an alternative place at which the services in question can be provided without the objectionable rule in question.” In this case, in fact, the claimant had an alternative school Q, which she could attend. In other words, the Court insisted that both Strasbourg and the British court decisions did not show an infringement of a person’s Article 9 rights when she or he could, without excessive difficulty, manifest or practice their religion as they wished in another place or in another way.

In regards to the legitimate expectation issue, Lord Hoffmann’s memorable observation given in *Matadeen v. Pintu* was evoked, in which he stated, “treating like cases alike and unlike cases differently is a general axiom of rational behaviour.” According to the High Court, there were at least three valid reasons for considering this case different from what had happened to the applicant’s sisters. First of all, the applicant had joined the school seven years after her youngest sister, hence it was reasonable to expect that some of the school’s policies could have changed. Secondly, during that time, a new head teacher had taken the place of the previous one. Finally, there had been changes in the uniform policy, which the school was entitled to introduce. According to Silber J, any of these factors by

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327 Ibid., §31.
328 Ibid., §33. See also *Begum*, House of Lords, §23, “The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accomodate that practice or observance and there are other means open to the person to practice or observe his or her religion without undue hardship or inconvenience.”
330 R (on the application of X (by her father and litigation friend)) v. The Headteachers of Y School and the Governors of Y School, § 132.
themselves would have justified the decision to treat the claimant differently from her sisters, in spite of her expectations.

The third reason given by Silber J for dismissing the claim, was based upon the *fair balancing test* assessed by the school in prohibiting the pupil to wear a *niqab*. In fact, Silber J went on to hold that, even if there had been an interference with her right to manifest her religion, it would have been lawful because the law prescribed it, it was for a legitimate purpose, and it was proportionate. The sending of a letter home, in which the student was informed of the prohibition, was considered to be sufficient to assess that that rule was prescribed by law. Silber J, analysing the application of Article 9(2) in this case, stated the following points as legitimate purposes for the current school uniform, and their necessity, in a democratic society, for the protection of the rights of others: “(i) encourage pride in school; (ii) enable students to feel comfortable in their environment; (iii) ensure that girls of different faith felt welcome; (iv) encourage a sense of equality and cohesion within the School; and (v) protect children from social pressures to dress in a particular way and security.”

In his case analysis, Hill concluded:

The weakness of the approach of English law post *Begum* was underlined by Silber J’s comments commending the school on having in place a well thought out policy. Ironically, the approach now taken by English law makes the quality of the policy irrelevant. Provided that the right to manifest can be exercised elsewhere, it seems that the court will be entitled, or even obliged, to find that there had been no interference. […] In his admirably treatment of Article 9(2), Silber J unwittingly showed the inadequacy of the approach now taken by English courts applying the reasoning in *Begum*.

3.6.3. The Importance of *Watkins-Singh*

Almost a year after *R v. Y School*, the High Court of Justice, again through Silber J’s decision in *R*, dealt with the *application of Watkins-Singh v. The Governing Body of Aberdare Girls’ High School*. In this case, the court showed a new and different approach to Article 9 ECHR in cases concerning the wearing of religious garments which are in conflict with the school uniform policies.

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331 Ibid., §70.
The case concerned an observant non-initiated Sikh pupil, Ms Sarika Watkins-Singh, who was forbidden to wear the Kara bracelet at school because it infringed the school’s uniform policy. The Kara bracelet is worn on the wrist and has a width of about 50 millimeters. Because she refused to remove this garment, she was expelled from her school and had to join another one, which permitted her to wear a Kara. Ms Watkins-Singh, acting through her mother and a litigation friend, sued litigation before the High Court of Justice claiming that the school erred in its decision for two reasons. First, because, as an observant Sikh, wearing the Kara was a matter of great importance to her for both religious and racial reasons; and, second, because the school had indirectly discriminated her on the basis of the Race Relations Act (RRA) 1976 and the Equality Act (EA) 2006.

First, Silber J heard expert evidence about the significance of the Kara bracelet to Sikhs. Professor Eleanor Nesbitt made an informative witness statement in which she pointed out that “the 5 Ks are the outward signs required of a Sikh and there are Kesh (uncut hair), Kanga (comb), Kirpan (sword), Kach (cotton breeched) and Kara (steel or iron bangle).” The 5 Ks are important as they are intended to distinguish Sikhs form both their Muslim and Hindu contemporaries. “[…] It is important that the Ks be visible, but even more important (even if circumstances necessitate that the Kara be temporarily hidden from view) that the Sikh concerned continues to wear it on his/her right arm/wrist.” At the same time, however, the Kara is compulsory only in the case of initiated Sikh. In spite of this, Silber J argued that, “although the claimant is not obliged by her religion to wear a Kara, it is clearly in her case extremely important indication of her faith and this is a view shared for good reason by very many other Sikhs.”

Second, regarding the issue of indirect discrimination, the RRA had been introduced in order to give effect to the European Directive (2000/43/EC), which implemented the principle of equal treatment between persons irrespective of racial or ethnic origin. On this subject, according to the decision Mandla v. Dowell Lee [1983] 2AC 548, the House of Lords

334 Ibid., §24-26.
335 Ibid., §29.
336 Section 1(1A) of the RRA provides that:
«(1A) A person also discriminates against another if, in any circumstances relevant for the purposes of any provision referred to in subsection (1B), he applies to that other as provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but –
(a) which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons,
(b) which puts that other at that disadvantage, and
(c) which he cannot show to be a proportionate means of achieving a legitimate aim». 129
stated that Sikhs were a racial group defined by ethnic origin. Furthermore, the EA prohibited discrimination of religion or belief in protected activities.\footnote{337}

The reasoning of the High Court followed these steps. First, it identified as the relevant ‘provision, criterion or practice’ the fact that the school ban on jewellery only applied to the wearing garments which were not required to be worn as a compulsory requirement of the pupil’s religion or culture. Second, the relevant group, which constituted the pool in order to compare the claimant and determine the issue of disparate impact, “should be those pupils whose religious beliefs or racial beliefs are not compromised by the uniform code on the issue of the Kara or any other similar item of jewellery, which is required to show the pupil’s intimate association with his or her religion or race.”\footnote{338}

Third, ascertaining whether the provision also disadvantages the claimant personally, Silber J stated that “there would be a ‘a particular disadvantage’ or ‘detriment’ if a pupil is forbidden from wearing an item when (a) that person genuinely believed for reasonable grounds that wearing this item was a matter of exceptional importance to his or her racial identity or his or her religious belief and (b) the wearing of this item can be shown objectively to be of exceptional importance to his or her religion or race, even if the wearing of the article is not an actual requirement of that person’s religion or race.”\footnote{339} At the same time, however, it is not the Court’s purpose to state what religious symbols are mandatory.

Finally, Silber J found the school’s prohibition of the Kara not proportionate to its legitimate aims, which were the following: a rigid uniform policy for the prevention of bullying, the difficulties of explaining to other pupils the reason for such an exception, and the fact that such exception can discriminate against other pupils who cannot wear jewelry. On this point, the Court recalled domestic and Strasbourg case law that had drawn attention to the serious effects of racial discrimination and segregation in the educational context, and the consequences for both society and the psychological well-being of the individuals. However, Silber J justified both his previous decision in \textit{X v. Y School} and the House of Lords’ decision in \textit{Begum}, saying that “the niqab and the jihab are many times more visible to

\footnote{337}{Section 45(3) of the EA provides that:
«A person ("A") discriminates against another ("B") for the purposes of this Part if A applies to B a provision, criterion or practice-
(a) which he applies or would apply equally to persons not of B’s religion or belief;
(b) which puts persons of B’s religion or belief at a disadvantage compared to some or all others (where there is no material difference in the relevant circumstances).
(d) which puts B at a disadvantage compared with some or all persons who are not of his religion or belief (where there is no material difference in the relevant circumstances) and
(e) which A cannot reasonably justify by reference to matters other than B’s religion or belief».}

\footnote{338}{See Watkins-Singh, §46.}

\footnote{339}{Ibid., §56.}
the observer than the very small and very unostentatious Kara. In consequence, many of the arguments which were accepted by the courts as justifying prohibiting the wearing at school of the niqab and the hijab do not apply to the Kara.\footnote{Ibid., §78.}

In this way, Silber J shifted the issue from race to visibility. He used the questionable ‘visibility’ criterion for the religious symbols to assess whether the school erred in assessing the proportionality of its provision. In fact, he “distinguished the Article 9 case law on the basis that it could not be said that allowing pupils to wear a Kara caused substantial difficulties because they may stand out or that it undermines the uniform policy’s aim of fostering a community spirit because the Kara is small and is usually hidden by a long-sleeved sweater.”\footnote{R. Sandberg, Law and Religion, (Cambridge: Cambridge University Press, 2011), p. 97.}

However, while such reasoning can be sustainable in relation to Muslim dress, this is hardly true of the chastity ring in \textit{Playfoot}.\footnote{R (on the Application of Playfoot (A child)) v. Millais School Governing Body [2007] EWHC 1698 (Admin).} In this case, the applicant sought a judicial review of the decision of her school to forbid her from wearing a chastity ring as a symbol of her commitment to the Christian faith because it went against school uniform policy. She contended that this decision unlawfully interfered with her right to manifest her religion under Article 9 ECHR and that it discriminated against her in breach of Article 14 ECHR.

The judge held that Article 9 was not engaged since, while she wanted to manifest her decision to remain virgin until the marriage because of her Christian belief, the act of wearing a ring was not “intimately linked” to the belief in chastity.\footnote{Ibid., §23.} Moreover, the ‘purity’ ring is not a mandatory requirement of the Christian faith. In addition, she had joined the school knowing that there was a ban on jewellery and garments for pupils, excepted for “a Muslim girl to wear a headscarf where it was considered by her to be a requirement of her faith; two Sikh girls have been allowed to wear a Kara bangle on a similar basis; and a pupil was allowed to wear a headscarf as it was believed that this form of dress was required as part of her faith as a member of the Plymouth Brethren.”\footnote{Ibid., §38.} Generally, the rules for the uniform policy served the same purposes detailed in \textit{Watkins-Singh}.

In comparing this case with \textit{Watkins-Singh}, the argument brought by Silber J in \textit{Watkins-Singh} showed two controversial factors. First, the argument that the Kara bracelet, unlike the ‘purity’ ring, could be covered is not completely true. In fact, when her teacher
asked to the pupil to remove the Kara, everyone could clearly see it, and saying that the Kara can usually be covered is different from affirming that it must be always covered.\textsuperscript{345}

Second, “the success of the claim in Watkins-Singh means that litigants are now best advised not to pursue claims under Article 9 but to invoke the detailed anti-discrimination provisions under the Equality Act and its accompanying secondary legislation.”\textsuperscript{346}

3.6.4. The Azmi Case: Discrimination in Employment

A discrimination claim regarding wearing the full-face veil was also made in Mrs A Azmi v. Kirklees Metropolitan Borough Council.\textsuperscript{347} This case differed from the other British cases in that it involved a teacher, not a pupil, and hence it was a case of discrimination in employment, and not an infringement of school uniform policy. For this reason, the competent court was the Employment Tribunal and, afterwards, the Employment Appeal Tribunal, both of which rejected the applicant’s claims of direct and indirect discrimination on the grounds of religion.

The applicant was Mrs Azmi, a Muslim woman, who was employed as a bi-lingual support worker at the Headfield Church of England Junior School in Dewsbury. Since her youth, she has worn a long dress and a veil in the presence of adult men. Her veil covers both her head and face. When she attended the interview and training days, she only wore the Muslim headscarf and a black tunic, and did not mention her religious requirement to wear a full-face veil.

Some time after she signed her contract, Mrs Azmi asked the head teacher if she could wear the veil when teaching with male teachers, or if she could avoid working with male teachers at all. The head teacher and his assistant decided to undertake an observation of her work with and without the \textit{niqab}. They both assessed that pupils needed to see their teacher’s face in order to achieve proper and clear communication. Despite this conclusion, the applicant decided to keep her veil during her teaching lessons. For this reason, she was suspended and made her claims before the ET and, later, the EAT. Mrs Azmi argued that the proper comparator to assess her direct discrimination was a female Muslim teacher who

\textsuperscript{345} See also, R. Sandberg, \textit{Law and Religion}..., p. 97.
\textsuperscript{347} UKEAT/0009/07/MAA.
covered her head but not her face. Both the ET and the EAT rejected this and concluded that “the comparator should be a person, not of the Muslim religion, who covered her face for whatever reason.”\footnote{Ibid., §53.} In fact, the applicant was excluded not because of her religious belief, but because her veil was a barrier to effective learning by her pupils. It was concluded that such comparator would also have been suspended. For this reason, both tribunals found no direct discrimination against the applicant.

There was also no indirect discrimination. Both the ET and the EAT found that there was a potential case of indirect discrimination, and proceeded to consider whether the provision adopted by the school against the applicant was a proportionate means of achieving a legitimate aim. The EAT stated that the reasoning of the ET had not erred in law in concluding that, although the requirement not to wear the \textit{niquab} when teaching did put persons of Mrs Azmi’s belief at a particular disadvantage, the means chosen were proportionate. In fact, as said before, during lessons Mrs Azmi’s communication with the children was less effective when she wore the full-face veil.

This case, when compared with \textit{Dahlab}, clearly shows a basic difference between the UK and states such as Switzerland, France, or Turkey in the implementation of the ideals of pluralism and coexistence among different religions in schools, understood as public spaces. The similarities between the two cases were that both schools were public schools, both the teachers were devout Muslims, and both teachers were prevented from displaying their religious affiliation through the full veil or the head veil. The difference between the two cases lies in the reasons for the restrictions on religious dress. In the case of Mrs Azmi, she was prohibited from wearing the \textit{niquab} because it interfered with effective communication with her pupils. Mrs Dahlab, however, was forbidden to wear a headscarf on that grounds that religious dress conflicts with the duty of teachers as public officers to be impartial towards any religion, in order to embody the ideal of the neutrality of the state. The first case thus highlights a ‘practical’ concern, whereas the second one takes a ‘theorical’ stance. This kind of distinction between the \textit{Azmi} case and the \textit{Dahlab} case becomes less sharp when the wearing of the headscarf by pupils is at issue. In these cases, the most prominent reasons for forbidding the headscarf or the \textit{niquab} at school are health and safety concerns, as well as incompatibility with school uniform policies. Only secondarily have judges faced the problem of the significance of headscarves or other Muslim garments in schools, and its connection to Church-State relationships. However, it is worth noting that, in a paradigmatic way, the
Begum case does not challenge “the British demarche in dealing with the Islamic headscarf: that this was a matter best decided at local level by the respective school.”349

With this in mind, it is possible to address Levinson’s criticisms of the British school system compared to the French one. Levinson had argued that the multicultural prolongation of British liberalism, which places private choice over public values, produces deficiencies of the latter. In fact, she argues, students are not really exposed to differences in ‘quasi’ private schools where they find their mono-religious community. Hence, she maintains that there is no public space with which all can identify.

As Joppke puts it “the Islamic headscarf functioned as a mirror of identity.”350 What is the identity reflected in it? The answer can be both personal and state identity, where the latter sometimes comes first. It is evident that both France’s attack on the Islamic headscarf, and Britain’s hands-off attitude towards it fall within the ambit of liberalism as a project of toleration among cultural and religious differences. On the one hand, liberalism as perceived in the UK is a kind of modus vivendi (criticized by Rawls), which allows many different conceptions of living to co-exist peacefully. On the other hand, in France there is a more ambitious project, such as is promoted by Rawls in Political Liberalism, to find an overlapping consensus of common values as a sort of ideal form of life.351 However, it is reasonable to assume that the idea of toleration embodied by liberalism requires both laisser-faire and ethical consensus:

I take this to be the message of the French and British headscarf controversies. Both countries represented, in crystalline form, the two faces of liberalism: modus vivendi in Britain and ethical consensus in France. Modus vivendi liberalism is conducive to extreme claims, such as by head-to-toe veiled teachers. And there is no built-in stopping point, because of an inevitably weak sense of the collective self. If Britain indeed is, as multiculturalism would like it, a ‘community of communities,’ all cathectic energy is spent at lower levels, so that the meta-community must forever remain in search of itself. Conversely, the ethical consensus liberalism of France, which stipulates abstract individuals devoid of all their origin features, becomes indistinguishable from a nationalism which threatens individual liberties and liberalism itself.352

350 Ibid., p. 119.
351 See §2.3.
352 C. Joppke, Veil: Mirror of Identity..., p. 119.
3.7. Conclusion

The proliferation of Islamic headscarf controversies in school environments throughout Europe shows that such controversies are no longer a peculiarity of France, where they started. However, such controversies have appeared in different ways in different countries. In general, for many countries, there are certain norms, most notably respect for public order and health and safety reasons, which seem to be violated by wearing the headscarf. On the other hand, however, there are also national legacies pertaining to State-Church relationships and other factors. For instance, in countries where secularism is a constitutionally protected principle, Muslim headscarves worn in public spaces, such as schools or universities, are seen as a threat to State neutrality.

At a deeper level still, as Joppke has pointed out, “the Islamic headscarf functions as mirror of identity which forces the Europeans to see who they are and to rethink the kinds of public institutions and societies they wish to have.” In fact, the central paradox at the heart of all these controversies is that the headscarf is seen as an affront to liberal values, but its suppression is likewise illiberal and amounts to a denial of these values. To support the prohibition on headscarves it is necessary to identify order with the constitutional principles of secularism, as, for instance, was done in Leyla Sahin v. Turkey. As Woodhead has argued, however,

this leads to a circular argument: public order depends on upholding secularism, secularism requires the repression of religion, the repression of religion is required to uphold public order. In other words, the widespread banning of religious dress in public spaces in many European countries, sometimes with the support of the ECtHR, brings into sharp relief an illiberalism which seems to sit much too easily with many European forms of secularism.

More concretely, to wear a headscarf falls within the ambit of religious freedom, which is protected in the liberal State. In fact, the right to freedom of religion is a mother right, which guarantees the inviolability of the human dignity (since religion is not just a demanding taste but concerns to the most individual’s vital issues). Moreover, determining

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353 Ibid., p. 2.
the meaning of religion and its behavioral implications falls entirely outside the competence of the liberal State (at least as long as no rights of third parties are impaired). Thus, any limitations on the right to freedom of religion must always be proved as effectively necessary, and this must be the case at both the national and international levels.

Moreover, from the national point of view, governments need to face the fact that religious pluralism needs not threaten their status quo. Instead, religious pluralism can be regarded as a positive challenge that can help to strengthen and clarify the meanings and means of tolerance and civic sensibility. In addition, “it also requires the state to create the preconditions for mutual knowledge, which is an important goal in order to nurture the natural disposition of individuals and groups to cope with difference.”356 This is well explained through the notion of ‘integration,’ which is a major preoccupation of French intellectual discourse in its early laws on education. Of course, this should be a driving aim for all democracies, yet the ways of achieving that goal differ greatly in the different European countries. In particular, the foregoing analysis has highlighted two lines of thought. According to the first line (followed by States such as France, Turkey and, in a slightly different way, Switzerland) integration can only be achieved by stripping the public sphere of any religious connotation in order to overcome ‘visible differences’ and to promote a ‘visible unity.’ This unity described by Rawls in Political Liberalism and embodied in the French concept of laïcité, is one in which personal beliefs do not find any room in the public sphere. It asserts that liberalism has its origin in the privatization of religion. The second line of thought, (followed by the UK), promotes integration through the accommodation of religious requests when possible. This is a variant of liberalism that privileges private choice and non-interference over a sense of common citizenship.

These two lines of thought reveal that “inherent in liberalism is a tension between toleration and ethical perfection, with Britain and France institutionalizing variants of – respectively – toleration and perfection. If confronted with the fact of pluralism, each variant of liberalism is potentially self-destructive: toleration liberalism is eroded by the paradox of tolerating the intolerant, while ethical liberalism turns illiberal by evicting the merely private from a homogenized public space.”357 Thus, at the national level, there are no a priori correct answers to solving headscarf controversies in schools, but the first fundamental step in

357 Joppke, Veil: Mirror of Identity..., p. 83.
handling this highly debated topic is to take seriously the fact that before teaching pluralism, it is foremost necessary to allow citizens to live it.

From the international perspective, the decisions of the ECtHR have tended to affirm that Member States have a certain margin of appreciation when dealing with sensitive issues, so that, in the case of the Islamic headscarf, it is generally left up to the member States to assess their need for restrictions. However, this margin should go hand in hand with European supervision. In fact, the ECtHR must be as a mother with her children: vigilant and, when required, capable of intervening without overstepping its limits.

In fact, siding with the States on this delicate topic cannot become either a *modus vivendi* or an automatic result of the assumption that State secularity is a simple method of ensuring that all religions and beliefs are treated fairly and equally. In many of the judgments examined above, the applicants went before the ECtHR to assert that they were neither aggressive proselytizers nor religious fundamentalists. They asked for the protection of their right to freedom of religion, and for the respect of the principles of equality, freedom and dignity guaranteed under the ECHR. The Court of Strasbourg, thus, has the important duty of using its subsidiary role to help States establish the proper place of religious beliefs within the democratic political process. This is possible only by acknowledging that “secularism can itself be presented as a particular world-view and so a state’s adoption or advocacy of it may seem to contradict the principle of neutrality” and that “religion […] [is] not a problem for legislator to solve but a vital contributor to the national conversation.”

Of course, in many cases, by resorting the margin of appreciation, the ECtHR has avoided becoming an arbiter in highly divisive religious issues and avoided populist resentment. As McGoldrick has pointed out, “the issue – the narrower one of the place of religious symbols in schools, and the broader one of the foundations of the national and sub-national polities – were returned to the national democratic political and independent judicial folds for evolution and resolution. It is submitted that this reflected a sensible and credible judicial strategy of self-restraint for the ECtHR to follow.”

At the same time, in light of the Court of Strasbourg’s vital role as a last line of defense for individual rights, it would be encouraging to see that it tries to overcome stereotypes related to the Islamic veil. So long as they obey the law, people who come to live in a new country should not be expected to leave their faith, culture or identity behind.

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359 Ibid., p. 502.
Indeed, this diversity can contribute to the creativity that Europe needs. In fact, it is not always true – as the cases assessed have shown – that wearing visible religious symbols in the school environment constitutes evidence of the failed integration and assimilation of immigrants. In the context of many European countries, the presence of veiled women should be viewed firstly as a cultural religious manifestation, and only her connected behavior can indicate a reluctance to integrate. Again, specific circumstances give rise to specific cases.

The roots of headscarf controversies are difficult questions of identity, social mobility, and religious expression, all features of the broader question of ‘integration.’ In particular, Islam poses a challenge to the strict form of secularism, which distinguishes France and Turkey from most other Western democracies. Under the doctrine of secularism, integration and equality, are supposed to be guaranteed by barring religion from public schools. This is because schools are intended to endorse a model of integration that strives for a color-blind equality, for indifference to differences. Conversely, there are countries, such as the UK, where the model of integration consists, essentially, of not worrying about cultural differences among citizens. In fact, ethnic minority groups are not only left alone by the State to practice their faith, language, or culture, but are encouraged and subsidized to do so. In the public schools where, the wearing of headscarves or other visible religious garments have caused trouble, this was seen as a problem for school governors, not national authorities. One of the major drawbacks of this model, however, is the potential fragmentation of the population into ghettos. Having this in mind, the most obvious finding to emerge from this analysis is that there is no perfect model of integration, which is capable of solving all the issues related to headscarf controversies.

As Trigg puts it,

Rights cannot be advocated in a vacuum. Total neutrality by a State implies indifference as to whether rights should be respected. There will always have to be a positive programme of education to create an atmosphere in which laws can be enforced. Even a liberal State, preoccupied with the rights of individuals, has to ensure that children are brought up to value them. The problem is that the importance of respecting particular rights begins to undermine any idea of why the rights begins to undermine any idea of why the rights were regarded as important in the first place. For example, the importance of religious liberty is seen as implying that each person is free to believe anything. It will then seem wrong to imply that some beliefs are better established than others, because that is to cast judgment on the decisions of individuals. The State could seem to be challenging their freedom. Diversity is not just a consequence, but is celebrated as good

in itself, as the proper result of freedom. Rational debate about religion is then seen not as the proper implementation of that freedom, but as an assault on individual rights. If people are being told they are wrong in what they believe, that is held to be an attack on the values of freedom and equality.\textsuperscript{361}

Chapter 4

THE STRUGGLE BETWEEN PARENTS’ RIGHTS AND SCHOOLS’ DUTY OF NEUTRALITY

Abstract

This Chapter examines the influence of the concept of State neutrality in protecting parents’ right to educate their children according to their personal beliefs, as guaranteed by Article 2, Protocol No.1. The first topic assesses the inclusion of religion as a topic of study in public schools. The case law of the ECtHR shows that issue of religious education is firstly a matter for national governments and political institutions. In fact since the Protocol has entered into force, only three cases have been admitted by the Court: ‘Folgerø and Others v. Norway,’ ‘Hasan and Eylem Zengin v. Turkey,’ and, most recently, ‘Grzelak v. Poland’ and ‘Appel-Irrgang and Others v. Germany.’ In the first two cases the Court of Strasbourg firstly examined whether the religious classes complied with the criteria of objectivity, pluralism and criticism; secondly, it verified whether the State had protected parents’ rights under Article 2 of the First Protocol of the Convention. Surprisingly the Court’s most recent jurisprudence provides a new starting point on which a number of observations can be made in accordance with the law governing the right of parents to withdraw their children from religious education classes. While the Court has consistently stressed the State’s margin of appreciation under Article 2 of the First Protocol, in practice this is more apparent in ‘Appel-Irrgang and Others v. Germany’ and in ‘Grzelak v. Poland,’ than in ‘Folgerø and others v. Norway’ and ‘Zengin v. Turkey.’ Moreover, the first two judgments suggest that opt-out provisions are not necessarily required in order to achieve equality of attention to different religions, although by comparing ‘Folgerø’ and ‘Appel-Irrgang,’ one could easily conclude that the state, which takes this route, will face less scrutiny. The second topic analyzed in this Chapter is the role played by sex education in relation to Article 2, Protocol No.1. In particular, where sex education is compulsory, such as in the Netherlands, Norway,
Denmark, Germany etc., the main issue is to reconcile it with the different religious and philosophical views held by parents, in order to avoid undesirable interference. Since the Convention has entered into force, two cases have been brought before the ECtHR regarding this issue: the well-known case of ‘Kjeldsen, Busk Madsen and Pedersen v. Denmark,’ arbitrated in 1979, and, most recently, the decision of ‘Djan and Others v. Germany’ in 2011. Both cases were decided based on the criteria of ‘neutrality’ and the ‘factuality/objectivity’ of the teaching, criteria that can be unreliable when moral and ethical issues are at stake. The last topic concerns the display of the crucifix in Italian state schools. If the Court is to retain legitimacy and respect in the eyes of all Europe’s citizens, its pronouncements on religious matters must show greater cultural literacy than some of those in the past. In this respect, the well-known case ‘Lautsi and Others v. Italy’ has taken a promising first step, which may turn out to be a watershed in the jurisprudence through two judgments delivered by the Second Section of the ECtHR and, later, reversed by the Grand Chamber. This judgment dealt with a number of major systemic issues, such as the application of the margin of appreciation doctrine, the relationship between secularism (Italian ‘laicità’) and neutrality in the educational field, and whether perpetuating national traditions necessarily discriminates against minority religions or philosophical beliefs.

4.1. A Controversial Issue: Religion as a School Subject

For a start, an overview of how and when religion is taught in the 46 Member States of the Council of Europe shows an extremely uneven approach. Only few European countries such as France, Albania, and the Republic of Macedonia do not provide religious education classes in State schools. However, this approach is an exception to the norm. In fact, Europe is a continent where religion is taught in the vast majority of the states. At the same time, there are different models governing religion as a school subject. In 25 countries (including Turkey), religious education is mandatory. In five of those countries, namely Finland, Norway, Sweden, Greece and Turkey, the obligation to attend classes in religious education is partial or absolute. Ten States allow for exemptions under certain conditions. This is the case in Denmark, Iceland, the United Kingdom, Ireland, Liechtenstein, Monaco, San Marino, Malta and Cyprus.

Conversely, in the other 21 member States (including Italy), taking classes in religious education is not compulsory.362 Thus, pupils can opt out of religion classes and attend lessons in other subjects. Given the nature of these differences, it seems impossible to

362 Andorra, Armenia, Azerbaijan, Bulgaria, Croatia, Spain, Estonia, Georgia, Hungary, Italy, Latvia, Moldova, Poland, Portugal, the Czech Republic, Romania, Russia and Ukraine.
find any significant wide agreement on religious education among the States, which have signed the ECHR.

Often within the debate over school curriculum and religion, both sides base their arguments on different interpretations of the right to freedom of religion, and the right of parents to ensure that their children receive an education that conforms to their religious and philosophical beliefs. For instance, those who wish to see a greater degree of religiosity and more respect to religious values in the curriculum invoke religious freedom, as do those who argue for the exclusion of any religious consideration from educational decision-making. At the same time, Article 2 of the First Protocol of the ECHR lies at the centre of the debate when religious freedom corresponds to the right of parents to raise children according to their religious or non-religious views. This is particularly the case when parents believe their children’s education is being undermined by school teachings, such as religious education and sexual education.

Despite the concerns of some parents, the inclusion of religion as a topic of study in public schools is legitimate in liberal democracies. The various international courts and committees have made this clear, stating that “schools need not to exclude subject matter, including religious education, from the curriculum simply because some parents or students may have religious or philosophical objections to its inclusion.”

Moreover, the ECtHR in Folgerø and Others v. Norway summarized the previous jurisprudence on this issue and it seemed prepared to defer States to some degree of autonomy and to acknowledge the importance not to manage the national curricula from Strasbourg. It affirmed:

\[(g) \text{ However, the setting and planning of the curriculum fall in principle within the competence of the Contracting States. This mainly involves questions of expediency on which it is not for the Court to rule and whose solution may legitimately vary according to the country and the era [...]. In particular, the second sentence of Article 2 of Protocol No. 1 does not prevent States from imparting through teaching or education}\]

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364 Application No. 15472/02 (Grand Chamber).

365 Section 45(3) of the EA provides that:
« A person (“A”) discriminates against another (“B”) for the purposes of this Part if A applies to B a provision, criterion or practice-
(a) which he applies or would apply equally to persons not of B’s religion or belief;
(b) which puts persons of B’s religion or belief at a disadvantage compared to some or all others (where there is no material difference in the relevant circumstances).
(d) which puts B at a disadvantage compared with some or all persons who are not of his religion or belief (where there is no material difference in the relevant circumstances) and
(e) which A cannot reasonably justify by reference to matters other than B’s religion or belief.»
information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalized teaching would run the risk of proving impracticable [...].

This conclusion supports the inclusion and even integration of religious knowledge into State school curricula. According to Evans, this is appropriate for three reasons: firstly because “as classrooms become increasingly religiously pluralistic, attempting to create a curriculum that fully respects all religions and philosophies raises insuperable difficulties.”

In fact, it would be extremely hard to accommodate all parents’ preferences in determining a curriculum. For instance, some parents may oppose any kind of religious education classes; other parents may think that their children should learn the basic beliefs held by the various religions present in society; finally other parents may believe that religious education is essential if one is to live a moral life, thus supporting a ‘confessional approach,’ which indicates that a religious community or Church is responsible for the curriculum and for the qualification of religious education teachers. Hence, in dealing with all these issues it is necessary that schools and educational authorities have some discretion in order to develop their own effective solutions to particular areas and countries.

The second reason not to exclude religious education from schools is that one of the objectives of education, as envisaged in the international human rights treaties, is the preparation of the child to live in a society shaped by cultural and religious differences, and grounded on the principles of tolerance and equality. For this reason, it is useful to have a basic knowledge of the different ethnic and religious groups who live in the same society. The General rapporteur’s summery of the Council of Europe’s conference on “The religious dimension of intercultural education” held in Oslo in 2004 argued:

Why is knowledge so important? Of two obvious reasons, it was said: We have to know the other in order to fully understand and respect the other. (And I think that the concept of respect was the one that was repeated most frequently in the groups when the aims of intercultural education were discussed. The respect for the dignity of every individual, the respect for the diversity of convictions, cultures and religions.) By knowing the other, we more easily respect the other, making him a real human being like myself within our common sphere of morality. The second reason is that we can only know ourselves by knowing the other, and we can only know the other by knowing ourselves. It was stated by many that without knowing anything about

366 Folgerø and Others v. Norway, §84.
367 Evans, Religious Education in Public Schools: An International Human Rights Perspective..., p. 457.
religions, it would be extremely difficult (to put it the least) to understand and enjoy most of the art that has been made – and is made today. There are so many references, direct and indirect, to the Holy Scriptures and religious traditions that not knowing these would be a kind of cultural illiteracy. But knowledge is not neutral, objective and value free. 368

The final reason to include religious education in schools is that its exclusion “can undermine the rights of children to an education that will give them the knowledge and insights to understand their own societies and the role that religion plays in the world today.” 369

Along these findings, Jeroen Temperman, analyzing the complex issue of religion education as a public school subject, highlights the importance of State neutrality in the context of public education. He argues,

First and foremost, the standards on the right to education imply a strong positive obligation incumbent upon the state to ensure sufficient public schooling with appropriate curricula, at all times. […] If the state fails in its positive duty to provide non-denominational education, for instance by maintaining historical church prerogatives that effectively allow primary school education to be monopolized by religion, then various educational and religious rights are inevitably infringed. 370

This situation should be avoided if the state “creates an educational system and a public school curriculum which is designedly and sufficiently neutral or non-religious or, if it grants adequate opt-out options when religious education is included in public school curriculum. Public school instruction is compatible with norms on freedom of religion or belief when taught in a neutral and objective way.” 371

On the one hand, it is clear that schools must aim not to indoctrinate the pupils or try to manipulate their consciences. On the other hand, however, is teaching the history of religion and ethics more neutral and objective than religious education? And what about the very aim of Article 2 of the First Protocol in light of the Travaux Préparatoires? On this question, it is worthwhile to recall what Mr Taitgen identified as the fundamental aim of Article 2 before the final signature of the First Protocol in 1952: “To protect the right of parents in the field of education and teaching against the danger of nationalisation,

368 Synthesis of discussion in the group sessions at the Council of Europe’s conference on “The religious dimension of intercultural education”, Oslo, Norway, 6 – 8 June 2004 by Inge Eidsvåg, general rapporteur. Available at http://folk.uio.no/leirvik/OsloCoalition/IngeEidsvaag0904.htm.
absorption, monopolisation, requisitioning of young people by the State – irrespective of whether they have religious convictions or merely the philosophical convictions of traditional humanism.\textsuperscript{372}

The case law of the ECtHR shows that the issue of religious education is primarily a matter for national governments and political institutions. In fact, since the Protocol entered into force, only three cases have been admitted by the Court: \textit{Folgerø and Others v. Norway}, \textit{Hasan and Eylem Zengin v. Turkey} and, most recently, \textit{Grzelak v. Poland}. Through an examination of these cases it will be possible to discuss the ‘practical’ ways in which these concerns and observations have been addressed.

\textbf{4.1.1. Folgerø and the Defective Opt-out Policy: Is This an Excessive Interference in the National Arena on ECtHR’s part?}

The \textit{Folgerø} case is deals with a complaint lodged by four non-Christian families, all members of the Norwegian Humanist Association, under Article 9 and Article 2 of the First protocol of the ECHR. Their complaint arose from the fact that the domestic authorities had refused to give a full exemption from mandatory classes on Christianity, religion and philosophy (the KRL subject) taught in Norwegian public schools. The second complaint regarded discrimination against Article 14, taken in conjunction with the above provisions and Article 8 of the ECHR.

The background of this case was the establishing of a new mandatory subject, the KRL, which provided a wider knowledge about Christianity, as well as other religious and cultural traditions. The right of exemption was limited to religious activities, and was granted only if parents could give specific reasons for the exemption. Essentially, this new subject replaced the former religion classes, which had allowed full exemption and alternative lessons for children whose parents did not belong to the Church of Norway.

The importance of this school subject should be seen in the light of the long established state Church of Norway, and the fact that about 80\% of the population belong to

this Church.\textsuperscript{373} The applicants expressed strong objections against the KRL subject, however, because it was dominated by Evangelical Lutheran Christianity and contained elements of preaching. Moreover, the refusal of full exemption was seen as a violation of their fundamental right to bring their children up according to their religious and philosophical views.

The reasoning of the Court of Strasbourg pointed out two main issues. The first one regarded the scope of Article 2 of the First Protocol and what ‘religious pluralism’ means in public education. The second was connected to the role of the European Court and the margin of appreciation allowed to national authorities on this particular issue.

In regards to the first issue, the Court stated that:

\begin{quote}
the second sentence of Article 2 of Protocol No. 1 implies [...] that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents’ religious and philosophical convictions.\textsuperscript{374}
\end{quote}

The Court identified two key points in order to deal with the instant case: the legal framework laid down in the Education Act 1998\textsuperscript{375} and the legislative intentions behind the KRL subject expressed during the preparatory works.

In the Norwegian school curriculum, the KRL subject was intended to be a meeting point for different religious and philosophical views. Moreover, “the problem of possible

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\item Furthermore the Article 2 of the Norwegian Constitution provides:
All inhabitants of the Realm shall have the right to free exercise of their religion. The Evangelical-Lutheran religion shall remain the official religion of the State. The inhabitants professing it are bound to bring up their children in the same.

And the new Education Act 1998, which came into force on 1\textsuperscript{st} August 1999 states:
[Section 1-2(1)] The object of primary and lower secondary education shall be, in agreement and cooperation with the home, to help give pupils a Christian and moral upbringing, to develop their mental and physical abilities, and to give them good general knowledge so that they may become useful and independent human beings at home and in society.

[Section 2-4] Instruction in Christianity, religion and philosophy shall
\begin{enumerate}
\item transmit thorough knowledge of the Bible and Christianity in the form of cultural heritage and the Evangelical Lutheran Faith;
\item transmit knowledge of other Christian communities;
\item transmit knowledge of other world religions and philosophies, and ethical and philosophical subjects;
\item promote understanding and respect for Christian and humanist values; and
\item promote understanding, respect and the ability to maintain a dialogue between people with different perceptions of beliefs and convictions.
\end{enumerate}

Instruction in Christianity, religion and philosophy is an ordinary school subject, which should normally bring together all pupils. The subject shall not be taught in a preaching manner. [...] \textsuperscript{374}
\end{enumerate}
\end{footnotesize}
inclusion of activities that might counter to the philosophical or religious convictions of parents had been given serious and significant thought by the government in the deliberations on how best to design the KRL subject.\textsuperscript{376} This was the reason for the so-called partial exemption greatly debated during the preparatory works. The partial exemption permitted students to be exempted from taking part in certain religious activities, such as preaching, reciting from Bible etc., but not from knowing the significance of these activities. In fact, “the Convention safeguards against indoctrination, not against acquiring knowledge: all information imparted through the school system would – irrespective of subject matter or class level – to some degree contribute to the development of the child and assist the child in making individual decisions.”\textsuperscript{377} In this case, ‘religious pluralism’ means that parents and pupils do not have the right to be kept ignorant on religious and philosophical matters.

Despite these considerations, the Court of Strasbourg determined that the purpose of the subject was to transmit a profound knowledge of the Bible and Christianity from the viewpoint of the Evangelical Lutheran faith, and that the other religions and philosophies did not enjoy the same depth of knowledge that was dedicated to the Lutheran religion. With regard to the system of exemption provided, the Court considered that the mechanism for partial exemption to be ineffective, since the differentiation between activity and knowledge was hard to define.

Therefore, after confirming that the Norwegian state had not sufficiently ensured that the information and knowledge present in the KRL subject were transmitted in an objective, critical and pluralistic manner, the Court concluded, with a narrow majority of 9:8 votes, that refusing the applicants’ children full exemption violated the European Convention. The Court did not carry out a separate examination in relation to Article 14 ECHR, taken in conjunction with Articles 8, 9, and Article 2 of the First Protocol.

As Anna Gianfreda points out, in this case, for the first time the Court carefully examined how the exemption worked. Most of the argument for its decision was grounded on that analysis.\textsuperscript{378}

According to Section 2-4 of the Education Act 1998,

\textsuperscript{376} Folgerø, §77.
\textsuperscript{377} Ibid., §78.
A pupil shall, on the submission of a written parental note, be granted exemption from those parts of the teaching in the particular school concerned that they, from the point of view of their own religion or philosophy of life, consider as amounting to the practice of another religion or adherence to another philosophy of life. This may concern, *inter alia*, religious activities within or outside the classroom. In the event of a parental note requesting exemption, the school shall as far as possible seek to find solutions by facilitating differentiated teaching within the school curriculum.

Hence the pupil could be granted the exemption only if the parents had clearly specified the reasons, and the part of the lesson which was considered in breach of their religion or philosophical beliefs. Moreover, the school had the right to refuse the exemption and, in that case, the parents had a right of appeal to the State Education Office in the county concerned.

However, the evaluations of the KRL subject made by national authorities in the years after its application in the schools, showed that the existing exemption scheme did not work for several reasons: 1. it was hard for the school to give in advance the information regarding each KRL class, 2. the schools offered few differentiated teachings and 3. each school had different criteria to evaluate what ‘religious activities’ meant. In light of the above findings, the Court found that

The system of partial exemption was capable of subjecting the parents concerned to a heavy burden with a risk of undue exposure of their private life and that the potential for conflict was likely to deter them from making such request. In certain instances, notably with regard to activities of a religious character, the scope of a partial exemption might even be substantially reduced by differentiated teaching. This could hardly be considered consonant with the parents’ right to respect for their convictions for the purposes of Article 2 of Protocol No. 1, as interpreted in the light of Articles 8 and 9 of the Convention. In this respect, it must be remembered that the Convention is designed to “guarantee not rights that theoretical or illusory but rights that are practical and effective […].”

Conversely, the joint dissenting opinion concluded that there had not been a violation of Article 2 of Protocol No. 1, maintaining that the majority of the Court had overstepped their limitations in their discussion of the partial exemption scheme. They also considered that the partial exemption scheme did not entail an excessive or unreasonable burden for parents who wished to make a request for an exemption, and that it therefore fell within the margin of appreciation enjoyed by the respondent state under Article 2 Protocol No.1. In fact,

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379 Folgerø, §23.
Norwegian history, which is also reflected in its constitution, shows that Christianity has a very long tradition in that country. Moreover, as the travaux préparatoires highlighted, first the notion of pluralism should not prevent an official recognition of a particular religious denomination, and, second, looking at this specific case, the partial exemption from the KRL subject was intended to take into account the needs of parents belonging to religions other than Christianity, or to no religion at all.

This case is still quite controversial because, on the one hand, the Court stated “the fact that knowledge about Christianity represented a greater part of the Curriculum for primary and lower secondary schools than knowledge about other religions and philosophies cannot […] of its own be viewed as a departure from the principles of pluralism and objectivity amounting to indoctrination.”\(^{382}\) On the other hand, however, the Court found a violation of Article 2 of the First Protocol because the KRL subject and its exemption did not meet the requirements of objectivity, neutrality, and pluralism in teaching about religion.

As Evans has highlighted, at this point there are two levels of difficulty that need to be addressed: “The first, philosophical, problem arises from the acceptance of the idea that there is some ‘objective and neutral’ position from which religion can be taught.”\(^{383}\) For instance, some religious parents might affirm that teaching that all religions are equally true is a falsehood and might see this approach as promoting secularism, which can be considered hostile to a religious viewpoint. The second problem regards the fact that even assuming that we accept that ‘objectivity and neutrality’ is the appropriate principle by which to judge curricula, how can those two values be judged? There are some fairly clear cases. If a school engages in religious instruction, that is teaching that a particular religion is true and preparing children for participation in that religion, it is not teaching in an objective and neutral way. In the same way, instructing children that all religions are untrue or superstitious or indoctrinating them with atheist beliefs would also fail the objective and neutral test.\(^{384}\)

These questions have no simple answer capable of overcoming all the difficulties highlighted. In fact, the possibility of producing a wholly non-controversial curriculum is quite remote, and looking for completely objective and neutral standards is far from being feasible. However, schools and their national governments need to find ways of dealing with

\(^{382}\) Ibid., §89.
\(^{383}\) Evans, Religious Education in Public Schools: An International Human Rights Perspective..., p. 463.
\(^{384}\) Ibid., p. 463.
debated topics, such as religion, and the European Court has to guarantee its subsidiary role on these issues.

The exemptions from religious education can be one of the ways through which some States and the ECtHR try to avoid the difficulties involved in teaching such a controversial subject. But again, exemptions to such classes are offered “when the material might not be taught in an objective or neutral manner or even where there is a perception by some parents that the classes are not objective and neutral” and the Norwegian case has already shown us how difficult it can be to deal with this terminology. Another way to address this issue can be to give teachers proper training, as well as well-prepared materials and other resources, in order to be able to promote a critical attitude in their students. Yet,

how can we be sure that teachers are qualified or interested in mediating religious disputes should they arise in the classroom? Or that teachers with their own propensities (anti, pro or neutral) won’t push their own personal agendas vis-à-vis religion? This danger is potentially present in all teachings where issues of substance are raised and divergent viewpoints are held. Nonetheless, it is important not to shy away from these questions simply because they are controversial. To do so, would be the death knell of all serious teaching.

4.1.2. Post Folgerø: Towards a Less Strict Scrutiny Approach on ECtHR’s Part

Few months after the Grand Chamber decision in Folgerø, the ECtHR delivered a further judgment, Hasan and Eylem Zengin v. Turkey. Here the Court of Strasbourg examined the case in a similar way to the previous one: first, it analyzed whether the religious classes in question complied with the criteria of objectivity, pluralism and criticism; secondly, it verified whether the State had protected parents’ rights under Article 2 of the First Protocol of the Convention.

The applicants were Mr Hasan Zengin and his daughter, Eylem, who brought a claim before the ECtHR alleging a violation of Article 2 of the First Protocol because of the denial of the daughter’s full exemption from classes in religious culture and ethics at a public school in Istanbul. Mr Zengin and his family were adherents of Alevism, which is the second largest developed branch of Islam in Turkey. He asked that his daughter to be exempted from

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385 Ibid., p. 466. Emphasis added.
compulsory religious education since his creed was different from the one taught in Turkish state schools. In fact, the applicants considered that “the syllabus, which was taught entirely from a religious perspective and which praised the Sunni interpretation of the Islamic faith and tradition, together with textbooks describing the traditional rites of Sunni Islam, clearly indicated that this instruction lacked objectivity.” His request was denied, however, in accordance with national provisions on this issue, which granted exemptions only to pupils of Turkish nationality who belonged to Christian or Jewish religions.

The Government, on its part, emphasized that “the mere fact of providing children with teaching on the Muslim faith could not in itself raise a question under the Convention, so long as the lessons were taught in an objective, pluralist and neutral manner.” Moreover, “the compulsory nature of the class arose from the fact that it was necessary to protect children from myths and erroneous information, which gave rise to fanaticism;” this was also the reason why Jewish and Christian pupils were exempted from those lessons.

The Court observed that the fact the Turkish Government gave greater priority to knowledge of Islam than to other religions or philosophies could not, in itself, be viewed as a breach of the principles of pluralism and objectivity, which would imply indoctrination. However, religious lessons did not take religious diversity sufficiently into account, in the form in which it is present in Turkish society. Nor had it taken into account the fact that Alevi’s faith had great weight with him. In fact, according to the Court, “only pluralism in education can enable pupils to develop a critical mind with regard to religious matters in the context of freedom of thought, conscience and religion.”

Furthermore, the Court considered that the exemption procedure did not take into account parents who have a religious or philosophical conviction other than that of Sunni Islam, Christianity, or Judaism. It therefore compelled parents to make a real choice between the school and their own values. For the latter two religions, the procedure for exemption also placed a heavy burden on parents due to the necessity of disclosing their religion.

In light of these findings, the Court unanimously found that the Turkish system of religious education violated Article 2 of the First Protocol.

Relaño, in analyzing both Folgerø and Zengin, argues that

387 Zengin, §36.
388 Ibid., §42.
389 Ibid., §44.
390 Ibid., §69.
Both states established subjects that lacked objectivity and neutrality without mechanism for exemption for all students equally, and consequently did not fall within the margin of appreciation; that is to say, the European Court limited the autonomy of the Norwegian and Turkish governments. Paradoxically, in Leyla Sahin v Turkey […], the Court validated the Turkish authorities’ actions regarding the prohibition of wearing the headscarf on university precincts; and by signaling that the national authorities are better equipped, in principle, than an international arbiter to offer judgment on the local needs and contexts, the Court grants importance to the decision-makers at a national level and maintains the margin of appreciation for the Turkish government. There is no doubt that the Strasbourg body can vary its legal assessments of the margin of appreciation in each case; what’s more, it does this continually, complicating the consolidation of a general theory.391

However, in this case, it is curious how the Court dealt with Article 24 of the Turkish Constitution, which regulates the right to religious freedom and beliefs. On the one hand, in Sahin, the Court made reference to the part of that Article that states that “education and instruction in religion and ethics shall be conducted under state supervision and control.” This reference was made in order to support the government’s interpretation with respect to the wearing of headscarves in universities. On the other hand, in Zengin the Court not only considered the interpretation of this Article inadequate, but it also pointed out that the root of the problem was “the inadequacy of the Turkish educational system, which, with regard to religious instruction, does not meet the requirements of objectivity and pluralism and provides no appropriate method for ensuring respect for parents’ convictions.”392

Surprisingly, the Court’s most recent jurisprudence provides a new starting point from which a number of observations can be made in accordance with the law governing the right of parents to withdraw their children from religious education classes. In particular, the Court took a step back by granting a wider margin of appreciation, and by avoiding a detailed analysis of the policies of single schools.

In particular, our attention is now drawn to the case Grzelak v. Poland, and the decision of admissibility in Appel-Irrgang and Others v. Germany. The first case regards a pupil, Mateusz Grzelak, enrolled in a State primary school to whom was refused an alternative class in ethics, since the parents, declared agnostics, had opted him out of religion classes. In fact, during religion classes, he had often been left unsupervised in the hallway, or was asked to stay in the school library. On this account of this, his classmates had subjected him to ridicule. For these reasons, the applicants (the pupil and his parents) alleged a

392 Zengin, §84.
violation of Article 9 taken in conjunction with Article 14 of the Convention arguing that firstly, the school did not offer an alternative class in ethics, and, secondly, this meant that the pupil did not have a mark in the space reserved for ‘religious/ethics’ in his school reports.

The Court held that the fact that the school failed to provide an alternative class in ethics, and consequently a mark for that subject constituted a violation of Article 9 taken in conjunction with Article 14 of the Convention. Firstly, the Court considered that “the absence of a mark for ‘religion/ethics’ would be understood by any reasonable person as an indication that the third applicant [the pupil] did not follow religious education classes, which were widely available, and that he was thus likely to be regarded as a person without religious beliefs.” Moreover, according to the Helsinki Foundation for Human Rights, statistical data showed that there was a huge disparity between the availability of classes in religious education and classes in ethics.

The Court concluded that, by effectively stigmatizing those students who did not have a mark in the ‘religious/ethics’ subject, the State did not comply with the right of citizens to keep personal religious or philosophical beliefs private.

Secondly, the Court observed that, in 2007, the amended Ordinance of the Minister of Education had entered into force, which meant that the mark in religious education or ethics would be included in the calculation of the ‘average mark’ obtained by the pupil at the end of each school year. In this respect, the Court observed that the above rule could adversely affect students, like the applicant, who could not attend ethics classes. For those reasons it concluded that:

The Court is not persuaded by the Government’s submissions to the effect that the absence of a mark for ‘religion/ethics’ is entirely neutral and simply reflects the fact of following or not following a class in religious education or in ethics. This argument is further undermined by the fact that on the third applicant’s primary school leaving certificate there was a straight line and the word ‘ethics’ was crossed out. The message conveyed by such a document is unambiguous and anything but neutral: the ethics class was not available as an optional subject to the third applicant and he chose not to attend religion class.

393 Grzelak, §95.
394 See also Grzelak, §72: As indicated by the Polish Ministry of Education, during the school year 2006-2007, 27,500 schools out of 32,136 organized classes in religious education while only 334 schools provided classes in ethics. The reason for this disparity was the small percentage of pupils who asked for ethics classes. Therefore it was frequently the case that the minimum number of seven pupils per class for inter-class instruction in ethics, as provided in the Ordinance of the Minister of Education in 1992, was not reached.
395 Ibid., §97.
In the second part of its judgment, the ECtHR rejected the applicant’s complaint that the school’s refusal to arrange classes in ethics breached the parents’ rights under Article 2 of the First Protocol of the Convention. With respect to this point, the Court found this case very different from Folgerø in a number of ways. In particular, the Court pointed out that neither religious education nor ethics were mandatory subjects in Polish schools, and observed that

It remains, in principle, within the national margin of appreciation left to the States under Article 2 of Protocol No. 1 to decide whether to provide religious instruction in public schools and, if so, what particular system of instruction should be adopted. The only limit which must not be exceeded in this area is the prohibition of indoctrination.\footnote{Ibid., §104.}

As Peter Cumper has pointed out, from the analysis of this case it is possible to make at least five observations, which suggest a new direction in the jurisprudence of the Court on the religious education issue.

First, “there is no specific obligation upon States to provide alternative or equivalent lessons to children withdrawn from RE classes under Art 2 P.1. The ECtHR has made clear that States retain a wide margin of appreciation in this regard and, even where there have been requests for such lessons, a potentially low take-up rate obviates any obligation on the part of States in this regard.”\footnote{P. Cumper, Religious Education in Europe in the Twenty-First Century, in ed. M. Hunter-Henin Law, Religious Freedoms and Education in Europe (Farnham: Ashgate, 2011), p. 217.} This consideration was made in Grzelak when the Court gave less weight to the fact that ethics, as an alternative subject to religious education, was taught only in 1.03% of Polish schools.

Second, the Court, ruling that the absence of mark in ‘religion/ethics’ violates Article 9 in conjunction with Article 14, seems to impose more rigorous obligations to those articles instead of Article 2 of the First Protocol. In fact, in this case, the right to education remains in the background.

Third, “in States where there is a particularly close correlation between the majority of faith and the nation’s identity, the State should take into account of the needs of minority faith pupils who have been withdrawn by parents from RE lessons.”\footnote{Ibid., p. 218.} In fact, in Grzelak, the ECtHR gave particular weight to the absence of a mark in religion and ethics because in a
country, such as Poland, where the great majority of the population belongs to the Christian faith, the absence of such a mark has a clear meaning.

Fourth, “the parental opt out in the field of RE may have certain resource implications for States, because additional rooms and staff must be available to teach (or supervise at the very least) affected pupils for the duration of the lessons on religion.” It is clear that the States now have onerous related obligations under the Convention.

Finally, Cumper underlines the fact that, sooner or later, the continent’s political leaders will have to decide how Europe’s schools – largely focused on Christianity when teaching religious education – will respond to increasing religious diversity and the growing influence of secularism. In this respect,

the ECtHR will almost certainly be called upon to adjudicate between parties and, in so doing, the temptation may be to continue to grant States a wide margin of appreciation – not least because there is little common ground between them in the provision of RE in schools. Of course, the fear of displeasing powerful political and ecclesiastical forces may lead to judicial caution and restrain. Thus, it is hard to predict the extent to which the ECtHR will influence the decision-making process in the field of religious education in Europe in the years ahead.

Coming to the last decision delivered by the ECtHR on this topic, we will see how much the Court can stretch the margin appreciation doctrine.

In the decision of admissibility in Appel-Irrgang and Others v. Germany, the applicants, a Protestant couple and their daughter, challenged the requirement of Berlin state schools that pupils must attend a compulsory course in ethics, since they believed it was against their religious belief. The national authorities dismissed their appeal. In particular, the Federal Constitutional Court concluded that engaging with ethical issues, fundamental rules of morality and fundamental rights was a necessary foundation for civil coexistence. Moreover, the ethics class taught students “the main values and ideas that had shaped western culture, particularly the Enlightenment and Humanism. Its aim was to encourage debate and discussion among students of the ideas that permeated philosophy, culture, religion and ideological opinions.” In addition, teachers were not allowed to unduly influence their pupils. Given that, the Court of Strasbourg found that all these requirements conformed to the

399 Ibid., p. 218.
400 Ibid., p. 223.
401 Appel-Irrgang, §5.
principles of pluralism and objectiveness enshrined by Article 2 of the First Protocol. Nor did the requirement to attend ethics classes violate that Article, since

...the Berlin’s legislature’s view that the stated objectives would be better achieved through one common compulsory class rather than separating pupils on the basis of which religious or philosophical groups they belong to or addressing the subject of ethics during other classes falls within the State’s margin of appreciation and is a question of expediency which, in principle, it is not for the Court to review.²⁰²

This view risks missing the point highlighted by the parents, which was that, by failing to take into account the historical position of Christianity, the claim of the objectivity and neutrality of the course had been undermined.

On this point, it is interesting to look briefly at the reasoning of Lebel J in a similar case delivered in 2012 by the Supreme Court of Canada, where two Christian parents claimed that the mandatory Ethics and Religious Culture (ERC) Program in Québec schools could harm their duty to pass on their faith to their children.⁴⁰³ Examining the content and the aim of that program, he proposed these questions in order to understand whether this program amounted to indoctrination on State’s part:

[...] is it a program that will provide all students with better knowledge of society’s diversity and teach them to be open to differences? Or is it an educational tool designed to get religion out of children’s heads by taking an essentially agnostic or atheistic approach that denies any theoretical validity to the religious experience and religious values? Is the program consistent with the notion of secularism that has gradually been developed in constitutional cases, particularly in the field of education?⁴⁰⁴

Lebel J argued that the answers to these questions could not come only from a subjective perception of the Program’s impact. Rather, he argued, it was also necessary (but clearly not easy) to assess the Program’s concrete impact in the everyday workings of Québec public school’s system. This is because the means employed to achieve a certain goal can seem appropriate in theory, but may ultimately fail in practice.

This Canadian case, and, in particular, these four decisions delivered by the ECtHR make a confused and inconsistent picture. As Leight argues, while the Court has consistently stressed the State’s margin of appreciation under Article 2 of the First Protocol, in practice

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²⁰² Ibid., §11.
⁴⁰⁴ Ibid., §53.
this is more clearly seen in Appel-Irrgang and Others v. Germany and in Grzelak v. Poland than in Folgerø and Others v. Norway and Zengin v. Turkey. Moreover, the first two judgments suggest that the opt-out provisions are not necessarily required in order to grant an equality of attention to different religions, although “comparing Folgerø and Appel-Irrgang one could easily conclude that the state which takes this route will face less strict scrutiny.”

4.2. Compulsory Sex Education Classes in State Schools: Denmark and Germany on Trial

Sex education is not mandatory in every European country, and a wide variety of teaching methods are employed throughout Europe. Typically it is taught in the context of Biology lessons, and in perhaps one other area of the school curriculum. For instance, in Belgium, biological aspects are covered in Biology lessons, and moral and ethical issues are addressed in religion and moral philosophy classes. In France, sex education is mainly incorporated into Health Education, but occasionally in Citizenship. In the majority of the European countries, parents have the right to withdraw their children from sex education to avoid clashes between their religious view and what may be taught regarding this very sensitive topic. But when sex education is compulsory, such as in the Netherlands, Norway, Denmark, Germany etc., the main issue is to reconcile it with the different religious and philosophical views held by parents, in order to avoid undesirable interferences.

Since the Convention has entered into force, two cases have been brought before the ECHR regarding this issue. The first is the well-known case of Kjeldsen, Busk Madsen and Pedersen v. Denmark, which was arbitrated in 1979. Over 30 years later, the second case regarded the decision on the admissibility of Dojan and Others v. Germany in 2011.

Let’s start with the analysis of the Danish case. In this case, the applicants were three Christian couples with children of school age. These families lodged applications with the European Commission on Human Rights in 1971, claiming that compulsory sex education in

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State primary schools violated Article 2 of the First Protocol of the ECHR and that the alternative of private schooling was insufficient to fulfill the obligations under this Article.

Sex education has been part of the Danish school system since the early 1900s, when it was introduced under the topic of Hygiene. In 1960, the Curriculum Committee made a clear distinction between instruction on the reproduction of man, which was integrated in the biology syllabus, and sex education, which remained optional for children and teachers. Ten years later the Committee, after having examined the pressing issue of an increasing number of unwanted pregnancies, suggested making sex education a compulsory subject in the curriculum for State schools. Thus, in March 1970, the Minister of Education proposed an amendment to the State School Act introducing this new provision. The provision passed among great debate. After it was passed, a new guide to sex education in State schools replaced the older one, defining the manner and the scope of sex education. The Guide suggested an instruction method centred on informal talks between teachers and children on the basis of pupils’ questions. It also emphasized that this teaching should be respectful of child’s right to adhere to his own conceptions to the extent that the discussion could touch ethical and moral issues connected to sexual life. The Guide recommended that teachers adopt an objective attitude using proper language and avoiding detailed technical explanations. However, according to the applicants, it was impossible to offer value neutral sexual education because, unlike biology, it was related to moral and ethical issues.

While this new provision applied to all State schools, private schools were free to decide to what extent they wanted to align their teaching in this field with those new rules. Moreover, the State supports private schools financially, subsidizing up to 85% of their running costs. The applicants found there were insufficient private schools, their children had to travel long distances to attend them, and the educational quality could be inferior of that of state schools.

In light of this context, the Commission concluded that the aim of making sex education a compulsory subject in the State schools, which was for students to learn “to take

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406 Kjeldsen, § 28: In the first to fourth years instruction begins with the concept of the family and then moves on to the difference between the sexes, conception, birth and development of the child, family planning, relations with adults whom the children do not know and puberty.

The list of subjects suggested for the fifth to seventh years includes the sexual organs, puberty, hormones, heredity, sexual activities (masturbation, intercourse, orgasm), fertilization, methods of contraception, venereal diseases, sexual deviations (in particular homosexuality) and pornography.

The teaching given in the eighth to tenth years returns to the matters touched on during the previous years but puts the accent on the ethical, social and family aspects of sexual life. The Guide mentions sexual ethics and sexual morals; different views on sexual life before marriage; sexual and marital problems in the light of different religious and political viewpoints; the role of the sexes; love, sex and faithfulness in marriage; divorce, etc.
care of themselves and show consideration of others in that respect” and “not…[to] land themselves or others in difficulties solely on account of lack of knowledge,” and the means adopted did not breach Article 2 of the First Protocol. In fact, the features of this educational arrangement “in no way amounts to an attempt at indoctrination aimed at advocating a specific kind of sexual behavior. […] Further, it does not affect the right of parents to enlighten and advise their children, to exercise with regard to their children natural parental functions as educators, or guide their children on a path in line with the parents’ own religious or philosophical convictions.”

However, as Meredith points out, “the Court recognized the tenuous foundation on which the Danish case rested, and the apparent contradiction in that part of its defence which provided for alternative private schooling – an unnecessary provision if state school sex education could be, and was, everywhere truly ‘objective’ and ‘factual.’”

At its base, the provision which made sex education compulsory in State schools, was founded on two main points: firstly, a detailed methodology for classroom practice, which revolved around the ‘neutrality’ principle; and, secondly, a defined form of education through the ‘factuality’ principle. On this point, the analysis of the Kjeldsen case has shown how these two principles can have paradoxical consequences.

Firstly, the ‘neutrality’ principle was intended to reassure parents that they would continue to have full jurisdiction over the moral guidance of their children in matters of sexuality. In theory, this principle is untenable – as some member of the European Commission took steps to point out […]. The provision of factual information about subject permeated with moral issues charges this very information with a moral message.

Secondly, in practice, teachers’ efforts to conform with the ‘neutrality’ principle has made Danish sex education the most liberal in the world because it is not perceived as the teacher’s primary task to offer moral guidance in a particular direction; this being a job of the parent. As a result Danish sex education might be viewed by its European neighbors as excessively amoral, which is not what is intended.

That said, the ECtHR made reasoned similarly, declaring inadmissible the applicants’ claim in Dojan and Others v. Germany.

In this case, the applicants were five German couples who belonged to the Christian Evangelical Baptist Church, and whose children attended the same State primary school. In

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407 Section 1 of the Executive Order of 15 June 1972.
408 Kjeldsen, §54.
410 Ibid., p. 134.
2005, the Dojan and Frölich parents requested that their children be exempted from mandatory sex education classes because the image of sexuality offered by the school was inconsistent with their religious and moral beliefs. Since the school refused any exemption, after the first two lessons those parents decided to keep their children from school for the next week, and, for this reason, they were fined 75 (EUR) each. Furthermore, in 2007 the Dojan parents kept their daughter from school in order to avoid sex education classes, and the related theatre workshop entitled “My body is mine” and they were fined 120 (EUR). In addition, Eduard and Rita Wiens and Heinrich and Irene Wiens prevented their children from attending the same workshop. Eduard and Rita Wiens and Artur and Anna Wiens further prevented their respective children from attending the school carnival, as they believed that this was also incompatible with their religious convictions. As a result of those school absences, they all received proportionate fines. Three couples continued to withdraw their children from school events, and were subjected to increased fines, which they did not pay; therefore all six parents were sentenced to roughly a month of imprisonment.

All couples alleged a violation of Article 2 of the First Protocol, as well as Article 8 and 9 of the ECHR. They also argued that, in breach of Article 14, they had been discriminated against in relation to others who had different religious and philosophical beliefs, in particular in relation to Muslim families who were permitted to opt out of sex education classes on the grounds of their religious belief.

According to section 33 of the Schools Act of the Federal Land to whom these couples belonged,

sexual education in school complements sexual education by a child’s parents. Its aim is to provide pupils with knowledge of biological, ethical, social and cultural aspects of sexuality according to their age and maturity in order to enable them to develop their own moral views and an independent approach towards their own sexuality. Sexual education should encourage tolerance between human beings irrespective of their sexual orientation and identity.411

With respect to this question, the Court of Strasbourg found that it was up to the State to determine how to conceive sex education because, in light of Article 2 of the First Protocol and the Kjeldsen case, on this issue national authorities have a wide margin of appreciation. Moreover, there are many subjects other than sex education, which can have, to a greater or lesser extent, philosophical complications or implications.

411 Dojan and Others v. Germany, Application no. 319/08, §10.
Looking also at the instant case, the Court pointed out first, that the aim of sex education classes was “the neutral transmission of knowledge regarding procreation, contraception, pregnancy and child birth [...] which were based on current scientific and educational standards.”

Second, the goal of the theatre workshop “My body is mine” was to prevent sexual violence and abuse of children making pupils aware of dangerous adult behaviors towards them. Finally, regarding the carnival celebrations at issue, the Court observed that they were not commixedtured with religious activities and, moreover, that pupils had the possibility of attending alternative activities in order to accommodate their religious and philosophical beliefs.

Given that, the Court observed that all these activities were consonant with the principles of pluralism and objectivity embodied in Article 2 of the First Protocol; moreover, the means applied by the national authorities to ensure children’s attendance at school, together with the means of enforcement of fines, were considered neither excessive nor determined in an arbitrary manner.

No separate issues arose under the other submissions made by the applicants. In particular, the allegations of religious discrimination as compared to Muslim families had not been subjected to domestic proceedings, since domestic remedies had not been exhausted in this respect.

This case was quite controversial, despite the fact that it few debates arose in the media, and little interest was generated among legal scholars. Yet this case shows first of all, as in Kjeldsen, how the criteria of ‘neutrality’ and ‘factuality/objectivity’ can be inconsistent when moral and ethical issues are at stake. It is true that every school subject has the possibility of leading to debates on sensitive matters because teachers can have different views on these topics. However, it is also true that there are subjects, such as sex education, which are very far from being ‘neutral.’

Second, it should be remembered that the Court did not take into account the fact that Muslim pupils could be exempted from sex education classes using as escamotage the fact that the applicants did not make any complain on this point before the national courts. However, it is self-evident that the mere presence of a opt out policy reveals the conflict present in the relationship between sexual teaching and parents’ right to educate their children according to their religious and philosophical beliefs.

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412 Ibid., §14.
Finally, the parents’ imprisonment for almost a month because they did not want to pay fines for their children’s school absences could seem quite exaggerated.

As Leigh argues, this case attempts to support the ideal of religious neutrality as equidistance from all creeds (but remember the opt out policy for Muslim pupils), yet this attempt sometimes leads to grotesque conclusions:

The conventional approach, based on equal respect, which emphasized the margin of appreciation, the absence of a single European model and toleration of differences provided religious freedom was not de facto impeded, seemed for a time to be out of fashion. In its place there emerged an increased emphasis on neutrality entailing geometrical equi-distance of the state from all religions – a preference for a particular secular-state model in other words.\textsuperscript{413}

4.3. The Presence of Crucifixes on the Walls of Italian Classrooms: A Human Rights Challenge

If the Court is to retain legitimacy and respect in the eyes of all Europe’s citizens, who hold diverse religious and secular faiths, its pronouncements on religious matters need to be considerably more literate in handling delicate religious and philosophical issues, than some past cases would suggest. With respect to this problem, the well-known case \textit{Lausti v. Italy}, with its two judgments delivered by the Second Section of the ECtHR and, later, reversed by the Grand Chamber (GC) has taken a promising first step, which may turn out to be a watershed in the jurisprudence.

That seminal judgment dealt with a number of major systemic issues, such as the application of the margin of appreciation doctrine, the relationship between secularism (Italian \textit{laicità}) and neutrality in the educational field, and whether perpetuating national traditions necessarily discriminated against minority religions or philosophical beliefs.

In order to analyze the instant case, it is necessary to look briefly at the protection of freedom of religion and the principle of \textit{laicità} in the Italian legal and historical framework.

Within the Italian Constitution there are six Articles which address the issue of religious freedom and regulate Church-State relationships.

\textsuperscript{413} I. Leigh, \textit{The ECtHR and Religious Neutrality}..., p. 62.
Both Article 2⁴¹⁴ and ³⁴¹⁵ affirm the principles of equality and non-discrimination on the basis of religious principles. Article 7 addresses the relationship between the State and the Catholic Church stating that these “are independent and sovereign, each within its own sphere” and “[t]heir relations are regulated by the Lateran pacts.” Article 8 declares the equal freedom of all religious denomination before the law, and “the right to self-organization according to their own statutes, provided these do not conflict with Italian law.” Article 19 guarantees the freedom of worship both individually and collectively but only in accordance with the public morality. Finally, Article 20 points out that “[n]o special limitation or tax burden may be imposed on the establishment, legal capacity or activities of any organization on the ground of its religious nature or its religious or confessional aims.”

Regarding the principle of laicità, there is no specific provision clearly and explicitly establishing such a principle, as in the French and Turkish Constitutions. At the same time, however, its connotation emerges from a combined interpretation of the above Articles; moreover in these years, the Constitutional Court, through its judgments, has identified that principle as a fundamental one. According to the Italian Constitutional Court, “the principle of laicità does not involve indifference towards religion; on the contrary, it promotes a positive attitude towards all religious denominations.”⁴¹⁶ In fact, the Constitutional Court guarantees that, through this principle, the State must protect “the freedom of religion in a context of confessional and cultural pluralism”⁴¹⁷ and, consequently, it implies “equidistance and impartiality of the law before all religions.”⁴¹⁸ Moreover, the State cannot use the religion and its moral obligations as means to achieve its own goals.⁴¹⁹

In light of this, it is important to note that Italy is not a confessional State because there is no State religion. On the one hand, as stated by Article 7 of the Constitution, the relationship with the Holy See is regulated by the Lateran Pacts, an international treaty that establishes a privileged status to the Roman Catholic Church. On the other hand, as provided

⁴¹⁴ Article 2 of the Italian Constitution:
The Republic recognises and guarantees the inviolable rights of the person, both as individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled.

⁴¹⁵ Article 3 of the Italian Constitution:
All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions.
It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom of equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country.


⁴¹⁸ Case No. 508/2000 Constitutional Court, §3. (Emphasis added, my translation).

⁴¹⁹ See also case No. 334/1996 Constitutional Court, §3.2.
by Article 8, other religious denominations have the right to self-organize, and their representatives can make specific agreements *(intese)* with the Italian government.  

The Lateran Pacts were signed in 1929 for King Vittorio Emanuele III of Italy by Benito Mussolini and for Pope Pius XI by Pietro Gasparri, Cardinal Secretary of the Holy See. At that time, they confirmed Roman Catholicism as Italy’s only official religion. For this reason, during the Italian Constitution’s preparatory works, and after the end of the Second World War, there was a long debate between the right and the left wings about mentioning the Lateran Pacts in its articles. In the end, the Lateran Pacts were introduced thanks in large part to an agreement with the Communist Party. The goal of their inclusion was to protect their legal nature from any political and ideological polemics, and to respect the religious view of the majority of the population. In 1985, an amendment to the Lateran Pacts was ratified. Its effect was that Catholicism was no longer considered the only official religion and, as a result, teaching the Catholic faith in primary and secondary schools became optional.  

Since that revision, the issue of displaying the crucifix in public buildings such as schools, hospitals and law-courts has become controversial and the subject of much debate. In 2000, the Court of Cassation, ruled against the presence of the crucifix in polling stations. In 2002, through the well-known *Lautsi* case, the Italian government had to address the fact that some parents objected to the presence of the crucifix in the classrooms of a primary state school attended by their children. In 2007, the Ministry of Education sent a letter to all schools, recommending that they not remove the crucifix from the classrooms.  

Before moving to the analysis of the *Lautsi* case, we will first examine the relevant domestic law in regards to the obligation to display the cross in classrooms. This duty predated the unification of Italy.\(^{420}\) Afterwards, during the Fascism, it was enforced by Article 118 of Royal Decree no 965 of 30 April 1924 (Rules of the Kingdom’s secondary schools) which reads: “Each school must have the national flag and each classroom a crucifix and the King’s portrait.”\(^{421}\) In addition, Article 119 of Royal Decree no. 1297 of 26 April 1928 (Approval of the general rules governing primary education services) lists crucifixes among the “necessary equipment and material on school classrooms.”\(^{422}\) According to the national courts, these two provisions are still in force because they do not conflict with the core principles of the Italian Constitution, which was adopted in 1948.

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\(^{420}\) In fact Article 140 of the Kingdom of Piedemont-Sardinia’s Royal Decree no. 4336 of 15 September 1860 required “each school without fail [to] be equipped […] with a crucifix”.

\(^{421}\) See also *Lautsi v. Italy*, Application No. 30814/06, Second Section, §20.

4.3.1. The Lautsi Case: From the National Jurisdiction to the Chamber of the ECtHR

At the start of the case, Mrs Soile Lautsi, a Finnish-born Italian national, lived in Italy with her eleven and thirteen years old sons, Dataico and Sami Albertin. During the 2001-2002 school year, her children attended the Istituto comprensivo statale Vittorio da Feltre, a State school in Abano Terme, in the province of Padua. A crucifix was displayed in both her sons’ classrooms. The applicant considered that this practice to be contrary to the principle of secularism with which she wished to bring up her children. Hence she brought her claim before the school board on April 22, 2002, pointing out that the Court of Cassation, in Judgment no. 4273 of March 1, 2000, had ruled against the presence of the crucifix in polling stations because it was contrary to the principle of secularism embraced by the State.

The school’s governors nevertheless decided to leave the crucifixes in all the classrooms. Since the display of the crucifix is regulated by administrative acts, the only Italian judicial authorities competent to void them are administrative courts, which are different from ordinary courts (i.e. civil and criminal). The applicant then challenged this decision in the Veneto Regional Administrative Court, alleging a violation of the principle of secularism protected by Articles 3 and 19 of the Constitution and Article 9 of the ECHR and a violation of Article 97 of the Constitution (impartiality of the Public Administration). This Court admitted the practice, and in January 2004 referred it to the Constitutional Court. The Constitutional Court delivered its decision no. 389 of December 15, 2004, without ruling on the merits and declaring the question put to be manifestly ill-founded because it can only decide disputes concerning the constitutionality of laws and acts with the force of law, and not administrative acts, such as the Royal Decrees on classroom furnishings.423

The decision of the Regional Administrative Tribunal (TAR), which was subsequently agreed by the High Administrative Court, examining the symbolic meaning of the crucifix found that

In the current social reality, the crucifix should be considered not only as a symbol of cultural and historical evolution, and therefore of the identity of our people, but also as a symbol of a system of values such as freedom, equality, human dignity and religious tolerance and also of the principle of laicità. These are the core principles of our

423 Ibid., §26.
Constitution. In other words, the Constitutional principles of freedom have many roots, and one of these is undoubtedly Christianity, in its very essence. Hence it would be paradoxical to subtly exclude a Christian symbol from a public building in the name of the *laicità*, which has one of its own distant roots in the Christian religion.\footnote{Decision no. 1110/2005, §11.9 (my translation).}

Given that, in March 2005, the TAR dismissed Mrs Lautsi’s complaint and the High Administrative Court rejected her appeal. She then brought her case before the *Consiglio di Stato* and in February 2006 it dismissed her appeal on roughly the same ground as that of the previous judgments.

At that point, the applicant went before the European Court, complaining that the display of the crucifix in the State school attended by her children was in breach of both Articles 9 and Article 2 of the First Protocol of the ECHR. In particular, she argued that “the situation she complained of, among other consequences, led to pressure being undeniably exerted on minors and the impression given that the State was estranged from those who did not share Christian beliefs. The concept of secularism required the State to be neutral and keep an equal distance from all religions, as it should not be perceived as being closer to some citizens than to others.”\footnote{Lautsi, Chamber of the Second Section, §32.}

Conversely, the Italian government insisted on three points. Firstly, the meaning of the cross was of course religious, but could also have other connotations. In fact, it argued that the cross “evoked principles that could be shared outside Christian faith (non-violence, the equal dignity of all human beings, justice and sharing, the primacy of the individual over the group and the importance of freedom of choice, the separation of politics from religion, and love of one’s neighbor extending to forgiveness of one’s enemies).”\footnote{Ibid., §35.} Hence, the message of the cross could be read independently of its religious dimension, as it embodied the set of principles and values at the ground of all democracies. Secondly, according to the government, the display of the cross did not imply any sort of religious gesture. Hence neither the freedom of parents to bring up their children according to their personal beliefs, nor secular and pluralistic education in Italy were undermined. Finally, “there was no
European consensus on the way to interpret the concept of secularism in practice, so that States had a wider margin of appreciation in the matter.”

The Chamber of the Second Section only directly addressed two of the three issues described above. Analyzing the meaning of the crucifixes in the classrooms, the Court emphasized that the religious connotation of crucifixes was really predominant to other meanings. For this reason, “in the context of public education they are necessarily perceived as an integral part of the school environment and may therefore be considered ‘powerful external symbols.’” This definition was borrowed from the judgment in the Dahlab case, in which the Muslim headscarf was considered in the same way. However, in that circumstance, as well as in this one, the Court did not give any criteria for classifying these ‘powerful symbols.’ The Court therefore found that the presence of the crucifix indicated a kind of indoctrination towards young pupils, favoring only Catholic religion and, therefore, infringing the Article 2 of the Protocol No. 1, taken together with the Article 9 of the Convention. On this point, Mancini supports the Court’s decision arguing that

[...] [t]he obligatory display of the crucifix in elementary schools violates the principle of secularism, because it suggests that schools favour the religion of the majority. [...] Citizens are not homogeneous; they hold different convictions, therefore the government does not treat them as equals if it favours one conviction on the ground that it is supported by the most powerful group. To identify a state with the religious culture and civilization of the majority, even in a highly homogeneous state, produces the exclusion of minorities and individuals belonging to other religions or cultures which must forcibly be represented by a symbol that is not in line with their identity and culture.

In light of this argumentation certain questions arise. Is it possible to affirm that removing the crucifixes from the wall of the classrooms will better represent all creeds? Can one apply this reasoning to the Dahlab case, where the protection of a person belonging to a minor creed is at stake?

Finally, the Court did not invoke the margin of appreciation doctrine and its applicability to the instant case, because it had already showed that the presence of the cross in the school breached the Article 9 (the State permitting the display of the cross in public schools had infringed its duty of impartiality towards all religions) and Article 2 of Protocol No. 1 (the State had been found guilty of pupils’ indoctrination). The Court added that it

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427 Ibid., §42.
428 Ibid., §54.
“[could] not see how the display in the state-school classrooms of a symbol that is reasonable to associate with Catholicism (the majority religion in Italy) could serve the educational pluralism which is essential for the preservation of ‘democratic society’ within the Convention meaning of that term.” The fact that the Court did not deal at all with the relation between the presence of the crucifix in the classrooms and the Italian cultural and historical tradition raises a further question: is it possible that the display of the cross in the state schools might enable children to understand the national community into which they were expected to integrate?

4.3.2. The Grand Chamber’s Corrections

The decision by the Chamber was met with protests both in Italy and abroad. The Italian Minister of Education condemned the judgment, declaring that no one could succeed in rubbing out Italian identity. Moreover, twenty-one out of forty-seven members of the Council of Europe openly criticized the ruling, and an exceptional number of ‘third parties’ was heard before the Grand Chamber.

On January 28, 2010, the Italian Government requested that the case be referred to the GC of the ECtHR for a rehearing. During a panel of five judges, on March 1-2, 2010, the Court quickly accepted that request. The hearing took place in Strasbourg on June 30, 2010, and the new judgment was delivered on March 18, 2011.

Essentially the GC, by fifteen votes to two, overruled the previous judgment, stating that the presence of crucifixes in the state school classrooms attended by Mrs Lautsi’s children did not breach the right of parents to ensure an education in conformity of their own religious and philosophical views, as protected by Article 2 of Protocol No. 1. The GC further considered that no separate issue arose under Article 9 of the Convention.

We will now examine the reasoning of the GC.

First of all, as Evans argues,

what the Chamber conspicuously failed to do was to consider whether the religious ‘marking’ of the educational environment meant that those being educated within it are or are not receiving an education which has regard for the religious or philosophical beliefs of the parent, which is what Article 2 of the First Protocol requires of the State. The mere

430 Lautsi, Chamber of the Second Section, §56. Emphasis added.
presence of such religious marking may have such an effect, and they may be an inhibiting factor, but the presence of a religious symbol does not in and of itself convert a balanced education into a religiously biased one.\textsuperscript{431}

On this point, the Government pointed out that the Chamber had not properly shown how the presence of a cross in the classroom could affect parents’ right to bring up their children in accordance with their philosophical beliefs. Of course, the GC found that Mrs Lautsi could regard the presence of the crucifix as a sign of the State’s indifference to her right to ensure that her children’s education conformed to her own philosophical convictions. However, the Court also observed that “the applicant’s subjective perception is not in itself sufficient to establish a breach of Article 2 of Protocol No.1.”\textsuperscript{432} In addition, “the applicants did not assert that the presence of the crucifix in classrooms had encourage the development of teaching practices with a proselytizing tendency, or claim that […] [her children] had ever experienced a tendentious reference to that presence by a teacher in the exercise of his or her functions.”\textsuperscript{433} With this judgment, the focus was placed on substance, rather than appearance.

Second, the GC stated that the crucifix had an evident religious connotation that stood out from other meanings but held that “the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State.”\textsuperscript{434} Clearly the application of that doctrine must be counterbalanced by the Council of Europe’s supervision, and, in the instant case, the Second Section had to demonstrate that the presence of the cross in the classrooms amounted to a form of indoctrination.

On this point, the Court referred, mutatis mutandis, to Folgerø and Others v. Norway and Hasan and Eylem Zengin v. Turkey. In the first case, where the Court examined the content of ‘Christianity, religion and philosophy’ lessons, the fact that the syllabus gave priority to Christian religion among others could not be viewed in itself as a departure from the principles of pluralism and objectivity amounting to indoctrination. Moreover, the planning and selecting of school curricula fell within the margin of appreciation of the State, and, in that case, the place of Christianity in Norwegian history had significant weight. In Zengin, the Court took the same approach, stating that, since Islam was the majority religion in Turkey, ‘religious culture and ethics’ classes could give more prominence to knowledge of

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\textsuperscript{432} Lautsi, Grand Chamber, §66.
\textsuperscript{433} Ibid., §75.
\textsuperscript{434} Ibid., §68.
\end{flushright}
Islam. However the Court observed that in both circumstances the government’s conduct was seen as coercive. Because there were no effective opt out provisions, the government was forcing every student to engage in activities mandated by its curriculum, regardless of the objections of students or their parents. For this reason, and not because one religion was predominant, the Court found a violation of Article 2 of the Protocol No.1.

Finally, the GC in Lautsi II pointed out that the cross, unlike a lesson, was a ‘passive symbol.’ For this reason, it is not comparable to a religious activity imposed on all pupils. Article 2, Protocol No. 1 cannot in fairness be read to limit the Government’s ability to display non-verbal symbols. On this point, the reasoning of the Court in the Kjeldsen case is extremely clear. It is required of the States that the information or knowledge in school curricula be conveyed in an objective, critical and pluralistic manner. With this understanding, does the passive display of the crucifix in classrooms limit pluralism and dialogue? As Weiler clearly showed in his intervention before the GC, in the Lautsi case silencing the government’s speech would likely make the school environment less pluralistic, and not more.

Also in Zengin, the Court stated that in a pluralistic State both majority and minority religious views could enjoy protection, and the restriction of either of those could undermine pluralism.

Moreover, Italy has always allowed students to wear religious symbols in school, including the Islamic headscarf and other visible symbols with a clear religious connotation. Thus, according to the Grand Chamber, Italy did not exceed the limits of the margin of appreciation left to the respondent States.

4.4. Is the Naked Wall the Best Expression of the Neutrality of the State?

In general terms, the ECtHR’s approach to religious symbols within the educational environment continues to oscillate. On the one hand, it often focuses on the overall school system provided by the State in light of its cultural and historical tradition. On the other hand,

it also tends to focus on the impact, which the presence of religious symbols might have on the perception of the impartiality of the State towards different religions and philosophical beliefs.

With this in mind, we now return to the questions suggested by the *Lautsi* case: “Is the presence of the crucifix interfering with the right to education of children? Is it interfering with the philosophical and religious convictions of their parents? And, more importantly, is the presence of the crucifix preventing the creation of a more tolerant environment?”

The answer of the Italian government to these questions before the GC was founded on a critique of the Second Section’s reasoning regarding the meaning of ‘State neutrality.’

The Government […] criticized the Chamber’s judgment for deriving from the concept of confessional ‘neutrality’ a principle excluding any relations between the State and a particular religion, whereas neutrality required the public administrative authorities to take all religions into account. The judgment was accordingly based on confusion between ‘neutrality’ (an ‘inclusive concept’) and ‘secularism’ (an ‘exclusive concept’). Moreover, in the Government’s view, neutrality meant that States should refrain from promoting not only a particular religion but also atheism, ‘secularism’ on the State’s part being no less problematic than proselytism by the State.

In addition, the Governments of Armenia, Bulgaria, Cyprus, the Russian Federation, Greece, Lithuania, Malta, and the Republic of San Marino, as third-party interveners, indicated in their collective view that the Chamber’s reasoning had been based on a misunderstanding of the concept of ‘neutrality,’ which had been confused with ‘secularism.’ Joseph Weiler, Professor of Law at New York University, presented the third-party arguments before the GC’s public hearing.

Weiler’s analysis is interesting and cogent. It shows that choosing a side – in this case either the naked wall or the crucifix affixed to it – is never a neutral decision.

His discussion is articulated along three main lines, which reflect three legal principles he drew from the case. The first principle says that the ECHR guarantees to individuals both the freedom of religion and the freedom from religion. According to the second, the school system has to be set up in order to ensure that students are taught tolerance and pluralism. The second principle refers to the Chamber’s definition of the State’s duty of

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437 *Lautsi*, Grand Chamber, §34.
neutrality, which states that “[this duty] is incompatible with any kind of power on its part to assess the legitimacy of religious convictions or the ways of expressing those convictions.”

Weiler criticized this definition of neutrality, and, therefore also the decision of the Second Section, through eloquent reasoning which touched on the legal principles mentioned above. In regards to the first principle, he added that the positive and negative freedoms of religion needed to be counterbalanced by the place given to religion by member states in accordance with their respective historical and cultural traditions. In fact, on one side there are States in which the strict separation of church and State is a core principle. For example, in France, laïcité is a principle of the French Constitution. In such cases, this separation of church and state indicates that religion is only a private matter. On the opposite side, there are countries that have a history of established State churches, such as England, where the Head of the State is also the Head of the Church. Clearly there is a great diversity of State-Church relationships across Europe and the ECtHR’s task is to supervise, and not impose, a specific model.

Regarding the second legal principle, Weiler argues that “the Court was right to emphasize that the Convention provisions in question should be interpreted in the light of the objective of educating towards a democracy which instills the values of pluralism and tolerance. […] We may, too, accept its ruling that in the classroom the Crucifix may have a plurality of meanings, but its predominant one is religious.”

According to Weiler, the Chamber translated the message of tolerance towards others into a message of intolerance towards one’s own identity. In fact, he maintained that the Chamber had embraced the values of laïcité and secularity, as they were ‘neutral’ categories, concluding that a sharp separation between Church and State could be the only solution capable of supporting Mrs Lautsi’s right to bring up her children in accordance with her philosophical views. Weiler’s parable of Marco and Leonardo, two pupils who are both challenged by the presence of the crucifix at school, is an attempt to show the potential educational consequences of that position. This parable shows that the presence of the cross, as a powerful and eloquent symbol, can provoke reactions both in people who are strong believers and in people who profess themselves to be atheists. For instance, Marco, who comes from a Catholic family, may look at the cross on the wall of his classroom and think that the classroom is very similar to his home. Simultaneously Leonardo, whose family is not

438 Lautsi, Second Section, §47.
Christian, can see a clear difference between school and his home. The same could happen if there was a naked wall instead of a crucifix.

As Weiler argues,

[...] there is something noble and educationally challenging in having all kids in the same public school and learning to respect each other in the rich diversity which characterizes our societies. But in the conditions of our societies, the naked public square, the naked wall in the school, is decidedly not a neutral position, which seems to be at the root of the reasoning of the Court. It is no more neutral than having a crucifix on the wall. It is a disingenuous secular canard, the opposite of pluralism, which has to be dispelled once and for all if we are serious about teaching our children, religious and secular, Christian, Muslim and Jew, to live as a harmonious society in mutual respect.440

From this point of view, it is not absolutely evident that the crucifix, as a religious symbol, has no place in Italian state schools.

Now, what is at stake is far from insignificant. In fact, what this case reflects is how each State deals with a multicultural society that is increasingly pluralistic and less homogeneous, and how the ECtHR balances the lack of European consensus on the public display of religion and its supervision.

In addition to the previous findings, the observations of J. Witte offer important insights regarding the final decision in Lautsi, as well as regarding U.S. Supreme Court case law on the same topic.441 The first observation that comes from this work is that “tradition count in these cases.”442 As Judge Bonello put in his concurring opinion “a court of human rights cannot allow itself to suffer from historical Alzheimer’s. It has no right to disregard the cultural continuum of a nation’s flow through time, nor to ignore what, over the centuries, has served to mould and define the profile of a people. No supranational court has any business substituting its own ethical mock-ups for those qualities that history has imprinted on the national identity.”443

The second observation is that, “religious symbols often have redeeming cultural value.”444 This means that religious symbols, such as the Christian cross, can have other connotations to which all citizens can see themselves.

440 Ibid., 4.
442 Ibid., p. 52.
443 Lautsi, Grand Chamber, concurring opinion Judge Bonello, §1.1.
444 Witte and Arold, Lift High the Cross: Contrasting the new European and American Cases on Religious Symbols on Government Property... p. 53.
Third, since there is a lack of European consensus on the public display of religious symbols, the ECtHR has given a wide margin of appreciation to Italy in determining how to balance the religious symbolism of the Catholic majority and the religious freedom and educational rights of atheistic minorities.

Fourth, “religious freedom does not require the secularization of society.” Even though removing all religious symbols from the public sphere can seem the most democratic solution for ensuring the ‘respect of others,’ the French model of laïcité in public schools is not necessarily the only way to conceive of Church-State relations.

Finally, ‘personal perception’ is not a sufficient criterion for placing a ban on majoritarian policies. The Grand Chamber “recognizes that while the crucifix may cause offense to Lautsi, it represents the cherished cultural values of millions of others, who, in turn, are offended by her views. But personal offense cannot be a ground for censorship. Freedom of religion and expression requires that all views be heard in public life.”


The Dahlab and Lautsi cases indicate that some religious symbols seem more compatible with the concept of State neutrality than others.

In the first case, the Court found that a headscarf worn by a teacher in a primary school could be considered a powerful religious symbol since it was a clear sign of participation in a particular faith. Nonetheless, the teacher neither proselytized her religion nor emphasized her choice to wear the veil during teaching hours. The Court condemned Ms Dahlab’s dress code on the grounds that it could lead to a kind of indirect indoctrination towards very young and sensitive minds. This was fully in accord with the idea of denominational neutrality enshrined in the Swiss educational system, which prescribes that schools should abstain from any denominational or religious considerations that might jeopardize the freedom of citizens in a pluralistic society.

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445 Idem.
446 Idem.
In *Lautsi I*, the Court recalled these reflections, arguing that the presence of the crucifix in the classrooms of primary State schools could be perceived “as an integral part of the schools environment and may therefore be considered ‘powerful external symbols.’”\(^{447}\)

Because the cross is essentially a religious symbol, it might be seen by the pupils as a sign that the school promotes a particular religion. Moreover, “the State has the duty to uphold confessional neutrality in public education, where school attendance is compulsory regardless of religion, and which must seek to inculcate in pupils the habit of critical thought.”\(^{448}\) Moreover, in the instant case, the presence of a religious symbol potentially implies an *indirect* indoctrination towards pupils as in the *Dahlab* case.

Given that, it is possible to assume that the adjective ‘powerful’ when applied to a religious symbol means that the message expressed by the symbol is extremely evident to all people who encounter it. It is also much more ‘disturbing’ than the meaning of a traffic signal, because the latter indicates just one thing (e.g. reduce the car speed to 50 km/h) while the former can have more hidden implications (e.g. cross in the classroom \(\rightarrow\) Christian religion \(\rightarrow\) the school has a religious connotation \(\rightarrow\) the school is against my family’s belief \(\rightarrow\) I won’t be accepted anymore, etc.).

The Grand Chamber in *Lautsi II* did not agree with that approach. First, it considered the specifics of the two cases to be entirely different. On the one hand, in *Dahlab* a teacher (who generally has a great influence on her students) wore the religious symbol, and the measures taken against her were primarily with respect to the denominational neutrality enshrined in domestic law and intended to protect the religious beliefs of pupils and their parents. In this light, the Court, taking into account the tender age of the pupils, stated that the domestic authorities did not overstep the limit imposed by the margin of appreciation.

On the other hand, in *Lautsi*, that the crucifix was affixed to the wall of a public building could imply that that building had a precise religious connotation. However, the Second Chamber mainly focused on the reasoning brought by the Italian government. From its point of view, the crucifix was essentially a ‘passive’ symbol. Judge Bonello also called it ‘mute,’ ‘voiceless,’ and, together with Judge Powers, ‘silent.’ This means that the cross “cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities.”\(^{449}\)

\(^{447}\) *Lautsi I*, Second Section, §54.

\(^{448}\) *Ibid.*, §56.

The Court thus suggested a more inclusive concept of neutrality, in which pluralistic education involves exposure to a variety of different ideas including ideas that differ from one’s own. This definition of neutrality suggests that the beliefs of the majority do not put any pressure on those who do not follow the same creed. Conversely, according to Mrs Lautsi, a declared atheist, the ideal of radical secularism and a non-religious public sphere were the only solutions that could ensure equal treatment of all citizens and peaceful coexistence among religious minorities, agnostics, and atheists.

As Zucca points out, it can be useful to explore this concept of neutrality in comparison to notions such as secularism, pluralism and impartiality, as the decision of the Grand Chamber engaged with these terms many times. In particular, the concurring and dissenting opinions offer a very interesting discussion.450

In his concurring opinion, Judge Rozakis argued that there is a strict link between neutrality and impartiality, following the argument of the Court. In fact, taking into account the Italian status quo on the display of religious symbols in the public schools, it is clear that religious symbols are welcome in the classroom. For example, there are no impediments preventing Muslim girls from wearing the headscarf or Jewish boys from wearing the kippah, etc. That said, “these elements, demonstrating a religious tolerance which is expressed through a liberal approach allowing all religions denominations to freely manifest their religious convictions in State schools, are, to my mind, a major factor in ‘neutralising’ the symbolic importance of the presence of the crucifix in State schools.”451

Judge Power, who wrote a separate concurring opinion, suggested that neutrality requires a pluralist approach on State’s part. For this reason, he firmly condemned the Chamber Judgment, which embraced secularism as a neutral view. He maintained that “a preference for secularism over alternative world views – whether religious, philosophical or otherwise – is not a neutral option,” but an ideology among others.452

Conversely, Judge Bonello in his concurring opinion argued that neutrality and secularism should not be part of the Court’s reasoning because “these are not values protected by the Convention, and it is fundamentally flawed to juggle these dissimilar concepts as if they were interchangeable with freedom of religion.”453 According to him, the job of the Court should only be to assess whether the presence of the crucifix in Italian

451 Lautsi II, Grand Chamber, Judges Rozakis and Vajic concurring opinion.
452 Lautsi II, Grand Chamber, Judge Power concurring opinion.
453 Lautsi II, Grand Chamber, Judge Bonello concurring opinion.
classrooms constituted a breach of Articles 2, Protocol No. 1 and 9 of the ECHR. The question of whether an eloquent presence could be viewed as a betrayal of secularism and a failure of the system of separation between Church and State was entirely an Italian business.

Finally, in the dissenting opinion of Judges Malinverni and Kalaydjieva, it was claimed that the only way for the State to protect the religious freedom of its citizens is to observe the strictest denominational neutrality. Moreover, it was argued that the idea of the secular State should apply not only to school curricula, but also to the whole educational system.

At this point the question becomes: what does the principle of State neutrality mean with respect to the representation of religions in the public sphere?

A possible answer is suggested by András Koltay, who argues that

[...] One of the possible interpretations of State neutrality continues down the path of the interpretation called radical secularism and would banish all religious symbols from the public sphere [this is the argument of the Court in Lautsi I and the reasoning held by Judge Malinverni in his dissenting opinion]. The other view is more permissive than this, and says that based on historical-cultural traditions, the State can treat certain religions as more important than others, if it does so with appropriate caution and by avoiding discrimination against other religions [Grand Chamber’s reasoning in Lautsi II]. However, it does not necessarily follow from the latter view that the State would have the right to require the display of crucifixes on the walls of State institutions. Those who acknowledge this right have to also look for additional arguments.454

At this point the definition of the crucifix as a ‘passive symbol,’ and the fact that it did not lead to the indoctrinations of young pupils aided the Court’s reasoning. However, defining a symbol as ‘passive’ does not necessary mean that it is ‘not powerful’ [see the Dahlab’s case]. On this point, Judge Powers underlined that “[...] in principle symbols (whether religious, cultural or otherwise) are carriers of meaning. They may be silent but they may, nevertheless, speak volumes without, however, doing so in a coercive or indoctrinating manner.”455

In this way, the Lautsi case has made a great contribution to the discussion of the place of religious symbols in public education. As van Oojen highlights:

Its contrast with the previous seemingly straightforward case law of the Court concerning religious symbols makes clear that neutrality should

455 Lautsi II, Judge Powers concurring opinion.
not be automatically taken as justifying limitation on religious symbols. Surely, the right to wear religious dress and symbols is not unlimited. But neutrality should not be taken as the magic word automatically providing reason for such limitation. Multiple approaches are possible in assessing religious symbols against the background of neutrality. While the assessment of the crucifix being compatible with neutrality is open to contestation, it reflects that neutrality can leave room for the display of religious symbols. Moreover, the Lautsi case neatly illustrates how the compatibility of religious symbols with neutrality can be assessed more thoroughly against the background of other circumstances.  

4.6. Conclusion

All European countries are multicultural entities, and growing religious diversity is an important dimension of this multiculturalism. The foregoing analysis has shown how religion can become divisive when the parents’ right to educate their children according to their beliefs conflicts with the schools’ ethos. In particular, if we are talking about State schools, parents’ and students’ common expectation is that those schools should be neutral about core values. This commonly means that schools must avoid any sort of indoctrination of pupils, and that it has to promote pluralism and equality among them. However, these principles can be challenged both by the schools’ active approach (i.e., through teachings on religion and sexuality), and by their passive approach, as highlighted by policies regarding the presence of religious symbols in the classrooms (in this case the crucifix).

The analysis pertaining to the active approach to religious education has shown that there is widespread disagreement throughout Europe as to 1. whether the religious curricula used in schools should instruct students about religious faith or offer them a form of comparative education that covers a broad range of religions and systems of belief, and 2. whether religious education should be compulsory or optional. Arguably, “some minimum of religious education is necessary to fulfill one commonly stated liberal goal for education – training for citizenship – because of the undeniable historical importance of religion in shaping present-day culture and its contemporary social significance.” Yet, on the other hand, the State should undertake a confessional responsibility for inducting pupils into

457 I. Leigh, The ECtHR and Religious Neutrality…, p. 49.
religious belief. In other words, State religious education should be about religion, but should not have a religious objective. Moreover, what is taught in public schools must not interfere with the moral or religious views of parents. Just as non-religious parents expect that their children will not be ‘indoctrinated’ by religious teaching, those parents who hold religious views ought to be able to expect that their children will not be ‘indoctrinated’ with ideas that are in opposition to their beliefs.

With respect to sex education, it is evident that, when it is taught within the curriculum of Biology (as a study of the reproductive system) it may seem uncontroversial. On the other hand, it may give rise to various disagreements when it becomes a subject for instruction which also involves emotional and moral aspects. In particular, many topics connected to sexuality, and different ways of addressing such topics, may be inconsistent with the core beliefs of religious parents. However everything in the school's approach to sex education should flow from the acknowledgment that the family is the primary educator of children and delegates part of that role to the public system. Since that, the fact that some parents decide to teach a particular perspective at home cannot become the reason why the school assumes to teach that or a different one to all children.

From these reflections, we may conclude that the Court has consolidated two apparently inconsistent trends: “On one hand, the states should respect the parents’ convictions, religious as well as philosophical, throughout the public school curriculum, which implies not only a slightly negative commitment, but also a positive obligation on the part of political powers to protect this right. On the other hand, the states have the power to disseminate, through education, information and knowledge which is, directly or indirectly, of a religious or philosophical nature, and not even the parents can contest the integration of this instruction into the curriculum because, in such a case all institutionalized teaching runs the risk of becoming impracticable.”458 This inconsistency reveals that a possible solution to this dilemma lies not only in balancing the legal interests at play in each particular circumstance, but also in rethinking the scope and content of the concept of ‘educational pluralism’ when deciding what has to be its aim.

Turning now to the presence of the crucifix on the wall of Italian classrooms, we can see that this comprehensive approach has been taken, but in the context of a passive symbol and not active teaching. The reasoning of the Court of Strasbourg in this circumstance was

458 E. Relaño, Educational pluralism and freedom of religion: recent decisions of the European Court of Human Rights…, p. 27.
paradigmatic because it dealt with the abovementioned issues, and it highlights a concrete example of how schools maintain a pluralist environment.

As noted in the forgoing analysis of Lautsi, the Grand Chamber’s view was that the decision whether or not to preserve a tradition fell in principle within the margin of appreciation of the State. The inevitable consequence is that non-dominant traditions and beliefs will not equally represented or perpetuated in the public reasoning and public visual sphere. Thus, a public sphere where all citizens’ philosophical and religious beliefs have the same weight is considered utopian. Of course, the State has the fundamental duty not to discriminate on religious ground, but it is one thing ‘not to discriminate,’ and, another thing ‘to equally represent’ all creeds and philosophical convictions. In fact, each country’s conception of freedom of religion and State-Church relationships has its roots in its own history and cultural tradition. This is why affirming that every recognized religion has the same cultural importance, would mean that a State had arisen in the vacuum. It is thus suggested that recognizing that every religion does not have the same cultural significance is not the same as giving one-religion special legal privileges over others.

With this in mind, as the Court has emphasized, the crucifix affixed on school’s classrooms clearly has a religious connotation and gives more weight to Christian religion than to other beliefs. However, it does not give rise to indoctrination of pupils by the State. The presence of this symbol in a public space may annoy those who belong to another religion (the crucifix is a passive symbol, but it is not mute). It may also touch the conscience of those who are in front of it (as Weiler suggested through the parable of Marco and Leonardo), but it does not mean a violation of the freedom to believe in whatever creed one wants. “Some practice or symbols that may have originated in the religion of the majority do not truly constrain the conscience of those who are not part of the majority. Such is the case for practices and symbols that have a heritage value rather than a regulatory function.”

In the same way, the ECtHR case law has often pointed out that religious education teachings do not necessarily imply the intent of indoctrination on State’s part, even though they involve comprehensive doctrines and give more room to a particular creed.

Now our aim is to look at the judgments on religious and sexual education through the above findings in order to challenge the idea, which has often came out from Strasbourg’s case law, that the creation of ‘agnostic’ teachings is the way to ensure the neutrality among

competitive views on these sensitive issues. The foregoing analysis has shown not only that this approach is impossible to reach, but also that it is far from the idea of educational pluralism demonstrated by the Court in *Lautsi*. On this point, in fact, Judge Power has argued that

the presentation of and engagement with different points of view is an intrinsic part of the educative process. It acts as a stimulus to dialogue. A truly pluralistic education involves exposure to a variety of different ideas including those, which are different from one's own. Dialogue becomes possible and, perhaps, is at its most meaningful where there is a genuine difference of opinion and an honest exchange of views. When pursued in a spirit of openness, curiosity, tolerance and respect, this encounter may lead towards greater clarity and vision as it fosters the development of critical thinking. Education would be diminished if children were not exposed to different perspectives on life and, in being so exposed, provided with the opportunity to learn the importance of respect for diversity.\textsuperscript{461}

The autonomy of an educational environment from any ideologies is not guaranteed by removing every controversial teaching or religious symbol. In fact ‘educate’ means to suggest a proposal, which always has its roots in a web of values. As Moon has argued,

if secularism or agnosticism, constitutes a world view or cultural identity, equivalent to religious adherence, then its proponents may feel excluded or marginalized, when the state supports even the most ecumenical forms of religious practice. But, by the same token, the complete removal of religion from the public sphere may be experienced by religious adherents as the exclusion of their world view and the affirmation of a non-religious or secular perspective, the culture or identity of one segment of the community. ‘Secularism’, in this context looks less and less like a neutral or common ground, that stands outside religious controversy, and more like a particular world view that dominates the public sphere because of the political power of its adherents.\textsuperscript{462}

The State in fact only violates the rights of parents and minors to education when it gives coercive value to certain social, political or ideological conceptions in the sphere of education. Clearly, the school has a position of authority insofar as it claims to develop and carry on the education that parents have started at home. In the name of preserving pluralism, however, teachers, and the school in general, are sometimes asked not to offer meanings, but to expose the student to the widest possible range of conflicting authorities in the belief that he will spontaneously select the best. However, the drawback of this system is that it

\textsuperscript{461} *Lautsi II*, Judge Power concurring opinion.

eliminates coherence from education and makes the teacher useless. This is why, for instance, exempting students from attending specific classes or activities can be a better solution than offering them mandatory teachings on sensitive issues. In such circumstances, the instruction provided does not propose any truths, but merely a list of different perspectives. *Lautsi*, however, suggests a new policy that respects the rights of different creeds and secular beliefs alike to express their view, but allows government to reflect democratically the traditional religious views of its majority.⁴⁶³

Chapter 5

PROTECTING TEACHERS’ RIGHT TO RELIGIOUS FREEDOM IN THE WORKPLACE

Abstract

This Chapter examines the effect of Article 9 of the ECHR on the protection of the right to religious freedom exercised by teachers in their employment environment. The traditional view assumed by the ECtHR at the beginning of its work was that, in general, the Convention rights did not apply to the employment area, because of the freedom of the employee to resign. This argument is grounded on the fact that the relationship between the employer and the employee is a voluntary one, and the latter can choose either not to accept the job or to terminate the contract if he or she has religious objections. In ‘X v. the UK,’ this reasoning has been followed both by the national courts and by the European Commission on Human Rights. Only recently has this position begun to change, thanks to the judgment in ‘Eweida and Others v. the UK.’ In this decision, the right to resign was no longer considered to be sufficient guarantee of the fundamental right to freedom of religion. In fact, with this decision, the Court of Strasbourg highlighted the necessity of weighty reasons if discrimination on grounds of religion is to be justified, since religious faith constitutes a core aspect of an individual’s identity. Moreover, the Court considered that the loss of employment is a severe sanction with grave consequences for the applicant. The fact that a dismissal can be a breach of a Convention right was recognized for the first time in ‘Vogt v. Germany.’ This case dealt with a teacher who had been fired for taking part in extremist political activities. This case suggested that, where there is an interference with work, Convention rights can be preliminarily engaged. This is also clearly indicated in the admissibility proceeding in ‘Saniewski v. Poland.’ Moving to the case ‘Lombardi Vallauri v. Italy,’ we see that the Court, for the first time, dealt with a situation in which the employer
was a religiously oriented university. Here, the different understandings of the neutrality of the State came into play, with different conceptions of neutrality being held by the Italian authorities and Strasbourg. In its most recent judgment, ‘Fernández Martínez v. Spain,’ the ECtHR seems to have abandoned its tested formula of ad hoc balancing between the collective dimension of freedom of religion and individual human rights, established in three well-known German cases ‘Obst,’ ‘Schüth,’ and ‘Siebenhaar.’ In ‘Fernández Martínez’ the Court of Strasbourg was in fact in line with the Spanish courts’ decision to opt for church autonomy instead of attempting any categorical balancing. The most important reason why in ‘Fernández Martínez’ the Court accepted this deference to the autonomy of the Church and refused to engage in a real balancing exercise was that the applicant was still considered to be a member of the clergy, albeit ‘secularized.’ In that respect, this judgment echoed the decision of the U.S. Supreme Court in ‘Hosanna-Tabor,’ in which the Supreme Court confirmed the existence of the ‘ministerial exception’ grounded in the First Amendment.

5.1. Does the ECtHR Still Consider the Right to Resign the Best Guarantee of Freedom of Religion?

Although the right to freedom of religion is protected under Article 9 of the ECHR, the question of whether the Convention rights apply within the workplace has always been highly controversial, and the ECtHR has given different interpretations on this issue since 1950.

The traditional view held by the ECtHR at the beginning of its work was that, in general, the Convention rights did not apply at the employment area, because of the freedom of the employee to resign.464 This argumentation is grounded on the fact that the relationship between the employer and the employee is voluntary, and the latter can choose either not to accept the job or to terminate the contract if he or she has religious objections. In X v. the United Kingdom,465 this reasoning was followed both by the national courts and by the European Commission on Human Rights.466

In X v. the United Kingdom, the applicant was a devout Muslim teacher, Mr Amhad, who had asked to leave work for 45 minutes during school hours on Friday afternoons in

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465 Application No. 8160/78.
466 Until Protocol 11 of the ECHR entered into force in 1998, the cases could not be brought directly before the European Court of Human Rights. In fact, as a first step, they were declared admissible or not by the Commission. Only if they were not manifestly ill-founded were they subjected to the Court’s judgment.
order to attend the mandatory prayers at the local mosque. To accommodate this request, his employer (the Inner London Education Authority, ‘ILEA’) suggested that he vary his contract from full-time to a four-and-a-half day workweek. At that point Mr Ahmad opted to resign. Shortly after, because of financial pressure, he reapplied to the ILEA for a part-time teaching post, and was re-employed on the basis of a four-and-a-half days per week contract.

Few months later, the applicant appealed to an Industrial Tribunal, contending that his resignation constituted an unfair dismissal. His application was dismissed since a full-time contract implies a five-day workweek. To work less than five days would not be full-time.

He then brought his case before the European Commission of Human Rights, arguing that he was forced to resign from his full-time post since the ILEA did not accommodate his religious duty. For this reason, Mr Ahmed maintained that his right to freedom of religion protected by Article 9 ECHR, taken alone and in conjunction with Article 14 ECHR, had been breached.

The Commission did not enter into the religious dispute regarding whether attending the mosque was mandatory, but only considered “whether an employee should inform his employer in advance that he will be absent during a part of the time for which he is engaged” and whether the employer had arbitrarily disregarded his freedom of religion.467

The Commission, retracing the applicant’s work history, observed that “in 1968, the applicant, of his own free will, accepted teaching obligations under his contract with the ILEA, and that it was a result of this contract that he found himself unable ‘to work with the ILEA and to attend Friday prayers.’ The contract, and the teaching obligations it implied, continued until its termination in 1975. Between 1968 and 1974 the applicant – without ever raising this issue with the ILEA – accepted that, because of the contract, he was prevented from attending the mosque during school time.”468 Then, in 1974 after his transfer to a school nearer to a mosque, the applicant asked to leave the school on Friday afternoons in order to attend the mosque, since the short distance obliged him to do so for his religion. In its decision, the Commission overcame this point, arguing that Mr Ahmed had not convincingly demonstrated that new duty. As Allen and Moon have argued, “it was not conclusively established that he had a binding obligation to attend the mosque and the education authority had allowed him to be absent when the consequences for his school were not so great.”469

467 X v. the United Kingdom, §14.
468 Ibid., §9.
When the case was heard in the Court of Appeal as *Ahmad v. Inner London Education Authority* Scarman L.J. gave a powerful dissenting judgment.\(^{470}\) He held that “the choice before the Court was to construe the requirements contained in the term of the contract of employment broadly or narrowly.”\(^{471}\) He opted for the latter in the context of both section 30 of the Education Act 1944, and the European Convention rights.

Section 30 of the Education Act 1944 requires that

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\text{[…] no person shall be disqualified by reason of his religious opinions, or of his attending or omitting to attend religious worship, from being a teacher in a county school or in any voluntary school […]. Provided that, save in so far as they require that a teacher shall not receive any less emolument or be deprived of, or disqualified for any promotion or other advantage by reason of the fact that he gives religious instruction or by reason of his religious opinions or of his attending religious worship […].}
\]

The ILEA’s approach towards this statement has always been partial in that it has ensured that the selection of teachers not be guided by discrimination on religious ground, yet it has not taken care to see that religious minorities be represented amongst their teachers. Moreover, since 1944, society has changed, hence “room has be found for teachers and pupils of the new religions in the educational system, if discrimination is to be avoided. This calls not for a policy of the blind eye but for one of understanding. The system must be made sufficiently flexible to accommodate their beliefs and their observance: otherwise, they will suffer discrimination – a consequence contrary to the spirit of section 30, whatever the letter of that law.”\(^{472}\)

What then does this provision mean within the context of Mr Ahmad’s contract?

Scarman LJ argued that the provision had to be construed broadly and that the teacher’s full-time contract should guarantee his right to attend religious worship inside or outside his work hours at the school. Moreover, in order to give business efficacy to a contract that implied a full-time service, the authority should reasonably limit the period of teacher’s absence and make arrangements to cover his classes. Hence Scarman LJ concluded his dissenting opinion by stating that “[o]nce the full implications of the section in its contractual context are properly understood, I find it impossible to say that the 45 minutes’ absence from class every Friday to go to the mosque constitutes a breach of this contract.”\(^{473}\)

\(^{470}\) [1977] I.C.R. 490


The Court of Appeal, however, and, shortly after, the European Commission held the opposite position, stating that there had been no religious discrimination against the applicant on the part of the State. As Lucy Vickers has argued,

This suggests that it is not an infringement of Article 9 to burden the practice of religion where it is proportionate to do so, for example by refusing to accommodate a religious practice which places too much of a cost on the employer. It is clear, then, that in the final analysis protection for the religious interests of employees is provided by the right to resign. However, even though resigning may be the ultimate freedom, to limit protection to this somewhat drastic remedy may be to fail to provide adequate protection to religious interests. In order to determine the proper scope for the protection of religion in employment, it is worth considering the reasons for its protection in the context of work.\(^474\)

5.1.1. The ECtHR’s Latest View on the Right to Resign: *Eweida and Others v. the UK*

Only recently, thanks to the judgment in *Eweida and Others v. the UK*,\(^475\) has the position of the Court of Strasbourg regarding the protection of freedom of religion of employees in the workplace begun to change. It is clear in this decision that the right to resign is no longer regarded a sufficient guarantee of the fundamental right to religious freedom.

This judgment covers four significant cases, brought by Christian applicants, complaining that they had suffered religious discrimination at work. The first two, *Eweida*\(^476\) (a practising Coptic Christian employed at British Airways) and *Chaplin*\(^477\) (a practising Christian working as a geriatric nurse at a State hospital), concerned restrictions on the

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\(^{475}\) Applications Nos. 48420/10, 59842/10, 51671/10 and 36516/10.

\(^{476}\) As concerned Ms Eweida the Court had to examine whether her right to manifest her religion had been sufficiently protected within the domestic provisions. On this point, the Court concluded that a fair balance had not been struck between her desire to manifest her religious belief and her employer’s wish to show a particular corporate’s image. Moreover, other applicant’s colleagues had previously been authorised to wear religious symbols when on duty such as Sikh turbans and Muslim headscarves without any negative impact company’s brand or image. It is also worth noting the fact that the airline company shortly after Ms Eweida’s complaint had amended the uniform policy to allow visible wearing of religious symbols. Hence this means that the earlier prohibition had not been of crucial importance. For all the above reasons the applicant’s right to manifest her religion protected by Article 9 of the ECHR was breached.

\(^{477}\) In regards to Ms Chaplin, the Court, assessing the balancing between her right to manifest religion and the protection of health and safety in the hospital where she worked, gave much more weight to the latter right. Moreover, it considered that hospital managers were better placed to make decisions about clinical safety than a court, particularly an international court, which had heard no direct evidence. Thus, the ECtHR stated that asking Ms Chaplin to remove her necklace with the cross had not been disproportionate and that the interference with her freedom to manifest her religion had been necessary in a democratic society.
wearing of a chain with a small cross around the neck at work. Both complained of a breach of Articles 9 and 14 of the ECHR. By five votes to two, the Court found a violation of Article 9 in *Eweida*, since the national authorities had failed to balance the applicant’s right to manifest her religion and the corporate image of the airline. Conversely, in *Chaplin*, the Court held unanimously that there has been no violation of Article 9. In this case, in fact, the domestic authorities had struck a fair balance between the right to manifest religion in the workplace and the State duty to guarantee a healthy and safe environment in hospitals. The second group of cases are *Ladele* and *McFarlane*. In these cases, the Court dealt with the conflict between freedom of religion and the prohibition on discrimination on the basis of sexual orientation.

As Peroni has pointed out, in these cases, the Court’s reasoning on Article 9 is valuable for at least two reasons. First, it offers a clear analysis of what counts as ‘manifestation of religion or belief.’ In fact, the Court refused to dismiss the freedom of religion complaints quickly at the interference stage, thus departing from the freedom to resign doctrine. Second, the Court showed a strong concern for the importance of guaranteeing the applicants’ right to manifest their religion at work. Hence, it gave more weight to the right to freedom of religion in the workplace than it had in previous cases.

Analysing the reasoning of the Court, it is clear that there was a shift from the idea that the right to resign is a guarantee of religious freedom to the idea that the possibility of changing jobs must be taken into account when considering whether a restriction on freedom

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478 Ms Ladele is a practising Christian, employed by the London Borough of Islington as a registrar of births, deaths and marriages. When the Civil Partnership Act of 2004 entered into force, the Borough decided to designate all the registrars as civil partnership registrars as well. Because of her religious belief Ms Ladele asked to be exempted from this new duty. At the beginning she was allowed to make informal arrangements with her colleagues. Shortly after two homosexual colleagues made a complaint about Ms Ladele’s refusal since they felt victimised. Then the Borough of Islington argued that with her behaviour she was breaching Islington’s ‘Dignity for All’ equality policy. Having lost the appeals at both the Employment Appeals Tribunal and the Court of Appeal she brought her case before the ECtHR complaining the breach of Article 9 taking in conjunction with Article 14 of the ECHR. The Court found that the aim pursued by the local authority was legitimate (requiring all its employees to act without discrimination against others) and the aims used to pursue this aim were proportionate. Hence there had been no violation of the Convention rights.

479 Mr McFarlane is a Christian sexual counsellor, employed by a private company with a policy to provide services equally to heterosexual and homosexual couples. Because of his religious beliefs, he refused to work with same-sex couples and for this reason he was fired. He brought his case before the ECtHR claiming a violation of Article 9 taken alone and in conjunction with Article 14 of the ECHR. The Court found no breach of both these provisions since the most important factor to be taken into account was that the employer’s aim was to guarantee the implementation of its policy of providing a service without discrimination.

of religion is proportionate. It is likely that the high levels of unemployment in the current crisis influenced this move.\textsuperscript{481}

On the one hand, the Government held that “the fact that these applicants were free to resign and seek employment elsewhere, or to practise their religion outside work, was sufficient to guarantee their Article 9 rights under domestic law.”\textsuperscript{482} On the other hand, the Court of Strasbourg argued that “given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.”\textsuperscript{483}

On this point, Judges Bratza and Björgvinsson underlined that “a restriction of a religion or belief manifestation of a religion or belief in the workplace may amount to an interference with Article 9 rights which requires to be justified even in a case where the employee voluntarily accepts an employment or role which does not accommodate the practice in question or where there are other means open to the individual to practise or observe his or her religion as, for instance, by resigning from the employment or taking a new position.”\textsuperscript{484} Furthermore, they both accepted, along the other Chamber’s members, that the manifestation of belief in the form of religious ornaments was sufficient to engage Article 9, and that a positive obligation to respect religious belief protected even a private employee.

In \textit{Eweida}, two factors in particular led the Court to assess that there had been a breach of Article 9. First, the cross around the neck was defined as a ‘discrete’ symbol, and, secondly, other employees were allowed to wear religious symbols (e.g. turban, hijab, etc.) without any negative impact on the company’s brand. Moreover, few months after Ms Eweida’s complaint, British Airways amended the uniform code to allow the visible wearing of religious symbols. Given that, the Court found that the domestic authorities had failed to balance the applicant’s right to manifest her religion and the employer’s right to pursue a specific corporate image through its uniform policy.

Conversely, in \textit{Chaplin}, the Judges of Strasbourg argued that the national courts struck a fair balance between the rights protected by Article 9 and health and safety reasons. It maintained that hospital managers were better placed to make this kind of decisions than

\textsuperscript{481} R. McCrea, \textit{Strasbourg Judgement in Eweida and Others v United Kingdom}. Available on line at \url{http://ukconstitutionallaw.org/2013/01/16/ronan-mccrea-strasbourg-judgement-in-eweida-and-others-v-united-kingdom/}.

\textsuperscript{482} \textit{Eweida and Others v. the UK}, §60.

\textsuperscript{483} \textit{Ibid.}, §83.

\textsuperscript{484} \textit{Ibid.}, Partly dissenting opinion of Judges Bratza and Björgvinsson, §2(b).
the international Court, which had heard no direct evidence. Moreover, these circumstances fell within the wide margin of appreciation allowed to Member States.

In these cases, it is evident that the Court’s reasoning has taken freedom of religion in the workplace to another level. As Peroni puts it,

the foundational role of freedom of religion in pluralistic and democratic societies has often been embraced in the Court’s case law since Kokkinakis, most notably in cases concerning the collective dimension of freedom of religion. The other aspect – its central role in believers’ identity – has not always been effectively recognized. Eweida and Chaplin are therefore remarkable in this respect: the Court gives the applicants’ interests the importance they deserve in the proportionality. Of course, there might always be strong countervailing interests, as Chaplin shows. But what matters is that the weight of what is stake for applicants is not ignored or trivialized.485

The other group of cases, Ladele and McFarlane, led the Court to definitely abandon the freedom to resign as a guarantor of religious freedom in the workplace. The Ladele case, in fact, showed that it was not considered necessary that “the Court should require ‘very weighty reasons’ in order to justify discrimination on grounds of religion”, since “religious faith constituted a core aspect of an individual’s identity.”486 Furthermore, in McFarlane the Court took into account that “the loss of his job was a severe sanction with grave consequences for the applicant.”487

Thus we see that the reasoning of the ECtHR has shifted in its assessment of the question of whether national authorities have struck a fair balance between employees’ right to manifest their religion and their employers’ interest in securing the rights of others since member States have a wide margin of appreciation on these issues.

To sum up, it is clearly evident that the Court, with these four cases, has definitely taken a step forward in securing the freedom of religion in the workplace by not using the right to resign as a mean, and by taking freedom of religion into greater account. This happened when the Court relied not only on the margin of appreciation doctrine, but also engaged with the argument of ‘reasonable accommodations.’ As Smet has pointed out, this new way of reasoning can lead to two different conclusions that are clearly shown when we compare Eweida to Ladele:


486 Eweida and Others v. the UK, §71.

487 Ibid., § 09.
Ms Eweida’s case is […] the perfect case in which to establish a duty of reasonable accommodation whenever the costs involved are minor (e.g. small institutional adjustments, commercial image or limited financial costs). The Court seems to agree with that proposition, given its reasoning with respect to Ms Eweida’s claim.488 Ms Ladele’s case, conversely, indicates that limits should be imposed on reasonable accommodations for religion when the right of others to be free from discrimination are at stake.489

Although this new approach is more protective of religious freedom in the workplace, it may not bring about huge changes. In fact, the Court has shown a willingness to defer to the assessment of employers in relation to what the workplace actually requires. In Chaplin, it clearly deferred to employer the task of assessing whether the applicant’s necklace really jeopardized the health and safety of her patients, arguing that “hospital managers were better placed to make decisions about clinical safety than a court, particularly an international court which has heard no direct evidence.”490 Hence, while the ECtHR’s approach has changed, the concrete impact of these changes may be limited.

5.2. For the First Time, a Dismissal is Considered to Have Breached Convention Rights: Vogt v. Germany

The fact that a dismissal can be a breach of a Convention right was recognized for the first time in Vogt v Germany.491 In this case a teacher was fired for her participation in extremist political activities. The applicant, Ms Vogt, had been a member of the German Communist Party (DKP) since 1972, and had been a teacher since 1979. In 1982, disciplinary proceedings were instituted against her on the basis that she had engaged in various political activities on behalf of the DKP. On the merits, the national courts held that the applicant failed to comply with her duty of political loyalty and ordered her dismissal as a disciplinary measure. In fact, as a civil servant (German teachers are considered in this way), she had betrayed the relationship of trust between herself and her employer. For this reason, the

488 Cf. “where there is no evidence of any real encroachment on the interests of others,” Eweida and Others v. the UK, § 95.
490 Eweida and Others v. the UK, §99.
491 Application No. 17851/91.
applicant brought her case before the Court of Strasbourg, alleging a violation of the right to freedom of expression secured under Article 10 of the Convention. Here, the ECtHR found a violation of her freedom of expression.

According to the Court, it was necessary to take into account the fact that there are several reasons for considering the dismissal of a secondary-school teacher as disciplinary sanction for breach of duty to be a very severe measure. In fact,

this is firstly because of the effect that such measure has on the reputation of the person concerned and secondly because secondary-school teachers dismissed in this way lose their livelihood, at least in principle, as the disciplinary court may allow them to keep part of their salary. Finally, secondary-school teachers in this situation may find it well nigh impossible to find another job as teacher, since in Germany teaching posts outside the civil service are scarce.\footnote{Vogt v. Germany, §60.}

Moreover, considering that Ms Vogt was a teacher of German and French, the Court argued that the possibility of indoctrinating her pupils through her teaching was very low. In addition, the applicant’s work at school had been always highly regarded by both her superiors and the families of her students. Finally, the Federal Constitutional Court had not banned the DKT and, consequently, the applicant’s political activities were lawful.

For all those reasons, Ms Vogt’s dismissal was considered to be in breach of Article 10 of the Convention, since there was no pressing social need which could justify the applicant’s limitation of her freedom of expression.

As Vickers has pointed out, this case does not suggest that “the Convention guarantees a right to a job, but merely that, where there is an interference with work, Convention rights can be preliminarily engaged.”\footnote{Vickers, Religious Freedom, Religious Discrimination and the Workplace…, p. 89.}

This is also clearly shown in the admissibility proceeding of Saniewski v. Poland.\footnote{Application No. 40319/98.}

Here the applicant alleged a violation of his freedom of religion, since during the school year 1996-97 the report listing his attended courses contained no mark for ‘religion/ethics.’ According to Mr Saniewski, this clearly showed that he was atheist, and could diminish his chances of getting a job or obtaining a place at university. Moreover, he complained, on behalf of his parents, that the school report breached their right to ensure his education and teaching in conformity with their religious and philosophical convictions.

The Court of Strasbourg declared this case manifestly ill-founded. The main argument was that
the applicant does not contend that he would have shown it to any higher educational establishment in the framework of an admissions procedures, or to submit it to any future employer. He has thus not substantiated his claim that the report might prejudice his future educational or employment prospects. Consequently, the Court does not find it established that the impugned school report had, or would have, any material impact on the applicant’s interests.\footnote{Saniewski v. Poland, §1.}

Therefore, the applicant failed to show that the school report breached his rights and freedoms guaranteed by Article 9 of the Convention. However, as Vickers argues, “had there been such proof, the case might have been admissible. The suggestion is, therefore, that interference with employment prospects can be an interference with Convention rights.”\footnote{Vickers, Religious Freedom, Religious Discrimination and the Workplace…, p. 89.} In these last two cases, the Court held the view that work-based restrictions on rights are significant interference because they will reduce the keenness of rights-bearers to exercise their rights. Hence the threat of dismissal is not dissimilar, in practice, to an outright ban on the activity.

Finally it is worth noting this last point:

\begin{quote}
The idea that people’s freedom to leave employment can act as a valid way to safeguard Convention rights can be contested. It is certainly true in a literal sense: courts will not force employees to work and do not grant specific performance to employment contracts. Yet, most employees are financially dependent on having a job, and the option of resigning is not experienced practically as a form of freedom. A further reason for protecting the right to freedom of religion in employment is that to do otherwise exposes some to a greater religious disadvantage than others.\footnote{Ibid., pp. 91-92.}
\end{quote}

Thus the ECtHR’s approach to freedom of religion in the workplace has begun to be brought into line with its approach to the protection of rights such as free expression and privacy.

\section*{5.3. The ECtHR and the Italian National Courts: Two Different Concepts of the Neutrality of the State When the Employer Is a ‘Religion Oriented’ University}

\footnotetext[5]{Saniewski v. Poland, §1.}
\footnotetext[6]{Vickers, Religious Freedom, Religious Discrimination and the Workplace…, p. 89.}
\footnotetext[7]{Ibid., pp. 91-92.}
The importance of the case *Lombardi Vallauri v. Italy* lies in the different principles that Italian domestic courts and the ECtHR have applied in order to guarantee the freedom of religion and the academic freedom of professors employed in a confession oriented university.

In particular, the instant case concerns a professor, Mr Lombardi Vallauri – who was appointed from 1976 to 1998 to teach Philosophy of Law at Catholic University of Sacred Heart in Milan under a contract that was subject to annual renewal. Article 10.3 of the Lateran Concordat of February 18, 1984, established that all teaching staff of that University must be approved by the Holy See (which makes a judgment called *gradimento*) in order to ensure the religious character of the institution. In 1998, the Holy See did not grant him the *gradimento* and, as a result, he could no longer be employed by the Catholic University of Milan. The applicant brought his case before the national authorities claiming that “les décisions attaquées étaient inconstitutionnelles en ce qu’elles violaient son droit à l’égalité, sa liberté d’enseignement et sa liberté religieuse.”

The Regional Administrative Court of Lombardia, in judgment No. 7027/2001, declared its incompetence to review a decision that had been adopted by the Faculty Board of the University, on the basis that that decision had been made by the Congregation for Catholic Education (a department of the Roman Curia). Moreover, according to the Concordat of 1984, the competent authority had no duty to justify the reason why the *gradimento* had been revoked, and the Faculty Board, too, was not allowed to examine the legitimacy of the decision for the reason that it belonged to another legal system. Afterwards, the applicant appealed to the Council of State, complaining again of a lack of communication of the reasons for the above decisions. In a ruling filed on June 18, 2005, the Council of State rejected the appeal, asserting that it could not take a view that was opposed to the ruling of the Constitutional Court No. 195/1972 in the *Cordero* case in accordance with Article 10 of the Concordat 1984.

In that case, the Italian Constitutional Court delivered a judgment on the issue of whether the requirement that the Catholic University appoint professors approved by the Holy See was compatible with Articles 33 (freedom to teach) and 19 (freedom of religion) of the Constitution. The most relevant parts of that decision read as follows:

Under Article 33, the State has the obligation to provide public education, stating the rules for and providing the necessary resources […], but it does not

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498 *Affaire Lombardi Vallauri c. Italie*, No. 39128/05, §12.
have the exclusivity of teaching […]. Provided that the creation of denominational universities, which may be religious or ideologically oriented, does not breach Article 33, it necessarily follows that the professors’ freedom of teaching (fully guaranteed in State universities) has to meet the particular jurisdiction of such universities to implement their own views […]. Given that, the freedom of universities ideologically qualified would be restricted if the State denied hiring and firing the professors on the basis of their personal commitment to the university’s view. Clearly, these powers are an indirect limitation of professor’s freedoms but they do not constitute a violation of his rights, since the professor is free to join (if appointed) the particular aim of the university; he is also free to terminate his contract when he no longer shares that aim.

The same arguments apply to demonstrate that there is no violation of Article 19 of the Constitution. The presence of denominational universities, with the aim to promote a religious belief, is undoubtedly an instrument of freedom. In the instant case it is clear that it would be a violation of the freedom of religion of those who have founded denominational universities if the State compelled them to hire professors with different religious views.

Having exhausted all national remedies, Mr Lombardi Vallauri decided to bring his case before the ECtHR, claiming a violation of Articles 10 (freedom of expression), 6 (right to a fair trial), 14 and 9 of the Convention. In particular, he complained that the Faculty Board’s decision not to renew his contract had not been justified and that it did not mention in what respects his opinions were inconsistent with the Catholic doctrine.

The Italian Government maintained that, first, Mr Lombardi Vallauri did not hold any permanent position at Catholic University, since his contract was renewed annually. For this reason, the central issue was the access to employment (see the sharp difference between this case and Vogt v. Germany). In fact, in 1998 he was applying for the post as professor of Philosophy of Law like other candidates. Second, the Government added, the limitation of

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499 Constitutional Court judgment No. 195/1972, §6, 7 (my translation). The Italian version read as follows:

6. […] in base all'art. 33, lo Stato ha, bensì, l'obbligo di provvedere alla pubblica istruzione, dettando le norme relative ed apprestando i mezzi necessari (apertura di scuole di ogni ordine e grado, ecc.) ma non ha l'esclusività dell'insegnamento. […]

Accertato che non contrasta con l'art. 33 la creazione di università libere, che possono essere confessionali o comunque ideologicamente caratterizzate, ne deriva necessariamente che la libertà di insegnamento da parte dei singoli docenti - libertà pienamente garantita nelle università statali - incontra nel particolare ordinamento di siffatte università, limiti necessari a realizzarne le finalità. […]

Da quanto precede risulta di tutta evidenza che, negandosi ad una libera università ideologicamente qualificata il potere di scegliere i suoi docenti in base ad una valutazione della loro personalità e negandosi alla stessa il potere di recedere dal rapporto ove gli indirizzi religiosi o ideologici del docente siano divenuti contrastanti con quelli che caratterizzano la scuola, si mortificherebbe e si rinmegherebbe la libertà di questa, inconcepibile senza la titolarità di quei poteri. I quali, giova aggiungere, costituiscono certo una indiretta limitazione della libertà del docente ma non ne costituiscono violazione, perché libero è il docente di aderire, con il consenso alla chiamata, alle particolari finalità della scuola; libero è egli di recedere, a sua scelta, dal rapporto con essa quando tali finalità più non condivida.

7. Le stesse ragioni valgono a dimostrare l'infondatezza della addotta violazione dell'art. 19 della Costituzione. La legittima esistenza di libere università, caratterizzate dalla finalità di diffondere un credo religioso, è senza dubbio uno strumento di libertà: ed anche qui giova ribadire che, ove l'ordinamento imponesse ad una siffatta università di avvalersi e di continuare ad avvalersi dell'opera di docenti non ispirati dallo stesso credo, tale disciplina fatalmente si risolverebbe nella violazione della fondamentale libertà di religione di quanti hanno dato vita o concorrano alla vita della scuola confessionale.
the applicant’s freedoms pursued a legitimate aim. The Catholic University is a confessional oriented institute and, according to its Statute and Concordat 1984, all professors must to be approved by the Holy See in order to guarantee that teachings are consistent with Catholic doctrine. Furthermore, the measures taken were proportionate to pursue that aim, because Mr Lombardi Vallauri was also a Full Professor at the University of Florence, where he could continue to teach.

Contrary to the Government’s argument, the Court of Strasbourg argued that while it was true that the applicant had a temporary contract, “le fait que ceux-ci aient été renouvelés pendant plus de vingt ans et la reconnaissance par ses collègues de ses qualités scientifiques témoignent de la solidité de sa situation professionelle.” For this reason, it maintained that this case was akin to Vogt v. Germany.

The Court also focused on the protection of the applicant’s freedom of expression in his teaching, once again attempting to achieve a balance between the individual’s rights and the right of a denominational organization to pursue its ethos. Following this argument, it found a violation of Article 10 of the Convention in its procedural aspect because of the absence of a detailed explanation on the Faculty Board’s part about the reasons why the applicant’s teaching conflicted with the university’s ethos. In fact, “le Conseil de faculté n'a pas indiqué à l'intéressé, ni même évalué, dans quelle mesure les opinions prétendument hétérodoxes qui lui étaient reprochées se reflétaient dans son activité d'enseignement et comment, de ce fait, elles étaient susceptibles de porter atteinte à l'intérêt de l'Université consis tant à dispenser un enseignement inspiré de ses convictions religieuses propres.”

Moreover, the Judges of Strasbourg contested the national authorities’ refusal to question the fact that the Faculty Board had simply agreed with the Holy See’s decision (this also involved the applicability of Article 6 of the Convention to the instant case). This point was extremely controversial because, on the one hand, according to the Catholic University’s Statute and the Concordat 1984, the Faculty Board cannot challenge the Vatican’s decisions on the gradimento. On the other hand, the Court recalled the fact that national authorities have the duty to protect the right to freedom of expression of professors. However it considered that “qu'il n'appartenait pas aux autorités nationales d'examiner la substance de la

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500 Lombardi Vallauri, §38.
502 Lombardi Vallauri, §47.
décision émanant de la Congrégation\textsuperscript{503} (see, \textit{mutatis mutandis, Metropolitan Church of Bessarabia and Others v. Moldova}\textsuperscript{504}).

In the light of those findings, it is clear that the position of the Court was inconsistent since in the instant case neither the Faculty Board (see the Statute and the Concordat 1984) nor the national authorities (see the ECtHR’s jurisprudence) could challenge a decision taken by a religious authority. Nevertheless, the ECtHR argued that the lack of knowledge on the part of the applicant regarding the reasons for the non-renewal of teaching contract did not allow him of a \textit{débact contradictoire}.\textsuperscript{505} Therefore, according to the Court, both Articles 10 and 6 had been breached.

The only dissenting opinion, provided by Judge Cabral Barreto, tried to demonstrate that this line of reasoning could be considered unrealistic, since it “demande aux parties d'apporter des preuves qui sont impossibles à obtenir et aux tribunaux d'adopter des décisions qui relèvent en fait d'une sorte d'utopie.”\textsuperscript{506} Questioning that Holy See’s decision could be utopic for two reasons. First, if the Holy See found that a professor was not eligible for the \textit{gradimento} because his teachings infringed a Catholic dogma, how could be possible to have \textit{a débact contradictoire de nature juridique}? Second, using a cause-effect reasoning, “il sera difficile voire impossible de déceler le lien de causalité entre les positions du candidat et son enseignement, puisque cet exercice requiert un pronostic quant au comportement d'une personne et une évaluation de ses qualities.”\textsuperscript{507} Therefore the answer to this dilemma could only be the revision of the Concordat 1984 on the \textit{gradimento} procedure. Was the ECtHR indirectly recommending this solution?

Reflecting on the instant case, Coglievina and Ruscazio argue that different readings of the neutrality of the State are being considered by the Italian authorities, on the one hand, and Strasbourg, on the other. In this context, according to the national courts, the neutrality of the State means that there is a sharp separation between the State and the Church on issues regulated by specific legal agreements (see Article 10 of the Concordat 1984). Conversely, the ECtHR affirms the State’s duty to distance itself from decisions made by religious

\textsuperscript{503} Ibid., §50.

\textsuperscript{504} See also M. Croce, \textit{Il ‘Caso Lombardi Vallauri’ dinanzi alla C.e.d.u.: una riscossa della libertà nella scuola?}, 2010. Available on line at www.statoechie.se.it.

\textsuperscript{505} Application No. 45701/99.

\textsuperscript{506} Lombardi Vallauri, ¶54.

\textsuperscript{507} Lombardi Vallauri, Dissenting opinion of Judge Cabral Barreto, ¶3.

\textsuperscript{507} Lombardi Vallauri, Dissenting opinion of Judge Cabral Barreto, ¶3.
authorities, but, at the same time, it demands a procedural control of these decisions in order to assure compliance with national legislation.

This approach, supported by the State’s duty to guarantee the equal rights of its citizens, “perhaps do[es] not take into account the specific context in which that decision was made (i.e. the ethos of the institution and the fact that the process of teacher’s recruitment at the Catholic University requires the direct involvement of the governing body of a religious Congregation); therefore, the State’s control on these procedural aspects would mean to control another legal system.” Thus, what the Court of Strasbourg seems to suggest is that the Italian government needs to review its legal relationship with the Holy See with respect to the employment policies of Catholic universities. This, however, could undermine the autonomy of confessional oriented universities. In addition, it could be seen as a rupture with the Italian constitutional system, because the freedom to establish schools with a religious or ideological orientation would be curtailed, unless the review mentioned above was accompanied by a reworking of the relationship between the State and religious or ideological schools.


From 2010-2011, the ECtHR dealt with a number of cases against Germany, in which the applicants were employees of churches. In each of the cases, the employees had been dismissed from their positions, but for different reasons. In Siebenhaar v. Germany, the applicant was dismissed because she belonged to a religion other than that of her employer.

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509 Application No. 18136/02.
In *Obst v. Germany*510 and *Shüth v. Germany*511 the Court addressed the cases of two men who had been dismissed because of extramarital affairs. The Mormon Church and the Catholic Church, had fired Mr Obst and Mr Shüth, respectively, because their affairs violated marriage, which both Churches consider to be a holy union.

The first case, *Siebenhaar v. Germany*, involved a teacher who worked in a nursery belonging to the protestant parish of Pforzheim. The protestant church in Germany requires loyalty from its employees, which means that they cannot work or collaborate with institutions whose ethos is different from or in contradiction with the principles of the church. When her employer discovered that Ms Siebenhaar was an active member of a religious community called the Universal Church (where she also gave introductory religious courses), she was fired. The applicant, having exhausted all national remedies, brought her case before the ECtHR, complaining a breach of Article 9 of the Convention since “des modalités de la mise en balance des intérêts en jeu par la Cour fédérale du travail, à qui elle reproche d'avoir privilégié le droit d'autonomie de l'Eglise protestante au détriment de son propre droit à la liberté de religion.”512

The main issue examined by the Court was whether the national courts had struck a fair balance between the interests of both parties. The national jurisdictions noted that “les principes définis par l'Eglise protestante car, en vertu de leur droit d'autonomie, il appartenait aux Eglises et communautés religieuses elles-mêmes de définir, dans le but de sauvegarder leur crédibilité, les obligations de loyauté que leurs employés devaient respecter.”513 For this reason, firstly, the applicant’s new membership to the Universal Church breached her duty of loyalty to the Protestant Church, freely signed before taking the job. Secondly, it was also held that the applicant’s new activities in the Universal Church could affect her work in the nursery. In conclusion, the Government argued that “une paroisse protestante qui gère un jardin d'enfants doit pouvoir exiger de ses éducatrices qu'elles abordent des questions de foi pendant leur travail et qu'elles y apportent des réponses dans la perspective protestante. Cette exigence serait essentielle pour la crédibilité de l'Eglise employeur à l'égard du public et de

510 Application No. 425/03.
511 Application No. 1620/03. Since 1983 Mr Schüth was the organist and choirmaster in a Catholic parish church and his employment contract was under the Ecclesiastical Employment and Remuneration Regulations and it was approved by the Bishop’s Vicar General. In 1994 he left his wife and he found another partner with whom had a child. In 1997 this situation became public and the parish church dismissed the applicant because he breached his duty of loyalty towards the Catholic Church’s fundamental principles. Then Mr Schüth brought his case before the ECtHR alleging a violation of Article 8 of the Convention. He complained that he was fired just because he had an extramarital relationship with a new partner.
512 *Siebenhaar*, §22.

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ses propres membres et correspondrait aux attentes des parents des enfants fréquentant le jardin d'enfants.\textsuperscript{514}

The ECtHR, on its part, noticed that the applicant’s employment contract clearly stated that she was forbidden to belong to and participate in an organization whose principles were inconsistent with the core values of the Protestant Church. The purpose of this prohibition was to avoid any risk of influence on children by a teacher with a different ethos. The Court also observed that the labor courts took into account the short duration of the applicant’s contract and her young age.

Given that, the Court found that the national authorities had struck a fair balance between the interests of the Church and the applicant’s private interests. In fact, they showed that the Protestant Church’s requirement of loyalty towards its employees was legitimate in order to guarantee the credibility of the Church itself. Hence there had been no violation of Article 9 of the Convention.

As Ouald Chaib has argued, commenting on this decision, “the reasoning in this judgment lies in the same line as in the case of Obst and Shüth.\textsuperscript{515} This was because “the Court examined the balancing exercise undertaken by the national judge and took several aspects of the applicant’s situation into account, such as her age, her chances to find another job and the nature of her job.”\textsuperscript{516} However a major difference between the Siebenhar case and the other two cases lies in the fundamental rights that are at stake. In the former case, the clash was between freedom of religion on both sides; conversely, in the latter cases the conflict arose between the right to private and family life of the applicants and the religious autonomy of the church. In sum, from the perspective of its previous case law concerning the church as an employer, the Court took a step forward, because the duty of loyalty towards the ethos of the denominational school environment overcomes the distinctions between service and private life.

\textsuperscript{514} Ibid., §32.
\textsuperscript{516} Idem.
5.5. The ECtHR’s Hands-off Approach towards the Decisions of Religious Authorities in Fernàndez Martinez v. Spain

In its judgment in Fernàndez Martinez v. Spain, and confirmed by the recent judgment delivered by the Grand Chamber, the ECtHR seems to have abandoned its tested formula of *ad hoc* balancing between the collective dimension of freedom of religion and individual human rights, established in the three well-known German cases Obst, Schüth and Siebenhaar. In Fernàndez Martinez, in fact, the Court was in line with the Spanish courts’ decision to opt for Church autonomy instead of any categorical balancing.517

The applicant, Mr Martinez, had been a priest since 1961. In 1984, he requested that the Holy See dispense him from the obligation of celibacy. The following year, he was married in a civil ceremony and, at present, has five children. However, the Vatican relieved him of his obligation of celibacy only in September 1997. Until then, he was considered by the Church to be a ‘married priest.’

In 1991, the applicant was employed as a teacher of religion and Catholic morals at a State-run secondary school under a renewable annual contract. The Spanish system of appointing teachers of religion is regulated by an Agreement of 1979 between Spain and the Holy See. Under this agreement, “it was the responsibility of the Bishop of the diocese to confirm, every year, the renewal of the applicant’s employment, and the Ministry of Education was bound by the Bishop’s decision.”518 In November 1996, a Spanish newspaper published an article on a seminar organized by the “Movement for Optional Celibacy” for priests. The applicant and his family appeared in a photograph alongside that article. The article also revealed the participants’ disagreements with the Church on issues like abortion, divorce, sexuality, and contraception.

For these reasons, the following year, the Bishop decided not to renew Mr Martinez’s contract as a teacher of religion. He determined that the applicant had violated his obligation, ensured by the Code of Canon Law, to “carr[y] out his duties with discretion and without his personal circumstances causing any scandal.”519 The applicant contested the Bishop’s decision, eventually arguing a violation of his human rights in front of the ECtHR. In his

519 Ibid., §19.
application, he claimed that he had been dismissed for making public his ideas about priests’ celibacy, and he assumed that the circumstances of the case were similar to those of Lombardi Vallauri v. Italy. Almost unanimously (6:1), the Chamber of the Third Section, determining that the main question arising in the instant case was whether the State was required, in the context of its positive obligations under Article 8 (right to respect for private and family life), to uphold the applicant’s right to respect for his private life against the Catholic Church’s right to refuse to renew his contract guaranteed by Articles 9 and 11 (freedom of association).

The Court first noted that “under the Spanish law the notion of autonomy of religious communities is supplemented by the principle of the State religious neutrality.”\footnote{Ibid., §81.} This means that, on the one hand, the State was not allowed to rule on the notion of ‘scandal,’ or on the celibacy of priests. On the other hand, the obligation of neutrality was not absolute; thus, the domestic courts were entitled to weigh the competing fundamental rights, and were also competent to examine whether grounds other than those of a strictly religious nature played a part in the decision not to appoint a candidate. Given that, the Court took the view that the reasons used to justify the non-renewal of the applicant’s contract had a strictly religious nature. In fact, the decision not to renew the teacher’s contract was made after his decision to appear with his family in a newspaper article revealing that his views on sensitive issues were not consistent with positions held by the Catholic Church. By acting in this way, the applicant broke his bond of trust with the Church. The Court further noted that the teacher’s personal example constituted an essential component of his beliefs and was a primary consideration in terms of suitability for teaching. In conclusion, allowing a wide margin of appreciation to the State in such matters, the Court found that in the instant case there had been no violation of Article 8 of the Convention. The case was also referred to the Grand Chamber, which confirmed this judgment. Before proceeding to examine this new approach, as highlighted by the GC in its reasoning, it is worth taking the following digression.

As Smet has noted, it is interesting to compare Fernàndez Martinez to another case from the Court of Strasbourg’s case law: Schüth v. Germany. In the latter case, which concerned the dismissal of an organ player by the Catholic Church for having engaged in an extra-marital relationship, the Court found a violation of Article 8. The main reason for this was that the German courts had failed to strike a fair balance between the rights of the Church and those of the applicant. In that occasion, “the Court also indicated a number of
factors that should be taken into account during such a balancing exercise, including the proximity of the applicant’s activity to the mission of the Church, the nature of the post and the possibility for the applicant to find new employment.” Conversely, in Fernàndez Martínez, the Court, following the reasoning of the Spanish Constitutional Tribunal, accepted the categorical balance deferring to the autonomy of the Church in this matter.

Why did the Court apply two different lines of reasoning to these quite similar cases? In fact, the Court found these cases to be only apparently similar, and it included many paragraphs intended to distinguish Fernàndez Martínez from Schüth. First of all, the applicant in the latter case was a layman, while the former case involved a laicized priest. Moreover, the document which had granted Mr Martínez a dispensation from celibacy in 1997 provided that, in accordance with canon law, “persons granted such dispensation could not teach Catholic religion in public institutions unless the Bishop ‘depending on his criteria and provided there [was] no scandal’ should decide otherwise.” Secondly, Mr Martínez, being a teacher of religion and ethics, was linked to the Catholic Church by a special bond of trust. The Court noted that “that bond necessarily gives rise to certain specific features that distinguish teachers of Catholic religion and ethics from other teachers who, for their part, are employed in the context of a neutral legal relationship between an authority and an individual.” Moreover, he had permitted himself and his family to appear in the newspaper, accompanied by opinions opposed to those of the Church, thereby causing a ‘scandal.’ In contrast, the applicant in Schüth had not taken such actions. The Court also pointed out that the applicant in Fernàndez Martínez had received unemployment benefits after the non-renewal of his post, whereas, in Schüth, the applicant had not found another post easily. Therefore, as Smet has pointed out, “it is arguably the nature of the applicant’s position – clergy or lay – and that nature alone that sets Fernàndez Martínez apart from the previous cases, leading the Court to accept the Spanish courts’ categorical balancing, instead of insisting on a more thorough ad hoc balancing.”

All these findings have been challenged by the Grand Chamber, which upheld the same conclusion, but though a split decision in which the Chamber was divided almost in the

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522 Ibid., §83.
523 Ibid., §85.
middle. However, some important differences occurred between the two Courts’ lines of reasoning, which better highlighted the need to take into account the church’s independence in decisions of her competence, thereby avoiding the formula of categorical balancing. In fact,

respects for the autonomy of religious communities recognized by the State implies, in particular, that the State should accept the right of such communities to react, in accordance with their own rules and interests, to any dissident movements emerging within them that might pose a threat to their cohesion, image or unity. It is therefore not the task of the national authorities to act as the arbiter between religious communities and the various dissident factions that exist or may emerge within them.\(^{525}\)

Following this reasoning, the main point of difference with the previous judgment was the question to be addressed. In fact, here the aim of the GC was not to demonstrate whether the State should ensure that the applicant’s right to privacy to prevail over the Church’s right not to renew the contract. Rather the crucial question was “the action of the State authority, which, as the applicant’s employer, and being directly involved in the decision-making process, enforced the Bishop’s non-renewal decision.”\(^{526}\) In fact, in this circumstance, the State confirmed the decision taken by the Bishop in regard to the applicant’s teaching contract. In other words, the point was whether the limitation of the applicant’s right to private life upheld by the State’s action was legitimate, and not whether the State should be obligated to take measures in order to give more weight to the applicant’s right to private life than to Church autonomy. The GC essentially supported all the argumentations of the lower Chamber, insisting on the duty of loyalty that bound the claimant to the Catholic Church, and maintaining that this bond was broken after he and his family did not do anything to avoid the press and become a ‘national case.’ In addition, the GC highlighted that even though the loss of his job was a severe sanction (although tempered by employment benefits), it should be seen “in the light of the fact that he had knowingly placed himself in a situation that was incompatible with the Church’s precepts.”\(^{527}\) Mr Martinez well knew that being a married priest and belonging to a movement that opposes Catholic positions on major issues were conditions not compatible with being a teacher of religious education in Spain. Also, the Bishop had been aware of this situation, but had decided to tolerate it until it became public. At that point, the credibility of the Catholic

\(^{525}\) Fernàndez Martinez, Grand Chamber, §128.

\(^{526}\) Ibid., §115.

\(^{527}\) Ibid., §146.
Church could be undermined and he acted accordingly. Thus the State, according to the 1979 Agreement between Spain and the Holy See (as in Lombardi Vallauri), supported his choice. For the Court, challenging this last point would mean challenging both the Agreement and the Church’s criteria when appointing religious teachers, both of which clearly falls within the State’s margin of appreciation.

On the other hand, there is the alternative point of view, suggested by Judge Dedon, who argued that “the celibacy rule contradicts the idea of fundamental human rights and freedoms”528 and that this “should be used as a principal reason for finding a violation of Article 8 of the Convention.”529 Such positions, however, run the risk of giving the Court the responsibility to judge religious principles.

5.6. Is the ECtHR Moving towards the ‘Ministerial Exception’ Suggested by the U.S. Supreme Court in the Hosanna-Tabor case?

The most important reason why, in Fernández Martínez, the Court accepted the deference to the autonomy of the Church and refused to engage in a real balancing exercise was that the claimant was still a priest appointed by the Catholic Church to teach religion classes. In this respect, the Court’s judgment in Fernández Martínez echoes the decision of the U.S. Supreme Court in Hosanna-Tabor, in which the Supreme Court confirmed the existence of the ‘ministerial exception,’ rooted in the First Amendment. According to this doctrine, the application of legislation on discrimination in employment is prevented when the employment relationship between a religious institution and its ministers is at stake.

The case concerns Ms Perich, a ‘called’ teacher of a church and school of the Lutheran Church-Missouri Synod, who was dismissed for insubordination after she threatened to sue the Hosanna-Tabor school for contesting her return to work from medical leave. By issuing such a threat, she had violated the Synod’s belief that Christians should resolve their disputes internally.530 This was the starting point for the Supreme Court’s

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528 Ibid., Dissenting opinion of Judge Dedon.
529 Ibid.
reasoning on this controversial case. It is possible from this case, to identify at least three key factors, which caused the Court to distance itself from judging a ‘religious dispute.’

First, the applicant was not only a teacher, but also a minister of the Church. The Synod, in fact, classified teachers into two categories: ‘called’ and ‘lay’. The latter are not required to be trained by the Synod, or even to be Lutheran, while the former, like Ms Perich, are considered as called to their vocation by God through the congregation. This meant that the applicant, after being trained at a Lutheran college, had received a ‘diploma of vocation’ and then had been called by Hosanna-Tabor called her. After the applicant became a called teacher, she began to teach religion in addition to secular subjects, and also led the students in prayer.

The role of Ms Perich at Hosanna-Tabor goes hand in hand with the Court’s recognition of “the existence of a ministerial exception barring certain employment discrimination claims against religious institutions – an exception ‘rooted in the First Amendment’s guarantees of religious freedom.’”531 According to Chief Justice Roberts’ majority opinion, the First Amendment religion clauses are an important achievement resulting from the conflict between the English Crown and the English Church, in order to exclude the creation of a national church. Moreover, in the context of disputes on church properties in American history, the Court confirmed that “it is impermissible for the government to contradict a church’s determination of who can act as its ministers.”532

The second aspect of the Court’s reasoning concerns its explanation of the ministerial exception, in particular who can be qualified as a ‘minister of religion.’ In this respect, Chief Justice Roberts, “reluctant […] to adopt a rigid formula for deciding when an employee qualifies as a minister,” concluded that Ms Perich was a minister covered by the ministerial exception.533 In fact, he pointed out that: first, the ministerial exception was not limited to the head of a religious congregation; second, the applicant had received a diploma of vocation which entitled her to become a commissioned minister; finally, among her job duties there was the important role of transmitting the Lutheran faith to the next generation.

The discussion on how to define who is a minister was also carried on by two concurring opinions. Justice Thomas’ opinion, in particular, highlighted the risks of defining in a juridical way who can be considered a minister, because the role of a religious minister is

531 Ibid., §6.
532 Ibid., §10.
533 Ibid., §15.
in itself religious.\textsuperscript{534} However, as Murray has argued, “Justice Thomas’ opinion differs from the majority opinion in that it seems to clearly foresee the link between the two questions of ‘who is a minister’ and ‘which institutions can have a minister.’ ”\textsuperscript{535} Again, there is a very tight link between the features of a minister and his or her church.

Similarly, Justice Alito’s opinion is focused on determining the conditions according to which an employee of a religious group falls within the ‘ministerial exception.’ In particular, he emphasized the fact that many denominations do not use the term ‘minister,’ while others consider large portions of their congregations to be ministers. This is why Justice Alito disagrees with Justice Roberts when he makes a detailed description of the functions required in order for the applicant to be considered a minister of religion. According to Justice Alito, in fact, “what matters is that respondent played an important role as an instrument of her church’s religious message and as a leader of its worship activities. Because of these important religious functions, Hosanna-Tabor had the right to decide for itself whether respondent was religiously qualified to remain in her office.”\textsuperscript{536} Hence, in the present case, the religious function of the applicant implied that she should accept the doctrine of internal dispute resolution, and the national courts could not overrule the church’s decision.

To conclude, this case provides evidence that the Supreme Court found that the ‘ministerial exception’ could be applied to a church employee who had a role in carrying out the church’s message and its mission. In his reasoning, Chief Justice Roberts, Jr. seems to minimize the scope of the ruling by avoiding “a rigid formula for deciding when an employee qualifies as a minister” and by not saying how the exception would apply in other circumstances.\textsuperscript{537} However, as Garnett argues,

\begin{quote}

it is not ‘discrimination is fine, if churches do it.’ It is, instead, that there are some questions secular courts should not claim the power to answer, some wrongs that a constitutional commitment to church-state separation puts beyond the law’s corrective reach, and some relationships – such as the one between a religious congregation and the ministers to whom it entrusts not only the ‘secular’ education but also the religious formation of its members – that...
\end{quote}

\textsuperscript{534} The question whether an employee is a minister is itself religious in nature, and the answer will vary widely. Judicial attempts to fashion a civil definition of ‘minister’ through a bright-line test or multi-factor analysis risk disadvantaging those religious groups whose beliefs, practices, and memberships are outside of the ‘mainstream’ or unpalatable to some. Ivi, Justice Thomas, Concurring, §1.


\textsuperscript{536} \textit{Hosanna-Tabor}, Justice Alito, concurring opinion, §8.

\textsuperscript{537} \textit{Hosanna-Tabor}, §10.
government should not presume to supervise too closely.\textsuperscript{538}

It is possible to say that this ruling can have important consequences in the ECHR jurisprudence, since it overcame the Court’s longtime practice of balancing the Church authorities’ decisions against government main areas of interests, such as employment legislations. As Vanoni argues “in this perspective, the decision of the Supreme Court in \textit{Hosanna-Tabor} is an interesting point of comparison for the continental lawyer engaged in the difficult balance between the autonomy and organizational independence allowed to religious organizations and the individual rights guaranteed to their employees.”\textsuperscript{539}

In fact, in the same way, the ECtHR in \textit{Fernández Martínez} has rejected the idea of a balancing test between the religious autonomy of the church and the employee’s rights under the ECHR. Instead, the Court should continue to avoid government involvement in church organization and theological disputes. Although we cannot know whether the Grand Chamber had looked at the ‘ministerial exception’ doctrine applied in \textit{Hosanna-Tabor} in its reasoning as a turning point, it is evident that it has endorsed the U.S. Supreme Court’s logic in supposing that in order to maintain neutrality “the government ought to stay out of internal matters of church governance and allow the church to decide who counts as a minister or teacher of faith.”\textsuperscript{540}

\section*{5.7. Conclusion}

The foregoing analysis has shown many approaches undertaken by the ECtHR in assessing the relationships between employer and employee in light of the right to freedom of religion. Essentially, there are two different ways in which that conflict can appear. On the one hand, a confession-oriented employer (e.g., a Church) might impose on its employees


\textsuperscript{539} L. Vanoni, \textit{Discriminazione sul luogo di lavoro e autonomia delle organizzazioni religiose in USA: il caso \textit{Hosanna Tabor Evangelical Lutheran Church and School V. EEOC}}, Rivista Associazione Italiana dei Costituzionalisti, No. 2/2012, p. 10, available online at \url{http://www.rivistaaic.it/sites/default/files/rivista/articoli/allegati/Vanoni.pdf}, my translation.

specific requirements connected to its ethos. On the other hand, a non-denominational employer might demand that its staff be respectful of all rules and policies in order to maintain the successful function of the school. Most of the time, the cases brought before the ECtHR concern the first situation. However, in both settings it is possible to find the same bone of contention: where to draw the line between the autonomy of the church (or believer) and the State’s power.

In regards to the first scenario, the Court of Strasbourg seems to have reached a turning point with Fernández Martínez. That this is a major shift seems to have been confirmed by the recent judgment of the Grand Chamber. Here, the ECtHR appears to be following the path that the U.S. Supreme Court laid out earlier in 2012 in Hosanna-Tabor. In short, and from a broader perspective, the European Court seems want to distance itself from Churches’ decisions and legacies. It is therefore departing from decisions such as Lombardi Vallauri. The issue seems not to be whether to allow or not allow religion in the public square, but whether the Court and national authorities should be deciding whose sacred texts, symbols, and religious practices can or cannot be accepted in the public sphere, specifically in schools and universities. Clearly, when other fundamental rights conflict, the balancing test is necessary, but the Court’s recent decisions have pointed out that Church autonomy must be considered before any ad hoc balancing. In fact, Article 9 of the Convention protects not only single individuals, but also organized groups. For this reason, it protects the right of an organized religion to express its religious identity through its recruiting policies. Neglecting to consider Church autonomy might conceivably be deemed an unjustified limitation of the above provision. Employing staff that identifies with the religious beliefs of the organization is meant to ensure that the religion’s core message is propagated through the organization itself. Therefore, a broader religious exception applying to those undertaking ‘secular’ work within a religious community can be justified.

Turning to the second setting, with which the Court has been involved since its beginning, it is worth noting, first of all, that the Court takes into account the reasons for the protection of Article 9 in the context of work in order to determine the proper scope of the protection of religion in employment, specifically, in the context of work within educational environments, such as schools and universities. As Vickers has argued, “it is certainly not

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suggested that workplaces should have as a primary concern the protection of religious interests, and yet employees spend a significant part of their lives at work and it is not feasible to expect them to leave their interests in autonomy and dignity behind when they enter the workplace.” Moreover, there are some religious requirements, such as practices of prayer, which apply at all times, and cannot be limited to the non-work sphere. In this regards, the ‘right to resign’ has the effect of limiting protection of religion to the area exterior to the work. However, if freedom of religion and belief needs significant protection in practice, resignation should remain the final stage of protection, to be applied when accommodation of the religious interest at work is inapplicable. As Vickers has noted,

The difficulty in determining the proper parameters for protection arises from the conflict which can arise between religious interests and other interests, conflict which may stem from the positive and negative nature of religious rights. These conflicts present significant challenges, and interact with broader debates on equality, multiculturalism, and religious, political and social identity.

Also within this second scenario, however, the ECtHR has shown a worrying approach towards the right to manifest religion. It has held, in fact, that “only acts ‘required’ by a particular religion will be covered by the right to manifest one’s religion and, in contrast to the approach of the U.S. Supreme Court, the Strasbourg Court has taken upon itself to determine ‘objectively’ what constitutes manifestation for these purposes, rather than relying on the subjective views of applicants.” Thus the Court runs the risk of becoming an arbiter of religious principles.

To conclude, having all this in mind, the aim of the Court of Strasbourg and of national authorities should be to find ways of balancing by means of which employees’ religious and philosophical beliefs can enjoy a significant level of protection at work, without disproportionately interfering with the rights of others. When the ‘rights of others’ means the right of Church autonomy, it is necessary to recognize that any State interference with that autonomy should not start from the presumption that it is obligated to challenge its core principles.

544 Ivi, p. 233.
545 R. McCrea, Religion and the Public Order of the European Union..., p. 126. This quote refers in particular to the cases of Ahmad v. the UK and Eweida and Others v. the UK.
CONCLUSION

The purpose of this study was to enhance our understanding of the scope and content of freedom of thought, conscience, and religion, as well as the right to education as guaranteed by Article 9 and Article 2, Protocol N.1 of the European Convention on Human Rights, and as interpreted in the case law of the European Court of Human Rights in the educational context.

Before proceeding to examine the main findings of the foregoing analysis, we will offer a brief overview of the work.

The first Chapter highlighted the importance and profound meaning of the provisions of the ECHR that deal with religious freedom. As the right to freedom of religion has its foundation in the very dignity of the person, it can be considered a pillar of democratic society. Hence, the second Chapter sought to assess the place given to religion in the public sphere according to mainstream contemporary theory. Religion is not always allowed to enter the public sphere, and so the discussion focused on whether religion can bridge the gap between public/private. Accordingly, it dealt with the meaning of the ‘neutrality of the State,’ whether ‘secularism’ is one of many world-views or the most vital, and the importance of including – or restricting – religious and moral doctrines in the public arena. In the light of this discussion, the next part of the work examined three issues through which the precedent findings could be critiqued: 1. the headscarf controversy, 2. the role of the concept of State neutrality in protecting the parents’ right guaranteed by Article 2, Protocol No.1 to educate their children according to their personal beliefs, and 3. the protection of the right to freedom of religion held and exercised by teachers in the school environment.

The evidence from this study reveals at least three problematic aspects of constitutional theory. These problems present a challenge to the main pillars of the protection of the right to freedom of religion, as guaranteed by the ECHR’s provisions.

The first finding highlights how the definition of State neutrality can be problematic within the religious freedom debate, particularly regard to the need for reasonable accommodations. It is a given, that many discussions about the role of religious symbols and instruction in schools are motivated by a fear of indoctrination. In addition, these debates are
often motivated by concerns about the possible contamination of the public space (i.e., State schools) that is intended to promote tolerance and pluralism among students and that therefore must not take sides on sensitive matters, such as religion. In fact, the issue of whether religion is a public or private matter becomes particularly controversial when its place in the educational environment is considered. One reason for keeping religion in the private sphere, and out of public life, is that it is often seen as having an inherently divisive nature. Accordingly, a recurring theme for those who object to any public role for religion is whether the State should maintain neutrality with respect to the different beliefs of its citizens.

Generally, the neutrality of the State on this sensitive matter means that governments should step back from endorsement of any particular religion, and even the idea of religion in general, in order to support the individual’s freedom to choose a particular belief, or reject belief. However, governments are not abstract entities, but they systems constituted by citizens bonded together by the valuable ideal of leading a nation towards a common good. Rawls’s doctrine of public reason is devoted to defining the kinds of arguments that are permissible for public officials in a politically liberal community, and he requires that the doctrine applies in particular to judges. In fact, public reason requires officials to offer justifications that are based on the political values of the community, and not on comprehensive religious or moral doctrines. However, as the late Rawls admitted, this request can be excessively onerous, and if this is the case, then religious and moral doctrines can be introduced to the political arena, but only through the lens of a ‘political language.’ In any case, a judge, like any other public officer, cannot appeal to his or her personal moral convictions. This indicates that a hefty burden is imposed on religious views. As Dworkin puts it “if it means that a judge may not give any place to controversial moral opinions in his judgment, because he would then be citing the moral opinions that he but not others think right, then it states an impossible demand. On no conception of law […] can judges in complex pluralistic communities acquit their institutional responsibilities without relying on controversial moral convictions.” At the same time, asking to citizens to refrain from manifesting their core beliefs in a public sphere through practices such as wearing religious symbols, opting their children out from mandatory classes which conflict with their beliefs, etc. can mean imposing a precise view. This is not the ‘neutral’ stance it pretends to be.

On the other side of the debate, there are Sandel and Taylor’s views. They do not think that questions about morality and religion can, or should, be set aside as Rawls and Dworkin suggest. Rather, they maintain that at every time, morality and religion must be part of the public debate. The norms of a society are not determined solely by abstract principles of justice. They are also decided by context. It is clear that Sandel and Taylor are not defending a discriminatory system where governments espouse religious and philosophical views, as in a theocratic regime. But neither do they require governments to hide before the myth of neutrality as indifference to core beliefs, nor do they believe that the presence of religion in the public arena undermines the State’s duty of impartiality before different religious and philosophical beliefs.

Moreover, as Taylor argues, there are norms that, quite simply, cannot be neutral when they directly interfere with citizens’ moral convictions, for instance, the French ban on wearing the Muslim headscarf in public schools, or the refusal to allow students to opt out of sex education classes in Denmark etc. This does not mean that those norms are necessarily illegitimate, but “inasmuch as they indirectly favour the majority, measures of accommodation must sometimes be taken to re-establish equity within the terms of social cooperation.”

On this last point, the foregoing analysis has revealed three main findings. First, the legitimacy of requests for accommodation on religious grounds is not unanimously accepted. In the case of France, this is because the secular nature of schools is considered to be central to the proper process of the integration of future French citizens, and many believe that successful integration depends on the neutrality of schools. This means, in short, that religion has no room in public education. Similarly, many Turkish cases have shown the need to ensure equality among citizens, and to respect the rights of others by not granting exemptions from mandatory religious classes or preventing students from wearing religious symbols. In this regards, the British case of Shabina Begum can be seen as a positive example how to deal with these sensitive issues. This case shows how it is hard to ensure everyone is equally respected. At the same time, however, it is also evident that the school made a great effort to meet the needs of all pupils in a multicultural society when conceiving the school uniform, particularly by including the requirement that Muslim girls dress modestly. Here, the national courts gave more weight to the school’s provisions regarding the uniform than to the pupil’s

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547 Taylor and Maclure, Secularism and Freedom of Conscience…, p. 68.
right to manifest her religion because all the circumstances at stake indicated that the headmaster and governors had been very sensitive to this issue.

Secondly, within the context of contemporary societies marked by moral and religious diversity, it is not religious convictions in themselves that must enjoy a special status, but rather all core beliefs that allow individuals to makeup their moral identity. As the Folgerø case highlighted, the right of parents to bring up their children according to philosophical beliefs, which are different from the majority, must be guaranteed through effective means. The pertinent distinction is therefore not between religious and secular core beliefs, but rather between core commitments and personal preferences that are not intimately connected to our understanding of ourselves as moral agents. In the Folgerø case, granting students a full exemption from religious classes is a way through which the schools can ensure that students are free to act on their beliefs if a particular teaching is really a threat to their moral beliefs. In fact, as we have seen, the possibility of producing a wholly non-controversial curriculum is quite remote, and establishing objective and neutral standards is far from being feasible.

Taken together, these two last findings suggest that there is a risk of favoring excessive accommodations, especially since anything can be thought to have a potentially disadvantageous impact on a person’s moral life. Whereas the jurisprudence on Article 9 of the ECHR clearly states that not every act motivated by religious or philosophical beliefs goes under that provision.

The last point emphasizes how important it is for courts and governments to bear in mind the definition of ‘core belief,’ and its implications when dealing with cases on freedom of religion. The pluralism of values and conceptions of the good life make it impossible to refer to a list of beliefs. The criterion adopted by the court to distinguish between belief and simple preference was clearly expressed in the early stages of the work of the ECtHR. In fact, in Campbell and Cosans, the Court of Strasbourg affirmed that the Convention protects only religions and philosophies, which are worthy of respect in a democratic society and are not incompatible with human dignity; moreover, the beliefs in question must attain a certain level of cogency, seriousness, cohesion and importance. In short, conviction of conscience is intimately connected to the individual’s moral integrity, and it entails himself to establish what is central and what is marginal to his moral identity. However, the national authorities must evaluate not only the genuineness of the belief, but also the consequences of the requested of accommodation on the rights of others and on the institution’s capability to

\[54^{5}\] See also Taylor and Maclure, Secularism and Freedom of Conscience,… p. 89.
pursue its aims. Serious restrictions to freedom of religion and parents’ right to education are sometimes legitimate, as long as they are not aimed to impose a particular conception of the good life. With that said, “it is probably unreasonable to expect a normative theory to provide a priori an adequate response to all the imaginable empirical cases that might arise” and “we cannot rule out a priori the possibility that insincere individuals or those with eccentric beliefs or expensive tastes will not surmount the two justificatory hurdles and obtain measure of accommodation.”

That reasonable accommodations are required in connection to the right to religious freedom means that this right has a status of ‘special right.’ In fact, any position maintaining that, in certain circumstances, it is a moral obligation to seek measures of accommodation, must inevitably demonstrate that religious beliefs belong to a distinct type of belief that calls for greater legal protection. Another part of the debate therefore rests on the status of religious beliefs and, therefore, of freedom of religion.

We now turn to the second main result of this study. Of course, freedom of religion can be weakened if the Western legal concepts of religion and freedom are diluted. In his last book – edited when I was in the middle of this work – Dworkin defines the religion as follows: “Religion is a deep, distinct, and comprehensive worldview: it holds that inherent, objective value permeates everything, that the universe and its creatures are awe-inspiring, that human life has purpose and the universe order. A belief in god is only one possible manifestation or consequence of that deeper worldview.” In his view, breaking the connection between the idea of religion and God means that there is no compelling distinction between religion and other human attitudes. Religious freedom can therefore be assimilated to a more general right to ethical independence. This approach has the advantage that legislators do not have to develop clear legal definitions of religion in order to protect the relevant rights. In fact, “the general right to ethical independence […] fixes on the relation between government and citizens: it limits the reasons government may offer for any constraint on a citizen’s freedom at all.”

Unlike Rawls, Dworkin believes that insulating political convictions from religious beliefs is wrong. He only rejects any kind of subordination. In his view, freedom of religion should not be regarded as a special right (because special rights place have too much power and place general constraints on government), but as general right to ethical independence. If

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549 Taylor and Maclure, Secularism and Freedom of Conscience…, p. 103.
551 Ibid., p. 133.
we accept this non-theistic understanding of the notion of religion, then freedom of religion becomes the right of each to live in accordance with his or her conception of a life well lived.

Considering the role of religion in public education in light of the idea of right to ethical independence means that the government cannot restrict citizens’ freedom when its justification assumes that one conception of how to live, of what makes a successful life, is superior to the others. Thus, on the one hand, the State has no business interfering in the way people manifest their religion and their private display of religious symbols, since the State should not impose a sense of what counts as religion on individuals. On the other hand, in order to respect the ethical independence of all, the State should avoid endorsing religion in its institutions and symbols. It should not teach the truth of religion, and it should avoid endorsing religious symbols and ceremonies. Moreover, secular liberal positions must be defended not through a ‘first order’ ethical argument for the superiority of non-religious views, but through a ‘second order’ moral argument for the value of ethical independence for all citizens. Yet how can this reasoning apply to parents who believe that sex education classes undermine their right to educate their children according to their beliefs? On the one hand, parents are said to have the right to bring up their children according to their conception of the ‘good life.’ On the other hand, the right to ethical independence cannot admit exemption on religious ground since religious freedom is not a special right.

Many cases have also shown that citizens can be forbidden to wear religious garments in public space. According to Dworkin, even though the need for a shared sense of secular identity may imply a restriction of the right to manifest religion, this violates the right of ethical independence because it assumes that secular identity is better than religious identity. Yet the question deals with reaching a justification where ethical issues are not at stake. The only way to do this is to consider religion as one of a number of fancy hobbies that anyone might have. What other justification can a state provide for forbidding students and teachers from wearing religious garments at school? Sometimes a headcovering might infringe a school’s uniform policy, yet this argument runs the risk of comparing a student who wants to wear the Muslim headscarf with another one who wishes to wear his favourite baseball cap. As the concept of religious freedom becomes more diluted, more such misunderstandings will occur. The same critique that Dworkin made of the Rawlsian doctrine of public reason can be made of Dworkin’s epistemology that is grounded on the idea of ethical independence. It is limited by efforts to exclude religion, as traditionally understood, from the public sphere. As Domingo argues “the human person as a source of value can integrate ethical, political,
moral and religious values to generate transversal values. In this sense, the idea of the unity of the value is very helpful.552

From the previous discussion, it can be seen that the right to freedom of religion is rooted in the very essence of the individual. Because of this, the inviolability of the human dignity of each citizen is at stake when the issue becomes the protection and limitation of the right to religious freedom. Thus, as Rawls asked in one of his main work, “how is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?”553

This question allows us to turn now to our last main finding. Constitutional theories have been viewed not only in the light of national perspectives, but also through the lens of a broader community constituted by all member States of the Council of Europe. The analysis of the preparatory works revealed the need to address the deepest causes of the cruelty and violence of the two World Wars. Thus, one of the principal fil rouge that has characterized the jurisprudence on Article 9 and Article 2, Protocol No. 1 has been the conception of the relationship to the alien. In fact, it is difficult to imagine something normatively more important to the human condition and to our multicultural societies.

Through the study of the ECtHR’s case law, two basic human strategies for dealing with the alien stand out, which I borrow from Weiler’s studies.554 These strategies mainly pertain to the European Union case law, but they can also being applied to ECtHR judgments. The first strategy is to remove boundaries in the spirit of ‘come, be one of us.’ On the one hand, this is honourable because it involves, of course, the elimination of prejudice, of the notion that there are boundaries that cannot be eradicated. However, this strategy runs the risk of inviting the other to be ‘one of us,’ by robbing him of his own identity. As Weiler points out, this attitude “may be a subtle manifestation of both arrogance and belief in my superiority as well as intolerance. If I cannot tolerate the alien, one way of resolving the dilemma is to make him like me, no longer an alien. This is, of course, infinitely better than the opposite: exclusion, repression, and worse. But it is still a form of dangerous internal and external intolerance.”555 The second strategy of dealing with the other is to acknowledge the validity of certain manifestations of his identity, but at the same time, to reach across

553 Rawls, Political Liberalism..., p. 4.
boundaries. This means that “we acknowledge and respect difference, and what is special and unique about ourselves as individuals and groups; and yet we reach across differences in recognition of our essential humanity.”

Here the interesting point is that one is invited to recast the boundary in a way that frees the alien to recognize and maintain his identity: “The soul of the I is tended to not by eliminating the temptation to oppress but by learning humility and overcoming it.” Obviously, the call to bond with the alien in this closer union demands a very high degree of tolerance. This tolerance has to be learnt and practised because it is the only way through which the diversity of the alien becomes an enriching experience and not a problem to overcome.

Moral and religious diversity is a structuring and, as far as we can see, permanent characteristic of democratic societies. For this reason, people espousing different, sometimes irreconcilable representations of the world and value systems must learn to cooperate and resolve their differences. In some cases, individuals’ core beliefs, whether religious or secular, are sources of authentic ethical and political disagreements. Are religious accommodations legitimate? What are the limits to freedom of religion? What must we teach our children, and what are the limits of parental autonomy? What is the status of religious beliefs in public deliberations? Should teachers, as public agents, be allowed to display religious symbols? What should be the place of the majority’s religious symbols in public space?

There are no a priori answers to the above questions. Thus it is reasonable to think that an ethics of dialogue is the best way to find an ‘overlapping consensus’ upon those highly debated issues. As Taylor and McLure argue “under such an ethics of dialogue, citizens engage candidly in discussions about the foundations and orientations of their political community, using the explanatory and justificatory language of their choice, while at the same time displaying sensitivity or empathy toward core convictions that are an integral part of their fellow citizens’ moral identity.”

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