Chapter 17:
Law, Religion and the School

(Myriam Hunter-Henin, University College London)

In **Routledge Handbook of Law and Religion (2014)**
Silvio Ferrari, University of Milan

"A liberal education is at the heart of a civil society, and at the heart of a liberal education is the act of teaching".

A Bartlett Giamatti

The school illustrates the fundamental trends underlying law and religion debates.[1] Battlefields between the State and religious communities, state schools were shaped to represent emblematically the chosen national model of Church/State relationships.[2] As the issue of religion entered the era of human rights,[3] schools then became key fora for testing the strengths and limits of religious freedoms of parents, of children or school staff against school or state policies.[4] Now that the very presence of religion in the public sphere is being questioned, the issue of religion at school often revolves around the extent to which the State directly or indirectly may be allowed to endorse a particular expression of faith in a public school setting.

[1] See for example the debate between Amy Gutmann and Michael McConnell: Gutmann, A, *Democratic Education*, Princeton, Princeton University Press (1999); McConnell, M, 'Educational Disestablishment: Why democracy is ill-served by democratic control of schooling' in *NOMOS XVLIII*, Moral and Political Education, New York, New York University Press (2002); Gutmann, A, 'Can Publicly Funded Schools Legitimately Teach Values in a Constitutional Democracy? A Reply to McConnell and Eisgruber', *ibid*, 170; *adde*, Levinson, M, *The Demands of Liberal Education*, Oxford, Oxford University Press (1999); Brighouse, H, *School Choice and Social Justice*, Oxford, Oxford University Press (2000); Macedo, S, 'Liberal Civic Education and Religious Fundamentalism: the case of God v. John Rawls?', 105 *Ethics* (1995), 468.
[2] Hunter-Henin, M, 'Religious Freedoms in European Schools: Contrasts and convergence', Introduction in Hunter-Henin, M (ed), Law, Religious Freedoms and Education in Europe, Ashgate (2011), 9.
[3] Sandberg, R, *Law and Religion*, Cambridge, Cambridge University Press (2011), Chapter 6.
[4] Hunter-Henin, M (ed), Law, Religious Freedoms and Education in Europe, Ashgate (2011).

Law and religion issues do not only take a special salience at school because of the academic and historical pertinence of the field. Education is also a network of potentially conflicting rights and interests. For parents, transmitting to their children the values and beliefs they are themselves deeply committed to will be one of the most fundamental responsibilities they undertake; ensuring that the school they children attend assist them in this process will therefore often be one of their most pressing concerns. For children, the school "is the place where they learn about the world, about the place they will occupy in it, about powers and inequality".[5] Educational systems committed to children's rights will need to respect pupils' convictions (which may coincide or diverge from their parents' beliefs) whilst maintaining their right to "an open future".[6] Finally schools, "*pépinières de l'Etat*" ("nurseries of the State"),[7] will form generations of citizens and will thus naturally attract legitimate state interests. These three sets of interests[8] need not always intertwine harmoniously. How is a State to strike the balance between those competing interests?

The question is one that every liberal State has to answer. [9] But the case-law of the European Court of Human Rights is of particular interest because it is meant to provide a common framework for a variety of nations with a multiplicity of cultures, traditions and understandings of state involvement in religious life. This chapter will therefore focus on the guidance provided by the European Court of Human Rights (ECtHR) regarding this question. As Angelo Bartlett Giamatti, then President of Yale University, reminds us in the abovementioned quote, two elements of a modern education may be identified: its liberal ethos and, at its core, the act of teaching. With a different terminology, the European Court of Human Rights has also insisted that religion should both be taught and displayed at school in a pluralistic, objective and neutral

[5] Freeman, MDA, 'The Human Rights of Children', *Current Legal Problems*, OUP (2010), 6.
[6] Feinberg, J, 'The Child's Right to an Open Future', in Aiken, W & La Follette, H (eds), Whose Child? Children's Rights, Parental Authority and State Power, Totowa NJ (1980), 124.
[7] Rollin, C,*Traité des Études*, vol. VI, (1726-1731), 1 (our translation). []
[8] Following William Galston's typology, Galston, W, *Liberal Pluralism: The implications of value pluralism for political theory and practice*, Cambridge, Cambridge University Press (2002), 93-94; *adde*, Adhar, R & Leigh, I, *Religious Freedom in the Liberal State*, Oxford, Oxford University Press, 2nd ed (2013), 244.
[9] Cf. for example, for references on the US and Canadian case-law on the topic, Adhar, R & Leigh, I, *Religious Freedom in the Liberal State*, op. cit, esp. chapter 8.

fashion.[10] If the "act of teaching is at the heart of a liberal education", the principles that have emerged from the former set of cases (those relating to religious education, therafter RE) should provide us with the core guidelines to be followed in all religious matters at school. And yet, as this chapter will demonstrate, the requirements of "objectivity, neutrality and pluralism"[11] that have emerged from the ECtHR's religious education case-law seem to have been transposed very differently to the latter set of cases. The emphasis on neutrality and privacy rights that characterizes the former leaves little space for RE courses that favour one religion over others (Part I). By contrast, the ECtHR has shown in the latter set of cases a benevolent attitude towards national arrangements even when they confer greater visibility on the majority religion (Part II). It is submitted that a more coherent approach would be welcome across religious issues at school.

The chapter will explore perspectives on how to reconcile the two sets of cases and suggest ways to manage more coherently the issues concerning religion and belief at school. It will advocate a balanced position respectful of both constitutional Church-State arrangements and individual human rights. To that end, the subtle and sensible interpretation of the concept of neutrality that has been developed in recent religious symbol cases at school should serve as a guiding principle. It is indeed to be preferred to the quantitative and crude assessment carried out in RE cases. On the other hand, the close scrutiny shown in RE cases should be an invitation to curtail the wide margin of appreciation and blank deference which the ECtHR has by contrast allowed Member States to enjoy in the regulation of religious symbols at school.

Religious education in state schools

As Ian Leigh notes, "it is clear that the Court of Human Rights does not take assertions that the objective of religious education is to instill cultural knowledge or fostering toleration at face

[10] ECtHR *Kjeldsen, Busk Madsen and Pedersen v. Denmnark* 7 December 1976, App nos. 5095/71; 5920/72; 5926/72.

[11] Leigh, L, 'Objective, Critical and Pluralistic? Religious Education and Human Rights in the Public Sphere', chapter 8, in Ungereanu, C & Zucca, L (eds), Law, State and Religion in the New Europe: Debates and dilemmas, Cambridge, Cambridge University Press (2011).

value".[12] This close scrutiny contrasts with the wide margin of appreciation granted to Member States when deciding whether religious symbols – whether worn by students, staff or affixed by the State – may be allowed in state schools.

This level of scrutiny will itself vary depending on the type of RE teaching and on the place given in the syllabus to the majority religion. Broadly speaking, the ECtHR will distinguish between religious instruction, where pupils are taught how to practice religion; religious education, where pupils are taught about religion without any precepts being presented as truths; and civic or ethics classes, which adopt a non-religious perspective Whereas religious instruction, otherwise known as a confessional approach,[13] will be equated to indoctrination[14] (but may still be saved by opt-out provisions), a civic ethics class will be deemed neutral and pluralistic and hence may be made compulsory for all children. In between, religious education, albeit praised by European instances as the most desirable option,[15] will ironically be the approach to face the most stringent scrutiny from the ECtHR. This scrutiny will be heightened if preponderance is given within the RE course to one particular religion. Thus the safest option for state schools it seems would be to deliver non-religious ethics classes (see *Appel-Irrgang* below). Should RE classes nevertheless be provided, opt-out provisions should be made available and be implemented in a way that does not compel pupils to reveal in any way their religious convictions (or lack of) (see *Grzelag* below). We therefore submit that the underlying principles that emerge from the ECtHR's most recent case law relating to RE are a new emphasis on neutrality (understood as equidistance towards religion) and on privacy (with greater attention paid to the risk of stigmatization suffered by opted-out pupils).[16] Any conclusions as to the theoretical underpinnings of the ECtHR's case law on RE must however be uttered with caution.

---

[12] Leigh, I, 'New Trends in Religious Liberty and the European Court of Human Rights', *Ecclesiastical Law Journal* (2010), 277.

[13] For a recent comparative overview of the various types of religious teachings offered in European schools, see Doe, N, *Law and Religion in Europe: A comparative overview*, Oxford, Oxford University Press (2011), 191.

[14] Office of Democratic Institutions and Human Rights (OSCE), *Toledo Guiding Principles on Teaching about Religion and Beliefs in Public schools* 17 (7th guiding principles) (2007), para 21.

[15] Council of Europe, Parliamentary Assembly Ass 4 October 2005, *Recommendation 1720 on Religion and Education*, para 8.

[16] See also Leigh, I, op. cit, note 11, who argues that the European Convention religious liberty jurisprudence increasingly stresses the role of the State as a neutral protector of religious freedom and protects individuals' right not only to manifest their religious belief but also their freedom from having to declare their religious affiliation.

Indeed the cases that support the conclusions are dealt with by the European Court in a very casuistic fashion, making any general conclusions perilous.[17] Nonetheless the confrontation of the solutions reached and the reasoning adopted by the Court in *Folgerø,*[18] *Zengin,*[19] *Grzelak,*[20]*Appel-Irrgang*[21] and *Dojan*[22] respectively allow us to make some general observations. It is in *Folgerø v. Norway* that the basic tenets of the ECtHR's present position are set out.

Folgerø v. Norway

In *Folgerø and others v. Norway*, non-Christian parents complained about the domestic Norwegian authorities' refusal to grant their children a full exemption from a compulsory course in Christianity, Religion and Philosophy (the KRL subject). The KRL subject was split into five main rubrics: Bible Stories; History of Christianity; Contemporary Christian View of Life; Other Religions; Ethics & Philosophy. The Norwegian framework provided pupils with the right to a partial opt-out from those parts of the course which they considered to amount to the practice of another religion or adherence to another philosophy of life. However the parents contended that a partial opt-out provision was not enough to protect their right, under article 2 of the First Protocol to the ECHR, to have their children educated in accordance with their own convictions. A partial opt-out was not only impracticable in its implementation; its enforcement in the particular circumstances had stigmatized the parents and their children. Moreover, and more fundamentally, they alleged that a partial exemption was in principle an insufficient protection of their convention rights given that the whole course in fact expressed a religious outlook to which they objected.

The case demonstrates how difficult it is to devise a sufficiently inclusive and open course of religious education so as to make it acceptable to all.[23] If the ECtHR more modeslty it

[17] Contra, see Ringelheim, J, 'Rights, Religion and the Public Sphere. The European Court in Search of a Theory', Chapter 12 in Ungureanu, C & Zucca, L (eds), op. cit, note 10, 284, who argues that a theory is emerging from the case-law.
[18] ECtHR *Folgerø and others v. Norway* 29 June 2007 Grand Chamber, App. no. 15472/02.
[19] ECtHR *Hasan and Eylem Zengin v. Turkey* 9 October 2007, App. no. 1448/04.
[20] ECtHR *Grzelak v. Poland* 14 July 2010, App. no. 7710/02.
[21] ECtHR *Appel-Irrgang & Ors v Germany* 6 October 2009, App. no. 45216/07.
[22] ECtHR *Dojan v. Germany* 13 September 2011, App. no. 319/08 (decision on admissibility).
[23] Cumper, P, 'Religious Education in Europe in the Twenty-First Century', chapter 10 in Hunter-Henin, M, op. cit., note 1, 219; adde, 'Introduction', in Schreiner, P et al, Good Practice in Religious Education in Europe: examples and perspectives of primary schools, Berlin, LIT (2007), 10.

seems only requires that RE courses satisfy criteria of "objectivity, neutrality and pluralism"[24], the KRL course sought more ambitious pedagogical aims. "The prevailing intention behind the introduction of the KRL subject was that, by teaching Christianity, other religions and philosophies together, it would be possible to ensure an open and inclusive school environment, irrespective of the pupils' social background, religious creed, nationality or ethnic group and so on" (para. 88). But fundamentalist parents – whether of religious or secular obedience – will by definition object to a pluralistic environment in which either the secular approach to life or a religious outlook is implicitly presented as merely one possible perspective on the world. On the other hand, if parents were allowed to object to religious education classes on those grounds, it would be tantamount to entitling them to refuse that their children be exposed to any other views but theirs. Allegedly parental rights under article 2 Protocol I would then trump all the other interests at stake, namely children's rights to an open future and the State's interest in making sure that public education provides a tolerant environment where children of all creeds learn to interact.

The court's decision in *Folgero* cannot be read as granting to parents such a right to veto contact with other beliefs. On the contrary, the Court expressly declares that "the second sentence of article 2 of Protocol I does not embody any right for parents that their child be kept ignorant about religion and philosophy in their education".[25] It is not the religious outlook *per se* then (provided it is not taught in a preaching fashion) but the emphasis on the majority religion which according to the Court is suspicious.

Problematic preponderance of the majority religion in religious education courses: neutrality as equidistance between religions

Preponderance of the majority religion is not ruled out as such: "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, in the Court's opinion, of

[24] ECtHR *Kjeldsen, Busk Madsen and Pedersen v. Denmnark* 7 December 1976, App nos. 5095/71; 5920/72; 5926/72.
[25] Para. 89.

its own be viewed as a departure from the principles of pluralism and objectivity amounting to indoctrination".[26] However, following the Court's reasoning, it is hard to conceive of an unbalanced course that would pass the test. Indeed the ECtHR then goes on to note that thorough knowledge is only expected of the Bible and Christianity whereas no requirement of thoroughness applies in respect of other world religions and philosophies (para. 92). Moreover the Court expresses concerns with the amount of items dedicated to Christianity. But if the preponderance of the majority religion is as such acceptable, one fails to see why Norway should be criticized for dedicating just over half of the course to it. The Court suggests that this quantitative imbalance might have been satisfactory had qualitative differences not also been noted. But pedagogically it seems consistent to set a higher target and expect a deeper understanding of the topic that is given prominence in the syllabus. Despite the assertion that the majority religion can legitimately feature more prominently in the syllabus, the Court therefore in fact demands that religions should be treated even handedly. This is in sharp contrast as we will see with the court's position in relation to religious symbols. It is also in itself a deeply unsatisfactory solution.

This careful weighing of the different parts of the course and the scrutiny over the depth of the teaching dedicated to each religion and philosophy may be criticized in pedagogical terms. As Carolyn Evans[28] points out, "the desire to be fair and accurate can lead to curricula which are dense in facts but that do not leave students space to engage with and be challenged by the material presented". By contrast the contentious Norwegian KRL course adopted a "phenomenological approach"[29] whereby students were encouraged to take an insider perspective and experience through various religious activities (such as hymn singing) the experience of a believer. This approach is arguably the only one capable of conveying to students

[26] *Folgerø*, para. 89.

[28] Evans, C, 'Religious Education in Public Schools. An International Human Rights Perspective', 8(3) *Human Rights Law Review* (2008), 471. See also, putting across the same idea, Jackson, R, 'How School Education in Religion Can Facilitate the Promotion of Tolerance and Non-Discrimination with Regard to Freedom of Religion and Belief', *Report from the Preparatory Seminar on Teaching for Tolerance and Freedom of Religion and Belief*, Oslo, 7-9 December 2002, available at http://folk.uio.no/leirvik/oslocoalition/RobertJackson.htm. [last accessed on 7th January 2014]

[29] For an analysis of different types of approaches to religious education, see Adhar, R & Leigh, I, op. cit., note 8, 267.

a real sense of what being a believer is like. But the line between "learning about religion" and "practicing religion" then becomes blurred. It is arguable that the preponderance given to the majority religion is more problematic under such an approach to teaching. In such a case, there is indeed a risk that religious education may tilt towards religious instruction whereby pupils are not only taught about religion but taught how to practice it. It may be this inherent ambiguity in the KLR course[30] that justified the Court's censorship, by a narrow margin of 9 to 8.

However the reasoning adopted by the majority goes much further and seems to indicate instead that any preference towards one religion is problematic *per se*. Parents' claim was not upheld in *Folgerø* because of the quasi exclusive Christian nature of the *activities* undertaken along the classes; it was upheld because of the preponderance of Christianity in the syllabus and the allegedly defective opt-out guarantees provided for. In fact, the majority seemed completely unconvinced by the admittedly delicate distinction between "knowledge" and "activities" (para. 97).Indeed a lesson by an enthusiastic passionate teacher could be more influential than the participation in activities such as hymn practice. But by avoiding these difficult distinctions, the ECtHR relies on the assumption that RE courses which favour one particular religion amount as such to indoctrination. This is a narrow and rather crude interpretation of the requirements of neutrality. Teachers' convictions, general attitudes towards religion within the school environment and the role of the majority religion in the country concerned as a whole will inevitably taint the way religious education is received by students. Reducing neutrality in religious education to a strict question of textbook page numbers and class hours is artificial. More deeply one may even wonder whether objectivity and neutrality is ever attainable in religious education.[31] Assuming that it is, the purely quantitative approach adopted (despite assertions to the contrary) by the majority reasoning seems unduly simplistic. If indoctrination may thus flow from mere quantitative imbalances in religious education syllabi, claimants' rights may still be respected and claims of violations avoided thanks to opt-out provisions.

[30] Section 2-4(f) the *Norwegian 1969 Act* (as amended by *19 June 1997 Act*) however specified at (v) that the same pedagogical principles shall apply to the teaching of the different topics. Nevertheless all the activities referred to relate to Christian religions.

[31] As noted by Carolyn Evans, op. cit., note 26, 463, some will see such an approach as promoting secularism.

Right to opt out and privacy rights

Again it is in the details of the ECtHR's analysis rather than in its declaration of principles that the Court's position may be found. The parents in the *Folgerø* case contended that the partial right to opt out was insufficient. First, the religious outlook permeated the entirety of the course and was therefore as a whole contradictory to their beliefs; secondly, it was difficult for parents to get sufficient advance and detailed knowledge of the topics covered and the way they would be presented in class in order to be able to determine which parts of the course they objected to. Finally exemption requests from parts other than those listed as "religious activities" required parents to state reasons thus indirectly prompting them to reveal their convictions to teachers and school staff. In response, the Norwegian government contended that if a full right of exemption was granted to parents, pupils would be potentially deprived of knowledge not only of Christianity but also of other religions and other philosophies of life.[32] "The Convention safeguarded against indoctrination not knowledge. (…) On the contrary the Convention should also ensure a child's right to education".[33] The ECtHR reviewed the implementation of the opt-out schemes in great detail[34] and expressed concerns. It endorsed the parents' view that the necessity to first obtain adequate information about the course created a challenging task (para 97). It then took issue with the stigmatization effect that the scheme potentially had on parents and their children (para 100). To a certain extent, opt-out provisions whether partial or general will always carry those risks. They will always require parents to enquire about the content of the RE course they are considering claiming exemption from. They will always by definition underline "the difference" of opted-out children.[35] According to the *Folgerø* decision, opt-out provisions can still in principle constitute valid safeguards. However, added complexity through partial schemes or potential privacy rights infringements (via requirements to justify even briefly the request for exemption) will incur the court's reprobation. Subsequent case-law has revealed that even full opt-out schemes may face disapproval if they lead to varying assessment methods

[32] *Folgerø*, ibid.
[33] Ibid, para 78.
[34] For subsequent examples of detailed examination of the ways opt-outs are implemented, see *Zengin*, op. cit., note 18; *Grzelak*, op. cit, note 19.
[35] See Mawhinney, A, 'The Opt-out Clause: Imperfect protection for the right to freedom of education in schools' 1 *Education Law Journal* (2006), 5.

or differing records between children attending RE classes and those who have opted out.[36] To avoid a violation under article 2 Protocol I, States should therefore make sure either that RE courses are non-assessed or that alternative classes are systematically offered. The latter part of the conclusion contradicts the constant assertion by the ECtHR that States are entitled to decide when it is convenient to organize alternative classes for opted-out pupils.[37] As for the first option of having non-assessed RE courses, one may wonder to what extent it would not undermine the importance of RE as a subject. It may be possible to argue that the absence of marks for RE was only held problematic in *Grzelag* because of the strong catholic majority of the nation[38] so that a similar situation may be upheld in religiously more diverse countries. But the reasoning adopted by the ECtHR does not lend itself for such a factually nuanced and modest interpretation.

What exactly can one make of this subtle and complex RE jurisprudence of the ECtHR? Coercion comes in many shapes and forms. School children because of their age and the compulsory and enclosed nature of the school environment will be particularly vulnerable to pressure. The ECtHR is therefore justified to be attentive to the subtle indirect pressures that children face. However it should then logically conclude that opt-out provisions are *per se* defective. Instead of RE classes accompanied by opt-out provisions, a possible way forward would be to devise inclusive courses which could be made compulsory. Indeed, secular courses – be they be serving the same objectives as RE courses – will be assumed to be neutral and according to the recent *Appel-Irrgang* decision,[39] may be made compulsory for all pupils. Confronting *Folgerø* and *Appel-Irrgang*, it seems that ethics courses are thus more likely to be acceptable under the Convention if they take on a secular guise. Because secular views are assimilated to neutral views, parents will not be allowed to request exemptions from secular courses. *A fortiori*, parents will not be granted a right to have their religious views accommodated through derogations in the general syllabus. Article 2 Protocol I does not allow

[36] In *Grzelag*, the ECtHR held that the school's failure to provide a mark for the subject "religion/ethics" constituted a violation of article 14 (protecting against discrimination in the enjoyment of convention rights) taken in conjunction with article 9 (protecting freedom of thought, conscience and religion). See Cumper, P, op. cit., note 22, 210.
[37] *Grezlag*, para. 104.
[38] The applicant had indeed claimed in his submission that the "entire education system in Poland was geared towards Catholicism" (para 64).
[39] Op. cit. note 20.

them to expunge the syllabus from views that they find offensive.[40] Sex education for example may thus be made mandatory.[41]

From this analysis, one may conclude that the ECtHR does not reject the imposition of majority views, as long as those views can be clothed in a secular guise. This conclusion contains two assumptions: a welcome assumption that there is no right not to be exposed to beliefs other than one's own (or one's parents') but also a more debatable suggestion that secular views are inherently more neutral than religious views.[42]

According to the RE most recent case-law of the ECtHR, neutrality is thus best assured through secularity. Any departure from neutrality (understood as secularity) will trigger a presumption of indoctrination. Effective protection of privacy rights will then need to be in place if States are to avoid the charge of stigmatization of minorities. Interestingly the ECtHR in its most recent case-law on religious symbols at school has adopted very different interpretations of both concepts of neutrality and stigmatization.

Religious symbols in state schools

As demonstrated in the first part, the ECtHR in its most recent case-law on religious education in state schools has subjected national schemes to a minute scrutiny. This detailed examination is in a sharp contrast with the Court's jurisprudence on religious symbols where a wide margin of appreciation is on the contrary granted to Member States and little attention is paid to the risk of

[40] For a similar position in the Canadian context, see Clarke, P, 'Religion, Public Education and the Charter: Where do we go now?' 40 *McGill Journal of Education* (2005), 351.
[41] *Dojan*, op. cit., note 21.
[42] On the relationships between secularity and neutrality, see Temperman, J, *State Religion Relationships and Human Rights Law: Towards a right to religiously neutral governance*, Martinus Nijhoff Publishers / Brill Academic Publishers (2010) who argues that secularity – understood as strict impartiality towards religion and belief – is possible and desirable; For a more "fuzzy" and culturally rooted account of secularism which underlies instead the interconnections between "law", "religion" and "secularism", see Menski, W, 'Fuzzy Law and the Boundaries of Secularism', (13)3 *PER / PELJ* (2010), 30.

stigma that individual pupils may experience.[43] Besides, in RE cases, the ECtHR seems to assimilate neutrality to secularity. A religious perspective will only be deemed to be neutral if the majority religion is not given prominence. By contrast, in its jurisprudence on religious symbols, the Court held that neutrality was compatible with a greater visibility given to the majority religion.

A wide margin of appreciation

The ECtHR's case-law is familiar with the concept of margin of appreciation. "Human rights may be universal on the abstract level, but they are national in their application".[44] Mindful of this reality, the ECtHR will not hesitate to largely defer to Member States' assessments. The more sensitive[45] or the more contested across Europe the issues at stake are, the greater will the margin of appreciation be.[46] The margin of appreciation will moreover generally tend to be greater in an educational context. Issues pertaining to the content of the curriculum will be characterized as a matter of principle as falling within the competence of the contracting States. For reasons of expediency and national traditions, States will be allowed to rule on such matters without close supervision from the Court – or so the ECtHR has consistently asserted.[47] But as demonstrated above in the first part, "the level of scrutiny shown in RE cases is somewhat at odds with the general pronouncements about the discretion available to the State".[48] By contrast, in its case-law on religious symbols at school, the ECtHR has recently emphasized the broad margin of appreciation that should be recognized to Member States.[49] State positions have thus as a result been upheld whether the symbols in question were worn by pupils (see *Dogru* and

[43] Especially as – by contrast to the contracting out approach still present in some religious symbol cases – alternative education in the private sector will not dispense the State from performing these positive duties in relation to RE courses (see *Folgerø,* para. 101).

[44] Lord Hoffmann, 'The Universality of Human Rights' quoted by Piret, J-M, 'Limitations of Supranational Jurisdiction, Judicial Restraint and the Nature of Treaty Law' Chapter 3, in Temperman, J, (ed), The Lautsi Papers: Multidisciplinary reflections on religious symbols in the public school classroom, the Netherlands, Martinus Nijhoff Publishers *(*2012), 77.

[45] For an example in relation to abortion, ECtHR *A, B and C v. Ireland* 16 December 2010, App. no. 25579/05.

[46] On the concept see, Hutchinson, M, 'The Margin of appreciation doctrine in the European Court of Human Rights', 48 *ICLQ* (1999), 638; Sweeney, JA, 'Margins of appreciation. Cultural Relativity and the European Court of Human Rights in the Post Cold War Era', 54(2) *ICLQ* (2005), 459; Letsas, G, 'Two Concepts of the Margin of Appreciation', 4 *Oxford Journal of Legal Studies* (2006), 705.

[47] For a recent example, see *Zengin v. Turkey*, op. cit. note 18, para 51.

[48] Adhar, R & Leigh, I, op. cit. note 8, 280.

[49] Cranmer, F & García Oliva, J, 'Education and Religious Symbols in the United Kingdom, Italy and Spain: Uniformity or subsidiarity', 19(3) *European Public Law* (2013), 555.

Bayrak below), by teachers (see *Dahlab*)[50] or affixed by the State (see *Lautsi* below). In relation to symbols worn by pupils, the ECtHR has laid down its position in a string of decisions involving France.

French secularism under review

In a series of decisions[51] involving France and – at least prospectively –[52] the 2004 French law[53] banning ostentatious religious symbols in French state schools, the ECtHR has demonstrated how wide a margin of appreciation may be granted to States. In the case of *Bayrak* against France of 30 June 2009 for example,[54] the ECtHR not only took for granted the French government's statement that the 2004 law was necessary for the sake of secularism (under the concept of *laïcité*), it also refrained from carrying out any meaningful proportionality test between the aim allegedly pursued (the protection of *laïcité*) and the infringement caused to the individual claimant. In state French schools, the principle of *laïcité* – usually defined as a system in which there is a separation between religion and the State – [55] is unquestionably relevant. The scope to be given to the principle is however debated. Following an "open" conception of *laïcité*'[56] religious neutrality is to be displayed by public agents, as representatives of the State, but rights of mere users of public services should not be affected.[57] More virulently, under a closed version of the concept which the 2004 Law embraced, institutions which are key to the transmission of core common values may be altogether required to be free of religious display and symbols. If the ECtHR arguably wisely refrained in *Bayrak* from taking sides in the debate

[50] ECtHR *Dahlab v. Switzerland* 15 February 2011, App. no. 42393/98.

[51] ECtHR *Dogru v. France* 4 December 2008, App. no. 27058/05, followed in 2009 by a series of decisions of inadmissibility concerning the expulsion of pupils from school for wearing conspicuous symbols of religious affiliation: *Aktas v. France* (App. no. 43563/08), *Bayrak v. France* (App. no. 14308/08), *Gamaleddyn v. France* (App. no. 18527/08), *Ghazal v. France* (App. no.29134/08), *J. Singh v. France* (App. no. 25463/08) and *R. Singh v. France* (App. no. 27561/08)

[52] In *Dogru*, the contested facts had occurred in 1999, i.e prior to the vote and implementation of the 2004 law.

[53] Loi n. 2004-228 of 15 March 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, colleges, lycées publics, *JO* 17 March 2004, 5190 (Act regulating, by virtue of the principle of "laïcité", the wearing of religious symbols or clothing in state primary and secondary schools).

[54] Op. cit., note 49.

[55] Rivero, J, 'La notion juridique de laïcité', *Revue Dalloz* (1949), 137.

[56] Willaime, JP, *Le Retour du religieux dans la sphère publique. Vers une laïcité de reconnaissance et de dialogue*, Lyon, Editions Olivetan (2008).

[57] Rivero, J, Comments on CE 27 November 1989 Avis, *RFDA* (1990), 1.

as to the meaning of *laïcité* in state schools, its reluctance to carry out any proper proportionality test is less convincing.

In *Bayrak*, the 2004 law had been enforced particularly harshly. After a meeting between the school authorities, the student and her family, the student had agreed to unveil if she could wear instead a black cap. The school authorities considered that the wearing of the cap was still religiously motivated and could not be allowed. Following the pupil's refusal to remove the cap, she was finally expelled. The decision to expel the pupil despite the substitution of a cap was said by the ECtHR to fall within the State's margin of appreciation[58]. The French State's argument whereby the legislative ban on religious symbols could otherwise be easily avoided was held to be reasonable.[59] Finally the rather heavy sanction of expulsion was considered to be proportionate since the girl could enrol for distant learning.[60] The ECtHR is not to decide for a particular form of Church/State arrangement across Europe[61] but it is expected to defend violations of minority rights. Whereas restraint to engage in the proper contours of the concept of *laïcité* was therefore arguably welcome in *Bayrak*, a more vigorous proportionality test would have been required to ensure an effective protection of pupils' individual rights. Besides, the Court's reluctance to analyze the exact contours of the concept of *laïcité* should itself give in when national measures which are clearly outside of the confines of *laïcité* are allegedly adopted for its sake. Since *Bayrak*, the 2004 law has been applied unduly extensively. First, whereas the 2004 law allows the display of non-ostentatious religious symbols, in effect any items or fashion accessory such as a large hair band will be prohibited at school if it is worn for religious reasons.[62] Secondly, French case-law (at first instance level) has even extended the 2004 prohibition to parent helpers who take part in a school outing, thus unduly extending the 2004 law beyond pupils and school premises.[63] These latest extreme applications of the concept of

[58] Para. 2(10).
[59] Ibid.
[60] Para. 2(11).
[61] See Adhar, R & Leigh, I, 'Post-Secularism and the European Court of Human Rights: Or how God never really went away', 75(6) *Modern Law Review* (2012), 1064.
[62] Conseil d'Etat 19 March 2013, 366749, *Recueil Lebon*.
[63] TA Montreuil 22 November 2011, *Revue Dalloz* (2012), 72.

laïcité amount, we submit, to a distortion of the notion[64] which should lead the ECtHR to decide that the margin of appreciation has been exceeded.[65]

Unlike pupils and teachers, States do not enjoy individual rights to freedom of religion. Yet, for the sake of preserving particular national Church/State arrangements and specific national cultural history, the same wide margin of appreciation will be afforded to States in relation to symbols affixed by state school authorities.[66]

Symbols of majority religion affixed by the State

In *Lautsi*, the Grand Chamber of the ECtHR[67], overturning the chamber decision[68] first rendered on the case, held that the obligatory presence of crucifixes on the classroom walls of Italian state schools did not infringe convention rights. The main rationale put forward by the ECtHR for this conclusion was the broad margin of appreciation enjoyed by the Italian State. According to Lorenzo Zucca,[69] the concept of margin of appreciation was indeed mentioned 27 times in the whole decision and 8 times in the 20 paragraphs summarising the Court's assessment. This heavy reliance on the concept of margin of appreciation is not entirely convincing: it may appear like a strategic decision to escape from the controversies caused by the case[70] rather than providing the basis for a fully pledged reasoning. Further justification should and could have been sought for this position in favour of the crucifix. The preponderance conferred as a result to the majority religion cannot as such be deemed contrary to the Convention. Unless this predominance amounts to indoctrination, mere display of religious symbols cannot by itself

64 See for a similar argument made in respect of the 2010 ban on the full-face veil in the whole of the public sphere, Hunter-Henin, M, 'Why the French Don't Like the *Burqa*: *Laïcité*, national identity and religious freedom', 61(8) *ICLQ* (2012), 1.

65 For an illustration, see ECtHR 23 *Ahmet Arslan v. Turkey* February 2010, App. no. 41135/98 in which it was held that Turkey had exceeded its margin of appreciation.

66 Temperman, J (ed.), op. cit, note 42.

67 ECtHR Lautsi and Others v. Italy 18 March 2011 [Grand Chamber], App. no. 30814/06.

68 ECtHR Lautsi and Others v. Italy 3 November 2009 [Second Section Chamber], App. no. 30814/06.

69 Zucca, L, 'Lautsi: A Commentary on a decision by the ECtHR Grand Chamber', 11(1) International Journal of Constitutional Law (2013), 218.

70 See McGoldrick,, 'Religion in the European Public Square and in European Public life – Crucifixes in the Classroom', 11(3) Human Rights Law Review (2011), 502 who approves this self-restraint.

trigger a violation of either article 2 Protocol I, protecting parental rights to have their children educated in accordance with their own beliefs or article 9, protecting the right to freedom of thought, conscience and religion. In the *Lautsi* case, it was possible to argue that the general benevolent attitude of the school towards religion and beliefs in general was enough to counterbalance the effect that the crucifix may have had on children. Despite the regrettable emphasis on the concept of margin of appreciation, the solution reached in *Lautsi* is therefore to be welcome as a signal that religion – be it that of the majority – may have a place at school.

Conclusion

Recent ECtHR case-law on religion at school has therefore a lot to teach us about the place of religion in the public sphere. Thanks to *Lautsi*, the Court has resisted enforcing a strict model of neutrality across Europe. Religion may still have a place in the public sphere; individuals cannot allege that this presence as such infringes their convention rights. However the exact place that may be conferred to religion is unclear. There are inconsistencies within the Court's jurisprudence itself. The position of the majority religion will thus be reviewed more or less carefully depending on whether it features in the syllabus of RE courses or through religious symbols affixed in state school classrooms. Moreover one is still to hear what the Court has to say about state-endorsed measures against religion. The recent trends in French Law – which go far beyond the initial confines and rationales of the 2004 law banning conspicuous symbols in French state schools – will thus provide an interesting field of exploration in that respect. It is to be hoped that whilst the nuanced interpretation of the concept of neutrality as developed in religious symbol cases will be retained, the wide margin of appreciation that has been granted to Member States in those areas will be confined by a more robust proportionality test which weights the aims sought by Member States against the interferences caused as a result with individual rights.

References

- Ahdar, R & Leigh, I (2013). *Religious Freedom in the Liberal State*. Oxford University Press, 2nd ed.

- Biggar, N & Hogan, L (2009). *Religious Voices in Public Spaces*. Oxford University Press.
- Brighouse, H (2000). *School Choice and Social Justice*, Oxford University Press.
- Callan, E (2000). 'Discrimination and Religious Schooling' in Kimlycka, W & Norman, W (eds), Citizenship in Diverse Societies, Oxford University Press.
- Clarke, P (2005). 'Religion, Public Education and the Charter: Where do we go now?' 40 *McGill Journal of Education* 351.
- Cranmer, F & García Oliva, J (2013). 'Education and Religious Symbols in the United Kingdom, Italy and Spain: uniformity or subsidiarity', 19(3) *European Public Law* 555.
- Cumper, P (2012). 'Religious Education in Europe in the Twenty-First Century', in Hunter-Henin, M (ed), Law, Religious Freedoms and Education in Europe.
- Doe, N (2011). *Law and Religion in Europe: A Comparative Overview*, Oxford University Press.
- Evans, C (2008). 'Religious Education in Public Schools. An International Human Rights Perspective', 8(3) *Human Rights Law Review* 449.
- Feinberg, J (1980). 'The Child's right to an Open Future', in Aiken, W & La Follette, H (eds), Whose Child? Children's Rights, Parental Authority and State Power, Totowa NJ.
- Freeman, MDA (2010). 'The Human Rights of Children', *Current Legal Problems*, Oxford University Press, 1.
- Galston, W (2002). *Liberal Pluralism: the Implications of Value Pluralism for Political Theory and Practice*. Cambridge University Press.
- Gutmann, A (2002). 'Can Publicly Funded Schools Legitimately Teach Values in a Constitutional Democracy? A Reply to McConnell and Eisgruber', *NOMOS* XVLIII, Moral and Political Education, New York University Press, 170.
- Gutmann, A (1999). *Democratic Education*, Princeton University Press.
- Hunter-Henin, M. (2012). 'Why the French Don't Like the *Burqa*: *Laïcité*, national identity and religious freedom', 61(8) *International Comparative and Law Quarterly* 1.
- Hunter-Henin, M (2011). 'Religious Freedoms in European Schools: Contrasts and convergence', Introduction in Hunter-Henin, M (ed), Law, Religious Freedoms and Education in Europe, Ashgate.

- Hutchinson, M (1999). 'The Margin of Appreciation Doctrine in the European Court of Human Rights', 48 *International Comparative and Law Quarterly* 638.
- Jackson, R (2002). 'How School Education in Religion Can Facilitate the Promotion of Tolerance and Non-Discrimination with Regard to Freedom of Religion and Belief', report from the Preparatory Seminar on teaching for Tolerance and Freedom of Religion and Belief, Oslo 7-9 December 2002, available at http://folk.uio.no/leirvik/oslocoalition/RobertJackson.htm.
- Leigh, I (2011). 'Objective, Critical and Pluralistic? Religious Education & Human Rights in the Public Sphere', Ungereanu, C & Zucca, L (eds), Law, State and Religion in the New Europe: Debates and dilemmas, Cambridge University Press.
- Leigh, I (2010). 'New Trends in Religious Liberty and the European Court of Human Rights', *Ecclesiastical Law Journal* 277.
- Letsas, G (2006). 'Two Concepts of the Margin of Appreciation', 4 *Oxford Journal of Legal Studies* 705.
- Levinson, M (1999). *The Demands of Liberal Education*, Oxford University Press.
- Macedo, S (1995). 'Liberal Civic Education and Religious Fundamentalism: the case of God v. John Rawls? ', 105 *Ethics* 468.
- Mawhinney, A (2006). 'The Opt-out Clause: Imperfect protection for the right to freedom of education in schools', 1 *Education Law Journal* 5.
- McConnell, M (2002). 'Educational Disestablishment: Why democracy is ill-served by democratic control of schooling' in *NOMOS* XVLIII, Moral and Political Education, New York University Press.
- McGoldrick, D (2011). 'Religion in the European Public Square and in European Public life – Crucifixes in the Classroom', *Human Rights Law Review* 451.
- Menski, W (2010). 'Fuzzy Law and the Boundaries of Secularism', (13)3 *PER / PELJ* 30.
- Piret, J-M (2012). 'Limitations of Supranational Jurisdiction, Judicial Restraint and the Nature of Treaty Law', in Temperman, J (ed), The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom, , Martinus Nijhoff Publishers.

- Plesner, IT (2004). 'Promoting Tolerance through Religious Education', in Lindholm, T & al (eds), Facilitating Freedom of Religion or Belief, Martinus Nijhoff Publishers.
- Ringelheim, J (2012). 'Rights, Religion and the Public Sphere. The European Court in Search of a Theory', in Ungureanu, C & Zucca, L (eds), A European Dilemma. Religion and the Public Sphere, Cambridge University Press.
- Rivero, J (1949). 'La notion juridique de laïcité', *Revue Dalloz*, 137.
- Rollin, C (1817-19), *Traité des Études*, Paris, Ledoux et Tenré.
- Sandberg, R (2011). *Law and Religion*, Cambridge University Press.
- Schreiner, P (2007). 'Introduction', in Schreiner & al, Good Practice in Religious Education in Europe: Examples and perspectives of primary schools.
- Sweeney, JA (2005). 'Margins of Appreciation. Cultural Relativity and the European Court of Human Rights in the Post Cold War Era', 54(2) *International Comparative and Law Quarterly* 459.
- Temperman, J (ed.) (2012). The Lautsi Papers: Multidisciplinary reflections on religious symbols in the public school classroom, Martinus Nijhoff Publishers.
- Temperman, J (2010). *State Religion Relationships and Human Rights Law: Towards a right to religiously neutral governance*, Martinus Nijhoff Publishers / Brill Academic Publishers.
- Weithman, P (2009). 'Religious Education and Democratic Character', in Biggar, N & Hogan, L (eds), Religious Voices in Public Spaces, Oxford University Press.
- Zucca, L (2013). '*Lautsi*: A commentary on a decision by the ECtHR Grand Chamber' 11(1) *International Journal of Constitutional Law* 218.