12. Believing in Negotiation

Reflection on Law's Regulation of Religious Symbols in State Schools

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From a legal perspective, 'negotiating with religion' may refer to the constitutional arrangements that European States have negotiated with their established or majority churches. In consequence of immigration, these historical compromises are being put to the test by the presence of religious communities which were not party to the initial arrangements, and judges and legislators are struggling to handle religious claims. Attempts at renegotiating constitutional compromises punctually, through case-law or legislation, have produced diverging results ranging from the exclusion of religious views (recent bans on the *burqa*) to the accommodation of "moderate" forms of religious manifestation (reasoning in the *Begum* House of Lords case). Whilst religious minority claims have prompted a review of the concepts of law, democracy and pluralism and raised the fundamental question as to the limits that law (as opposed to other norms) should impose on individual freedom in the name of social cohesion, legal responses have in turn highlighted the blurred distinction and inner tensions between the religious and the secular[2] and created new subcategories between "moderate" and "radical" forms of religion. Focusing on recent

[1] I am grateful to Dr Lois Lee and Prof. Cécile Laborde for their insightful comments on earlier drafts. Any errors remain mine.

[2] See the discussion of the cultural/religious dimension of crucifixes in Italian state schools in the two European Court of Human Rights' *Lautsi* cases, infra n 11 and n 18.

developments relating to religious symbols in Western European state schools, this chapter will argue that re-negotiation of historical compromises is possible (and welcome) within existing national frameworks of state/religion relationships. The attention will be on the reasoning adopted at legislative and judicial level. It will be submitted that if courts and parliament more greatly engaged with religious claims, many of the current tensions and contradictions between secularism and religion would dissolve. But how exactly is this new form of negotiating with religion to be undertaken by legislators and judges? To explore this delicate question, the chapter will concentrate on the education sector.

State schools are a particularly opportune field for testing new forms of negotiation between the law and religious claims. From an historical and constitutional perspective, state schools are emblematic of the chosen national model of church/state relationships.[3] Education is also a network of potentially conflicting rights and interests[4]. Educational systems committed to children's rights will need to respect pupils' convictions (which may coincide or diverge from their parents' beliefs) whilst maintaining children's right to "an open future".[5] How is negotiating with religion likely to take place in this context? In a school context, negotiation with religion

[3] Myriam Hunter-Henin, "Religious Freedoms in European Schools: Contrasts and convergence", Introduction in *Law, Religious Freedoms and Education in Europe,* ed. Myriam Hunter-Henin, (Farnham: Ashgate, 2011), 9.

[4] Myriam Hunter-Henin, "Law, Religion and the School", in *Handbook of Law and Religion*, ed. Silvio Ferrari, (Oxford: Routledge,2014).).

[5] Joel Feinberg, "The Child's Right to an Open Future", in *Whose Child? Children's Rights, Parental Authority and State Power*, eds. William Aiken and Hugh La Follette, (Totowa NJ: Rowman & Littlefield, 1980), 124.

usually addresses the equilibrium to be struck between majority and minority religions. Negotiation with religion can thus be construed, first of all, as involving special consideration by lawmakers towards religious views. Furthermore, amongst those religious views, minority voices would seem to call for particular attention. In this approach, negotiated legal solutions would entitle a greater diversity of actors to intervene in legal regulation of religion than normal majoritarian parliamentary law-making.[6] *In fine*, negotiating with religion could thus be interpreted as a tool to redress the imbalance between majority and minority religious views. As an instrument designed to heighten the role of religion in law-making, negotiating with religion at school may seem to conflict with the requirements of state neutrality. This "special nature" of religion would certainly warrant justification. Conceptually one may be attracted to one of two sides of the concept of neutrality.[7] Under an inclusive version of neutrality, all local religious beliefs would need to be represented in the local school. Religious education courses would thus have to make room for even time of study for each religion and worldview and classroom walls would be adorned

[6] For a study of how negotiating techniques have given a voice to politically and economically marginalized indigenous communities, see Christa Scholtz, *Negotiating Claims: The Emergence of Indigenous Land Claim Negotiation Policies. Australia, Canada, New Zealand and the United States.* (Oxford: Routledge, 2006).

[7] See Roland Pierik and Wibren van der Burg, "What is Neutrality?", 27(4) *Ratio Juris* (2014), On-line version, *Amsterdam Law School Legal Studies* Research Paper No. 2011-20, accessed April 25, 2014 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1917392. Roland Pierik and Wibren van der Burg argue for inclusive neutrality as the default position. However they add that attention to the societal context and the specificities of the issues under debate should guide towards the preferred option, thus suggesting a complex and more fluid interpretation of neutrality. On neutrality, see also, this volume, Saladin Meckled-Garcia.

by symbols of each faith. Conversely, an exclusive version of neutrality would be illustrated by blank classroom walls and religion-free syllabi.

This chapter will argue against these two opposite and radical solutions. Not only are they artificial. The illusion that it is possible to strike a fair balance between all forms of belief at school or that a space free of beliefs can be created informs both solutions. Besides, neither of these solutions is necessary to fulfil human rights requirements. Prominence of one particular religion – be it that of the majority – may still comply with state neutrality if its display pursues a legitimate aim and does not stifle the manifestation of other beliefs. As this chapter will argue, imbalance in favour of majority views need not entail a violation of human rights. Furthermore, there is no reason why this conclusion should vary depending on whether the majority views are secular or religious. Negotiating with religion will not therefore be understood in this chapter as an instrument to foster religious views over secular outlooks nor will it necessarily entail systematically injecting more power to minority views. Negotiating with religion is not designed to achieve particular outcomes. It is mainly a process under which each interested party should be given the opportunity to put their view forward and have their interests considered. In fact tying the negotiating process to particular outcomes (be they the eradication of religion altogether or the exact same standing for all beliefs) would be antagonistic to true negotiating. Negotiating must mean that the end result remains open and that positions of compromise can be entertained.

But this emphasis on the open-endedness of negotiating should not be a vehicle for stronger parties to impose their views. Careful scrutiny will therefore be needed to ensure that the same opportunities are afforded to every participant. The search for a compromise between majority and minority views may not always be sufficient to

ensure respect for individual rights to freedom of /from religion. Unless attention is given to the circumstances of individual cases in the implementation of legal solutions, there is a danger that negotiation with religion will muffle the voices of those most concerned: in our setting, usually the students wishing to manifest their beliefs at school. This chapter will in turn address the conceptual and practical hurdles to negotiating with religion in state schools. Conceptually, negotiating with religion implies that radical solutions are not the only possible means to satisfying fairness and neutrality.[8] Welcoming all expressions of religion at school on an equal standing or banning all religious signs altogether may theoretically and constitutionally amount to sound decisions. The purpose of the chapter is to demonstrate that a third option – which gives a greater weight to one or a few religion(s) over others– may *also* be acceptable. Under the prism of negotiation, positions of compromises are not problematic *per se*. All depends on whether the prominence afforded to a particular religion relies on legitimate grounds in the given circumstances. In this chapter, I will argue that this more subtle apprehension of religion at school is compatible with requirements of state neutrality and human rights prescriptions.

Having overcome the theoretical objections to engaging in open-ended negotiations with religious actors, the chapter will go on to address the practical hurdles involved in these negotiations at school. The infinite possibilities afforded by negotiating techniques may in fact prove to be very limited. Depending on who is allowed to have their say and be truly heard, negotiating with religion may or may not be compliant

[8] For a study of the articulation of human rights requirements under the European Convention on Human Rights and the concept of neutrality, Ian Leigh, "The European Court of Human Rights and Religious Neutrality" in *Religion in a Liberal State: Cross-Disciplinary Reflections*, ed. Gavin D'Costa et al. (Cambridge: Cambridge University Press, 2013), 38.

with human rights requirements. If negotiating with religion at a regulatory level is often used to push forward a tamed version of religion, commitments to equality and human rights should encourage a more demanding version of negotiation. As this chapter will argue, negotiation with religion should therefore also be carried out at the enforcement stage. Thus construed and applied, it is submitted that negotiation with religion can achieve a more fluid approach to regulation which reconciles requirements stemming from constitutional national frameworks, individual human rights and local factors.

Conceptual Hurdles to Negotiating with Religion at School

This part will address objections in principle to negotiating with religion. Interestingly concerns about negotiating legal solutions come from opposite ends of legal theory. For tenants of a strict parliamentary sovereignty, negotiated legal regulation would jeopardize the privileged position of majority views which are the usual outcome of democratic decision making. Do claims raised by religious parents or children really require the tweaking of democratic solutions, they would ask? Similarly, but for opposite reasons, most multiculturalists would no doubt see negotiating with religion as an inherently flawed technique.[9] If the stronger position of the majority religion is structurally ingrained,[10] how can negotiations not be tainted and the balance then

[9] For a brief but clear overview of the various trends amongst multiculturalists, see Roland Pierik, "Multiculturalism", in *International Encyclopaedia of Ethics*, ed. Hugh LaFollette. (Oxford: Wiley-Blackwell, 2013), 3470.

[10] See for example, denouncing the structural majority bias, Veit Bader, *Secularism or Democracy? Associational Governance of Religious Diversity* (Amsterdam: Amsterdam University Press, 2007); Veit Bader, "Religious Diversity and Democratic Institutional Pluralism", 31(2) *Political Theory*

tilted towards the majority religion? For the former group, the solution lies in legislative uniform intervention which embodies common values *par excellence*. Negotiation techniques would simply have no place in law-making except for the realm of contracts. Less radically, this conception of law may accommodate varied solutions at local level, provided powers to regulate have been devolved to local authorities. Social cohesion and the unifying power of law are thus emphasised. From a strong multiculturalist perspective on the other hand, negotiating with religion is not satisfactory because it does not ensure systematic redress of minority positions. On the contrary the privileged social position enjoyed by majority views gives them a head start in the negotiation process. Negotiation with religion may therefore just be a subtle and deceiving way to reinforce the *status quo*. Instead – they claim- all instances whereby the majority religion is given greater weight or visibility should be challenged. This part will respond to this last claim.[11]

Is the greater prominence given in state schools to the majority religion problematic *per se*? Does it necessarily contradict state neutrality or/and violate individual human rights to freedom of religion? These crucial questions were addressed by the European Court of Human Rights in the *Lautsi* case.[12] In this case, the Grand Chamber of the European Court of Human Rights confirmed that the prominence

(2003): 265; Samuel Scheffler, "Immigration and the Significance of Culture", 35(2) *Philosophy and Public Affairs* (2007): 94.

[11] The first claim is considered in Part III below.

[12] ECtHR 18 Match 2011 *Lautsi and Others* v Italy [Grand Chamber], App. no. 30814/06.

given to the country's majority religion need not violate convention rights.[13] The obligatory display of crucifixes in Italian state school classrooms was therefore upheld despite the impressionable age of the audience (young pupils), the enclosed nature of school settings and compulsory school attendance.[14] The fact that the crucifix was mandated by state authorities and that Catholicism was thus endorsed by the State was also set aside. All of these factors may be problematic for a constitutional court. Certainly the endorsement of a particular religion by the State as well as the impossibility for pupils to escape the image of the crucifix has been held to be unconstitutional for the German constitutional court.[15] But the European Court of Human Rights is not a constitutional court.[16] It is up to Member States to choose their own conception of neutrality as long as it is enforced in a manner respectful of religious freedom under article 9 of the Convention. States will thus be free to decide

[13] For an analysis of the implications of the *Lautsi* case for church-state arrangements, see Saladin Meckled-Garcia, "Just Establishment? Two Kinds of Neutrality and the Human Right to Freedom of Religion", this volume.

[14] By contrast, arguing that because of the special vulnerable position of its viewers, the crucifix had an indoctrinating effect, Alison Mawhinney, "Crucifixes, Classrooms and Children: a Semiotic Cocktail', in *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom*, ed. Jeroen Temperman. (Leiden: BRILL/Martinus Nijhoff, 2012), 93.

[15] 32 BVerfGE (1995). More generally, see Tobias Lock, "Religious Symbols in Germany", in *Law, Religious Freedoms and Education in Europe*, ed. Myriam Hunter-Henin. (Farnham: Ashgate, 2011), 347.

16 Cf. Applauding for this reason judicial restraint on the part of the ECtHR, Joseph HH Weiler, "Lautsi: A Reply", 10(4) *International Journal of Constitutional Law* (2012): 230; Jean-Marc Piret, "Limitations of Supranational Jurisdiction, Judicial Restraint and the Nature of Treaty Law", in *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom*, ed. Jeroen Temperman, 59.

under their own constitutional and legal frameworks whether negotiating with religion at school should be resisted or welcome and if it is, whether it may extend to state endorsed measures, affect civil servants or only concern pupils. There are as many right answers to these questions as they are possible versions of neutrality and forms of church/state arrangements. In that sense, the reference to the concept of margin of appreciation by the Court in the *Lautsi* decision is understandable.[17] The alternative would be to consider that the mandatory display of a symbol of the majority religion in state schools inevitably stands in contradiction with the concept of state neutrality, however construed. It may indeed be argued that by endorsing a particular religious symbol and *a fortiori* by making its display mandatory, state authorities are siding with the majority religion.[18] This can be criticized at two levels: on a theoretical level, it may be seen as incompatible with neutrality; at an individual level, this attitude may be accused of generating an expressive harm to students and staff holding different religious beliefs or none. [19] As a result of the official display of the crucifix, staff and students holding different beliefs may feel that they cannot participate as meaningfully as their peers who belong to the majority Catholic religion. This can

[17] See Dominic McGoldrick, "Religion in the European Public Square and in European Public Life – Crucifixes in the Classroom", 11(3) *Human Rights Law Review* (2011): 451. But the over-reliance by the Court on the concept may be criticized, see *infra*.

[18] Supporting this position, see Jeroen Temperman, *State–Religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Governance* (Leiden/Boston: Martinus Nijhoff Publishers, 2010).

[19] See such reasoning in *Freitag v Penitanguishine* [1997] 47 OR 301. Adde, Christopher L Eisgruber and Lawrence G Sager, *Religious Freedom and the Constitution* (Cambridge, MA: Harvard University Press, 2007). On the relationships between Harm and religious freedom cases, see Ashleigh Keall, PhD diss., forthcoming.

however be contested: rather, the prominence given to the majority religion *may* be acceptable at both theoretical and individual levels. The counter-position was taken by the Chamber decision. Let us therefore examine its reasoning.

In the Chamber decision first rendered in the *Lautsi* case,[20] the crucifix was described as carrying, among the plurality of its potential meanings, a predominantly religious – Catholic – meaning. This was then held to be inescapably incompatible with the convictions of non-believers as well as with the beliefs of pupils of other religions. On 3 November 2009, the Chamber of the Second Section of the Court therefore went on to declare that there had been a violation of the European Convention on Human Rights. Such reasoning – with a narrow focus on the symbol of the crucifix itself is –I would argue– misplaced. Taken to its logical limits, it would imply the removal of all religious symbols from the public sphere because religious symbols will necessarily have an exclusionary effect. This is because the deeper religious meaning of the symbol will be lost on those who do not belong to the faith associated with that symbol. After all, the essence of religious symbols is to denote a particular affiliation and in so doing to differentiate those who belong to a particular faith and those who do not. But must it follow that as such religious symbols run counter to the requirements of pluralism and state neutrality –at least when symbols are exhibited in institutional settings? It need not. Respect for pluralism and state neutrality does not entail the absence of religion in the institutional sphere.[21] As Ooijen says,

> In the end, neutrality is something which can hardly be seen separate from individuals who perceive it. Letting this perception centre on the significance

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

[21] Malcolm D Evans, "*Lautsi v. Italy*: An Initial Appraisal", 6 *Religion and Human Rights* (2011): 237.

and effect of a symbol in fact testifies to the limits of a legal approach in raising theological and empirical questions[22]

Malcolm Evans has argued, very convincingly, that the European Convention on Human Rights does not require that an *appearance* of strict neutrality be enforced, but more meaningfully demands that the educational experience is — in its *substance* — compliant with the plurality of convictions. Religion may therefore *appear* in institutional settings as long as its display does not have an effect of indoctrination. Put differently, this effect of indoctrination cannot be equated to the mere presence of the crucifix. If it did, it would be tantamount to imposing a separatist model as the only possible 'church–state' model across Europe. The European Court of Human Rights on the contrary has recognized the legitimacy of a diversity of 'church–state' relationships across Europe.[23] The presence of a religious symbol in an institutional setting as such does not necessarily deviate from the requirements of state neutrality and pluralism. When it does, this deviation does not in itself entail a violation of human rights. Secondly, must it follow from observing the differing impact of religious symbols on members and non-members of the relevant faith that symbols will inevitably give rise to a clash of individual rights? It need not either. The decision

[22] Hana MAE van Ooijen, "Neutrality and Displaying Religious Symbols", in *The Lautsi Papers* (2012), 219.

[23] See for a recent assertion, ECtHR 9 July 2013, *Sindicatul "Păstorul cel bun" v. Romania*, App. no. 2330/09, Grand Chamber, para. 38: 'where questions concerning the relationship between the 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 be the case in particular where practice in European States is characterised by a wide variety of constitutional models governing relations between the State and religious denominations'.

to display religious symbols – if made by an individual or a group – may amount to a manifestation of religious faith protected under article 9 of the European Convention on Human Rights, but the desire to have these religious symbols removed cannot find justification in any counter individual right. There is no right to be spared from the sight of symbols.[24] The tension therefore remains. A pragmatic approach, however, of negotiating with religious actors, may provide a more satisfying solution.

Negotiating the Display of Majority Religious Symbols

The meaning of negotiating with religion at school needs to be clarified. It does not suggest that the issue as to whether crucifixes should remain on or be removed from state school classroom walls be subject to local deliberation, through a vote by parents, pupils and staff members. This is not what I advocate for under the concept of 'negotiating with religion'. This prolongation of democratic decision-making at the school level would not ensure satisfactory representation of minority voices. Conversely, one objection to the display of religious symbols should not necessarily override other parents and pupils' wishes either:[25] The wishes of the majority cannot be discredited simply because they are those of the majority.[26] The negotiating process I advocate is best characterized as a balancing exercise. In the context of the *Lautsi* case, it would have led to weighing up the impact of the crucifix against the

[24] Grand Chamber judgment, *Lautsi*, at para. 66. For a discussion, see Adhar and Leigh (2012).

[25] For such a system in some autonomous communities in Spain, decisions of the Administrative Court of Justice of Castile-Leon 20 September 2007, n. 1617/2007, RJCA/ 2008/109 and of 14 December 2009, *Aranzadi Repertory of Jurisprudence*, available at http://www.tirantonline.com, TOL 1.724.360. Accessed April 24, 2014.

[26] Grand Chamber judgment, *Lautsi*, Concurring Opinion of Judge Bonello at para. 3.5 to 3.16.

overall attitude towards religion in the Italian school in question. In light of the openness of the Italian school to other religions, as illustrated by the possibility for pupils of all faiths to wear religious symbols or the accommodation for attendance to religious festivals of all creeds,[27] one might have concluded that the emphasis given to Catholicism and Christianity through the display of crucifixes in the classroom was balanced by the overall benevolent attitude towards all religions at school.

A 'negotiating with religion' approach would also be more in line with the rights at stake. The presence of the crucifix allegedly violated the atheist claimants' (and other pupils') rights to freedom from religion, which is protected under article 9 of the European Convention on Human Rights. It also potentially contravened their mother's right to have her children educated in accordance with her (atheist) convictions, which is protected under article 2 of the First Protocol to the European Convention on Human Rights. I would argue that article 2 of the First Protocol postulates 'negotiating with religion'. Article 2 of the First Protocol does not entitle parents to protection from all traces of religion or equivalent philosophies different from their own;[28] neither does it allow parents to request that all aspects of the school environment comply with their own beliefs. This provision, however, enables parents to complain should schools aim at or introduce measures that have an effect of indoctrination of students.[29] In other words, article 2 of the First Protocol forbids radical postures that are intolerant of other beliefs, whether they come at the request of parents or are decided by school authorities. In order to assess whether a parent's

[27] Cf. Grand Chamber judgment, *Lautsi*, at para. 74 and para. 39.

[28] ECtHR 20 October 2009 *Appel-Irrgang v. Germany*, App. no. 45216/07.

[29] ECtHR 7 December 1976 *Kjeldsen Busk Madsen and Pedersen v Denmark*, App. nos. 5095/71; 5920/72; 5926/72 and 1 EHRR 711.

claim is legitimate, it is therefore essential to verify that both parties (parents and school authorities) are not acting out of pure intolerance. On the part of the school, this entails that the presence of crucifix does not serve an aim of indoctrination; on the part of the claimant parent, this implies that the infringement suffered hinges on more than a distaste for the display of differing beliefs. Neither of these verifications can convincingly be carried out without considering the overall environment surrounding the display of the crucifix and more broadly, without examining the school context as a whole. It therefore logically follows that a balancing exercise is inherent in the application of article 2 of Protocol I.

It is in the evaluation of the possible powers of indoctrination associated with the crucifix present in state classrooms that the Chamber and Grand Chamber most diverged. The Chamber judgment referred to factors which contributed to reinforcing the message of the crucifix to the point of making it 'compelling'.[30] By contrast the Grand Chamber downplayed the influence that the crucifix may have had on pupils.[31] If, as decided in the Chamber judgment, the message of the crucifix combined with the vulnerability of its observers amounts to indoctrination, nothing more needs to be said: a violation of article 2 of Protocol 1 must follow. Another educational purpose, however, can also be arguably associated with the crucifix: the presence of the crucifix in European state schools could help familiarize children with the cultural heritage of the nation. The European Court has recognized in the past that emphasis given to the dominant religion for historical reasons is compatible with article 2

[30] Second Chamber judgment, *Lautsi*, para. 55.

[31] Grand Chamber judgment, *Lautsi*, para. 66.

Protocol 1.[32] However the emphasis must be carried out in a pluralistic, objective and critical manner.[33] In the absence of an opportunity to opt-out, the verification of these qualities should have led to an examination of the overall school environment, as advocated in the 'negotiating with religion' approach. The Grand Chamber overruled the Chamber decision but did not follow the approach herein recommended. In order to downplay the impact of the crucifix, the Grand Chamber characterized it as a passive symbol[34] and underlined the wide margin of appreciation granted to Member States in those areas.[35] Neither of these justifications is convincing. Not only – for reasons that fall outside the scope of this chapter – is the notion of passive symbol rather puzzling, it also fails to take into account the overall environment and does not balance the impact of the crucifix against surrounding factors. As for the repeated recourse to the concept of margin of appreciation,[36] one might think that it is a sign of reverence for the national context in which the case emerged. The concept of margin

[32] ECtHR 29 June 2007 *Folgerø and others v. Norway* [Grand chamber], App. no. 15472/02, para. 89: '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.' But see, pointing to the ambiguities of this assertion, my chapter, "Law, Religion and the School", in *Handbook of Law and Religion*, ed. Silvio Ferrari (Oxford: Routledge, 2014).

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

[34] Grand Chamber judgment, *Lautsi*, para. 72.

[35] Grand Chamber judgment, *Lautsi*, para. 64-70.

[36] Lorenzo Zucca, "*Lautsi:* A Commentary on a Decision by the ECtHR Grand Chamber" 11(1) *International Journal of Constitutional Law* (2013): 218. According to Lorenzo Zucca, 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.

of appreciation[37] affords States some leeway on particular sensitive issues on which there is no consensus across countries of the Council of Europe. It therefore often enables States to assert their own national distinctiveness on particular delicate issues.[38] If, however, the way that religion is represented in state schools as a whole falls under the margin of appreciation afforded to Member States, the protection granted under article 9 of the Convention and article 2 of the First protocol may seriously be undermined. The insistence on the margin of appreciation in *Lautsi* is therefore unsatisfactory.[39] Rather than underlining a pertinent reverence to context, it seems instead to signal a reluctance by the Court to carry out a thorough assessment of the circumstances of the case. 'Negotiating with religion' would, on the other hand, necessarily ensure that a vigorous balancing exercise could not be avoided. Does this conclusion preclude any legislative uniform regulation of religion at schools? The concept of negotiation with religion does not demand that all regulations rely on local consultation. It will, however, always require a balancing exercise at the enforcement stage. This requirement should alleviate concerns about the practical implementation of negotiations with religion, notably the fear that the voices of those most concerned

[37] On the concept see Michael R Hutchinson, "The Margin of Appreciation Doctrine in the European Court of Human Rights", 48 *ICLQ* (1999): 638; James A Sweeney, "Margins of Appreciation. Cultural Relativity and the European Court of Human Rights in the Post Cold War Era", 54(2) *ICLQ* (2005): 459; George Letsas, "Two Concepts of the Margin of Appreciation", 4 *Oxford Journal of Legal Studies* (2006): 705.

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

[39] Besides, the concept of margin of appreciation should not technically come into the reasoning unless the right at stake is subject to limitations and restrictions as is the case under article 9 of the European Convention of Human Rights for example but is not under article 2 of the First Protocol.

would be muffled by compromises reached at higher level between more powerful actors.

Practical Hurdles to Negotiating with Religion at School

Having overcome objections raised in principle against negotiating with religion in state schools and demonstrated that this process, understood as an open-ended balancing exercise between competing interests, can be compatible both with the requirements of state neutrality and human rights, this final part will address more practical concerns. The concept of negotiation – at first associated with contract law – has spread well beyond this field, carried by assumptions about its inherent fairness.[40] This assumption of fairness has long been disputed in contract law and in echo to Fouillée's famous quote,[41] Lacordaire points out that freedom of contracts will benefit the stronger party.[42] Negotiating with religion at school may generate similar fears. Is there not a risk that the negotiating process will benefit the stronger party? The purpose of this final part is therefore to consider the various safeguards that need to be put in place in order to prevent such concerns from materialising. Let us therefore consider the various levels at which negotiating with religion may take place and examine in each instance how to ensure that the weaker parties also have their say in the process.

[40] Alfred Fouillée, *La Science sociale contemporaine*, (Paris : Hachette, 1880), 47 : 'Qui dit contractuel dit juste', ('What is contractual is fairness' (our translation)).

[41] Above fn 40. .

[42] For an analysis of Fouillée's quote and the myths it carries, see Louise Rolland, "A trois petits bonds, à reculons" 21 *McGill Law Journal* (2006): 765.

At a preliminary stage, one may discern that judges will engage with concepts of religion for the sake of defining what beliefs and practices qualify as 'religious' under article 9 of the European Convention on Human Rights. At this preliminary stage, negotiation will take place in the loose sense of stretching the boundaries of concepts in order to welcome (or reject) a given practice within protected categories. In the past, the European Commission on Human Rights seemed to have put claims based on religious freedom to a test of necessity: the applicant, it was suggested in some cases,[43] had to show that a particular practice was necessary to his/her religion in order for it to be protected. According to this test, the wearing of religious dress will often be controversial as in most cases it will be seen at most as being encouraged by a religious institution but will rarely be imposed as being mandatory. The test would thus restrict the protection to practices which are non-negotiable for the believers because they are truly compulsory in the eye of their religious community. English Courts have at times seemed to apply a similar reasoning. In *Playfoot*,[44] the High Court held that the practice of wearing a purity ring was not intimately linked to the claimant's Christian beliefs because the claimant was under no religious obligation to wear it. Such an approach is dismissive of many if not most religious practices. It is now accepted that any manifestation or conduct which gives expression to religion or belief will fall under the ambit of article 9(1) of the European Convention on Human

[43] See European Commission of Human Rights 5 December 1978 *Arrowsmith v. UK*, App. no. 7050/75 8. Comments by Caroline Evans, *Freedom of Religion under the European Convention on Human Rights*, (Oxford: Oxford University Press, 2001), 115.

[44] High Court 22 June 2007 *Lydia Playfoot (a minor) v. Governing Body of Millais School*, [2007] EWHC 1698 (Admin). See Mark Hill, "Bracelets, Rings and Veils: The Accommodation of Religious Symbols in the Uniform Policies of English Schools", in *Law, Religious Freedoms and Education in Europe*, ed. Myriam Hunter-Henin, 307.

Rights which protects freedom of religion and belief.[45] In recent cases, the subjective conviction by the applicant that the symbol or attire in question expresses a religious duty has been sufficient to trigger the application of article 9(1) of the European Convention on Human Rights, consequently shifting onto the State the onus to demonstrate that the interference caused to that practice could be justified under the subsequent paragraph. Whether in its first restrictive approach or in the more open model, the European Court does not, it seems, 'negotiate' the concept of religion as such. On the contrary, the early test of necessity was a technique designed to avoid any confrontation with religion by restricting the protection to unproblematic cases which obviously had a religious dimension. Similarly, the present approach makes negotiation with religion at this conceptual level unnecessary. By adopting what is essentially a subjective test of what constitutes religion, the European Court (and indeed English courts if we are to follow the precedent of *Williamson*)[46] avoids the issue of definition. Such a delicate enterprise of definition seems indeed unnecessary given that the protection afforded by article 9(1) extends to non-religious beliefs and manifestations anyway. One may also wonder whether judges would be the best placed to discuss matters of religious doctrine. From the angle of negotiation, such attempts may be criticized as conferring too much power on the State (through its

[45] See Ian Leigh, "Recent Developments in Religious Liberty", *Ecclesiastical Law .Journal* (2009): 65.

[46] In the case of *Williamson*, Lord Nicholls of Birkenhead stressed that: 'it is not for the court to embark on an inquiry into the asserted belief and judge its "validity" by some objective standard such as the source of the material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual', *R. v. Secretary of State for Education and Employment and others*, ex parte *Williamson* [2005] UKHL 15, para 22.

judges) to frame the discussion and its outcome. They do not provide for negotiation in the sense of dialogue or exchange of arguments between different sides since definitions and meanings are exclusively derived from a state perspective. Delegating the matter to expert testimony on the correct interpretation of a particular religious requirement may absolve judges from the accusation of mingling with religious affairs; however, even presuming that the identification of the relevant expert does not prove controversial, passing the problem onto religious scholars will not enable a better representation of the minority position. The success of the individual claim will still be dependent on the individual practice conforming to orthodox teaching and rites. The practical hurdles to negotiating with religion at this preliminary stage therefore prove to be too problematic to be overcome. More promising is negotiation with religion at ground level, between local actors.

Negotiation at ground level is carried out between school authorities, governors and representatives of religious communities. This process is often seen as the ideal tool to reach legal solutions which will be acceptable to all at local level. Section 149(1) of the Equality Act 2010 which came into force in April 2011 provides that in the exercise of its functions public authorities such as schools must have due regard to the need to *inter alia*:

> foster good relations between persons who share a religion or belief and persons who do not share it.

In England and Wales, school uniform policies in state schools will thus usually be the outcome of consultation with representatives of major religious communities. In the case of *Begum*,[47] it was thus noted with satisfaction by the Law Lords that the

[47] *R (Begum) v Governors of Denbigh High School* [2006] UKHL 15. See also, Lucy Vickers, this volume, Chapter 13.

school had gone to great length to devise a uniform policy which all representatives of the local religious communities thought appropriate.[48] The governing body of the school contained a balanced representation of different sections of school community; four out of six parent governors were Muslim and the consultation process had been extensive.[49] At this level, negotiation takes place in a fuller sense as it involves the exchange of arguments and does lead to a solution which is not predetermined but open to the compromises which may emerge as a result of the dialogue. However, the openness of the process is not complete. Undoubtedly moderate solutions of compromise will be favoured. Indeed it is the option on which the majority of the religious groups consulted – generally of mainstream moderate schools – are most likely to concur. Moreover the main addressees of the negotiation outcomes – the pupils in this context – will have no direct influence in the exchange of views. If religious freedom is an individual human right, how can one justify devising solutions which fail to take into account individual views?

The answer, I would submit, lies in the distinction between two normative levels: if the individual or minority views may not legitimately bear a lot of weight in devising the rules and policies relating to religion at school, their voice should be heard at the enforcement stage. How did the House of Lords (now Supreme Court) tackle these two levels in the authoritative case of *Begum*? The House of Lords ruled that individual beliefs should be protected even if, on the facts of the case, it rejected the individual claim. One conclusion to draw is therefore that negotiating with representatives of majority religions may not be extensive enough for schools to comply with legal requirements. In practice it is, however, unlikely that individual

[48] Ibid, para. 7.

[49] Ibid, para. 4.

claims will be successful if they are raised against well-balanced solutions which are well accepted by the local community and the majority of students. If schools are under a duty to negotiate in order to promote good relations, so are individuals under an implicit duty to respect the overall harmony and refrain from adopting positions which would potentially jeopardize the overall equilibrium. This equilibrium may conflict with the recognition of individual autonomy and the idea that public recognition of the core features of a person's identity is important to their sense of self-worth.[50] I suggest that a stronger proportionality test should be carried out at the enforcement stage. The pitfall of unduly representing stronger parties will be avoided if a meaningful balancing exercise is carried out at the enforcement stage. The impact of a particular restriction on an individual's right to freedom of religion should thus be assessed against the aim that the measure is pursuing. The *Begum* case may be criticised not because of its unreasonable conclusion but because the point of view of the student concerned was largely ignored.[51] Miss Shabina Begum's desire to wear a less revealing uniform than the attires allowed under her school's policy was assumed to be fickle and coerced. The fact that she had worn the permissible uniform for two years without complaint was held to suggest that her change of mind was somewhat capricious.[52] The influence of her brother who had joined a fundamentalist Islamist group also shed doubts on the genuineness of Miss Begum's wish.[53] Finally, it was feared that allowing her to wear the *jilhab* might pressurize her peers to also adopt a

[50] Charles Taylor, *Multiculturalism and the Politics of Recognition* (Princeton NJ : Princeton University Press, 1992) ; Maleiha Malik, "Progressive Multiculturalism: Minority Women and Cultural Diversity", *International Journal of Minority and Group Rights* (2009): 7.

[51] See however, Baroness Hale's judgment, notably, para. 96.

[52] Ibid, para 45.

[53] Ibid., para 80.

stricter form of dress.[54] It could also have been argued, however, that Miss Begum's change of mind about the proper form of dress to wear coincided with her reaching puberty. The influence that her brother possibly exercised upon her was a valid concern, as was the influence that she herself may have exercised on other female pupils; but we cannot simply assume that the request to change her uniform reveals influence upon her by her brother or that granting her request would inevitably exercise pressure on her school friends. A more vigorous proportionality test, as advocated under the concept of negotiating with religion, would require tangible elements attesting to the reality of those undue influences.

Naturally, if the proportionality test becomes too vigorous, it will be tantamount to granting individuals positive rights of derogations from general applicable laws and policies.[55] Eventually any sense of common values will be lost. But negotiation at the enforcement stage need not be taken this far. What I propose here is not to dilute the overarching values that bind school communities. Negotiating with religion at the enforcement stage would simply ensure that restrictions to individual religious freedoms do not rely on broad assumptions about the meaning and dangers of a particular religious symbol. In that sense, negotiating with religion would not dismiss legal systems which regulate religious symbols in state schools through legislation. In

[54] Ibid, para. 65.

[55] This position is advocated by Erica Howard, according to whom the proportionality test in religious claims should always include consideration of whether the educational institution could have dealt with the request in a less stringent way and could have accommodated the request (fully or at least partially) without suffering an undue burden. See Erica Howard, *Law and the Wearing of Religious Symbols: European bans on the Wearing of Religious Symbols in Education* (Oxford: Routledge, 2012). Comments by Myriam Hunter-Henin, 4(12) *International Journal of Discrimination and the Law* 2012: 243.

France, the 2004 law[56] is the pertinent legal basis on the matter. Under that law, pupils attending state primary and secondary schools are banned from wearing conspicuous religious symbols. The 2004 law pursues several aims: promoting the core and common French value of *laïcité*[57] (which has always had a special salience in state schools);[58] protecting heads of schools from the media attention and the difficulties they would face if they were left the responsibility of devising negotiated solutions at local level; and affording a free neutral space where young girls could escape the pressure[59] they experienced in their communities to wear the veil. The purpose of this chapter is not to evaluate the legitimacy of those aims. Reflection on these aims and on the proper contours of *laïcité* would be very valuable;[60] but such enterprise falls outside the scope of the precepts of negotiating with religion. Indeed, in the approach I defend, negotiating with religion at school should not be interpreted

[56] 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, collèges, 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).

[57] Jean Rivero, "La notion juridique de laïcité", *Revue Dalloz* (1949): 137.

[58] Since the reforms of Jules Ferry in the late nineteenth century, schools through free, compulsory, public education for all have become the symbol of integration for all into the Republican State, See Jean-Claude Milner, *De l'Ecole.* (Paris: Le Seuil, 1984).

[59] See the *Stasi Report* prior to the 2004 French loi, *Rapport de la Commission présidée par M. Bernard Stasi de réflexion sur l'application du principe de laïcité dans la République* submitted on 11 December 2003 (Paris: La Documentation française, 2004).

[60] See in relation to the 2010 French ban on the full-face veil in the whole of the public space (Loi no. 2010–1192 interdisant la dissimulation du visage dans l'espace public of 11 October 2010, *JO* 12 October 2010), Myriam Hunter-Henin, "Why the French Don't Like the *Burqa*: *Laïcité*, National Identity and Religious Freedom", 61(8) *ICLQ* (2012): 1.

as a tool to systematically challenge general values but as a technique designed to ensure that these are fairly enforced in individual cases.[61]

Negotiation with religion at school does not take place in a vacuum. It is carried out against a broader background of national frameworks and international human rights. In that sense, the local negotiation that may (as in Britain) or may no longer (as in France, since the 2004 law) take place at local level is itself constrained by these broader requirements. These constraints themselves need not be challenged. There is value in negotiating legal solutions on the ground: negotiation between local actors encourages trust between people as they co-operate, plan common projects, try to avoid frictionand recognize their interdependence. But there is also value in devising legal solutions in Parliament: the legislative route creates a sense of being *part of a larger whole* – a cohesive, unified, integrated society.[62] Negotiating with religion does not postulate that the former is superior to the latter. Whatever the chosen form of law-making, however, negotiating with religion prescribes that negotiation operates at the enforcement stage. It will then take the shape of a balancing exercise between competing claims. Proportionality in concrete cases will be key to determining the acceptable compromise to be reached in each case. The European Court of Human

[61] There is therefore no inherent tension between *Laïcité* and negotiation. *Laïcité* could be enforced in a manner compatible with the negotiation requirements I have set out. For an illustration of this nuanced application of *laic* principles, see Conseil d'Etat 27 November 1989 (avis), n 346893, *EDCE* 1990, 239.

[62] See Roger Cotterrell, "Justice, Dignity, Torture, Headscarves: Can Durkheim's Sociology Clarify Social values?", 20(1) *Social & Legal Studies* (2011): 3.

Rights could be more attentive to the proportionality test. In the *Bayrak* case,[63] where a young Muslim girl had been expelled from a French state secondary school after refusing to remove her veil, the European Court showed extreme reverence towards Member States' positions. In effect, the only element that seemed to have been decisive in this case was the legitimate goal pursued by the contested legislative measure. Once the Court was satisfied that the relevant legal basis was pursuing a legitimate goal (here, prospectively, the 2004 French law defending the constitutional value of *laïcité*), it paid no attention as to how the law had been applied in the individual case. It thus entirely dispelled Miss Bayrak's willingness to wear a black cap in lieu of her veil. In comparison to the young girl's flexibility and accommodating attitude, the decision by French school authorities to nevertheless expel the student seemed extreme; but it passed the proportionality test before the European Court with no problems. The fact that the pupil could enrol for distant learning seemed sufficient to justify the expulsion. By contrast, I would argue that the possibility – also underlined in the English case of *Begum* –[64] for the pupil to change school or enrol for distant learning cannot make the restriction proportionate. If it did, the onus of reconciling freedom of religion and education would then rest exclusively on the individual. Fortunately this contracting-out approach seems to have been abandoned in more recent ECtHR cases.[65] However it is unlikely to benefit individual claimants who wish to wear religious symbols against national values or school

[63] ECtHR 30 June 2009 *Aktas; Bayrak. Gamaleddyn; Ghazal; J. Singh; R. Singh v. France* App. nos. 43563/08; 14308/08; 18527/08; 29134/08; 25463/08 and 27651/08.

[64] See above, note 41.

[65] ECtHR 15 January 2013 *Eweida and others v the United Kingdom*, App. nos. 48420/10, 59842/10, 51671/10 and 36516/10.

policies. In its recent *SAS* decision,[66] the European Court of Human Rights held the French *burqa* ban[67] to be a proportionate interference with religious freedom rights even though the prohibition extended to the whole of the public sphere. Two considerations were decisive in the Court's reasoning: the extremely concealing nature of the garments prohibited (full-face covering clothing)[68] and the strong national consensus underlying the ban.[69] As a result, the Court was content to grant France a wide margin of appreciation and upheld the ban. To what extent is the reasoning adopted in *SAS* transferrable to religious symbol cases in an educational context? The 2004 French ban on religious symbols at school does not only target full-face covering garments but applies to all ostentatious religious symbols. However underlying common national values feature more strongly in an educational context than in the general public sphere. State schools have always been at the epicentre of *laïcité* and at the core of the French national identity. It is therefore unlikely that the European Court of Human Rights will, for the near future at least, strengthen its proportionality requirements in cases relating to religious symbols at school.

Conclusion

This chapter has demonstrated that negotiating religion at school is of value for law-makers. Conceived as a balancing exercise between competing interests, it ensures

[66] ECHR 1 July 2014 *SAS v France*, App no 43835/112014. For a critical analysis of the case, see Myriam Hunter-Henin, 'Living Together in an Age of Religious Diversity: Lessons from *Baby Loup* and *SAS*' *Oxford Journal of Law and Religion* (2015) 1.

[67] See above fn 60.

[68] ECHR 1 July 2014, fn 66, para 146.

[69] Ibid, para 153.

better representation of minority views in legal regulation. In fact, any legal system committed to human rights cannot do away with negotiating with religion – at least at the enforcement stage. A proportionality test that balances the goal pursued by the restrictive school measure against the impact it causes to a particular pupil is necessary if individual religious freedom rights are to have any meaning; but the test need not slide into systematic rights of accommodation for individuals. If it did, negotiating with religion would become the seed for an inclusive version of neutrality under which all religions (gradually) achieve equal standing. This chapter has argued for a more complex and more context-sensitive approach to negotiating with religion. In our approach, neither versions of neutrality is favoured *a priori*. Outcomes depend entirely on the issues at stake and the relevant circumstances. This seemingly complex balancing exercise is actually already practiced to varying degrees and with more or less success.

Several layers and forms of negotiation have thus been identified in this chapter. A first stage of negotiation – at conceptual level, in the courtroom – implies pushing the boundaries of concepts in order to welcome more individual practices within the protected categories. A second stage of negotiation – on the ground, in the classroom – relies on consultation with local religious communities, the result of which are then to be reflected in the local school's policy. Finally, a third stage of negotiation consists of balancing competing claims to individual and group religious identities with claims to national identities and social cohesion. The first stage has been largely rejected and for good reasons: despite the well-intentioned aim of stretching categories in order to allow for greater diversity of manifestations of individual beliefs, this negotiation with concepts by judges is to be resisted. Indeed, it would lead judges into discussions of religious scholastics for which they are ill-equipped.

Besides, as judges would retain the control of definitions, this process of negotiation would remain largely unilateral and therefore would fail to meet the requirements of a fair negotiation process.

By contrast, negotiation on the ground is a two-way process which involves both school authorities and religious actors (via the main religious communities in the vicinity). However, the point of view of the most interested parties – individual pupils – still remains absent and the dynamic of the whole process is therefore skewed in favour of majority mainstream views. If negotiation with religion is to be welcome in education, it cannot therefore be in the restricted sense of consultation and deliberation at local level but has to imply a broader balancing of conflicting values which leaves room both for individual expression and common national values. Despite the practical difficulties, negotiating with religion is not therefore a far-fetched ideal. A few recent developments however push lawyers into the opposite direction: the relaxed application of the proportionality test by the European Court of Human Rights as illustrated in the *Bayrak* case or the attraction for the contracting out approach for example go against the advocated approach because they do not allow for a weighing of competing claims but shift all the onus of adapting (for the latter) or all the burden of proof (for the former) onto the individual.

Conceptually, the proposed approach of 'negotiating with religion' may be accused of clouding the concept of state neutrality. It is true that the opposition between inclusive and exclusive neutrality gives a clearer picture. Under an inclusive version, all religions are treated on an equal footing by the State. By contrast, under an exclusive version of the concept, public institutions must keep safely away from religion altogether. My proposed approach does not give such predetermined answers as to the general relationships between the Sate and religion. But far from being a flaw, this

chapter has argued that this 'pragmatic plural approach provides more fruitful solutions than a narrow-minded, either-or choice for any one of these neutrality interpretations'.[70]

[70] Pierik and Van der Burg, (2014): 21.