CONGREGATION FOR CATHOLIC EDUCATION
EDUCATING TODAY AND TOMORROW
A Renewing Passion
Rome, 18-21 November 2015

CONFERENCE MANUAL

Sessions for ELA

European Association for Education Law and Policy
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CONGREGATION FOR CATHOLIC EDUCATION

EDUCATING TODAY AND TOMORROW

A Renewing Passion

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PROGRAMME

OPENING SESSION

Paul VI Audience Hall – VATICAN CITY

Wednesday 18 November

Time	
09.30 am – 01.00 pm 02.00 pm – 03.00 pm	**Matriculation** (Institutum Patristicum Augustinianum, Via Paolo VI, 25 – Roma)
03.30 pm	**Opening Prayer**
	Greeting and introduction from the Prefect of the Congregation for Catholic Education Card. Giuseppe VERSALDI
	Conference by the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life
	Musical Interlude
04.00 pm	***Education: A Never-Ending Passion. From the Council to Today*** ***Fiftieth Anniversary of Gravissimum educationis and Twenty-Fifth Anniversary of Ex corde Ecclesiae*** (Multimedia Presentation: PowerPoint or DVD)
04.15 pm	**Experiences of some of those on the front-line** Prof. Étienne VERHACK***, Consultor of the Congregation for Catholic Education*** Rev. Pierre HURTUBISE, o.m.i.,***Director of the Centre for Research into the Religious History of Canada***
	Musical Interlude
05.00 pm	***New Scenarios in Education,*** **from the responses to the** ***Instrumentum laboris "Educating Today and Tomorrow. A Renewing Passion"*** Prof. Italo FIORIN, ***Director of the "Scuola di Alta Formazione: Educating to encounter and solidarity" (LUMSA, Rome)***
05.00 pm	Conferences Prof. Anne CUMMINS,***Vice Rector of the Australian Catholic University (Australia)*** Dr. Philippe BOILLAT,***Director of the Human Rights Division of the Council of Europe***
	Musical Interlude
06.15 pm	***The Congress's Aims and Procedures*** His Excellency Archbishop A. Vincenzo ZANI, ***Segretary of the Congregation for Catholic Education***

CLOSING SESSION

Paul VI Audience Hall – VATICAN CITY

Saturday 21 November

Time	
	WORKING TOGETHER FOR EDUCATION
09.00 am	**Prayer**
	Greeting from the Prefect of the Congregation for Catholic Education
	Artistic/Musical Interludes
09.15 am	***A Renewing Passion: Summing Up the Work of the Congress*** Fr. Pedro AGUADO, Sch.P.
09.45 am	***Guidelines and Suggestions for the Future of Education*** Prof. Nieves TAPIA – Fr. Antonio SPADARO, S.J. - Prof. Jan DE GROOF
10.30 am	***Educating Today and Tomorrow: The Forum Held at UNESCO***
	The Dicastery at the service of education His Excellency Archbishop A. Vincenzo ZANI
11.30 am	***Interviews and dialogue*** ***Speech of Pope Francis***
13.00 pm	**Conclusion**

SEPARATE SESSIONS

Session for **UNIVERSITIES**

Centro Mariapoli (Castelgandolfo)

Thursday 19 November

Time	IDENTITY AND MISSION (Moderator: Msgr. Philippe BORDEYNE)
8:45 am	**Prayer**
9.00 am	**Identity and Mission of Catholic Education** ***Introductory Conference based on the Questionnaire*** Rev. Fr. Jorge Humberto PELÁEZ PIEDRAHITA, S.J., Rector of the ***Pontificia Universidad Javeriana*** (Bogota)
9.30 am	**Nature and Duties of Educational Institutions in the Different Social and Cultural Contexts** ***Experiences*** Rev. Fr. Gregorio Lapus BAÑAGA, Jr., C.M., President of ***Adamson University*** (Manila) Dr. Ewa Agnieszka LEKKA-KOWALIK, Director of the ***John Paul II Centre*** (Lublin) Rev. Fr. Walid MOUSSA, O.M.M., President of ***Notre Dame University-Louaize*** (Lebanon)
10.15 am	**Q&A session**
10.45 am	**Break**
11.15 am	**Catholic Educational Institutions in Dialogue with Other Formational Institutions** ***Conferences by Leaders*** Fr. Joaquim CLOTET, F.M.S., Rector of the ***Pontifícia Universidade Católica do Rio Grande do Sul*** (Porto Alegre) Rev. Thierry MAGNIN, Rector of the ***Université Catholique de Lyon*** (France), President of FUCE Dr. John J. DeGIOIA, President of ***Georgetown University*** (USA)
12.00 am	**Q&A session**
12.30 pm	**Mass**
	SUBJECTS (Moderator: Prof. Franco ANELLI)
03.30 pm	**The Subjects of Education** ***Introductory Conference based on the Questionnaire*** Prof. Jorge Benedicto BAEZA, Rector of the ***Silva Henríquez Catholic University*** (CHILE)
04.00 pm	**Duties and Responsabilities of the Various Subjects: Bishops, Religious Congregations, Lay people, Directors, Teachers, Students, Parents, Associations** ***Experiences*** Rev. Fr. John I. JENKINS, C.S.C., President of the ***University of Notre Dame*** (USA) Dr. Maria da Glória GARCIA, Rector of the Portugese Catholic University Dr. Chuan Yi TANG, President of ***Providence University*** in Taichung (Taiwan)
04.45 pm	**Q&A session**
05.15 pm	**Break**
05.45 pm	**Goals of Formation and the Educating Community** ***Guidelines*** Rev. Mario Ángel FLORES RAMOS, Rector of the ***Universidad Pontificia de México*** Rev. Fr. Paul BÉRÉ, S.J., lecturer at ***Hekima College*** / ***Catholic University of Eastern Africa*** (Nairobi) and at the ***Institut Théologique de la Compagnie de Jésus*** (Abidjan) Rev. Stephen MAVELY, S.D.B., President of the ***Assam Don Bosco University*** of Guwahati (India)
06:00 pm	**Q&A session**

Friday 20 November

Time	FORMATION (Moderator: Msgr. Guy-Réal THIVIERGE)
8:45 am	**Prayer**
09.00 am	**The Formation of Formators** ***Introductory Conference based on the Questionnaire*** Rev. Fr. Herminio DAGOHOY, O.P., Rector of the ***University of Santo Tomas*** (Manila)
09.30 am	**Initial Formation and On-Going Formation, Quality and Evaluation of Formators** ***Experiences*** Dr. Alfonso SÁNCHEZ-TABERNERO, Rector of the ***Universidad de Navarra*** (Spain) Fr. Pedro Rubens FERREIRA OLIVEIRA, S.J., Rector of the ***Universidade Católica de Pernambuco*** (Brasil), President of IFCU Dr. KI-BAE SEUNG, President of ***Seoul St Mary's Hospital of the Catholic University of Korea***
10.15 am	**Q&A session**
10.45 am	**Break**
11.15 am	**Suggestions, Methods and Strategies**

	Roundtable with experts Ø Fr. Anthony CASAMENTO, C.S.M.A., Director for Identity and Mission, ***Australian Catholic University*** Ø F. Pius RUTECHURA, Vice Chancellor of the ***Catholic University of Eastern Africa*** (Nairobi) Ø Fr. Arturo Marcelino SOSA ABASCAL, S.J., former Rector of the ***Universidad Católica del Táchira*** (Venezuela), ***Delegate for the Interprovincial Jesuit Communities in Rome***
12.00 am	**Q&A session**
12.30 pm	**Mass**

Session for **SCHOOLS**

Centro Mariapoli (Castelgandolfo)

Thursday 19 November

Time	IDENTITY AND MISSION (Moderator: Prof. Luigi PATI)
8:45 am	**Prayer**
9.00 am	**Identity and Mission of Catholic Education** ***Sr. Yvonne REUNGOAT, Superior Generale FMA***
10.00 am	**Educational Institutions in the Different Social and Cultural Contexts** ***(Experiences)*** Ø ***Rev. P. Joaquim MARTINEZ, s.j. Jesuit Refugee Service – International Education Coordinator (Jesuits)*** Ø ***Rev. Boutros AZAR, General Secretary for Catholic Schools (Lebanon)*** Ø ***Rev. Fr. Jean de Dieu TAGNE, General Coordinator of the "Association pour la Promotion et la Protection du Droit à l'Éducation pour Tous" (Blas - Cameroon)*** Ø ***His Excellency Bishop Pero SUDAR, Auxiliary Bishop of Sarajevo (Bosnia-Herzegovina***)
10.15 am	**Q&A session**
10.45 am	Break
11.15 am	**Catholic Educational Institutions in Dialogue with Other Formational Institutions** ***(Conference by Leaders)*** ***Msgr. Aldo GERANZANI, Rector of the Collegio San Carlo (Milan – Italy)*** ***Fr. Jòzsef URBÁN, Director of the Piarist Gimnázium (Budapest - Hungary)*** ***Prof. José María DEL CORRAL*** and Prof. Enrique PALMEYRO, ***Scholas occurrentes*** ***Ms. Joy BEDFORD, Principal of Our Lady of the Sacred Heart College, Enfield, Australia***
12.00 am	**Q&A session**
12:30 pm	**Mass**
	SUBJECTS (Moderator: Sr. Inés GARCÍA CASANOVA, c.c.v.)
03.30 pm	**The Subjects of Education** ***Prof. Elinor R. FORD, Emerita Professor of Fordham University (New York - USA)***
04.00 pm	**Duties and Responsabilities of the Various Subjects: Bishops, Religious Congregations, Lay people, Directors, Teachers, Students, Parents, Associations** ***Moderator: Etienne VERHACK*** Ø ***His Excellency Archbishop Gerard BERGIE, President of the Committee of Catholic education of Assemble of Catholic Bishops of Ontario-Canada*** Ø ***Fr. Pedro AGUADO, President of the Education Committee of the Union of Superiors General*** Ø ***Dr. Roberto GONTERO, National President of the Assocation of Parents for Catholic Schools (AGESC - Italy)*** Ø ***Dr. Guy BOURDEAUD'HUI, President of the World Union of Catholic Teachers (UMEC)*** Ø ***Ms. Christine ROCHE, President of the Office of the Administrative Council of the International Catholic Centre for Cooperation with UNESCO (CCIC)*** Ø ***Dr. Martino MERIGO, Association of Students of Catholic Schools (FIDAE - Latium)***
05.00 pm	**Q&A session**
05.30 pm	**Break**
06.00 pm	**Goals of Formation and the Educating Community** ***(Guidelines)*** ***Prof. Pascal BALMAND, General Secretary for Catholic Education (France)*** ***Rev. Fr. Thomas CHATHAMPARAMPIL MATHEW, Vice Chancellor of Christ Unity (Bengaluru – India)***
06.30 pm	**Q&A session**
07.00 pm	***Conclusion***

Friday 20 November

Ore	FORMATION (Moderator: Prof. Étienne VERHACK)
8.45 am	**Prayer**
09.00 am	**The Formation of Formators** ***(Introductory Conference based on the Questionnaire)*** ***Prof. Juan Carlos TORRE PUENTE (Universidad Pontificia Comillas, Madrid - España)***
09.30 am	**Initial Formation and On-Going Formation, Quality and Evaluation of Formators** ***(Experiences)*** Ø ***Prof. Gerald CATTARO, Director of the Center for Catholic School Leadership, Fordham University (New York -***

Educare Oggi e Domani
Una passione che si rinnova

	USA Ø ***Dr. John LYDON, Director of the MA in Catholic School Leadership Programme, School of Education, Theology & Leadership, St. Mary's University Twickenham (London - England)***
10.15 am	**Q&A session**
10.45 am	Break
11.15 am	**Suggestions, Methods and Strategies** ***(Roundtable)*** ***Superior General of the Sisters of Charity of Saint Giovanna Antida Thouret*** ***Rev. Vítor Hugo MENDES, Executive Secretary of the Department for Culture and Education, CELAM*** ***Dr. Christine MANN, President of the European Committee for Catholic Education (CEEC)***
12.00 am	**Q&A session**
12.30 am	**Mass**

Session UNIVERSITIES AND SCHOOLS

Centro Mariapoli (Castelgandolfo)

Friday 20 November

Ore	CHALLENGES AND OUTLOOK (Moderator: Dr. Sjur BERGAN)
03.30 pm	**The Challenges of Today and Tomorrow** ***(Introductory Conference based on the Questionnaire)*** ***Prof. Angelo PALETTA, University of Bologna***
04.15 pm	**Outlook** ***(Roundtable)*** **Fundamental Rights in Education and Freedom of Choice** Prof. António Pedro BARBAS HOMEM, ***Director of the Centre for Juridical Studies (Lisbon – Portugal)*** **Charisms in Education** Prof. Sr. Helen ALFORD, o.p., Vice-Dean Faculty of Social Sciences, Pontifical University Saint Thomas Aquinas – Angelicum (Rome) Ø **Studies, Research and Programmes: "Scuola di Alta Formazione: Educating to encounter and solidarity" (LUMSA, Rome)** ***Prof. Italo FIORIN*** Ø **Professional formation** ***Dr. Katrin KELLER, Director of Marienhaus (Germany)***
05.15 pm	**Q&A session**
05.45 pm	**Conclusions** ***His Excellency Archbishop Angelo Vincenzo ZANI***

Session for **OIEC**

Auditorium Conciliazione (Rome)

(Via della Conciliazione 4 - Rome)

HORA	ACCIÓN	JUEVES 19 IDENTIDAD Y MISIÓN DE LA ESCUELA CATÓLICA	VIERNES 20 LA FORMACION DE LOS DIRECTIVOS, DOCENTES Y PADRES
09:00 hrs.	Diagnóstico	Resultados, análisis y conclusiones del Cuestionario, respecto al núcleo 1: Identidad y Misión de la Escuela Católica.	Resultados, análisis y conclusiones del Cuestionario, respecto al núcleo 3: La formación de los directivos, docentes y padres.
9:15hrs	Ponencia	Una Escuela Católica comprometida y transformadora: Su identidad y misión hoy y mañana	La formación de los docentes y de los directivos de las escuelas, pieza clave para el cambio y la mejora de la educación católica hoy y mañana.
10:05hrs	Diálogo		
10:30 hrs.		Breve intermedio I	Breve intermedio III
10:40 hrs.	Testimonios	¿Cómo se trabaja, desarrolla y perfecciona la identidad de la Escuela Católica en los diferentes contextos del mundo? Luces y dificultades.	Experiencias y testimonios de lo importante y determinante que resulta la alta cualificación de los docentes y directivos de las escuelas. La calidad de la escuela es proporcional a la calidad de sus directivos y de sus docentes.
11.10hrs	Mesa Redonda	La coherencia, la evangelización, la clase de religión y el diálogo interreligioso e intercultural en la Escuela Católica: amenazas, dificultades, orientaciones y retos.	Programas, modalidades o estrategias de formación de los directivos, docentes y familias. Orientaciones y mínimos a tener en cuenta en las acciones formativas
12:10 hrs.	Diálogo		
12.30hrs		Almuerzo	Almuerzo
HORA	**ACCIÓN**	**LOS SUJETOS DE LA EDUCACION**	**DESAFIOS DE LA EDUCACION CATÓLICA HOY Y MAÑANA**
15:30hrs.	Diagnóstico	Resultados, análisis y conclusiones del Cuestionario, respecto al núcleo 2: Los sujetos de la educación.	Resultados, análisis y conclusiones del Cuestionario, respecto al núcleo 4: Los desafíos de la educación católica hoy y mañana, globalmente y según contextos y sectores.
15:45hrs.	Ponencia	Nuevo rol de los sujetos de la educación en la Era de la Colaboración: una escuela católica que da protagonismo a sus agentes, cuida sus relaciones y trabaja en red hacia dentro y fuera de la misma.	Los cambios y las mejoras que se deben dar en la escuela católica, para mejor responder a sus desafíos hoy y mañana. Orientaciones y estrategias.
17:00 hrs.		Breve intermedio II	Breve intermedio IV
17:15 hrs.	Testimonios	¿ Experiencias de nuevas formas de ejercer el liderazgo y la participación. Nuevas estructuras organizativas. Trabajo en red entre sujetos y/o entre instituciones.	¿ Experiencias de cambio, innovación y compromiso de la escuela católica en el mundo.
17:45hrs	Mesa Redonda	La misión compartida, la participación y coordinación, la colaboración y el trabajo en red: exigencias, formación y orientaciones.	**Desafíos de la escuela católica, más urgentes, en los diferentes continentes del mundo. Claves y orientaciones para una respuesta creativa y comprometida.**

ELA PROGRAM

CONGREGATION FOR CATHOLIC EDUCATION

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A Renewing Passion

Rome, 18-21 November 2015

Sessions for ELA

European Association for Education Law and Policy

Program
(Slight amendments may still occur)

Tuesday 17 November 2015

07.30 pm	**ELA informal Meeting for the Participants who arrived already on Tuesday** *(Hotel Columbus, Via della Conciliazione, 33, 00193 Roma)* Drink

Wednesday 18 November 2015

03.30 pm – 06.30 pm	**Opening Session - See Conference website** http://www.educatio.va/content/cec/it/eventi/congresso-educare-oggi-e-domani/educating-congress/programma.html *(Paul VI Audience Hall – Vatican City)*

08.30 pm	**ELA Gathering :** *(Residence of the Belgian Ambassador to the Holy See, Via Giuseppe de Notaris, 4, 00197 Roma)* **Welcome by the Ambassador** **Freedom of Education and Right to Education: The Priority of the Next Decades** Prof. dr. Jan De Groof, Professor at the College of Europe, Bruges (Belgium) and at Tilburg University (the Netherlands), President ELA **Walking Dinner**

Thursday 19 November 2015

09.00 am – 06.00 pm **'Separate Sessions' - See Conference website**
(Castelgandolfo, Centro Mariapoli)

10.00 am **ELA Seminar :**
(Castelgandolfo, Centro Mariapoli)

Chair: Prof. dr. Luiza Ribolzi, Professor at the University of Genova and Vice President of the Agency for the Assessment of University and Research Institutions (Italy)

Introduction : Prof. dr. Jan De Groof, Professor at the College of Europe, Bruges (Belgium) and at Tilburg University (the Netherlands), President ELA

First Keynote

Religious Rights in and through Education – Religious Pluralism and Society
Prof. dr. John Garvey, President of The Catholic University of America (USA), Former Dean of the Boston College Law School (USA)

Specific approaches

Justiciability of International Dimensions of the Right to Education in Russian Courts: Domestic Interpretation of the 4-A Scheme
Dr. Maria Smirnova, Federal Centre for Educational Legislation, Moscow (Russia), The University of Manchester (UK)

The Wrongs of Religious Rights - Fostering Peace & Justice through Education
Mr. Francis Moneke, Director of Human Rights and Empowerment Project (Nigeria)

Discussion
Started by Prof Pablo Meix Cereceda, Professor of Administrative Law at the University of Castilla-La Mancha

Second Keynote

Religious Education versus Secularism? The Context of the Private and Public Schools
Prof. dr. José Luis Martinez López-Muñiz, Professor at the University of Valladolid (Spain)
Prof. dr. Patrick Brennan, Professor of Law at the Villanova University School of Law (USA)

Specific approaches

Secularism, the Harm Principle and Religious Freedom within Education
Drs. Georgia Du Plessis, Lecturer at University of the Free State (South Africa)

Religious Instruction in Public Schools
Mr. Masoud Ebrahimnejad, University of Oslo (Norway)

A Balanced Religious Education in Public School. A Possible Way to Build Bridges over Religions and Cultures
Mrs. Ida Bunaes, University of Oslo (Norway)

Discussion
Started by Marta Ponikowska, Latin American Alliance for the Family (ALAFA) Poland, Regional Director

Third Keynote

The Issue of Language, Education and Inclusion of Diversity
Prof. dr. Fernand de Varennes, Dean at the Faculty of Law, Université de Moncton (Canada)

Discussion
Started by Mrs. Ida Bunaes, University of Oslo (Norway)

03.30 pm – 06.00 pm

ELA Seminar :
(Castelgandolfo, Centro Mariapoli)

Chair : Prof. dr. Ingo Richter, Professor at Irmgard Coninx Stiftung (Berlin) and University of Tübingen (Germany)

Keynotes

School Religious Distinctiveness: The Consequences for Parents, Pupils and Teachers
Prof. dr. Charles Glenn, Professor at Boston University (USA)

A Meta-analysis on the Effects of Catholic Schools on Student Achievement versus Public Schools and Some of the Reasons for the Catholic Advantage
Prof. William Jeynes, Senior Fellow, Witherspoon Institute and Professor, California State University (USA)

Specific approaches – Involvement of Parental and Family Rights

The Heart of the Church: Educating in Christian Virtue
Mrs. Christine de Marcellus Vollmer, Pontifical Council for the Family and the Pontifical Academy for Life (Venezuela)

Homeschooling in Brazil: New Judiciary Discussion and the Tradition
Prof. dr. Rubens Becak, Professor at the University of Sao Paulo (Brazil) with the participation of Luis Felipe Cirino, University of Sao Paulo (Brazil)

Discussion
Started by Rodrigo Queiroz e Melo, Universidade Católica Portuguesa

	Specific approaches – Teacher's Rights **"*The teacher acts in a manner which maintains the honour and dignity of the profession*"—Teaching in Catholic Schools** Prof. dr. Ihor Kruk, Executive Staff Officer at the Alberta Teachers' Association (Canada) *Discussion* Started by Dr. Maria Smirnova, Federal Centre for Educational Legislation, Moscow (Russia), The University of Manchester (UK) *Conclusions* by Prof. dr. Jan De Groof, Professor at the College of Europe, Bruges (Belgium) and at Tilburg University (the Netherlands), President ELA

08.30 pm	**ELA Gathering :** *(Portuguese Embassy to the Holy See, Villa Lusa, Via S. Valentino, 9, 00197 Roma)* **Welcome by the Ambassador** **Challenges of the Intercultural Society: Role of Confessional Schools** Prof. dr. Ben Vermeulen, Member of the Council of the State and Professor at the University of Amsterdam (the Netherlands) **Walking Dinner**

Friday 20 November 2015

09.00 am – 06.00 pm **'Separate Sessions' - See Conference website**
(Castelgandolfo, Centro Mariapoli)

10.00 am **ELA Seminar :**
(Castelgandolfo, Centro Mariapoli)

Chair : Prof dr. Roberto Toniatti, Professor at Trento University (Italy)

First Keynote

The Role of Religion to Shape Intercultural Society – Islamic Education
Prof. dr. Jaap Dronkers, Chair International Comparative Research on Educational Performance and Social Inequality, Maastricht University (the Netherlands)

Specific approaches

Asia: Regional and National Perspectives
Prof. dr. Ruhi Paul, Professor of Law at National Law University, Delhi (India)

Publicly Funded Islamic Education in Europe and the United States
Prof. dr. Jenny Berglund, Professor at Södertörn University, Stockholm (Sweden)

Discussion
Started by Prof dr. Ingo Richter, Professor at Irmgard Coninx Stiftung and University of Tübingen (Germany)

Specific approaches - Universities

The Right to Higher Education
Dr. Kamila Guseynova, United Nations FAO

The University as a Community
Prof. dr. Paul Zoontjens, Tilburg Law School, Department for Public Law, Jurisprudence and Legal History (Netherlands)

Discussion
Started by Mr. Masoud Ebrahimnejad, University of Oslo (Norway)

Second Keynote

The Role of Catholic Schools (in Australia and New Zealand) in Educating for Human Rights and Social Justice.
Prof. dr. Sally Varnham, Professor at the University of Technology Sydney (Australia)

Religious Education and Secular State: an Overview in Latin America
Dr. Nina Ranieri, Law School of the University of São Paulo (Brazil), Public Law Department; with the participation of Drs. Angela Limongi, Drs. Danilo Valdir Vieira Rossi, Drs. Eliza Lucena and Drs. Meire Cristina Souza and Drs. Michel Lutaif, Law School of the University of São Paulo (Brazil)

Specific Approaches

Religion in South African Education: Current Debates and Future Possibilities
Prof. Johan Beckmann, Faculty of Education, University of Pretoria (South Africa)

Catholic Schools in an Expanding Landscape of School Choice in One U.S. City
Prof. dr. Cara Candal, Pioneer Institute and Boston University (USA)

Discussion
Started by Francis Moneke, Director of Human Rights and Empowerment Project (Nigeria)

03.00 pm – 04.30 pm **ELA Seminar :**
(Castelgandolfo, Centro Mariapoli)

Chair : Prof. dr. Joan Squelch, Professor at the University of Notre Dame (Australia)

Keynotes

Comparative Analysis of Religious Rights in Education and Church/State Relations on Education
Prof. dr. Merilin Kiviorg, University of Oxford, Wolfson College and Professor at University of Tartu (Estonia)

A Comparative Analyses of Religious Freedom in Education: An American Perspective
Prof. dr. Charles Russo, Professor at the University of Dayton, Ohio (USA)

Specific Approaches

Discussion on the National Agenda on Church/State Relations in Education
Prof. dr. John Panaretos, Athens University of Economics and Business (Greece)

Religious Associations and Public Secondary Schools in Russia. The Legal Basis of Relations
Prof. dr. Artemiy Rozhkov, Vice-Rector of Moscow City University (Russia)

State and Church in Education: Special Attention to the Control and Support – the Hungarian Case
Prof. dr. Balàzs Gerencsér, Pazmany Péter Catholic University (Hungary)

Discussion
Started by Drs. Georgia du Plessis, Lecturer at University of the Free State (South Africa)

	Conclusions by Prof. dr. Jan De Groof, Professor at the College of Europe, Bruges (Belgium) and at Tilburg University (the Netherlands), President ELA

08.30 pm	**ELA Gathering:** *(Embassy of Taiwan at the Holy See, Via della Conciliazione 4/d, 00193 Roma)* **Guest of Honour :** Zenon Cardinal Grocholewski, Previous Prefect of the Sacred Congregation for Catholic Education **The Relevancy of Legal and Human Rights Approach in Education** Prof. dr. Pedro Antonio Barbas Homem, Director of the Centro de Estudos Judiciários, Lisbon and Chair and Full Professor of the Faculty of Law of Lisbon University, Former Vice-Rector and Pro-Rector of the University of Lisbon (Portugal) **Walking Dinner**

Saturday 21 November 2015

09.00 am – 12.30 pm	**Closing Session- See Conference website** *(Paul VI Audience Hall – Vatican City)*

02:00 pm	**Reception and Buffet at the Libera Università Maria SS. Assunta (LUMSA University)** *(Vatican, Borgo Sant'Angelo, 13, 00193 Roma)*
03.00 pm – 17.00 pm	**ELA Conference at the LUMSA University** *Chair*: Prof. dr. Jan De Groof, Professor at the College of Europe, Bruges (Belgium) and at Tilburg University (the Netherlands), President ELA. (The meeting will also be attended by Prof. dr. Giuseppe Dalla Torre, Rector Emeritus LUMSA University (Italy) and Prof. dr. Paolo Cavana, Professor at LUMSA University) *Agenda***:** **1. Welcome** Prof. dr. Francesco Bonini, Rector LUMSA University (Italy) Prof. dr. Jan De Groof, Professor at the College of Europe, Bruges (Belgium) and at Tilburg University (the Netherlands), President ELA **2. Conclusions of the Conference *'Educating Today and Tomorrow : A Renewing Passion, Rome, 18-21 November 2015'*.** Intervention by Prof. dr. Italo Fiorin, Professor at LUMSA University (Italy) **3. The National Agenda on Challenges/Conflicts of Catholic Schools vis-à-vis the State** Regional and Comparative Report by : - Guy Selderslagh, Secretary General of the European Committee for Catholic Education and Director of the Study Service of the General Secretariat for Catholic Education (Belgium). - Prof. dr. Sean Sheridan, TOR, President of Franciscan University of Steubenville, Ohio (USA). **4. Research Project Concerning the Impact of Constitutional Courts on the National Education Agenda** Prof Pablo Meix Cereceda, Professor of Administrative Law at the University of Castilla-La Mancha Drs. Georgia Du Plessis, Lecturer at University of the Free State (South Africa) Intervention by Rapporteurs **5. Follow-up of the Comprehensive Analysis of the Status of Non-Governmental Schools (Africa, North-America, South America, Asia, Australia and New Zealand, Europe): Glenn Ch. and De Groof J., *Balancing Freedom, Autonomy and Accountability in Education*, *4 Volumes*, Nijmegen: Wolf Legal Publishers, 2012 –** Working Group : Methodology and Timing **6. Preparation of the 'ELA 2016 Conference' in Rome** **7. Closure**

08.30 pm	**ELA Informal Gathering** *(Residence of the Belgian Ambassador to the State of Italy, Forum Romanum, Via San Teodoro, Rome)* **Welcome by the Ambassador** **Speech by** Msgr. Vincenzo Zani, His Excellency Archbishop, Secretary of the Congregation for Catholic Education, Guest of Honor **Walking Dinner**

Sunday 22 November 2015

	Special Program :
10.30 am	Holy Mass (in English) *(Campo Santo Teutonico – just inside the Vatican Gardens)*
11:30 am	Exclusive Visit of the Vatican Gardens – Guided Tour

LIST OF PARTICIPANTS AT CONFERENCE

List of participants (alphabetical order)

Naam	Voornaam	Function	Email
Atanasio	Joao	Professor at University of Lisbon (Portugal)	atanasio1@sapo.pt
Barbas Homem	Pedro	Director of the Centro de Estudos Judiciários, Lisbon and Chair and Full Professor of the Faculty of Law of Lisbon University, Former Vice-Rector and Pro-Rector of the University of Lisbon (Portugal)	pedrobarbashomem@gmail.com
Becak	Rubens	Professor at the Univesity of Sao Paulo (Brazil)	rubens.becak@gmail.com
Beckmann	Johan	Professor at the Faculty of Education, University of Pretoria (South Africa)	johan.beckmann21@gmail.com
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SPEECH BY PROF DR. JAN DE GROOF

Prof. dr. Jan De Groof, Professor at the College of Europe, Bruges (Belgium) and at Tilburg University (the Netherlands), President ELA

Challenges on Law and Policy

Jan De Groof

Intro

1. Sarika, Malachi and Emma are school-age children in Kenia, France and US. They were barred from attending a class or simply excluded from school.

For different reasons.

Sarika, because she is a girl and gender discrimination in education among the Maasai in *Kenya* is still recognized as the number one cause of persistent poverty and all of its consequences.

Malachi because her long skirt was deemed to religious.

A Philadelphia-area teen because he is HIV-positive. A visibly pregnant girl was not allowed to take exams according to an unspoken rule that has long been a part of the education system in Sierra Leone…

That day was not something they would like to remember.

Exclusion from education or the denial of proper education opportunities, particularly for minorities , eg. for Roma, remains a prior concern on practically all continents.

Among all human rights, the right to education is reaching the highest ranks, close to 'the right to life'; the right to equality is mainly guaranteed by the right to education.

Pope John Paul II, on the occasion of his meeting with members of the European Court of Human Rights (10th November 1980) mentioned the *priority role* of education among all other human rights (as a 'precondition to the practice of other rights)' and added:

'*The right to and freedom of education is decisive for the culture of an entire people'.*

The first protesters, four years ago, at the *Tahrir Square* in Cairo, Egypt – students – asked for '*Education in freedom'. 'Equity and Dignity through Education'.* A similar scenario emerged at the *Maidan Square* in Kiev (Ukraine), and in Kinshasa (DRC).

Neither the Right to Education, nor the Freedom of Education should be denied…

I will focus on 'Religion, Education and the Law', - the three pillars of civilization.

Focus of my speech

2. One of the conclusive responses of the Questionnaire based on the *Instrumentum Laboris* of the Congregation of Catholic schools, reads as follows:

"*What can we do against the intrusion of the State that tends to impose the content of school curricula to the extent of expunging every possible reference to the spiritual and religious dimension of human experience ?"*

National Bishop Conferences report about disinterest by politicians and the unreliability of some States and governments that often also translates into a lack of adequate regulation of relations between Church and State.

Why does the catholic community create catholic school and universities ?

Not just because of the expected strong academic output.

Because young people should be enabled to critically understand the world, to raise alternative questions, to be introduced in a coherent structure of values, to resist spiritual poorness and provoke openness to transcendence.

For those reasons, the 'school climate', 'school culture', the school 'spirit', the witness of teachers will differ from the neutral State school. And so does the 'shared responsibility' of parents, of the *community* and of the school, - particularly in a world culture where there is little trust.
Catholic schools should be '*free*' schools, as mentioned in Belgium.

I want to stress this morning mainly two issues: (1) States should promote Catholic schools, but (2) those schools should articulate more expressly their specific mission.

'Freedom *of* ' and 'Freedom *for*', as mentioned earlier by the Congregation (2013).

The 'post 2015 Agenda' and the '2030 Goals'

3. 70% of the new born babies are supposed to get later a job in professions that still not exist. The last PISA report stated that it is less important what and how much is known, but how to make use of knowledge and how to learn what we did not learn. The universities of the XIInd and XIIInd century (Salerno, Bologna, Paris, Oxford, Salamanca, Leuven) aimed at the *'facultas'* – the intellectual capacity to 'understand', before getting the '*licence*' to practice the profession.

What is at stake to reach the UN '*20130 Goals'* ?

The announcement of the *Sustainable Development Goals* (in New-York by 193 States, some 8 weeks ago), and especially Goal 4 on Education Rights, is not sufficient.

In my view, the Church and other stakeholders should advocate and ask for review mechanism to sanction the concrete fulfillment of education and religious rights through policy and legislation. The Inter-American Court of Human Rights ordered in several cases remedial measures (in the case of Street Children, university scholarships, …).

Moreover it is the *local* level that should engage with rights and freedoms in education (*Localizing Human Rights):* it is there that they prove to be vital or just an illusion. The focus of review processes on national, regional and global level should be complemented by the local embedding…..

That's the basis.

Secondly, innovation in society cannot be fostered by education State monopoly but by a plurality of different types of institutions, - including catholic Colleges, Faculties and Universities, and by academic freedom.

Non State-institutions have the duty to be competitive and to become laboratories for new or different educational approaches and ideas.

Secularism enshrined in the Law rather than Pluralism?

4. How education affects and frames society will be decisive of the ethical character of this 21st century. '*Only the educated are free'.* According to Emmanuel Kant:

> '*L'homme ne peut devenir homme que par l'éducation."* The more when religious conflicts clearly are the challenges of our time.

Catholic schools and universities continue to play a decisive role, for future societies, and also confronting the many shades of 'secularism' (rather than 'secularization'): some negative attitude in society, a hidden or explicit hostility vis-à-vis signs of religion in the public space. Some call it, 'negative neutrality', moral 'relativism' or 'laicism' favoring (scientific) atheism over religions, or even worse, 'indifferentism'…

But, a laicistic approach risks to ignore social reality. Schools, deprived of every religious content, deny the correlation between culture and religion and are entwined with a false image or … a lie ! ('Freedom *from* religion is not the counterpart of freedom *of* religion'.) According to international law, the State has an obligation to deal with cultural and religious diversity within the public arena, especially in schools and promoting 'charter' schools. The negation of identity is not consistent with a human rights approach.

Catholic schools can fulfill the role of '*aide mémoire'* or '*agent provocateur'*: reminding governments of their function in the service of man and the value of human rights. Education enables people to fulfill the principle of *human dignity.*

Furthermore, Religious schools and catholic universities must value a healthy pluralism through dialogue. Academic freedom however has to be related to the *search for Truth*. How can He who said '*The Truth will set you free'* (Psalm 36) ??? be an obstacle to freedom ?

Catholic doctrine is parallel with Human Rights Law. May I express a concern: universal rights are 'interdependent and invisible', however provisions protecting marriage, the family, parental rights and religious freedom are jeopardized by entities advocating cultural relativism. The U*niversal Declaration of Human Rights* remind us that it 'cannot be applied piecemeal, according to trends or selective choices'.

Natural Law (1): Parental Rights

5.The poet Wordsworth wrote: '*The Child is Father of the man'…*

Education means: the sharing of a co-responsibility of Families, Schools, Educators, and the Society.

The child definitely does not belong to the State. We should remain skeptical vis-à-vis each temptation of the State to influence the mind of the child, the creation of '*homo sovieticus'*. On 'Statist' doctrine, Nazis, Fascists, and Marxists used exactly the same terminology, - not by chance.

As the French law expert, Jean RIVERO, pointed out :

> "*Pourquoi la liberté d'éducation est la liberté la moins aimée au monde?*", "*Why is the Freedom of Education the least loved freedom among all forms of freedom?"*

It is a freedom that disturbs, worries governments, who are not able to 'form' and influence the mind of the child - to create the new 'Soviet man' - in a sphere of life which is so close to the formation of values and ways of understanding the world…

International courts defined 'education' as '*the transmission of values, beliefs and culture'*, distinct form 'instruction' meaning, 'teaching' of skills and 'training'.

Gravissimum Educationis Momentum offered a new ecclesiology. The primary responsibility for the education of their children falls to parents. The family has a responsibility to search for the truth and International law stresses repeatedly the importance of school choice that parents make.

In a landmark judicial decision, nearly a century ago, the United States Supreme Court, in asserting the constitutional right to non-government schools and the primacy of parents, ruled:

> "*The child is not the mere creature of the State;* those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." ("Pierce v. Society of Sisters," 1925).

The French scholar André-Vincent mentioned : 'Le droit fondamental des parents dans l'éducation découle de leur responsabilité primordiale envers *la vie.'* (The Education Article 5 is not by hazard the most detailed of the whole the pontifical *Charter of the Rights of the Family).*

Subsequently that principle has been stated with confidence and repeated in various international covenants and in a large number of constitutions, but it is still not always accepted as self-evident.

The European Court of Human Rights, in the historic Judgment of 23 July 1968 on the Belgian Linguistic Case, said:

> "*The State is obliged to respect the rights of parents by promoting the freedom of education."*

Parents are motivated to ensure that their children receive a good education. The Court clearly sanctioned the following principle:

> "*The responsibility for the maximum personality development of young people lies with the parents.*"

Their responsibility responds to '*Natural Law'.*

This remains a universal principle, but I have to remind legislators in the East of the predominant role of this axiom very frequently indeed!

Moreover, there is some evidence, as shown through research, that the *ambitions of parents* and parental involvement are the best preconditions for high-performing schools. Non-governmental schools are responsive to parents, 'the authority that authorized them': '*In loco parentis'.*

Natural Law (2) : Pluralism

5. *Pluralism* in society – not just the diversity characteristic of every society but *structural pluralism* based on respect for principled differences -- is vital for **a** vibrant democracy and can only be fulfilled through a variety of public and private schools and through the involvement of *civil society*---not just government---in education.

A widespread choice of different types of schools seems the only option in order to reach high quality *and* equal education opportunities, not just because of the lack of critical State capacity in several countries but also for the sake of a vibrant democracy. 'The more decentralized, the higher the effectivity of education provision' : "Experience has shown that the most decentralized systems are also the most flexible, the quickest to adapt and have the greatest propensity to develop new forms of social partnership."

As Alexis de Tocqueville wrote in '*Democracy In America':*

> *"… without local and free institutions, a nation does not have the spirit of Liberty."*

As mentioned by Justice Sachs in the Judgement of the Constitutional Court of South Africa in the case of *Christian Education South Africa versus the Minister of Education:*

> *"Such religious bodies are part of the fabric of public life and constitute active elements of the diverse and pluralistic nation. Religion is not just a question of belief or doctrine. It is a part of a way of life, of a people's temper and culture, and has the capacity to awake concepts of human dignity and self-worth which form the cornerstone of human rights. (…) Culture and religion constitute a strong weave in civil society…".*

The art of '*associating together' and t*he right to '*be different' should be remembered for educational institutions too.* There is as a demanding universal UNESCO principle to remember and to apply: '*All individuals and groups have the right to be different, to consider themselves as different and to be regarded and respected as such.'*

It is not by accident that weak economies do not have a pluralistic school policy…

Natural Law (3) : Education Freedom

6. Government *must* regulate. State is ultimately responsible for guaranteeing, protecting and promoting the right of all to quality education, but State standards should not undermine freedom of education on following six issues:

- *Freedom to found non-state schools* and ground the school project on a specific religious mission. (The former superior General of the Society of Jesus, father Arrupe, once mentioned: 'Education is of vital importance for the Church, - so important that the ban to

teach is the first and sometimes the only prohibition that certain regimes use to dechristianise a country in two generations, without shedding a drop of blood…".)

- Official status (*effectus civilis)* of their diploma's;
- Recruitment of *personnel* (and involve them in school 'co-'responsibilities) but also the requirement of their loyalty (and the loyalty of parents) vis-à-vis the school mission and Charter;
- Autonomy of *curriculum* and school programs;
- *Religious instruction*, and not just instruction about religions; reflects the status of the teacher of religion the full independency of the Church ?
- Proper School *inspection*, …

Unfortunately, violations or breaches on education freedom by states can be detected in all continents …, although Religious Freedom and Freedom of Education represent two fundamental principles of democracies.

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Four criteria should be respected by the national education legislator:

- The lawmaker must restrict himself to *minimal* standards, respecting the specific mission of the school. These standards should be relevant and proportionally detailed with respect to the goal envisaged;
- It must leave enough room for *alternatives* for realizing the same goals;
- Legislation can only be designed after broad *consultation* of all recognized forms of education and stakeholders;
- Finally, full autonomy must be guaranteed in terms of *didactic* aspects and *pedagogical* approaches.

Therefore the '*Steering from a distance by government'* should be combined with '*close control of the school management by competent laypersons',* including parents.

A new paradigm: 'Publicly funded schools' whatsoever the legal status - The State shall support effectively Education Pluralism

7. The more, the State should concern itself with the financial viability of the quality and low-fee non-state school. In many countries, worldwide, government or local support is based on a 'common constitutional principle or a practice' or public-private-partnerships, but techniques can differ.

Nevertheless, low-fee private schools in urbans slums in India, Kenya, Nigeria, … with an enrolment of 40% of the poorest students, are not funded by government, but are highly desired by public opinion because they are conveniently located, have smaller class sizes, hire more committed teachers and perform better… In many countries, the greater autonomy and higher accountability of non-state schools enable their students to perform better, although evidence on the impact of private schools on quality worldwide is mixed.

There is some evidence that low cost non-state schools, also in the sub-Sahara region, can reach poor families.

This does not diminish State's obligations.

Let me phrase it in this way:

- If one accepts that the state *monopoly* is contrary to *pluralism*;
- If non state schools serve the *public interest*, when there are in line with fundamental rights;
- If the principle of '*equal opportunities'* implies that a value choice cannot be penalized simply on the basis of their distinctive forms and content of instruction,
- If the State should remind the human rights *core obligation* to 'respect, protect, promote and fulfill, whereby the latter includes the assignment to 'provide' *or* to '*facilitate*',

Then, this reasoning entails the State *obligation* to support non state schools.

To what extent should a non-state school be subsidized ?

To the level required to exercise *the essence* of a fundamental right, taking due account of the availability of public resources and *proportionally* with the funding of state schools.

International review shows clearly that the lack of critical capacity of state in some countries requires civic society initiatives, to be supported by public authorities.

The '*Framework for Action – Education 2030'* of the 'World Education Forum' suggests a shift in the State driven approach, using more accurately the term '*Publicly-funded school* ' (and not just 'State schools). Rather than monopolies, *partnerships* between State and civil society and their *complementarity* promote the common 'public good'.

The Church is called anyway to partner more effectively with the public schools.

From answers on the *Questionnaire* and research worldwide, the choice for non-State schools can also be the result of systemic government failure to provide quality education. It was noted that effectiveness (of education system) could be improved by subsidizing established low-fee schools rather than starting new public schools. They should not be rivals but working for the general spiritual and material well-being. There exist excellent examples of a *cooperative model between Church and State*, taking into account full autonomy of both and the pluralism of Society.

Due to the prominent role the UN '*2030 Agenda for Sustainable Development'* devotes to 'Civic Society Organizations' in the education sector, is would be 'unforgivable' if governments refuse to involve catholic schools actively in the national education strategy.

National Bishop Conferences and Academia should be invited to draft the list of forthcomings in legislation and policies from that perspective.

Each school should be a 'Charter School' : Inclusive and Distinct

8. Schools should be able to show their distinctiveness, their '*caractère propre'*, their specific mission.

'Differences in education' should be promoted and not neutralized. It is important that schools *prove* to be distinctive, and that they take advantage of this freedom (in a responsible and coherent way). At the same time, society has a right to expect that every young person will be prepared to function successfully in society and in private life.

There is more. Catholic school should express *consistently* what they stand for. They have to research on the religious aspects of their collective identity.

Each school should be invited to refine - through its '*Charter'* – the values it is standing for. The success of a school depends on the graduates' capacity to implement *in concreto* the search for *Bonum, Verum, Pulchrum, - the Good, the True, and the Beautiful.*

There exist many inspiring examples, worldwide. Johannesburg Archbishop Buti Tlhagale, a former priest in Soweto, showed the good practices to promote the 'empowering of faithful lay people and Christian morality' in schools, as does catholic leadership in Ukraine and Iraq, - by providing room for silence and meditation, f.eg. at the beginning of classes, (the opening of a chapel), the expression of the inner self, the choice of literature, the surprising beauty of sciences, self-respect in the gym, attention for the unprivileged, …, - the philosophy of life affects school life profoundly.

Four principles of the Pedagogy according to Ignatius of Loyala make that Catholic schools are recognizable, in Jesuit schools in India and elsewhere, even when less than 20% of the pupils and less than 10% are Christian: *respect for the uniqueness of each pupil, confidence in the capacity of development for each student, belief in the goodness of the creation and thus of mankind, but also lucidity about the goodness and badness in each person.*

The '*Ethos of the School*' reflects the way that the school community (the '*communio')* develops personal rights and duties, the way also that any vulnerable person – whatever the reason for his or her vulnerability – is cherished and guided.

But there is more. I would foster also the concept of the school as '*A School for Ethics'*, - namely the cultivation of ethical standards through an educational vision, shared by all partners. Education does indeed affect the total personality of a young person, and therefore his or her ability to acquire and exercise democratic rights and duties in the most responsible way, within the common education setting, and within the s*ocieties* to which he or she will belong.

Teachers

9. A basic requirement to foster the credibility of schools' ethos is the freedom of choice with regard to the *personnel recruitment*. The teacher, by excellence in the catholic school, should be an '*enthusiast*', what implies in the etymological sense of the word, 'divine habitations, joyous and courageous activity, individual prayer and ardent love'.

The Court confirmed that the Church can demand a certain degree of *loyalty*. But a 'fair discrimination' based on religion, requires that the organization ethos is made explicit and appears to be a determining and proportional occupational requirement for personnel. Too often, school board neglect this requirement.

The credibility of the catholic school depends on how teachers integrate Christian values into their teaching. This 'mediation' should not be limited to teachers of religion but spread over the whole team (of teachers), for which appropriate spiritual training has to be offered, training in a philosophical conception of life, so that they can articulate values through the variety of subjects. As they should ensure *'the best interest of the child'*, their rights have to be respected by the school authority.

What really makes the difference is how, in a most practical sense, a school shapes a 'value approach', through its curriculum, the choice of its staff, the respect for 'otherness', the moral attitude within the leadership of the educational institution. This *value approach* will guarantee even more effectively real changes, much more than formal reforms.)

In conclusion

10. What should be added on the '*Future of Education*' Agenda ?

High-quality education favors the willingness to 'live together', even in less privileged settings, despite the rise of nationalism and religious extremism. In many countries, the proportion of students born in another country had increased fourfold since 2000 and roughly half the school population has an immigrant background. 'Cultural diversity is something to be enjoyed. It is not the problem. The problem is ignorance'. *We have to build schools instead of prisons.*

Schools should lay the foundations of hope. The philosophy of hope should be encouraged, through and not *despite* the school, because '*Dans l'éducation de l'enfant, il y a le tout de sa vie.' : "*his or her whole future life is determined by education".

Schools play a predominant role in instilling the values of tolerance. This can hardly be achieved in an educational space that is void of any articulation of 'identity', be it individual or collective and with or without minority rights. Especially in a multi-religious society, identity develops in dialogic relationships with others. "*Only among other 'selves' is man a 'self'…".*

This century shall be defined as the time when tolerance must stand for responsibility. This becomes all the more pressing when churches and, indeed schools, are threatened and burnt out. They should remain places of Hope.

ABSTRACTS AND PAPERS SUBMITTED

Thursday 19 November 2015

Morning Session

Prof. dr. José Luis Martinez López-Muñiz, Professor at the University of Valladolid (Spain)

Religious Education versus Secularism. The context of the Private and Public Schools

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1. Introduction: religion in education as touchstone of the specific framework of the constitutional States under rule of law and human rights.-

1. Before some trends of the Enlightenment and, above all, until the great political Revolutions since the last decades of the eighteenth century, which established the contemporary constitutional rule of law, beginning with that which gave rise the United States of America and followed by those afterwards in France and then in other European and American countries, the religious component had always been, all over the world, essential in education of every level of childhood and youth people[1].

The Constitutional State under the rule of law –the *Rechtsstaat,* l'*État de droit*, el *Estado de Derecho*- has been established throughout nineteenth and twentieth centuries, little by little, despite long periods of absolutism or totalitarian dictatorships, more or less completely on every continent and in most of the world's countries.

This model of State, rooted in human rights, has to guarantee the religious liberty (freedom of the consciences, freedom of worship, liberty of thought and expression) in its individual and collective dimensions, but different ways to achieve that have led to different of State relationships with religion.

These could be summed up in three distinct categories: first, ***denominational States***, with a particular commitment to some religious denomination, but keeping also due respect to other denominations, as is still the case in Europe of the United Kingdom and the Scandinavian States, in the area of Anglican and Protestant Christianity, or of Greece, in that of Orthodox Christianity[2], as well as in other world regions with many Islamic States; second, ***non-denominational States*** which nevertheless collaborate with religion and religious denominations under equality and neutrality criteria, so as in fact it happen in numerous States, as for instance in Europe is the case of Germany or Belgium, or Italy or Spain[3]; ant finally, third, ***secularist States***, which try to keep religion out of public sphere and therefore actually *profess*, under the guise of non-denominationalism and neutrality, a true ideological denominationalism against religion, at least with regard to their social

[1] See Glenn, Ch. L. (2012), 'State and Schools: An Historical Overview», and «Educational Freedom in the context of Religion', in: Glenn, Ch. L. & De Groof, J. (eds.), *Balancing Freedom, Autonomy and Accountability in Education*, 1, WLP, Nijmegen (The Netherlands), pp. 3-24 and 63-83; Glenn, Ch. L. (2006), 'Historical background to conflicts over religion in public schools', in Martínez López-Muñiz, J.L., De Groof, J., and Lauwers, G. (eds.), *Religious Education in Public Schools: Study of Comparative Law* (Yearbook of the European Association for Education Law and Policy), vol. VI, Springer, Dordrecht (The Netherlands), pp. 377 ff, particularly 280-281; and Glenn, Ch. L. (2004) 'Historical background to present conflict about education and religion', *Persona y Derecho,* 50, pp 121 ff.

[2] See Martínez López-Muñiz, J.L., (2006), 'La enseñanza de la religión en la escuela pública: panorama comparado e internacional; solución española', in Martínez López-Muñiz, J.L., De Groof, J., and Lauwers, G. (eds.), *Religious Education in Public Schools: Study of Comparative Law*, cit. above, pp. 13-14.

[3] See op. cit. above, pp. 8-13, 20, 23, González-Varas Ibáñez, A. (2015), *Derecho educativos, calidad en la enseñanza y proyección jurídica de los valores en las aulas,* Tirant lo Blanch, Valencia, pp. 99-112, and Glenn, Ch. L. (2012), (2006) and (2004), op. cit. above.

and public consequences. It has been the case of France and its *laïcité*[4], but also of United States in some interpretations of the requirements of the first amendment and its Jeffersonian establishment clause[5].

We set aside the States which don't yet recognize in any way religious freedom because they are identified with one specific denomination or non-religious ideology and they impose it on everyone, preventing as far as possible every other one. Obviously they are not properly shaped by rule of law. International community should seek the ways to have respected this freedom, proclaimed as a fundamental human right in the Universal Declaration of Human Rights (1948) and in various other international normative texts.

In any case, effective implementation of human rights and the rule of law brings important consequences for the relationship between education and religion.

The emergent constitutional State under the rule of law, undoubtedly inspired by the Enlightenment movement, appeared historically united also to an assumption by the State – itself or through public authorities subordinated to it -- of a special responsibility, if not, paradoxically, a full exclusivity, for the education of the people. It was understood indeed as a very important task, which, in more than one country, will be disputed with churches, specially charged with it before. Other countries, however, found different ways of collaboration between State and Church or churches which allowed keeping the religious dimension integrated with schooling provided or, at least,

regulated, promoted and assured by the State[6]. The initial or progressively changing shape of the different States according to the distinct models of their relationship with religion becomes evident in an especially intense way through their rules and their role on education.

2. Religion in private or non-governmental schools, colleges and universities as a part of the core content of the educational freedom and of the fundamental right to a freely chosen education; the determinant issue of public funding in equal conditions.

1. Insofar as constitutional States under the rule of law -- whatever might be their constitutional, legal or practical relationship with religion -- guarantee freedom of education and even more, especially after the end of the Second World War, the right to a freely chosen education, private or non-governmental schools or colleges and universities (all those established by a free social initiative) could shape the education provided with a religious component expressing their own character, under the protection and the guarantee of public Powers.

Let us remember that the **International Covenant on Economic, Social and Cultural of Rights**, of 1966, has categorically proclaimed at the end of its article 13 that

> *No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the*

[4] See Glenn, Ch. L. (2012), (2006) and (2004), op. cit. above; Morange, J. (2006), 'L'enseignement religieux dans les établissements scolaires publics en France', in Martínez López-Muñiz, J.L., De Groof, J., and Lauwers, G. (eds.), *Religious Education in Public Schools: Study of Comparative Law*, cit. above, pp.197 ff.; or Georgel, J. and Thorel, A-M. (1995), *L'enseignement privé en France du VIII^e^ au XX^e^ siècle*, Dalloz, Paris, pp. 3-9.

[5] See Glenn, Ch. L. (2012), (2006) and (2004), op. cit. above, or Russo, Ch. J. (2006), 'Prayer and religious activity in American Public Schools', in Martínez López-Muñiz, J.L., De Groof, J., and Lauwers, G. (eds.), *Religious Education in Public Schools: Study of Comparative Law*, cit. above, pp. 213-215.

[6] See Glenn, Ch. L., op. cit. above.

observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Other international conventions have insisted, with the same words, upon this important rule[7].

But that liberty finds really its deepest reason in what is also proclaimed previously by the same article 13 of the mentioned International Covenant:

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

It can be easily deduced from this text that this liberty or free choice recognized to parents or legal guardians as representatives of minor children at their charge and responsible for their attention, care and upbringing, is not only a way to ensure for them a religious and moral education in conformity with their own convictions, as the right to religious freedom certainly requires, but it certainly may and must fulfil that purpose provided that the liberty to establish and direct educational institutions makes it possible to shape them with religious guidance and teaching programs that can be truly satisfactory for those who seek this kind of education.

Let us remember briefly that Protocol number 1 of the European Convention on Human Rights guarantees also, but with the enforcement instrument of the European Court of Human Rights, this *right of parents to ensure (…) education and teaching in conformity with their own religious and philosophical convictions*, thus making concrete the great principle solemnly proclaimed by art. 26 of UDHR: *Everyone has the right to education. (…) Parents have a prior right to choose the kind of education that shall be given to their children*[8].

2. Effective enjoyment of this universal right to a freely chosen education is impossible however without social solidarity with those who don't have the economic means to pay the expenses of education in schools or colleges and universities. That necessary solidarity can of course be through private patronage, but a modern social State must ultimately, as an expression of the solidarity of all society, guarantee to every child and especially to those without sufficient economic resources this fundamental right in an effective way and in basic equal conditions of public funding among public or private education institutions, among governmental and non-governmental schools and –under similar requirements of capacity- colleges and universities[9].

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[7] As the *Convention on the Rights of the Child* (1989), art. 29.2.

[8] See, for instance, Martín-Retortillo Baquer, L. (2008), *"Los padres tendrán derecho preferente a escoger el tipo de educación que habrá de darse a sus hijos" (Un estudio de jurisprudencia del Tribunal Europeo de Derechos Humanos)*, El Justicia de Aragón, Zaragoza.

[9] Even under its not much convincing theory on liberty, that has been already clearly proposed by Mill, J.S., (1859), *On liberty*. We quote from edition by Rapaport, E. (1978), Hackett, p. 104. Friedman, M. & R., *Free to choose* (1979), more recently, has given economic reasons (we quote from Spanish translation, *Libertad de elegir* (1980), Grijalbo, Barcelona-Buenos Aires-Mexico, pp. 211 ff). Legal reasons have been provided, among many others, by myself (2008), 'La educación escolar, servicio esencial: implicaciones jurídico-públicas', in Requero Ibáñez, J.L., and Martínez López-Muñiz, J.L. (dirs), *Los derechos fundamentales en la educación*, Cuadernos de Derecho Judicial, Consejo General del Poder Judicial, Madrid, pp.15-78, more particularly pp. 41, 67-71 and 78; and De los Mozos Touya, I. (1995), *Educación en libertad y concierto escolar*, Montecorvo, Madrid, especially pp. 107 ff, 140-141 and 181-223. See too FERE -CECA (2008), *Financiación pública de la enseñanza: conclusiones del Seminario sobre financiación pública de la enseñanza*, Edebé, Barcelona.

Number 30 of General Comment 13th of the U.N. Committee on Economics, Social and Cultural Rights, of 8 December 1999, on the right to education (art. 13 of the Covenant) says rightly that "given the principles of non-discrimination, equal opportunity and effective participation in society for all, the State has an obligation to ensure that the liberty set out in article 13 (4) does not lead to extreme disparities of educational opportunity for some groups in society." Experience demonstrates that private or non-governmental institutions tend unavoidably to become elitist in an economic sense if the public authorities don't contribute with a financial support for those who choose them, more or less similar to that allocated to governmental institutions.

3. In any case, wherever private or non-governmental institutions officially founded and led by churches or other religious institutions or with an outstanding religious component in their own character can be freely established, they will undoubtedly seek to carry out an education firmly based in religion, giving adequate answers, and moving from the intelligence and behavior of new generations the deceits and deficiencies of a *secularism* which can be trying to prevail in the society through very different expressions and means. Surrender to ideas and practices of this *secularism* only can come then, for these educational institutions, from some weakening of the religious convictions which gave them birth and should inspire them, from laxity or actual loss of their own identity. They could be then forgetting, perhaps, that *secularism,* as an ideology closed to any transcendence, to any opening for a relationship between human being and God, particularly in public life and in shaping society and culture, even ignores the great value that *secular* and *secularity,* correctly understood, truly have, as well as the true need for an appropriate *secularization* of what there had been unduly *"clericalized"*.

4. The first thing, in short, to achieve an effective religious education which faces up to the current rampant ideology of secularism is a full and effective guarantee by the State of freedom in education – the freedom to establish and to direct centers of every kind - and the right to a freely chosen education, including a just public funding with equality and without unacceptable discriminations. But such a State's guarantee can become a lost opportunity unless churches and citizens exercise that freedom and this right in an effective way, with the effort required to do so successfully.

Ø Religious teaching in public or governmental educational institutions: possibilities, requirements and conditions.

In most of the world however, apart from countries in which the state is still scarcely established with some stability and minimally appropriated economic resources, educational institutions – particularly at primary and secondary levels - have been created and are directed by the national, regional, or local government or other public entities.

The role of religious education in these institutions will depend on relationship with religion or religions of each State's model. Denominational and non-denominational or neutral constitutional States under the rule of law, if they are opened to an equal collaboration with their citizens to satisfy their religious needs, will seek the ways to make effective the parents' right to moral and religious education of their children in conformity with their own convictions, according to international legal texts[10] and indeed some national Constitutions. Secularist States will find instead special difficulties to satisfy this widely recognized right and can think their duties limited to allowing pupils to go weekly outside the public school to get the chosen religious instruction. For this secularist model of State there is no room for religion lessons or acts of worship in governmental or public schools, colleges or universities. As we said before, this conception constitutes a true *fundamentalist* expression of the ideology of *secularism*, with a very strong emphasis uneasily

[10] See *General Comment 13th* of the Committee on Economic, Social and Cultural Rights of U.N. (1999), at. 28.

compatible with a deep and complete understanding of human rights. The aim is placing religion out of civil world, but it is not possible to get even a slight idea about how this purpose can be conciliated with the religious freedom of every human being. In fact however we can see some evolution in favor of religious freedom in countries as France or United States, traditionally more attached to this kind of *secularism*[11].

3. Denominational States commonly include in their general education programs compulsory denominational courses on the religion established, but they have to foresee and organize at the same time some teaching or study alternatives for all those who demand to be excluded of official religion classes. That is obviously required by human

rights guarantees[12]. The Committee on Economic, Social and Cultural Rights of U. N. has said in its *General Comment 13th*, at 28 that *public education that includes instruction in a particular religion or belief is inconsistent with article 13 (3)*[of the commented International Covenant] *unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians*.

4. Inclusion of religion teaching in general programs and more particularly in governmental schools can be a challenge for States based at the same time on a principle of religious neutrality or non-denominational character and also on the duty to collaborate with the predominant Church in their societies and with every other church or religious community significantly established in the country, and thus with their citizens for the satisfaction of their religious needs, including educational ones. Based on this assumption, legal rules must solve issues such as how denominational religious teaching can be organized and offered in these public centers, by which teachers, who and under what conditions may appoint or hire and dismiss them, what rights and duties these teachers should have, what kind of alternative teachings or activities should be offered for those that do not want any denominational religious teaching, etc.

For those who are not able or don't want to choose private or non-governmental institutions under religious inspiration, the effectiveness of a school's religious education and its consequent value against the *secularism* will in a considerable measure depend therefore on a well-functioning religious education in governmental schools, based on adequate State regulation, provided of course that religious communities, as well as interested citizens, manage rightly to make the most of it[13].

5. Something might still be said about a more general insertion of religious knowledge as a part of the content of general culture in official programs of education and particularly for pupils in

[11] See Martínez López-Muñiz, J. L. (2006), 'La enseñanza de la religión en la escuela pública…', cit. above, pp. 1-8; Morange, J. (2006), 'L'enseignement religieux dans les établissements scolaires publics en France', cit., pp. 205-212; Russo, Ch. J. (2006), 'Prayer and religious activity in American Public Schools', cit., pp.213-234, and Russo, Ch. J. (2004), 'The United States Supreme Court and vouchers: equal educational opportunity for students in elementary and secondary schools?' (about Zelman decision, 2002), *Persona y Derecho*, 50, pp. 157-190.

11 [12] As it has held by the European Court of Human Rights mainly in *Folgerø and others v. Norway*, of 29 July 2007 and in *Hasan and Eylem Zengin v. Turkey*, of 9 October 2007, summarized by Meix Cereceda, P. (2014), *El derecho a la educación en el sistema internacional y europeo*, Tirant lo Blanc, Valencia, pp. 97-100.

[13] Specific chapters on Belgium, Italy, Portugal, Austria, Germany or Russia can be seen in Martínez López-Muñiz, J.L., De Groof, J., and Lauwers, G. (eds.) (2006), *Religious Education in Public Schools: Study of Comparative Law*, cit. above, written by De Groof, J., Cicatelli, S., Pulido Adragão, P., & Gonçalves, D., Potz, R. & Schinkele B., Avenarius, H., and Lauwers, G. For an overview in more general terms all over the world see the particular studies on each country in volumes 2, 3 and 4 of Glenn, Ch. L., & De Groof, J. (eds.) (2014), *Balancing Freedom, Autonomy and Accountability in Education* (the last volume also coedited by Stillings Candal, C.) . In volume 1 there are several studies summarizing the situation of the educational liberty and the right to education in the different continents.

governmental educational institutions. That might be established either through appropriate inclusion in subjects like history and other anthropological and social sciences or by means of a specific subject dedicated to study of religion and its historic and current relationship with society and culture. Such teaching and learning should be carried out without any specific denominational perspective, with the same neutrality and objectivity required (though not always evident) in public schools for every other curriculum subject.

The Council of Europe recommended some years ago the implementation of such learning given its importance for the comprehensive education that men and women nowadays need[14]. And the Committee on Economic, Social and Cultural Rights of U.N., in its *General Comment 13th*, quoted above, has expressly said at number 28 that commented art. 13 (3) of the International Covenant *permits public school instruction in subjects such as the general history of religions and ethics if it is given in an unbiased and objective way, respectful of the freedoms of opinion, conscience and expression*.

That is being indeed implemented in different ways by various countries. One possibility actually might be to include in general State programs for primary and secondary education one compulsory subject dedicated to religion but offering this teaching and this learning in every governmental school in a way which allows pupils (or their parents or legal guardians during their minority) to choose among a non-denominational and neutral modality or a specifically denominational one. As long as possible, contents of these different forms of this teaching and learning should have moreover some parallelism, so that every pupil will not fail to know the most important similar deeds and ideas, in spite of sufficient room for the more specific teachings which should be respected in the denominational approaches[15].

This generalization of knowledge on religion in a manner that respects the convictions of everyone would be a good contribution to a pluralistic peaceful life in society. It would also probably help to reduce the advance of secularism, even though indeed keeping, reducing or increasing this ideology don't depend only nor mainly on institutionalized education.

[14] See ***Recommendations of the Parliamentary Assembly to the Committee of Ministers, of 2 February 1993 on religious tolerance in a democratic society***, and ***of 27 January 1999 on Religion and Democracy***, partially reproduced in Martínez López-Muñiz, J.L. (2006), 'Religion as Compulsory Subject in State Schools: Comparative Trends, International and European Commitments', in De Groof, J., Lauwers, G., & Singh, K., (eds.), *The Right to Education and Rights in Education*, WLP, Nijmegen (The Netherlands), pp. 177 and 190-191. By the way, it should be noted that this contribution was written to be included in Martínez López-Muñiz, J.L., De Groof, J., and Lauwers, G. (eds.) (2006), *Religious Education in Public Schools: Study of Comparative Law*, cit. above, instead of the text published in Spanish at pp 1 -28, with largely matching content. There was a mistake in edition. That explains some mentions to this book.

[15] Spain has tried to establish this kind of solution in 2003, but that was a failed attempt. Socialist Party reached the government few months later and prevented its application (see our contributions quoted just above). Popular Party returned to power four years ago and has passed some reform of education act but without including that project.

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Secularism, the Harm Principle and Religious Freedom within Education

Georgia du Plessis*

I. Introduction

A very popular principle used to limit the religious actions of private persons is the 'harm principle'. John Stuart Mill presented this principle as very simple and states that "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is … *to prevent harm to others*".[1]

For purposes of this paper the question is the following: can the right to religious freedom of the learner or the parent or parental choice regarding religious freedom within public school education, be limited by way of the harm principle? For example, let us suppose that Johnny does have the right to be exempted from a compulsory lesson in sex education due to his own conscience and ideological views or those of his parents. Let us then assume that this belief is deeply held but will require the school to make alternative provision for him during this lesson. The school or other parents then complain that allowing the exemption for Johnny harms the school financially and should not be allowed. The school also argues that by not exposing Johnny to sex education his psychological development is harmed because he will not acquire the required skills to be a successful citizen whom embraces his sexuality and respects the sexuality of others in the in the modern world.

What is the harm principle, where does it come from and can it be used in this context?

II. The use of the harm principle

A. What is the harm principle?

On the face of it the principle seems simple as proposed by John Stuart Mill above. If your actions cause harm, government has the authority to restrict those actions. If they do not, it does not.[2] Freedom is a good thing, and as long as a person exercises such freedom without causing harm to anyone, why is it anybody's business?[3] This is the adage of you have the right to swing your arm, but it ends at the other chap's nose.[4] It also seems that from the principle can be concluded that if conduct will bring pleasure to a person and won't harm anyone else, the government will diminish rather than enhance human welfare by prohibiting the person from engaging in this harmless conduct. HLA Hart stated it in the following way: "[A] very great difference is apparent between inducing persons through fear of punishment to abstain from actions which are harmful to others, and inducing them to abstain from actions which deviate from accepted morality but harm no one …. [W]here there is no harm to be prevented and no potential victim to be protected, …*it is difficult to*

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[1] Mill, J.S. (1863), *On Liberty*, Ticknor and Fields, Boston, pp. 22-23 (emphasis added). Also see, Smith, S.D. (2010), *The Disenchantment of Secular Discourse*, Harvard University Press, Cambridge, Massachusetts, and London, England, p. 70.

[2] Smith, S.D. (2010), *The Disenchantment of Secular Discourse*, Harvard University Press, Cambridge, Massachusetts, and London, England, p. 73.

[3] Smith, S.D. (2010), *The Disenchantment of Secular Discourse*, Harvard University Press, Cambridge, Massachusetts, and London, England, p. 74.

[4] Smith, S.D. (2010), *The Disenchantment of Secular Discourse*, Harvard University Press, Cambridge, Massachusetts, and London, England, pp. 74-75.

understand the assertion that conformity …is a value worth pursuing, notwithstanding the sacrifice of freedom which it involves."[5]

B. The use of the harm principle?

Dworkin[6] and others use the harm principle to establish instances where rights and specifically religious freedom can be limited. Marci A. Hamilton, in her provocative book contrasts "common-sense" religious liberty against "extreme" religious liberty within the United States. The criteria used to determine extreme religious liberty is the "harm principle" as developed by John Stuart Mill.[7] Marci Hamilton sees the harm principle as essential to prevent over-extensive religious freedom and the restriction of religious autonomy.[8] Also, according to Hamilton, there is universal agreement that the no-harm rule underlines criminal, tort and regulatory laws. The notion was also articulated by John Locke in the 17th century, widely shared by the framing generation in the 18th century, and entrenched in modern philosophy and law by John Stuart Mill, who was the most influential philosopher in the 19th-century English-speaking world.[9]

> "Clergy sex abuse, polygamy, children dying from faith-healing, companies that refuse to do business with same-sex couples, and residential neighborhoods forced to host homeless shelters and rehab clinics next door to children. What do these have in common? They are all examples of believers harming others and demanding religious liberty regardless of the harm."[10]

The concept of harm has even been used within South African case law. For example, in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*[11] it was stated that sodomy included the private conduct of consenting adults which caused no harm to anyone else. It had no other purpose to criminalize conduct which failed to conform to the moral or religious views of a section of society. The harm caused by the criminalization could, and often did, affect his ability to achieve self-identification and self-fulfillment.[12]

III. Criticism of this principle

There are various reasons why this thesis argues against the harm principle. It is agreed with Steven D. Smith that, in the end the harm principle may be analytically useless. It may operate as a sort of license for a "whole enterprise of deceptive, circular, question-begging, discursive practices".[13] It is not as simple as Mill claims it to be. It is argued that there are adequate principles in place to restrict or limit religious freedom, but that the liberalist approach to the harm principle is overbroad and as already stated, open to abuse.

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[5] Smith, S.D. (2010), *The Disenchantment of Secular Discourse*, Harvard University Press, Cambridge, Massachusetts, and London, England, p. 76.
[6] Dworkin, R. (2013), *Religion without God*, Harvard University Press, England, pp. 130-131.
[7] Hamilton, M.A. (2014), *God vs. the Gavel: The Perils of Extreme Religious Liberty*, Revised Second Edition, Cambridge University Press, New York.
[8] Hamilton, M.A. (2014), *God vs. the Gavel: The Perils of Extreme Religious Liberty*, Revised Second Edition, Cambridge University Press, New York.
[9] Hamilton, M.A. (2014), *God vs. the Gavel: The Perils of Extreme Religious Liberty*, Revised Second Edition, Cambridge University Press, New York, p. 300.
[10] Hamilton, M.A. (2014), *God vs. the Gavel: The Perils of Extreme Religious Liberty*, Revised Second Edition, Cambridge University Press, New York, p. i.
[11] (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998), p. 8.
[12] (Paragraph [36] at 31E/F--G/H.)
[13] Smith, S.D. (2010), *The Disenchantment of Secular Discourse*, Harvard University Press, Cambridge, Massachusetts, and London, England, p. 106.

The first point of criticism is that the harm principle is vague in that it is not clear what harm means. It is therefore open to various interpretations which will enhance the supported values of the day or of the government. For example, a liberal society will interpret harm in line with liberal values and interpretation.

Smith argues that the principle is not as misguided as it is empty. He regards it as a hollow vessel, alluring and irresistible, but without content. Advocates can put into it whatever views and values they happen to favour. The principle is attractive for smuggling purposes because at its core it means whatever you want it to mean.[14]

> "Most obviously, the numerous refinements and qualifications introduced by proponents of the harm principle deprive the principle of the simplicity that Mill claimed for it. Cosmetically, the principle is still simple – government can restrict liberty only to prevent "harm" – but since "harm" itself is not now a simple fact but rather the conclusion of a controversial and complex normative reflection, the simplicity is illusory. It is as if someone were to say that there is one "very simple principle" that can readily be applied to resolve all conflicts between a state and its citizens: "Let justice be done." Okay, but…" It may be, of course, that such matters are simply not amenable to simple propositions and nice generalizations. Nonetheless, as we have seen, its apparent simplicity is one of the harm principle's major attractions. By depriving the principle of this attractive feature, liberal refinements make it much less useful than it at first appears."[15]

> "The harm principle holds that government should restrict liberty only to prevent "harm." But "harm," as we have seen, turns out to be a receptive vessel into which advocates can pour virtually any content they like, or that they can persuade others to swallow. Once we recognize the hollowness of the notion of "harm," it becomes apparent that there is no reason why anyone needs to object to the harm principle."[16]

Mill states that harm means not things that merely concern the actor himself, but only the conduct that concerns others can be subject to the harm principle.[17] Therefore, only if the conscientious objection or exemption from a specific lesson concerns or affects others, will the harm principle apply. The problem with this argument is that it is extremely difficult to determine when conduct affects or harms only oneself or also another person. For example, it will be very difficult to determine whether the exclusion of a learner from sex education today will be detrimental to persons in same-sex unions in the future and whether it will make such a learner necessarily more intolerant. It will also be influenced by other factors, such as his / her situation at home and what the parents teach the child. It is therefore rather difficult to determine whether there is an exact causal link between one action or inaction and future harm and whether that action or inaction will cause harm to others. One also has to determine whether the parent's choice to keep the child from such classes will cause harm to the child himself / herself. This in itself will be extremely difficult to establish since forcing the child to participate contrary to the wishes of the parents or his own conscience might also cause harm. In such cases, it will also become important to determine which

[14]Smith, S.D. (2010), *The Disenchantment of Secular Discourse*, Harvard University Press, Cambridge, Massachusetts, and London, England, p. 72.
[15] Smith, S.D. (2010), *The Disenchantment of Secular Discourse*, Harvard University Press, Cambridge, Massachusetts, and London, England, p. 94.
[16] Smith, S.D. (2010), *The Disenchantment of Secular Discourse*, Harvard University Press, Cambridge, Massachusetts, and London, England, p. 104.
[17] Mill, J.S. (1863), *On Liberty*, Ticknor and Fields, Boston, p. 23.

harm weighs the heaviest – that of the denial of the choice and conscience of the parents or learner or the possibility of harm towards persons of same-sex unions.

The second principle of criticism is that authors, such as Marci Hamilton, do not properly justify why the harm principle should be deciding factor when it concerns the limitation of religious freedom. The proposal of a principle should be accompanied by the justification as to why it is legally significant (the harm principle is not even a legal principle) and why this principle should be the sole method of determining the limitation of the right. Within the South African Constitution, 1996, section 36 (the limitation clause) contains several factors that need to be balanced before any right can be limited. Section 36 states that:

> "1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

From this it is clear that the limitation of a right is much more complex than the mere determination of harm – a concept that is difficult to define and which can be interpreted in line with any ideological values that are supported on that day. Limitation, at least within the South African context requires a careful and nuanced approach between values of human dignity, equality and freedom taking into account fundamental factors.

The third line of criticism is that the harm principle is not universally accepted as proposed by Marci Hamilton and not the only principle that underlines criminal law and other laws. Harm might be one of the factors that carry weight in criminal and tort laws, it is not the only one. Here considerations of human dignity, equality and freedom are present (amongst other values). Furthermore, although the harm principle might be popular and widely accepted, the content, meaning and application thereof is not as mentioned above.

IV. Conclusion

Although religious freedom is not absolute, it is argued that there measures already in place to deal with the limitation of religious freedom and that an extra vague and overbearing "harm" principle to restrict religious freedom merely adds another liberal hoop through which religion must jump. It is agreed with Marci Hamilton that there are instances where religious freedom needs to be limited. Religious freedom is no defence for illegal action. Religious freedom does not necessarily mean that faith-healing parents need not obtain medical care for their children[18], for example. However, the harm principle is not a legal principle and not the desired principle to limit religious freedom. It is an instrument of liberalism used as a vehicle to limit religious freedom while solely enhancing liberal and secular values to the exclusion of all other values.

[18] Hamilton, M.A. (2014), *God vs. the Gavel: The Perils of Extreme Religious Liberty*, Revised Second Edition, Cambridge University Press, New York, p. 63.

It is therefore argued that the harm principle will be an over burdensome, superficial and exclusive limitation to religious freedom since the necessary legal limitations are already in place and an extra harm principle will be superfluous.

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ISLAMIC INSTRUCTION IN PUBLIC SCHOOL
Islamic educations in public schools during the school hours could serve as a bridge to participation in the society.
NORWAY

Masoud Ebrahimnejad[1]

Norway is a sparely populated country with a population of 4,5 million, spread on 328.000km2. Norwegian education is related to our historical development as an independent nation. In approximately 500 years Norway was a part of Denmark and Sweden. Since 1905 Norway has been an autonomous national state.

The Norwegian school system is dominated by the Norwegian concept: "enhetsskole tanken" or a tool in a welfare-state program for more equality between social groups. The idea of comprehensive school for all (Lauglo, 1998).

The Norwegian educational history describes a school with much popular influence and a school strongly affected by local community ideology. Today not only public schools but also private schools are almost total financed by the state, and are implemented according to an overall state policy for education.

Religion subject in school has been the subject for many discussions and several changes over the past decades. In the Norwegian school curriculum there is long tradition to instruction in the Christian faith. The country has strong relation with Christianity as a main religion for the majority and cultural heritage.

"Christian object clause" (*den kristne formålsparagraf*) in section 1 of the Act:

"Primary school shall, with the understanding and co-operation of the home, assist in giving pupils a Christian and moral education and in developing their abilities, spiritual as well as physical, and giving them good general knowledge so that they can become useful and independent human beings at home and in society. School shall promote spiritual freedom and tolerance, and place emphasis on creating good conditions for co-operation between teachers and pupils and between the school and home."

In 1997 Christian Knowledge, Religion and Philosophy of life (KRL) were introduced. KRL subject has created great protests in schools, and the subject was changed several times.

Religious minorities in Norway protested to this religion subject at school. Finally a group of parents took the case through the Norwegian Court and to the UN Human Rights Committee then the European Court of Human Rights. Norway has received criticism in both international Courts. In 2007 the Norwegian school system received a judgment by the European Court of Human Rights (ECHR). As consequence of this judgment the subject was renamed Religion, Philosophies of life and Ethic (RLE).

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In November 2008, the parliamentary parties agreed on a new mission statement for schools and kindergartens. Parliamentary politicians gathered for a clarification of Christian and humanistic values and heritage, and it is also placed a focus on our national heritage.

Common values are demoted from being the core of the basic values only to be examples of Christian and humanistic values. This is not inclusive formulations, in a multicultural and multi religious society.

The change of the subject KRL (Christian Knowledge, Religious and Ethical Education) to RLE (Religion, Philosophies of life and Ethic) as a direct consequence of the judgment by the European Court of Human Rights was meant to do easier for religious' minorities to get instruction on their own religion and be treated equal.

Unfortunately this change did not last longer and would rather not go the right way for development. It has been put a stop to this development and Norwegian educational policy have turned back to the old regime. Christianity has got again biggest place on this religion subject in Norwegian school. In this new religion subject has Christianity more than 50% of the all education hour and less than 50% going to the rest of the world's religions and philosophy of ethic.

Freedom in education:

- **Private schools**

After a long political conflict, in 1970 we got a law for private schools. The law was renewed i 1985 (Privatskoleloven, 1985). Schools based on religion or based on an alternative pedagogic were allowed, and got financial support from the state, at a rate of 85% of the cost for a state school pupil.

Up to the late 1980`s only Christian and Rudolf Steiner schools however were allowed. The state sanctions private school applications. Some years later Montessori schools also were permitted. Today we have 32 Rudolf Steiner schools, 98 Christian schools[2] and 8 Montessori schools as an alternative to the 3200 Norwegian public state schools. From 2012 the number of Christian schools has increased from 40 to 98 schools at 2015. There is no Muslim private school in Norway yet.

Norway has had a relatively late urbanization. The special geography and history of Norway are important reason for the absence of a historical rooted national upper class. There have been private home-teachers, Christian schools and some other private schools. But we do not have a strong tradition with private upper-class schools.

Education otherwise at the primary and lower secondary level, are built on religious or ideological reasons, for special interested groups. The country has Lutheran state church. Teaching in school is based on the same religion. But this religious hegemony has decreased. Christian groups and others have worked for private schools, based on parents' rights and human rights as you find them in international conventions (UNESCO,1960), (UN,1948) (Vestre,1999) and (Habermas,1995).

- Freedom of speech is determined within the European Human Rights Convection Article 10 The right to alternative education, private school or other forms of alternative education can be rooted in both religion and freedom of speech.

[2] http://www.klassekampen.no/article/20140416/ARTICLE/140419956

- The Convention of Dec.16. 1966 of United Nation about Economic, Social and Cultural Rights (ØSK. art 13 No. 3 and 4). The Convention says that Contracting Parties is committed to respect the parent's freedom to choose other schools for their children than those established by public authorities, provided that schools meet any minimum requirements for training approved by the state, and to ensure their children a religious and moral education in conformity with their own convection.

However there are many national and international conventions which they are supporting parents right… to ensure their children the religious and moral education in conformity with their convictions (ECHR, protocol No. 1, Article 2). There is no real choice to select alternative school in Norway today. Counter-argumentation to staple Muslim private schools is often based on assumption and suspicion. These arguments often say that Muslim private schools can lead to segregation. Instead of following our assumptions should we relate us to international conventions which oblige everyone to adhere to fundamental human rights.

- **Norway is a multi- religious society!**

Norway is a multi- religious and multi – cultural society. Many religions and cultures have become part of the country's cultural diversity as a result of immigration. The country has gone from a homogeneous society to a heterogeneous society, where Christianity alone will not represent the people's religion and culture. Norwegian schools have become a meeting place for different cultures from every continent. Muslims, Humanists, Buddhists, Jews, Hindus, Sikhs, and many other religions are now visible and well- organized minorities. Among these immigrants are Muslims probably the largest immigrant groups in the Norwegian schools.

How many Muslims living in Norway, there is no clear and right statistics. We know the number of registered members of Muslims communities, but the numbers of practicing Muslims are likely to be higher than this. In 2012 were 180.000 Muslims registered in Norway[3].

At the beginning of 2015 there were 106.700 registered members of Muslims communities[4]. At the same time, there were 804,963 immigrants, included persons who were born in Norway with immigrant parents who came from different parts of the world. In 2015, immigrants included persons who were born in Norway with immigrant parents who come from Muslim countries, constituted 15,6 percent of the Norwegian population.

Oslo is the county with the highest proportion of immigrants and persons with immigrant parents who were born in Norway in relation to population. One of four in Oslo has such background.

- **Muslims pupils get their Islamic instruction in their local communities outside the School hour.**

Already in my early research in 2009 among Muslims immigrants in Norway have I mentioned on two minorities groups of Muslims who has representing extreme version of Islam. These two groups showed the potentials ability to falling out from the majority society.

[3] https://no.wikipedia.org/wiki/Islam_i_Norge
[4] http://forskning.no/meninger/leder/2013/02/hvor-mange-muslimer-er-det-i-norge

However the groups of Islamists and Isolated Muslims are minority groups inside the Muslims immigrant but they are exist in every community.

1. Isolated Muslims are another group who adhere to a closed society in parallel with the host society. They will not have much with the host community to do. This group mainly feels foreign in Norwegian schools. They think that they will have major problems in order to get job even though they take education in Norway. They prefer all types of alternative schools rather than Norwegian public schools.

   They are against all sexual education and they wish more Islam in Norwegian public schools. They believe that it is not easy to be a Muslim in Norwegian schools. They prefer to go to the school in their home- country or a private Islamic school. This group chooses a particular isolation strategy towards the Norwegian society. This group has an extreme view, and relationship to Islamic rules and laws.

   Islamists: People in this group feel a strong value conflict between home- culture and school – culture, while still attending Norwegian schools and want more Islam instruction in Norwegian schools. They are against all teaching about sexuality in school. They choose a confrontation strategy in relation to secular principles in a democratic society and trying to change the host society to their favor. They are strongly influenced by traditionally Islamic home- culture, and they are following the religious doctrine and their actions are influenced by Islamic attitudes. They have an extreme relationship with Islamic rules. Boys are representative for this group.

Islamists constitute a minority in Muslim immigrant population in Norway, according to my survey. They have a strong desire to not face up to the Norwegian public school.

Families as these children grow up in, are among the most conservative Muslims. Religious values and attitudes are dominant in this family group and Islam practiced in a conservative way here. They are against any type of sexuality education in school. They also believe that Norwegian schools are characterized by extreme secularization where religious values and attitudes are absent.

Via survey among Muslims immigrants in Oslo I tried to show, how is the relationship between Muslims immigrants and Norwegian schools and this immigrant group's expectation from the Norwegian school and education policy. The majority of participant in my survey, express a wish to have more Islam instruction in school and they feel strong needs to know more about their own religion (Ebrahimnejad, 2009 &2011).

In the following text I am trying to give a picture of the Norwegian education policy in the theme of religious instruction in public and private schools:

- As I mentioned already In 2008 after the judgment made by the European Court of Human Rights, the Norwegian primary schools got a new subject named: Religion, Philosophy of life and Ethic.

According to The Education Act and The National Curriculum, Religion, Philosophies of life and Ethics shall be an ordinary school subject normally attended by all pupils.

The teaching in Religion, Philosophies of life and Ethics shall present different world religions and philosophies of life in an objective, critical and pluralistic manner.

The teaching in the different topics shall be founded on the same educational principles.

The school shall respect the religious and philosophical beliefs of pupils and parents and ensure their right to an equal education.(Education Act § 2-3 and §2-4).

Religion is a compulsory subject at Norwegian schools.

There is no possibility for choices among the religious education in public schools. The education is meant to be common for all pupils. But it is possible to opt out if parents ask for that. Following written notification by parents, pupils shall be exempted from attending those parts of the teaching at the individual school that they, on the basis of their own religion or own philosophy of life, perceive as being the practice of another religion or adherence to another philosophy of life, or that they on the same basis find objectionable or offensive (Vestre. S.E. 2011). It is not necessary to give grounds for notification of exemption. (Ed. Act § 2-*3a)*

In 2015 the Norwegian government has changed its education policy and that as consequences of this change has RLE (Religion, Philosophy and Ethic) subject also been renamed to KRLE and Christianity has gained new content. The Christianity got more than 50% of all educations hour.

- **Religious education and parental rights:**

Freedom of religion in Norway is a constitutional right (Grl.§ 2). This constitutional right should be viewed in accordance with the European Court of Human rights (ECHR), article 9 which explicitly determines that everybody as well as public or private should have right and opportunity to express their religion or belief, in education.

Parent's right to decide what kind of education children receive and their right to ensure religious and moral education in conformity with their own faith and religion has been central in the Norwegian school tradition for a long time. This has also been central to international human rights conventions:

United Nations Convention on Dec. 16. 1966 on Civil and Political Right(ICCPR) Article 18, paragraph 4).According to this Convention, the Contracting Parties commitment to respect the right of parents to ensure their children's religious and moral education in conformity with their own convictions.

- The convention of 4. Nov. 1950 of the European Court of Human Right, for protection of human rights and fundamental freedoms (ECHR protocol 1, article 2). Convection says that the functions state commitments in education, must practices respect for the parents right to ensure education in conformity with their own religious and philosophical convections.

A compulsory religious instruction in school creates some problems in relation to the parent's right.
It seems that the state chooses a neutral educational concept for a common religion subject. It is in this vase, an ideological choice. State's right to set scientifically and quality requirements for private schools and home. Education shall follow the public school's ideology as it is formulated in the curriculum (Ed. Act§§ 2-12 and 2-13) is in my opinion, in violation of parents rights (Vestre, S.E, 2011).

Conventions require that the parents are supported in the right… to ensure their children the religious and moral education in conformity with their convictions (ECHR, protocol No. 1, Article 2).
The conventions are therefore religious influence seen as a positive right for parents and children. Respect for the parents right, would tell us to involve the parents choosing the education program that brings a desired effect. The conventions do not have neutrality as a goal, but rather the

opposite, to ensure the right attitude formation and an active religious, or philosophy of life influence through education.

- **Islamic education during the school hours in state – funded schools could serve as a bridge to participation in the society!**

To clarify this issue, I would like to refer to data from my own questionnaire survey which was done among Muslim immigrants in Oslo (Ebrahimnejad, 2009).

There are several ways to accommodate the request of Islamic instruction in schools.

Some countries organize Islamic instruction depending on the number of Muslims attending the class or school. If this number is too small, the pupils may have to have their religious instruction together with children from other classes or other schools or the number of hours they spend in school is shortened;

Some countries allow Muslim pupils and parents who are given the opportunity to receive Islamic instruction in school to opt-out and eventually receive most of their Islamic instruction in their local communities;

Finally, some countries allow Muslim parents to make arrangements for their children to receive religious education away from school, during school hours.

In Norway Muslims get their Islamic instruction in their local communities outside the School hour.

According to the definitions of culture, all which human beings learn and practice in everyday life, are perceived as culture. When we talk about culture, we must necessarily look at religion as an important influence. As a group Muslims life is much influenced by religious rituals and traditions. Islam covers all aspect of a Muslim's life. Islam has clear rules and laws for any daily chore. A Muslim is required to follow the rules contained in the Quran. The most important thing for a Muslim parent is, to give their child- rearing based on their religious beliefs. Muslim immigrants are a relatively new group in Europe and their traditions probably seem more controversial than other immigrant groups. In addition their cultural and religious attitudes are often focused and discussed in the media in a negative way. Muslims children like all children, in western democratic society, have a right to be heard and to be understood.

39% of participants in my survey believe that their culture is foreign, thus they are often misunderstood at school, and 58% think that the teachers do not have knowledge about their culture. When the children are sent to school, their parents trust that their children are in good hands and that they are in a place where their interests and values are safeguarded, but the reality seems to be something else. For those who insist to learn about their own religion, Muslims private schools could serve as prevention against extremism.

69% of survey participants want more education about Islam in school. This group of participants says that they need Islamic instruction in state- funded schools. 75% believe that Quran is a source for knowledge thus it is important to learn the Quran to increase their knowledge. 43% wish to go to the private Islamic school and 14% says, "Muslims should be allowed to study at home instead of going to school"(Ebrahimnejad, 2009).

There are two types of private schools in Norway: (1) religious schools, (2) Pedagogical alternatives. There is no private Islamic school in Norway so far.

The education Act says that the public school's mission statement, curriculum and provisions on compulsory religious and ethical education should also apply to private schools and education at home (Ed.Act. §§ 2.12 and 2-13).

According to the National Curriculum there is no possibility for choice amongst the religious education in public schools. The education is meant to be common for all pupils, and the religious subject meant to be a neutral school subject.

As I mentioned before, in Islam, culture and religion is woven together. To understand the one, we must have knowledge about the other.

Religion is mainly a practical subject where rituals are very important. How could such a practical subject, be useful when it is turned in to a purely theoretical subject?

Theory without practice creates distance and an unfortunate distinction between knowledge and morality. Programmatic neutrality is particularly problematic in contexts where knowledge and understanding not only requires a theory, but also participation and experience. Authentic religious understanding requires participation in prayer, songs and rituals (Vestre. S.E. 2011). We may read the explanations about, what prayer is, but do we understand a prayer without participating praying?

What will happen to the Muslims parents' right… to ensure their children the religious and moral education in conformity with their own convictions, and what will happen to the Muslim pupils, who wish and need to learn about their own religion and find out their identity?

To learn about one's own religion and culture is an essential need for every child. Immigrant children who are living and growing up in a country other than their homeland feel this need of course stronger than other children. This could be a way to find out "Who am I?" and "Who do I want to be"? In the absence of the opportunity to learn about their own religion in Stat funded- schools in Norway, Muslim immigrant pupils are forced to search for this knowledge in other places than the schools. They are forced to create their own parallel world and, thus falling out of the Norwegian community!

However the stats policy toward Muslim private schools is in violence with the parents right to ensure their children the religious and moral education in conformity with their own convictions, but my question is: where should the Muslims children and young Muslims learn about their own religion? How can the society ensure that our children do not end up in extremist groups?

During my current research about Islam instruction out of the Norwegian public school and among mosques in Oslo I have got an interesting experience.

At one of the lower- secondary schools in Oslo[5] the principal of the school has observed some negative behaviors of some Muslim youths. They called each other with negatively charged words such a bad Muslims and traitors. They said to each other that they must not sit next to the person who eats pork meat. Girls who had not hijab were also harassed and bullied that they are not good Muslims. The principal called their parents into a meeting to find a solution. The solution was that the youth Muslims would get a few hours teaching in Islam for a short period about their religion Islam. After these lessons the behavior of those youth Muslims has totally changed in a positive way.

[5] http://www.dagbladet.no/2015/10/20/nyheter/skole/groruddalen/41584747/

This experience shows that lack of knowledge about Islam can lead to a lot of unpleasant situations and this can be avoided with a little more teaching about Islam at school.

There are hundreds of Quran schools around Norway. They are managed by persons or organizations that are not approved by the Norwegian education authorities. Quran schools are defined as leisure offers. That's why the government and school authorities have no any control and supervising at these types of schools.

To give the children education based on parents own convection, the Muslims parents often choose to send their children either to Quran schools, after school hour in Norway or a school in their home country. We are not sure what Muslim children and youth learn in these schools.

Would you not rather have religious instruction by authorized persons in Norwegian schools, or state – funded private schools, so that the parents would know what their children learn?

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A balanced religious education in public school. A possible way to build bridges over religions and cultures.
NORWAY

Ida Bunæs[1]

The religious subject in the Norwegian public school will go through a remarkable change this autumn. The name of the subject will change from Religion, Philosophies of life and Ethics (RLE) to Christianity, Religion, Philosophy of life and Ethics (KRLE), and lead to a stronger emphasis on Christianity. This happens despite of the fact that the Norwegian society increasingly becomes a more multireligious and multicultural society, and despite of a judgment from 2007 by the European Court of Human Rights (ECHR), which required that the Norwegian subject Christianity, Religion and Philosophy of life (KRL) had to change to a more balanced subject. This have been one of the most important cases for the interfaith dialogue forums in Norway. They believe that a more balanced subject can help to reduce the gap between religions and cultures in Norway and Europe, and will help to build a stronger dialogue and cooperation across the borders.

Interfaith dialogue

The Church of Norway has represented the main expression of religious belief in Norway for a thousand years. It has belonged to the Evangelical Lutheran branch of the Christian church since the 16th century, and has been a state church since then until 2012.[2] Christianity has had a great impact on the Norwegian society, and despite the fact that the number of church members is decreasing, the society is still heavily influenced by Christian cultural heritage and the Church of Norway is still the religious majority, with 75,8 % of the population as their members (Bunæs 2014:1)

Norway as a multireligious society is a relatively new phenomenon, affected by the increasing immigration in the 1960s. Within a few decades, Islam has become the largest Non-Christian religion in Norway. It is difficult to say for certain, how many Muslims living in Norway today, because this largely depends on who you consider to be a Muslim. Theologian Oddbjørn Leirvik estimates that the current number of persons with Muslim background in Norway is approximately 220,000, if you include the people who have migrated to Norway, their children born in Norway and those with only one parent born abroad. Numbers from 2013 show that approximately 120,800 people were registered as members of a Muslim organization in Norway (Bunæs 2014: 2), of which 60000 is members of the Islamic Council of Norway.[3] Another influential denomination is the Norwegian Humanist Association, with nearly 70000 members.[4]

The new religious landscape has forced the Church of Norway to take a stand in the new situation. Religions have always encountered each other in different contexts and dialogue between religions is widely regarded as a necessity. Hans Küng, president of "Global Ethic Foundation" underlined in 1991 the importance of religious dialogue with his quote "There will be no peace among the nations without peace among the religions. There will be no peace among the religions without dialogue

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[2] "Church of Norway – a brief history". Last modified February 16, 2015. https://kirken.no/nb-NO/church-of-norway/

[3] "Om IRN". Accessed November 1, 2015. http://www.irn.no/om-irn

[4] "Historien om Human-Etisk Forbund". Last modified November 2, 2015. http://www.human.no/Om-oss/Historikk/

among the religions". Leirvik also points at the importance of dialogue, he believes that dialogue has a meaning beyond the personal motivation that individuals may have, namely as a tool to prevent distress caused by religious conflicts. Despite the fact that the situation in Norway today, makes it impossible to designate Norway as a place with high levels of conflict, Leirvik still claims that religious dialogue is a necessity to create a common space in society for people who think and believe differently (Bunæs 2014:2).

The religious subject

From the 1990s the activity of interfaith dialogue has increased, both in Norway and internationally (Leirvik 2007: 53). In 1992-93 the faith-communities of Norway was gathered for the first time in an organized project at the Nansen Academy in Lillehammer. The title of the project was "Community Ethics in a Multicultural Norway". They had gathered four representatives from the Norwegian churches, two representatives from Islam, two from the Humanist Association, a Jewish representative, one from Bahá'í society, a Buddhist, a Hindu and a Sikh (Leirvik 2006:17). When the minorities came together, they discovered a common concern: the way their religion and life was presented in schoolbooks. The syllabus was created without involvement from the aforementioned faith communities. The minorities felt that the educational gaze was largely influenced by the ideas of the Christian majority. The meeting led to the Norwegian religious- and life stance communities joined the Campaign for Freedom of Belief in Norwegian schools. They struggled for a relevant religion and belief education in schools, exempt from what was perceived as confessional Christian Studies, and the establishment of an alternative subject.[5] They invited the Church of Norway to join the coalition, which in 1996 led to creation of the permanent organization the multicultural Council for Religious and Life Stance Communities. The Church of Norway which already had regularly meetings with Islamic Council of Norway, became an important contributor to advocate for an equal religious subject.

As a result of a changed religious landscape, the formal link between the public school and the church has been weakened. Until 1969, the religion subject was a part of the Church of Norway's education in Christianity. Today the churches contribute to the Christian education through their own youth-programs, like most faith societies do. Christianity is still a part of the religion subject in the public school, but the current subject also contains other religions, secular world views, philosophy and ethics. Even though the subject seems to have modernized the actual subject has been quite controversial as to its aims and contents and has been revised several times over the years.

The dispute surrounding the religious subject continued through the 90`s as a protest against the institution of a new compulsory subject of religious education in schools, which was announced in 1995. The Norwegian Islamic Council and the Norwegian Humanist Association, in conjunction with independent parents, brought a lawsuit against the Norwegian state, claiming the right to full exemption from the religion subject, in a subject, belief minorities still felt was overly influenced by Christian majority interests to be genuinely inclusive. They brought their case all the way to the Supreme Court, but in the end, they lost their case against the state (Leirvik 61:2007).

The Islamic Council retreated in lack of money, but Humanist Association was not ready to give up, and brought their case all the way to the European Court of Human Rights (ECHR), where Norway was convicted of human rights violations in connection with Christian teaching in schools. The reasoning was that the subject did not take sufficient account of objectivity, diversity and inclusion, and that it was obligatory. The Norwegian government was forced to change the subject. A part of the Christian education had to yield for education in other religions and faiths. They even changed the name of the subject from Christianity, Religion and Philosophy of life (KRL) to Religion,

[5] "Årsrapport 2013". Accessed November 1, 2015. http://www.trooglivssyn.no/doc//STL_arsrapport_2013.pdf

Philosophy of life and Ethics (RLE). And although they removed the rule that Christianity would make up 55% of the subject, Christianity remained the largest part of the subject.

The religious subject as a bridge-builder

Media has a tendency of giving a negative image of Muslims. By talking of Muslims as a group, they are promoting a mindset of Us and Them. This can be related to what the Jewish philosopher Martin Buber describe in his book *Between Man and Man* (2002), as an I-Thou relationship. Buber distinguish between three ways in which we are able to perceive a man who is living before our eyes; *the observer, the onlooker* and *becoming aware.* Both the observer and the onlooker have the desire to perceive the man who is living before our eyes and sees him as an object. But while the observer sees the other as an object consist of traits that he wants to know more about, the onlooker neither demands action from him nor inflicts destiny on him. The way becoming aware on the other hand is different. To him the other is more than an object, more than something he could grab. This person might tell you something, he is real, he is a part of the mans life, this relationship is what Buber describes as a I-You relationship. While the observer and onlooker have an I-Thou relationship, where they never get to be a part of the objects (Buber 2002:10-12).

According to the Norwegian curriculum, religion subject shall contribute to the capacity for dialogue between people with different perceptions of religion and belief issues. This implies respect for religious values, human rights and human rights ethical grounds.[6] The genuine dialogue as Buber sees it, is always an I-You relationship (Buber 2002:22). An I-You dialogue in the classroom would be the perfect scenario. Unfortunately the number of Muslims in Norway are still far too few to make this scenario happens in real life, the majority of classes won't even have one Muslim and the large part of the population never get to know a Muslim personal. Despite this fact, the teacher can still use Buber's genuine dialog as an example.

A way for the I to meet the You is by breaking down the stereotypes within the religions. Taking away the tribes, is one way to make the other more realistic. And even though Buber describes the I-You conversation as the genuine dialogue, he underline that it is impossible to stay in a I-You relationship, because we need to go back to the I-Thou relationship to navigate in this world (Bunæs 2014:35). This means that even in a genuine dialogue we need to take a step back to observe the other from time to time. But by seeing the other as more than a Muslim we can make the education closer to a I-You meeting. One way to do this is by presenting the differences within the religion, for instance, sects like Shia and Sunni, or different tendencies, like liberal, conservatives, fundamentalism, or talking about the gender perspective. The religion subject has the opportunity to show another side of the Muslims life, than the one produced by media.

By presenting differences within religion, the critical view on religion might also be much easier for the teacher to handle. By discussing subjects instead of discussing Christianity vs Islam, it is possible to see tendencies within religions. Talking about things religious people have in common across the religions make it easier to connect to the other. For instance by talking about the veil, the variation among cultures will come forward, either the veil as a sign of oppression or liberation used by Muslim feminist.

Christianity the major part of the subject

The religion subject is still characterized by its Christian heritage, as the Norwegian population was reminded of by the changes made this autumn. The Norwegian dialogue activists saw these changes

[6] "Læreplan i kristendom, religion, livssyn og etikk (KRLE)". Accessed November 8, 2015. http://www.udir.no/kl06/RLE1-02/Hele/Formaal

as a throwback, as the name of the subject once again got the word Christianity back and the subject should consist of about 50 % Christianity.[7] The protests from the multilateral Council for Religious and Life Stance Communities started all over again, this time using the judgment from ECHR as an argument and the dispute is far from over yet. Arguing that by giving Christianity such a large part of the subject it will be less time for the other religions, and Christianity might come forward as the most important and correct religion. One of the main argument is that the government never did any research on the religion subject, after they changed the subject to Religion, Philosophy of life and Ethics (RLE). Which means that they change the subject into Christianity, Religion, Philosophy of life and Ethics (KRLE) without foundation.

Even though the new subject might be seen as a throwback for the dialogue, it's still possible to find an argument for the new subject in Buber's dialogue philosophy. He emphasizes that in order to be able to reach out to the other you need to have a starting place, you must have been and you must be with yourself (Buber 2002:24). This means the pupils need to know about their own tradition in order to get into a dialogue. Because approximately 75% of the Norwegian pupils belong to the Church of Norway it will be most natural here to follow the majority of the people and as mentioned earlier, the church still has a strong impact on the culture, the Christianity is still affecting the whole population in some way. This might be a good argument, but the teacher still has the responsibility for ensuring an objective subject and there should be no room for preaching in the classroom.

This subject is mainly in the public schools of Norway, the private schools on the other hand is not a part of this. But even in the policy of private schools, it is possible to see a tendency of favoring one religion over the others. Christian schools has increased the last years, in 2012 there were 40 Christian schools in Norway while today the number is 98, and still there are no Muslim schools in Norway.[8]

There is no doubt that the religious subject in the Norwegian public school has the potential to make a difference. And it will be interesting to follow the new subject and its development. The Norwegian Humanist Association emphasize that they will pay close attention to further developments in the subject.[9]

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EUROPEAN AREA OF SKILLS AND QUALIFICATIONS

Marta Ponikowska

I. Introducation

Is Europe enough unified to guarantee the necessary conditions for mobility without borders? Are people of Europe free to study, work and gain new skills and qualifications beyond the national borders?

'Over the last decade the European Commission, supported by Member States, has placed a growing emphasis on the transparency and recognition of skills and qualifications acquired by individuals during their education and professional life.'[1] This paper presents the various political and legal instruments, which support the process of building the area of skills and qualifications in the EU (EASQ). The European area of skills and qualifications can be understood, as a citizen-and-business-friendly, internal EU platform, where skills and qualifications are easlily comparible and internationallly recognized. The aim of building the area of skills and qualifications in Europe is directly connected to the personal development of learners, and thereby the development and mobility of wider European society, and the strenghtening of the EU Single Market.

This paper will deal specifically with the education and learning policy instruments related to lifelong learning and mobility. It will also discuss the modernisation of the directive on the recognition of professional qualifications and the resolution on the European Qualifications Framework, and will explain their effects on the functioning of the internal market. It will present the actions taken by the various Directorates General of the European Commission as well as selected international organisations. In the light of the ongoing reforms to European qualifications systems and the EU strategies for education and skills, the question of their ability to build an internal European area of skills and qualifications remains unanswered.

Skills and qualifications are also connected with the concept of mobility, that is one of the strategic objectives for European cooperation in education and training included in a document 'Education and Training 2020'[2]. The mobility of Europeans, however, requires specific mechanisms and instruments that would facilitate transitions to the new work and learning places. That is why the possibility of comparison and recognition of the needs of education market and the needs of the labor market is a key issue in the context of mobility.

II. European area of skills and qualifications.

European area of skills and qualifications can be understood as the area of transparency and recognition of qualifications acquired in vocational education training (VET) or higher education[3], where recognition of competencies and qualifications is guaranted, regardless of national borders.

1 Recognising skills and qualifications across Europe Promoting transparency and recognition for Vocational Education and Training. In Focus, 20111, ECORYS

2 Council Conclusions of 12 May 2009 on a strategic framework for European cooperation in education and training (ET 2020) [Official Journal C 119 of 28.5.2009].

3 European Parliament resolution of 22 October 2013 on Rethinking Education (2013/2041(INI)), point 77.

The purpose of the construction of this area is to facilitate process of a better recognition of skills and qualifications based on learning outcomes[4] and to contribute to the simplification of the functioning of the existing EU instruments which ensure the comparison and recognition of qualifications across the EU[5]. Also, as the European Parliament proposes EASQ may include qualifications gained outside of the formal education and training systems. This can be seen as a tool for empowerment, democratic participation, social inclusion and as a pathway to involve or bring people back into the labour market.[6]

EASQ is connected, among the other, with the issues like: lifelong learning, mobility, freedom of movement and freedom of establishment, EU single market and recognition of professional qualifications. That is why there is a big need for coherence between different tools and instruments being in use in all the above mentioned areas.

D. Ulicna[7] identifies the following elements of the European area of skills and qualifications : European Skills/Competences, qualifications and Occupations (ESCO), the European Qualifications Framework (EQF), the European Credit Transfer System (ECTS), the European Credit Transfer System for Vocational Education and Training (ECVET)[8], validation of non-formal and informal learning, the Europass, the Standards and Guidelines for Quality Assurance in the European Higher Education (ESG) and the European Quality Assurance in vocational Education and Training (EQAVET)[9].

The European Commission includes the following EASQ instruments when addressing the need for a public consultation with stakeholders: the EQF, quality assurance arrangements, credit systems, tools for documenting qualifications, skills and learning experiences, tools for cooperation on the recognition of qualifications and tools providing skills intelligence:[10]

- European *qualifications frameworks* (QF EHEA and EQF),
- Common European *quality assurance arrangements (ESG, EQAR and EQAVET),*
- European *credit systems* (ECTS and ECVET),
- *Tools for the documentation of qualifications, skills and learning experiences* are provided to individuals to describe their acquired knowledge, skills, competences and qualifications in a more transparent and structured way (*the Europass framework including the Europass CV and the European Skills Passport*),
- European *cooperation on the recognition of qualifications* for further learning or for jobs (ENIC/NARIC, Lisbon Recognition Convention, the Directive on the recognition of professional qualifications),
- Council Recommendation on the on the *validation of non-formal and informal learning* of 20 December 2012 (2012/C 398/01),
- European tools for *labour market intelligence*: the *European Skills Panorama* and the European multilingual classification of Skills, Competences, Qualifications and Occupations (*ESCO*).

4 COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS. Rethinking Education:Investing in skills for better socio-economic outcomes, COM(2012) 669 final, 20.11.2012. Page 19.
5 http://www.ncge.ie/uploads/Koen_Nomden_ELGPN_Dublin.pdf
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8 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:398:0001:0005:PL:PDF
9 http://www.ecvet-team.eu/system/files/documents/933/forum-2013-plenary-introduction-towards-european-area.pdf
10 Stakeholder consultation on the European area of skills and qualifications. Background document. http://ec.europa.eu/dgs/education_culture/more_info/consultations/skills_en.htm

From 17.12.2013 to 15.04.2014, the European Commission holds a public consultation on the EASQ. Through the public consultation with the stakeholders, the EC wants to collect information about the problems faced by learners and workers with regard to the transparency and recognition of their skills and qualifications when moving within and between EU Member States and potential benefits of developing a European Area of Skills and Qualifications.

That is interesting to note that the EU policy makers included the Council of Europe Convention on the recognition of qualifications concerning higher education in the european region, Lisbon, 11.IV. 1997 (European Treaty Series- No. 165) into the building blocks of the EU based EASQ. Also, in the EASQ components context, it is noteworthy to mention the European Research Area, that principles were 'developed to provide a common approach to, amongst others, enhance the quality of doctoral training in Europe, increase the dialogue with the industry and the labour market, and foster international networking.'[11] ERA seems to be a very appropriate example of creating the synergy of education sector, labour market and the society needs.

A: Lifelong learning

The European Union developed lifelong learning policy instruments, supporting recognition of qualifications and skills, and comparison of professional experience. Those instruments helps people and businesses to increase their educational and entreprenourship opportunities in a Member State other than the State of origin.

'Council conclusions on a strategic framework for European cooperation in education and training (ET 2020)'[12] adopted in 2009 is a document that clearly strenghten cooperation between Member States in the field of education. Among the four strategic objectives identified in the Council conclusions, are: implementation of the concept of lifelong learning and mobility – in particular Council articulates the need for progress in the implementation of learning strategies, developement of the national qualifications frameworks linked to the European Qualifications Framework, more flexible educational pathways, openness to non-formal learning and informal learning and the application of the principles laid down in the European Quality Charter for mobility. By 2020 it is planned to achieve a level of 15% of adults (aged 25-64) pursuing in the EU the idea of lifelong learning. Countries that have implemented the most effective lifelong learning strategies are Denmark, Sweden and Finland[13].

The main instruments of the EU lifelong learning policy are listed below:

- European Credit Transfer System (ECTS), which provides the ability to recognize scientific achievements gained abroad,
- Europass – tool promoting the mobility (Decision of the European Parliament and of the Council on a single Community framework for the transparency of qualifications and competences)[14],
- Key competences for lifelong learning[15] (Recommendation of the European Parliament and of the Council on key competences for lifelong learning)[16],

11 Ibidem.
12 Council Conclusions of 12 May 2009 on a strategic framework for European cooperation in education and training (ET 2020) [Official Journal C 119 of 28.5.2009].
13 http://ec.europa.eu/education/lifelong-learning-policy/benchmarks_en.htm
14 Decision No 2241/2004/EC of the European Parliament and of the Council of 15 December 2004 on a single Community framework for the transparency of qualifications and competences (Europass)
15 http://europa.eu/legislation_summaries/education_training_youth/lifelong_learning/c11090_pl.htm

- European Qualifications Framework (Recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning)[17],
- The European Reference Framework for Quality Assurance in Vocational Education and Training[18] (Recommendation of the European Parliament and of the Council on the establishment of European reference framework for quality assurance in vocational education and training)[19],
- European Credit Transfer System for Vocational Education and Training (ECVET) [20]. (Recommendation of the European Parliament and of the Council on the establishment of a European Credit System for Vocational Education and Training (ECVET).[21]
- Validation of learning in informal and non-formal. (Council Recommendation on the validation of non-formal and informal)[22],
- European Skills Passport[23].

European Skills, Competences, Qualifications and Occupations (ESCO) is an instrument that integrates some of the above listed. According to the European Commission, in particular the Directorate-General for Education and Culture and DG Employment, Social Affairs and Equal Opportunities, 'ESCO is designed to be multilingual taxonomy assigning specific occupations as professional competence.'[24] ESCO is an international meta- tool that has facilitated the development of national labor markets by increasing the dialogue between the labor market and the education sector and vocational training. ESCO can be viewed as a platform for supporting the development of other instruments defining learning outcomes (eg. Europass Diploma Supplements or the European Qualifications Framework) thus contributing to strengthening the comparability of qualifications.

B: Qualifications in the EU

The issue of qualifications is regulated in the art. 53 of the Treaty on the Functioning of the European Union (TFEU), which empowers the Council to adopt directives for ensuring mutual recognition of diplomas, certificates and other evidence of formal qualifications. Article 53 TFEU does not include recognition of qualifications for scientific purposes[25].

Issues concerning the construction of a European area of skills and qualifications seem to be particularly important in relation to the need for the development of the internal market of the EU. The key to the development of the EU internal market is employers' access to workforce with appropriate qualifications.'Since the beginning of the European Communities, it was clear that the differences in the education systems are so large that the requirements for professional

16 Recommendation 2006/962/EC of the European Parliament and of the Council of 18 December 2006 on key competences for lifelong learning [Official Journal L 394 of 30.12.2006]

17 RECOMMENDATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning (Text with EEA relevance) (2008/C 111/01)

18 http://europa.eu/legislation_summaries/education_training_youth/vocational_training/c11108_pl.htm

19 Recommendation of the European Parliament and of the Council of 18 June 2009 on the establishment of a European Quality Assurance Reference Framework for Vocational Education and Training [Official Journal C 155 of 8.7.2009]

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22 COUNCIL RECOMMENDATION of 20 December 2012 on the validation of non-formal and informal learning (2012/C 398/01)

23 http://europass.cedefop.europa.eu/en/documents/european-skills-passport

24 A. Marszałek, Wspólna taksonomia kompetencji oraz zawodów jako instrument wspomagający funkcjonowanie systemów kształcenia oraz rynków pracy w XXI wieku, E-mentor nr 3 (35) / 2010, http://www.e-mentor.edu.pl/artykul/index/numer/35/id/760

25 M. Szwarc- Kuczer, Traktat o funkcjonowaniu Unii Europejskiej. Komentarz. Ed. A. Wróbel, Warszawa 2012, Part I, p. 893

qualifications may pose a significant barrier to the freedom of establishment.'[26] Matters relating to the recognition of professional qualifications, in the SOLVIT[27] system persist at the level of 15%[28]. In the period 2010 - 2011, a total numer of cases related to the recognition of qualifications and registered in the SOLVIT system was 408 were, 355 of them has been resolved. These matters included the issues such as the refusal to recognize specific qualifications, lack of appropriate conditions, in order to compensate for differences between qualifications, exceeding the time limits in the procedure of recognition of qualifications.

The European Commission stresses that national regulations in the field of regulated professions and differences between countries in terms of proprietary types of activities and levels of qualifications are important barriers to the development of the services sector in the EU[29]. As the M. Maciejewski claims, European solutions in the field of harmonization and mutual recognition of diplomas and professional qualifications are measures to facilitate the exercise of freedom of establishment and freedom to provide services.[30]

The labor market in the EU is facing some serious threats, including the aging of the European population and early exit from the labor market. Therefore, special place is given to the concept of life long learning, that is considered as a factor that can influence employment rate in the EU. It is time when Europeans should understand that, they can not rely in their professional lives on the once acquired skills or qualifications[31]. Instruments offered by lifelong learning policy should become a natural tools for Europeans who want to prepeare themselves and respond to the rapid changes in the labor market. [32]

As identified in the background document for stakeholder consultation on the European area of skills and qualifications[33] recognition and transparency procedures concerning qualifications are crucial when supporting third country nationals legally residing in Europe into the labour market, the education and training systems and, more generally, society. Qualifications policy of the EU is alos crucial for attracting new talnts and businesses to Europe.

Professional qualifications directive and qualifications framework seem to be the two flagship EU qulaifications policy instruments, that will be described below. It is noteworthy that these two initiatives are being under responsibility of two different Directorates General within the European Commission.

(i) Professional qualifications directive 2005/36[34] and its modernisation.

26 M. Szwarc- Kuczer, Traktat o funkcjonowaniu Unii Europejskiej. Komentarz. Ed. A. Wróbel, Warszawa 2012, Part I, p. 893
27 SOLVIT is an Alternative Dispute Resolution Mechanism that has been set up to help EU citizens and businesses who have been denied the possibility to exercise their European Internal Market rights because a public administration in another Member State has misapplied Internal Market legislation.
28 ENFORCEMENT IN THE EU SINGLE MARKET. JACQUES PELKMANS AND ANABELA CORREIA DE BRITO, CEPS Centre for European Policy Studies, Brussels, 2012, s. 28
29 Ibidem, s. 12
30 M. Maciejewski, Swoboda przedsiębiorczości, swoboda świadczenia usług i wzajemne uznawanie dyplomów, http://www.europarl.europa.eu/ftu/pdf/pl/FTU_3.2.3.pdf, , p. 1

31 http://ec.europa.eu/growthandjobs/pdf/1206_annual_report_en.pdf page 9 (4.4.2007)
32 http://ec.europa.eu/growthandjobs/pdf/2004-1866-EN-complet.pdf page 31
33 Stakeholder consultation on the European area of skills and qualifications. Background document. http://ec.europa.eu/dgs/education_culture/more_info/consultations/skills_en.htm
34 Directive 2005/36/EC on the recognition of professional qualifications. 7.09.2005 OJ EU L 255 30.09.2005, p. 22

Initially, the qualifications recognition was based on the detailed harmonization of education systems in different sectors. 'A characteristic feature of this approach has been that of a harmonized program of education, practical training requirements and a list of qualifications that were subject to recognition.'[35] After the entry into force of the Single European Act[36] began the so-called 'a new approach to harmonization', a point of interest was moved from various sectors into the work on the general principles of mutual recognition of professional qualifications (legal qualifications has been always treated separately). Since 2007 a Directive 2005/36 on the recognition of professional qualifications[37] replaced the old system (in force remained Directive on the legal profession).

Directive 2005/36 EC on the recognition of qualifications regulates scope previously covered by sectoral directives. In the context of this study, it is noteworthy that the recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning has no legal implications on Directive 2005/36/EC.

The Directive applies to nationals of the EU Member States, Iceland, Norway and Liechtenstein. Necessary for the application of the provisions of the Directive is the existence of so-called 'cross-border element', for example a situation in which the person performing the regulated profession on the basis of qualifications obtained in one Member State wants to perform in another Member State.

The result of the public consultation conducted by the Commission between January and March 2011 was the publication of the Green Paper concerning the modernization of the Directive.[38] As the benefits of the proposed amendments to the Directive , the EC pointed the reduced complexity of the procedures described in the Directive by introducing a European Professional Card, the modernization of the automatic recognition of qualifications for nurses, midwives, pharmacists and architects, ensuring greater transparency in the field of regulated professions, the introduction of e - management in the process of recognition of qualifications. In terms of the set objectives of the modernization plan, the EC proposes specific solutions such as allowing electronic submission of the application for recognition, the creation of a special platform that enables automatic recognition. In addition, the European Commission in the course of modernization intends to adapt Directive TS EU ruling C-330/03 , which formulated the principle of partial access to regulated professions.[39].

EC Green Paper also refers to a qualifications frameworks in the context of art . 11 of the Directive, which provides five levels of qualifications according to the type and duration of training. As the Green Paper authors state, levels specified in Art. 11 may coincide with the eight EQF levels. EC indicates that 'the simultaneous use of two different classification systems poses a risk of confusion for the competent authorities and other stakeholders.' Therefore, the European Commission presented a proposal to delete Article 11 of the Directive and its associated Annex II.[40]

The question about the relationship between art. 11 Directive and the European Qualifications Framework was also raised in an external report prepared for the European Commission.[41] According to research conducted for this report, the preferred classification is a classification based on the EQF as knowledge, skills and competence and not, as in art. 11 of the duration of the studies and the type of institution where education proceeded. Among the respondents, there was no clear consensus as to assess the application of art. 11 in practice.

35 M. Szwarc- Kuczer …Ibidem. p. 897.
36 Single European Act of 17 February 1986, OJ EU L 169, p. 1.
37 Directive 2005/36/EC on the recognition of professional qualifications. 7.09.2005 OJ EU L 255 30.09.2005, p. 22
38 GREEN PAPER Modernising the Professional Qualifications Directive, 22.6.2011KOM (2011) 367, p. 13
39 TS UE C-330/03
40 GREEN PAPER Modernising the Professional Qualifications Directive, 22.6.2011KOM (2011) 367, p. 13
41 The Study evaluating the Professional Qualifications Directive against recent EU educational reforms, GHK. S. 13-14

'The recently revised Directive on professional qualifications, which supports smooth recognition of qualifications in regulated professions, is an important milestone in promoting mobility of professionals across Europe. The revised directive introduces a "European Professional Card", in the form of an electronic certificate, that should enable quicker recognition of qualifications as well as facilitate temporary mobility for professions that will benefit from it. The directive also defines minimum training requirements for professions benefiting from automatic recognition and foresees the possibility to set up common training frameworks and tests, aimed at broadening opportunities for automatic recognition.'[42]

(ii) European Qualifications Framework for lifelong learning.

'Currently in Europe but also in the world's educational systems, we can see a paradigm shift in education that gives the priority to the results of the learning process defined in terms of knowledge, skills and competences of the priority items.'[43] Recognizing these changes, DG Education and Culture began in 2004 work on the European Qualifications Framework. From 2006 to 2008, work on the recommendation of the European Parliament and the Council on the establishment of the European Qualifications Framework for lifelong learning, culminated in the adoption of the document in April 2008.[44] Section 15 of the recommendations states: "(...) this Recommendation conforms to the principle of subsidiarity by supporting and complementing Member States by facilitating further cooperation between them to increase transparency and to promote mobility and lifelong learning life. It should be implemented in accordance with national law and practice."

The intention of the EU is not to define the principles of operation of national qualifications systems, but to create a common reference framework serving as a translation device between different qualifications frameworks in Europe. EU Member States are recommended to: implement national qualifications systems connected with the European Qualifications Framework (including the appointment of special coordination structures), use an approach based on learning outcomes when defining skills; promote the validation of non-formal learning and informal learning; promote the principles of providing quality in education. 'The EQF acts as a translation device to make national qualifications more transparent across Europe, promoting workers' and learners' mobility between countries and facilitating lifelong learning. The EQF aims to become a common European reference framework to which different countries' national qualifications' systems relate'.[45]

According to the Cedefop agency [46], the EQF is used in Europe as a catalyst for reform of the education sector, vocational training and qualifications system. The agency also highlights the essence of the EQF as an instrument of European cooperation, indicating, inter alia, the way in which individual Member States designing national qualifications framework, are inspired by the structure of EQF. Recommendation on EQF, however, does not require Member States to introduce national qualifications frameworks. According to OECD experts: 'qualifications system can facilitate the individual in navigating along the ways of diffferent life long learning forms/possibilities or can be a deterrent, depending on what incentives or disincentives it provides.'[47]

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42 Stakeholder consultation on the European area of skills and qualifications. Background document. p. 6 http://ec.europa.eu/dgs/education_culture/more_info/consultations/skills_en.htm

43 Wspólna taksonomia kompetencji oraz zawodów jako instrument wspomagający funkcjonowanie systemów kształcenia oraz rynków pracy w XXI wieku, A. Marszałek, E-mentor nr 3 (35) / 2010, http://www.e-mentor.edu.pl/artykul/index/numer/35/id/760

44 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:111:0001:0007:PL:PDF

45 Recognising skills and qualifications across Europe Promoting transparency and recognition for Vocational Education and Training. In Focus, 20111, ECORYS

46 CEDEFOP The development of national Qualifications frameworks in the European union; main tendencies and challenges, September 2009, Criteria and procedures for referencing national qualifications levels to the EQF.

47 OECD, Qualifications systems, Bridges to lifelong learning. 2007, p. 10

The European Commission presents the EQF not only as a 'reference framework for all types and levels of qualifications, including those awarded in and outside formal education and through the validation of non-formal and informal learning' but also as a tool that may facilitate the recognition of qualifications between Europe and third countries[48]. The European Qualifications Framework (EQF) is a cross-cutting tool and relates to all types and levels of qualifications and is closely linked to all other tools, no matter the sector (e.g. HE, VET, adult learning) or the dimension (credit systems, quality assurance, learning outcomes, validation of non-formal and informal learning) of the tools. It could play a key role in enhancing the transparency and recognition of skills and competences and promoting the implementation of the learning outcomes approach. However, according to a recent evaluation, its role in the development of policies and tools for mobility and lifelong learning could be improved, greater coherence with other tools could be achieved, especially in the area of quality assurance, and it should be more directly visible and useful to individuals and stakeholders.'

C: Skills and qualifications in the works of selected international organizations

Skills and qualifications matter not only to the EU but also to other international organisations and agencies, such as the United Nations (UN): Organization of the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the International Labour Organization, the World Bank, Organisation for Economic Cooperation and Development. Those organisations work on issues related with the labor market, the education sector and the economy. The following are the programs and initiatives undertaken by selected international organizations in terms of skills and qualifications.

(i) Organization of the United Nations Educational, Scientific and Cultural Organization (UNESCO)

UNESCO since 2007 monitors in countries of ECOWAS (Economic Community Of West African States)[49] activities related to qualifications.[50] UNESCO Regional Office in Dakar (BREDA)[51] also supports the Member States of ECOWAS in terms of improving the quality of education, in particular by encouraging the establishment of a national qualifications framework covering the certification and validation of competences and experience.

In 2012 UNESCO presented the report 'Youth and skills. Putting education to work.'[52] The report shows the situation of young people who after leaving school do not have the skills needed to function in society and find a good job. The report shows how the development of programs and strategies for the development and management of skills can improve the situation of young people.

(ii) The International Labour Organisation (ILO)

48 Stakeholder consultation on the European area of skills and qualifications. Background document. p. 8 http://ec.europa.eu/dgs/education_culture/more_info/consultations/skills_en.htm

49 http://www.ecowas.int/

50 Anne-Marie Charraud and Patrick Werquin "The Implementation of National Qualifications Frameworks (NQFs) and Regional Qualifications Frameworks (RQFs) in ECOWAS Countries Final Report." 2011, s. 8.

51 http://www.unesco.org/new/en/dakar/

52 http://www.unesco.org/new/en/education/themes/leading-the-international-agenda/efareport/reports/2012-skills/

The International Labour Organisation (ILO) Skills Department [53], works on policies and systems related to skills, in the context of poverty alleviation and skills related to youth employment. Since 2009, the Department of Skills conducts research program for the implementation and results of operation of the national qualifications framework[54]. ILO conducted research on how to implement a national qualifications framework as part of the strategy to develop the skills and increasing employment. ILO is working within the framework of a research program concerning the Qualifications Framework of the European Training Foundation.

(iii) The World Bank (WB)

the World Bank presents skills as key to raising the level of productivity and economic growth in the world. The return is also attention to the changing needs of national labor markets , which, together with the growth of innovation in the economy need employees with different kind of skill. The World Bank has developed the Skills Toward Employment and Productivity (STEP)[55]. This program is designed to help analysts, researchers and policy makers in designing national strategies and sectoral policies regarding skills that affect economic growth. STEP program is built on the basis of five interrelated steps:[56] *Getting children off to the right start; Ensuring that all students learn; Building job-relevant skills; Encouraging entrepreneurship and innovation; Facilitating labor mobility and job matching.* The second program supporting the work of the World Bank in terms of skills is SABER[57], a program supporting dialogue and actions to reform national policies that affect the education and training systems[58].

(iv) Organization for Economic Cooperation and Development (OECD)

The OECD has developed a strategy in 2012, "Better Skills, Better Jobs , Better Lives""[59] and leads a special portal 'skills.oecd.org'. OECD activities are a response to the current changes in labor markets, where next to each function unemployed graduates and employers who can not find workers with the right skills. OECD wants the developed strategy to help countries better manage skills, which translate into no economic development. OECD analysts emphasize the importance of cooperation between science with the labor sector and the involvement of social partners. Some countries have published already, and some are still working on national strategies regarding skills. Key from the perspective of the OECD is appropriate to implement such strategies and adapt them in a holistic dimension that is involving stakeholders at local and national level.

III. Conclusions

In the light of the ongoing reforms to European qualifications systems and the EU strategies for education and skills, the question of their ability to build an internal European area of skills and qualifications remains unanswered. It is definitely not enough to claim that EASQ instruments are

53 http://www.ilo.org/skills/areas/lang--en/index.htm
54 http://www.ilo.org/skills/projects/WCMS_126588/lang--en/index.htm
55http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/EXTHDNETWORK/EXTHDOFFICE/0,,contentMDK:22677370~pagePK:64168445~piPK:64168309~theSitePK:5485727,00.html
56http://siteresources.worldbank.org/EDUCATION/Resources/278200-1099079877269/547664-1278533890893/Stepping_up_skills.pdf
57 http://siteresources.worldbank.org/EDUCATION/Resources/278200-1221666119663/saber.html
58 http://www.kwalifikacje.edu.pl/images/download/Aktualnosci/konf_zagr/relacja/nina%20arnhold.pdf
59 „Better Skills, Better Jobs, Better Lives"59 ISBN 978-92-64-177338 © OECD 2012

exact as those developed under the EU LLL policy as works on the EASQ go wider than DG Education and Culture.

All the policy and legal instruments, except of Directive 2005/36 on the recognition of professional qualifications, have been introduced as a soft law instruments or strategic documents. This soft law instruments are however implemented into the national law systems in a manner similar to introducing the EU harmonization legislation. Can we say that EASQ may be the first step toward the common European Education Area[60]?

The report State of play of the European Qualifications Framework empasize the need to align the work of the various bodies of the EU and the various initiatives in the field of skills and qualifications.[61] The variety of the available instruments was also noticed in the discussion forum Qualifications Platform, operated by the European Training Foundation[62]. How different instruments overlap and serve the same goals?

German researchers indicate that EQF does not provide sufficient criteria for the evaluation and comparison of qualifications from different Member States. They also highlight the lack of comparability between national and European qualifications framework, due to differences between national qualifications systems, education systems, and degree of development of the various sectors[63].

A very important aspect of building a European area of skills and qualifications is the involvement of the social partners in policy making process. Both employers and employees see the importance of issues such as qualifications framework as an important tool for modernizing education and training, a growing need to identify and evaluate the skills and competences acquired outside formal education, the need for a coherent approach to validation, the key role of the social partners, representatives of industries and other participants in the decision-making process at all levels (national, regional, local), in the process of implementation of EU instruments, the need for involvement, the need for the provision of information to all stakeholders in the sector of education and training on the impact of EU instruments for their work[64]. Active participation of the social partners creates opportunities for the creation of a European area of education and skills corresponding to the real needs of learners and workers, regardless of the citizenship.

As A. Marszalek states correlation between the education sector and the labor market is a guarantee not only for the personal development of citizens but also for the society. "These two markets: education and employment services can not function effectively when they are separated from each other - on the contrary, they should be complementary. And this is possible if we consider them in

60 „Since the year 2000 the Lisbon Strategy has been aiming to ensure competitiveness and social cohesion in Europe. The Recommendation on the establishment of a European Qualifications Framework in 2008 set an important milestone for comparing education systems and qualifications in Europe. With remarkable energy all EU member states and several candidate countries are currently working on the implementation of this Recommendation and are therefore clearly pointing the way towards a European Education Area". (Austrian refrencing report, 2011, p. 8)

61 DIRECTORATE GENERAL FOR INTERNAL POLICIES POLICY DEPARTMENT B: STRUCTURAL AND COHESION POLICIES CULTURE AND EDUCATION State of play of the European Qualifications Framework implementation STUDY *Panteia/Research voor Beleid*: Simon Broek, Bert-Jan Buiskool, Marcia van Oploo and Suzanne de Visser, 2012, s. 21

62 What impacts are the Bologna Process and EQF having? The case of the EU Professional Qualifications Directive? https://lnconnections02.etf.europa.eu/blogs/f062de46-649f-4ccf-80a9-190ab49938fe/entry/what_impacts_are_the_bologna_process_and_eqf_having_the_case_of_the_eu_professional_qualifications_directive?lang=en_gb

63 Qualifications Frameworks: A Contribution to the Development of the European Labour Market? A European conference, 25/26 June 2012, Munich (DE)

64 Thessaloniki, 10 February 2012 ECVL/MB/JB/LZAH/2012/010 The role of the social partners in implementing European tools and principles *Increasing the relevance of education and training to the labour market.* Joint Conference of Cedefop and the Social Partners European Parliament, Brussels, 24 and 25 November 2011 Conference Conclusions.

the context of lifelong learning, defined as learning from preschool to late phases of retirement, including the entire spectrum of formal learning (in schools and other institutions of education), non-formal (institutions outside the education system) and informal (natural, relating to any of lifelong learning activities, aimed at developing the knowledge, skills and competences within a personal , civic, social and employment -oriented."[65] Building the European area of skills and skills - using the achievements of different sectors and European policies, despite the challenges arising from the diversity of instruments, creates an opportunity to raise the standard of living of European society.

Is it possible to build an effective European area of skills and qualifications, taking into account the differences between education systems, methods of training and quality assurance systems? Not all researchers agree on the reality of the creation of a European area of skills and qualifications. As indicated by J. B. Calendini and C. Storai: " The difficulties in the mutual recognition of qualifications by the Member States do not stem from technical or methodological difficulties, but are associated with differences resulting from the type of societies".”[66] Authors simultaneously undermine the possibility of creating a coherent approach taking into account the differences between various national approaches. The concept of the European market determine qualifications as problematic and unlikely due to the weakness of the plans for harmonization of national education sectors. They note, however, that codification efforts, aimed at developing a Community approach to qualifications exist in parallel with the reforms of education systems of vocational education. The existence of multiple organizations with conflicting interests and existance of different classifications is also considered by the authors as an obstacle on the way to the coherent EASQ.[67] I agree with the comments Calendini and Storai. The construction of a European area of skills and qualifications seems to be a very difficult task, especially considering the lack of EU powers to enforce the law applicable in all the Member States.

In the light of the ongoing reforms of the European qualifications systems and the European strategies for education and skills, the question on the EU ability to build an internal European Area of Skills and Qualifications remains unanswered. It is worth asking the question about the compatibility of the EU instruments impact on the construction of a European Area of Skills and Qualifications. The other question mark concerns the possibility to build the European area of skills and qualifications, taking into account the differences between the education systems, methods of training and quality assurance systems.

Economic changes in Europe and the needs of the labour market will certainly play a significant role when looking for the answers. For the time being I echo Calendini and Storai opinion that solutions concerning the skills and qualifications in various countries will more or less vary. Close cooperation with the social partners, trade unions, education and business sector actors need to be conducted both on the level of the EU and the Member States. The well-functioning common area of skills and qualifications cannot be achieved through implementation of the EU directive or regulation; to be successful it needs cooperation and consesnus among the stakeholders.

65 Wspólna taksonomia kompetencji oraz zawodów jako instrument wspomagający funkcjonowanie systemów kształcenia oraz rynków pracy w XXI wieku, A. Marszałek, E-mentor nr 3 (35) / 2010, http://www.e-mentor.edu.pl/artykul/index/numer/35/id/760

66 J.B. Calendini and C. Storai “Vocational qualifications and the Europen labour market: the challenges and the prospects.” W: The Economics of Harmonizing European Law, Edited by A. Marciano, J.M. Josselin, p. 180

67 Ibidem, p. 179

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Thursday 19 November 2015

Afternoon Session

Prof. dr. Charles Glenn, Professor at Boston University (USA)

School Religious Distinctiveness: The Consequences for Parents, Pupils and Teachers

Charles L. Glenn[1]

The distinctiveness of religious schools, my assigned topic, might seem a subject about which very little need be said. After all, such schools are defined by their religious mission, and they are created and sustained by the vision and the sacrifices of individuals and communities with strongly-religious motivations. In turn, teachers chose to work in religious schools, and parents to entrust their children to them – sometimes, again, at considerable financial sacrifice – because they value how those schools are different from the common public school.

This difference is intended to extend to the entire mission of the school, not to be limited to periods of formal religious instruction. As the Sacred Congregation for Catholic Education has stated, "The specific mission of the school ... is a critical, systematic transmission of culture in the light of faith and the bringing forth of the power of Christian virtue by the integration of culture with faith and of faith with living."

Terence McLaughlin has described this desired characteristic of Catholic schooling particularly well:

> what is involved in this . . . distinctive feature of Catholic education requires sustained attention. It includes the identification by pupils of those elements of culture which are opposed to the Gospel, an attempt to enrich the perception of subjects such as science, history, the humanities and the arts with a religious perspective, the study of philosophy and its relationship to divine wisdom and the unification of the programme of the school as a whole with a distinctive understanding of the human person.[2]

From the perspective of Evangelical Protestant schooling, "the cultivation of a Christian worldview . . . involves reflecting on the nature of things, on the place they have in the larger scheme of creation and redemption, in human nature and in history."[3] Thus among Protestant as well as Catholic educators (and we could extend this to Orthodox, Jewish, and Muslim educators) there is a concept of the goals of education that goes well beyond instruction in doctrines and in ritual practices.

So why do we need to discuss the consequences of the distinctiveness of religious schools? There are two over-arching reasons.

The first is the mounting evidence that schools with a clearly-defined mission that includes but extends beyond academic instruction make an important contribution to the health of society as well as to the flourishing of individual students.

The second is that this distinctiveness is threatened today as it never has been before except

[1] Charles L. Glenn, Professor at Boston University

[2] McLaughlin, T. H. 1996. "The Distinctiveness of Catholic Education." In The Contemporary Catholic School: Context, Identity and Diversity. Terence H. McLaughlin, Joseph O'Keefe S.J. and Bernadette O'Keeffe (Eds.). London: The Falmer Press. Pp. 136-54, p. 142.

[3] Myers, K. A. 1989. All God's Children and Blue Suede Shoes: Christians and Popular Culture. Wheaton (IL): Crossway Books, p. 180.

under totalitarian regimes. As we will see, the threats are both external and internal, and the latter may be especially difficult to counter.

I. Why School Distinctiveness is Important

Perhaps it would be helpful to give an example of how differing worldviews can have implications for educational practice. Supporters of 'humanistic education' in the Netherlands stress the importance of schools helping pupils to learn how to make decisions for themselves. Supporters of Protestant education, on the other hand, regard this as wishful thinking based upon a view of human nature that denies its potential for evil. Simply leaving pupils to make decisions as best they can, helping them only with the (ostensibly neutral) process of decision- making independent of external authorities, leaves them utterly vulnerable to the influence of the values abroad in society. It is not as though pupils were likely to invent authentically original values for themselves; during the stage when they tend to reject whatever their parents stand forthey are very likely to act on the basis of the values that are presented to them in the media and by their peer group.[4]

In order to equip young people to be competent decision-makers, leaders in Protestant education believe, it is important to provide them with an alternative way of understanding the world and arriving at decisions, so that they will not be overwhelmed by the influence of what seems absolutely taken for granted in the surrounding culture. The school should help pupils to learn to see with eyes that are not dazzled by the images presented to them by the wider society.

This could be considered a curious reversal; religiously-based schooling has usually been thought of as anchored in conventional thinking in contrast with the free-spirited questioning and criticism of all that is taken for granted that might be found in public or Humanist schools, schools in which "emancipation is to be attained by organizing the learning environment in a manner that will eliminate any serious encounter with the manifestations of tradition."[5]5

Protestant and Catholic educators in the Netherlands insist, however, that it is their own form of schooling that is critical and unconventional, and that the weakness of public schooling is its acceptance of the existing state of things and the framework of meaning that leads to that acceptance. Public schooling, they believe, does not give pupils a basis from which they are in a position to criticize the existing situation in the world around them. It is naive to expect that pupils can, out of their own guts, so to speak, bring forth reasonable and coherent grounds for being critical of and finding alternatives to the materialism and indifferent cruelty of the wider society.

A well-considered distinctiveness based on a comprehensive worldview is, from this perspective, *more* conducive to equipping pupils to be responsible decision-makers than is the uniformity and neutrality called for by some public school advocates.

Beyond clarity of vision, one of the most important dimensions of faith-based schools is that the adults involved – staff and parents – have a disposition to trust one another's motivations and good intentions toward a group of vulnerable children for whom they share responsibility to a degree that is not ordinarily present in other domains. There is abundant research indicating that trust within schools is a crucial factor in their effectiveness, academically as well as in the development of character. Bryk and Schneider's research in Chicago demonstrated that "the social relationships at work in school communities comprise a fundamental feature of their operations."[6]

[4] Steinberg, L. 1997. Beyond the Classroom, New York: Simon and Schuster.
[5] Bowers, C. L. 1985. "Culture against Itself: Nihilism as an Element in Recent Educational Thought." American Journal of Education. August, 465-490, p. 476.
[6] Bryk, A. S. and Schneider, B. 2002. Trust in Schools: A Core Resource for Improvement.

Schools based upon a shared religious ethos are often especially effective in developing these qualities of trust and engagement. As two writers for *The Economist* have pointed out, "Religion seems to provide social bonds in a world in which so much conspires to produce alienation and anomie. There are remarkably few places nowadays where adults can meet and take a trusting relationship for granted."[7]

The trust engendered in some – perhaps most – faith-based schools goes beyond facilitating the working relationship among staff and with parents; it also can liberate teachers to teach at a deeper level. Craig Engelhardt notes that "[w]hereas secular school educators must generally keep private their deepest inspirations, understandings, and concerns related to the child and the curriculum, the religious schoolteacher *understands these things to be a vital aspect of the curriculum.*" This permits classes in a faith-based school to "actively engage questions such as 'Who am I?' 'What is my purpose?' 'What is valuable as a life pursuit?' and 'What are the foundational principles and purposes of life, society, and my coursework?'" that would be out-of- bounds in a public school class. Such discussions "not only unlock the possibility of inspiring children at a deeper level, but they place subject matter in a meaningful context."[8]

Religious schools may thus offer a safe place for discussions about difficult choices, as we found in our research this past year in seven Islamic secondary schools in the United States. Students reported to us that the class discussions in their Islamic schools were much more lively and challenging than in their previous public schools, where everyone had been afraid of giving offence by expressing strong convictions. Similarly, Alyssa, one of the teenagers interviewed as part of the National Survey of Youth and Religion, was enthusiastic about the teachers at her Christian school: "I love them all. A lot of them have been through a lot in their life and now they're Christians so they tell us testimonies and it's helpful just to hear that they went through something [hard], too, you know?"[9] It seems unlikely that public school teachers could be so open about their travails and their convictions. It is in such settings of trusting relationships, and not in large impersonal public schools, that character can best be developed.

At elementary school age, what most pupils need is the security of being part of a world that makes sense; they must learn to love what is noble and hate what is base, as Aristotle tells us, before they learn to reason about it. It is not at this stage in development appropriate to place heavy emphasis on the idea that values and social norms may differ widely and be based upon cultural differences; it is instead important to socialize children at this age into a coherent structure of values and norms. As psychologist Elmer John Thiessen has pointed out, "children learn to be rational by imitation and identification, and these processes are non-rational. Such non-rational initiation should not therefore be condemned as indoctrinatory."[10] Only after rational judgment is clearly established are they equipped to begin to handle the diversity of values and norms that they must come to terms with in order to live in a pluralistic society.

Socialization occurs not only through the explicit content of academic courses, but just as much through the underlying ways in which the school itself operates. The need to create a school climate that is safe and respectful of those involved is not simply a precondition for the educational

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New York: Russell Sage Foundation, p. 5.

[7] Micklethwait, John and Adrian Wooldridge. 2009. God Is Back: How the Global Revival Of Faith Is Changing the World. New York: Penguin Press. P. 148.

[8] Engelhardt, C. S. 2013. Education Reform: Confronting the Secular Ideal. Charlotte, NC: Information Age Publishing, pp. 186, xxiv.

[9] Smith, C. with Denton, M. L.. 2009. Soul Searching: The Religious and Spiritual Lives of American Teenagers. Oxford University Press, pp. 114-5.

[10] Thiessen, E. J. 1993. *Teaching for Commitment: Liberal Education, Indoctrination, and Christian Nurture*. Montreal: McGill-Queen's University Press, p. 115).

mission of the school, but itself a very important part of that mission. In creating the identity of the school it is essential that these questions of how the school seeks to live, its *distinctive character*, be clearly and effectively addressed.

The distinguished Protestant philosopher Nicholas Wolterstorff has put this well, urging that "Christian education will have to be an alternative mode of education, not just in the sense of communicating alternative thoughts but in the much more radical sense of equipping students for an alternative way of life."[11]

There is a considerable literature that represents faith-based schools as teaching intolerance and any unfitness for life in a diverse society. James Dwyer, for example, without educing an evidence, insists that girls who attend Catholic schools will end up sexually frigid, and that religious schools in general harm children in all sorts of ways, producing not only intolerance but also "diminished self-esteem, extreme anxiety, and pronounced and sometimes life-long anger and resentment."[12] He concedes that religious school *may* be permitted as an alternative, but only if they conform themselves to public schools through abandoning such "harmful practices" as "compelling religious expression and practice, teaching secular subjects from a religious perspective . . . and making children's sense of security and self-worth depend on being 'saved' or meeting unreasonable, divinely ordained standards of conduct."[13]

In fact, however, research has again and again shown such charges to be untrue. Sociologist Alan Peshkin, for example, surveying secondary students in a "fundamentalist" Protestant school and the local public school in a town in Illinois, found that "93 percent of the Bethany students compared with 80 percent of the public high school students responded that they would approve of a black family moving next door. . . . 93 percent of the Bethany and 95 percent of the public school students agreed that 'people who don't believe in God should have the same right to freedom of speech as anyone else'."[14]

Other research has found that Mexican American students in Catholic parochial schools "were substantially more acculturated that their public school counterparts . . . [and] were more likely to have non-Hispanic friends, were more willing to date and marry outside their own ethnic group, were more willing to identify with the WASP value system, showed significantly less prejudice against other ethnic groups, and were more willing to fulfill their civic duties such as voting, military service, and obedience to the law."[15]

Jay Greene summarized the results of a number of such studies:

> In a review of the research, my colleague Patrick Wolf identified 21 studies of the effect that public and private schooling have on political tolerance. Tolerance is typically measured by asking students to name their least-liked group and then determining whether students would allow members of that group to engage in political activities, such as running for elected office or holding a rally. The more willing students are to let members of their least-liked group engage in these activities, the more tolerant they are judged to be. I conducted two of those 21

[11] Wolterstorff, N. 2002. *Educating for Life: Reflections on Christian Teaching and Learning*. Stronks, G. G. and Joldersma, C. W. (eds.). Grand Rapids, MI: Baker Academic, p. 177.
[12] Dwyer, J. G. 1998. *Religious Schools v. Children's Rights*. Ithaca, NY: Cornell University Press, p. 15.
[13] Ibid., 179.
[14] Peshkin, Alan. 1986. *God's Choice: The Total World of a Fundamentalist Christian School*. Chicago: University of Chicago Press. Pp. 332-3.
[15] Walch, Timothy. 1996. *Parish School: American Catholic Parochial Education From Colonial Times to the Present.* New York: The Crossroad Publishing Company. P. 202.

> studies, and others were produced by researchers at institutions including Harvard, Notre Dame and the University of Chicago. The studies varied in whether they looked at national or local samples of students and whether they examined secular, religious or all types of private schools. Of those studies, only one – focusing on the relatively small sector of non-Catholic religious schools – found that public-school students are more tolerant. Eleven studies, examining both secular and religious private schools, found that private-school students are significantly more likely to be tolerant, and nine found no difference.[16]

There is abundant evidence that many educators in faith-based schools are concerned to promote a thoughtful engagement with society in all its complexity, drawing from the resources of a religious tradition to do so. Two recent Canadian essays attest to this. One, discussing Catholic schools, urges that

> [i]n the midst of diversity, particularly religious diversity, there is a pressing need for religious educators to educate their adherents about the implications of life in a democratic society, particularly in relationship to citizenship. The aim is to re-widen the narrowing of society beyond the secular and material categories of capitalism. However, more is needed than the obvious acknowledgment of religious differences; there is a need to recognize the contribution of religions to the common good of political society.[17]

The other argues that, in Jewish schools, students

> practice the habits of mind required for democratic culture: listening to one another, waiting their turn to speak, respectful debate, flexibility, and · willingness to compromise. . . . the civics curriculum helps students experience Judaism in a dynamic, non-dogmatic, and non- exclusive way: they experience their Jewish learning as a process in which Jewish sources are used creatively in relation to other systems, and for a real-life purpose.[18]

Is the charge true, that those who hold strongly to religious convictions and practices are unfit for full and free participation in a pluralistic society? As with the charges against faith-based schools, this has no anchor in research or in reality. A national study of the religious experiences and attitudes of thousands of American teenagers found that "religious youth are exposed to and have the chance to acquire and practice a series of useful capacities and skills. . . . these skills may also be transposed and deployed for use in multiple nonreligious settings. . . . Thus, religious communities may inculcate in youth abilities that can increase their confidence and functional capacities, which may enhance their well-being and life outcomes." This hypothesis was borne out by a comparison between those teenagers who reported being most active religiously (across all religious groups), and those who reported being least active, "even if there were no differences between the examined religious types in race, sex, region of residence, parental marital status, parental education, and family income."[19] The researchers found that

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[16] Greene, J. P. 2013. "Vouching for Tolerance at Religious Schools." *The Wall Street Journal*. July 12. See Wolf, P. J. 2007. "Civics Exam." *Education Next*. Summer. Pp. 67-72.

[17] D'Souza, M. O. 2013. "The Distinctiveness of Catholic Education." In Graham P. McDonough, Nadeem A. Memon, and Avi I. Mintz (Eds.). *Discipline, Devotion and Dissent: Jewish, Catholic, and Islamic Schooling in Canada*. Waterloo, Ontario, Canada: Wilfrid Laurier University Press. Pp.45-72. P. 61.

[18] Beiles, G. 2013. "Jewish Education, Democracy, and Pluralistic Engagement." In McDonough, G. P., Memon, N. A., and Mintz, A. I. (eds.). *Discipline, Devotion and Dissent: Jewish, Catholic, and Islamic Schooling in Canada*. Waterloo, Ontario, Canada: Wilfrid Laurier University Press. Pp. 101-20. P. 105.

[19] Smith with Denton, op. cit. Pp. 244, 231.

> more religious teens appear to possess greater moral compassion and concern for justice than their nonreligious peers – and apparently for religiously related reasons and not simply because of differences in their demographic compositions. . . . More religious teens are also significantly more likely to do noncompulsory volunteer work or community service, with the Devoted twice as likely as the Disengaged in doing so (50 compared to 25 percent).Furthermore, the most religious tend to volunteer or do community service more often than the less religious. They are also significantly more likelyto engage in the kinds of volunteer and service activities that bring them into contact with racial, economic, and religious differences, which helps generate what social theorists call "bridging" social capital that fosters social cohesion and trust.[20]

Nor are the benefits of faith-based schools limited to character traits like tolerance. In a book that has become a classic of the sociological study of education, Coleman and Hoffer found that

> the achievement growth benefits of Catholic school attendance are especially strong for students who are in one way or another disadvantaged: lower socioeconomic status, black, or Hispanic. . . . The dropout rates from Catholic schools are strikingly lower than those from public schools or other private schools. This reduced dropout rate holds both for those who show no signs of problems as sophomores and for those who as sophomores are academically or disciplinarily at risk of dropping out.[21]

Similar results have been found in Germany, where "pupils in Protestant and Catholic secondary schools in North Rhine-Westphalia had higher educational outcomes than those in public schools, after controlling for other characteristics."[22] In England, Mortimore and his colleagues, though no friends of denominational schooling, found in their careful study of effective schooling in London that Church of England and Catholic "voluntary aided" schools had a definite advantage. There was "a consistent pattern of associations between voluntary status and schools' effects upon a number of the cognitive and non-cognitive outcomes. . . It is likely that schools which were chosen for very specific reasons may have had the advantages of greater parental support for their educational aims and, because of such support, were helped to be more effective." And, again, "voluntary schools, based on denominational membership, may also elicit a greater commitment from both parents and pupils, which may act as a strong cohesive force."[23] Similar results were found in a comprehensive study in the Netherlands.[24]

Coleman and Hoffer place great emphasis on how the "functional community" of shared values that forms around a Catholic (or other faith-based) school where parents regularly interact with one another helps to form the "social capital" that is a key to successful participation in school and in society. Campbell observes that "If Coleman is right and Catholic schools are flush with social capital, and [sociologist Robert] Putnam is right that social capital facilitates collective action, then Catholic school students could be expected to be characterized by a greater degree of civic

[20] Smith with Denton, op. cit. Pp. 229-30.
[21] Coleman, J. S. and Hoffer, T. 1987. Public and Private High Schools: The Impact of Communities. New York: Basic Books. P. 213.
[22] Dronkers, J. 2004. "Do Public and Religious Schools Really Differ? Assessing the European Evidence." In *Educating Citizens: International Perspectives on Civic Values and School Choice.* Patrick J. Wolf and Stephen Macedo (Eds). Washington, D.C.: Brookings Institution Press. Pp 287-312. P. 299.
[23] Mortimore, P., Sammons, P., Stoll, L., Lewis, D., and Ecob, R. 1988. *School Matters*. Berkeley: University of California Press. Pp. 221, 273.
[24] Marwijk Kooy-von Baumhauer, L. 1984. *Scholen verschillen: een verkennend vergelijkend onderzoek naar het intern functioneren van vijventwintig schoolgemeenschappen vwo-havo- mavo*. Groningen: Wolters Noordhoff.

engagement than public school students."[25] And this is indeed the case. Campbell found that "students in Catholic schools perform better than students in assigned public schools on all three objectives of civic education – capacity for civic engagement, political knowledge, and political tolerance."[26]

But perhaps more important than all of these measurable advantages is the fact that faith-based schools, if they live up to their promise, help students to place what they are learning in a context that will give direction to their lives and enable them to resist the blandishments of a culture that is adrift yet powerfully seductive. Stephen Vryhof, writing from a neo-Calvinist perspective, argues that "[v]irtues need to be grounded in a more complex worldview" than public schools are able to offer, a worldview "that gives a fuller account of human experience, that resonates more fully with reality in all its many corners, and that, to a significant extent, offers an explanation for the unexplainable." Because of their ability to offer such an account of experience, "faith-based schools provide, beyond just solid values and social support, the resources for meeting the deepest of human needs: connectedness to something bigger and more meaningful."[27]

Children and youth are more likely to experience such a coherent ethos in schools that are free to draw upon a distinctive tradition, what McLaughlin calls a "'thick' or 'comprehensive' theory of the good." Only such a school culture can help young people to resist the great downward suck of a consumer society, a culture of naked materialism that offers nothing to shape lives of consistent and generous purpose.

II. How School Distinctiveness is Threatened

But do most faith-based schools live up to that promise? Fifteen years ago I published a book called *The Ambiguous Embrace: Government and Faith-based Schools and Social Agencies*[28] in which I optimistically predicted that governments would increasingly turn to voluntary associations and institutions of the civil society to meet a variety of human needs. I explored the dangers that could arise from associated regulation and bureaucratic procedures, but suggested – contrary to my assumptions when I began the study – that the greater danger to the integrity of school and agency mission was what I called "pre-emptive capitulation," a surrender of that mission before government demanded it. Taking the examples of such organizations as the Salvation Army and Teen Challenge, I argued that institutions that were very clear and explicit about their distinctiveness would be able to maintain it in the face of pressures for conformity. On the other hand, I warned that there was much anecdotal evidence of loss of conviction on the part of staff of many faith-based institutions.

The heart of this self-betrayal, I suggested, was an anxious conformity to the expectations – and especially to professional norms – of the wider society, a concern to fit in rather than, as in the past, to stand out distinctively. Terence McLaughlin insists that

> the [Catholic] school must gain a clear and appropriately sophisticated grasp of what the nature and implications of Catholic educational aims and values actually are. Part of this process requires discernment about which features the general educational landscape need to be resisted and rejected and which are to be seen as compatible

[25] Campbell, D. E. 2001. "Making Democratic Education Work." In *Charters, Vouchers and Public Education*. Paul E. Peterson and David E. Campbell (eds.). Washington: Brookings Institution Press. P. 246.
[26] *Ibid*., 258.
[27] Vryhof, S. C. 2004. *Between Memory and Vision: The Case for Faith-Based Schooling.* Grand Rapids, MI: William B. Eerdmans Publishing Company. P. 8.
[28] Glenn, C. L. 2000. *The Ambiguous Embrace: Government and Faith-based Schools and Social Agencies*. Princeton University Press.

with, or maybe even expressions of, Catholic values.[29]

Although still numerically the largest group of non-public schools in the United States as in many other countries, it is clear that the Catholic education sector is having to grapple with difficult issues of mission. Bryk, Lee, and Holland, in their very positive account of Catholic schooling, point out that

> preserving the Catholic character of schools as they become lay institutions is a broadly shared concern – it would be imprudent to underestimate the powerful homogenizing forces that mass media and marketing have had on Catholic schools. In addition, Catholic schools today have connections to many professional educational organizations that bring a wide range of secular ideas into them. The gradually increasing numbers of non-Catholic facultyrepresent another potent secularizing force.[30]

I suggested, in *The Ambiguous Embrace*, that Catholic and Evangelical higher education institutions needed to do a much more thoughtful and consistent job of articulating this distinctiveness to teachers and administrators in training. Gerald Grace found that school-level leadership in Catholic schools in England was often uncertain about this aspect of their responsibilities. "The headteachers in this study had encountered dilemmas of moral behaviour relating to pupils, parents and teachers. They were aware that some form of moral leadership was expected from them but they were now more uncertain than in the past about the nature and direction of that moral leadership."[31] This is consistent with the finding in the Cardus study, discussed below, that Catholic school headmasters rated university attendance as their highest goal, while those of Evangelical schools placed an especially high value on character.

In the Netherlands, the country (together with Belgium) with the most extensive provision for support of faith-based and other schools chosen by parents, there has been a significant weakening of the distinctive character of these schools since the 1950s. Research a half-century ago by sociologist J. A. van Kemenade, who would later serve as Minister of Education, found that 57% of the parents with children in Catholic schools thought that the religious character of a school was important, but only 30% of Catholic school teachers agreed! In effect, there was a sort of betrayal from within resulting from changing conceptions of the nature of professional work, and loss of conviction about the possibility of reconciling religion with professional norms.[32]

Recently, another leading Dutch social scientist reached a parallel conclusion in reviewing research in Flanders: "these studies indicate that Flemish Catholic schools have a far smaller impact than one would expect on religious socialization."[33]

This has been a matter of deep concern in recent years for leaders in the Dutch confessional school sector, and has led to the sensitive question: if schools are no longer distinctively Catholic or Protestant, how does their maintenance with public funds guarantee liberty of conscience?

Some have suggested that the decision of the Dutch Catholic bishops, influenced by Vatican II, to replace the catechism with more open-ended religious instruction encouraged confusion about how to approach religious instruction. "Belief is not a question of learning something," they

[29] McLaughlin, *op. cit*., 138.
[30] Bryk, A. S., Lee, V. E., and Holland, P. B. 1993. *Catholic Schools and the Common Good.* Cambridge, MA: Harvard University Press. P. 334.
[31] Grace, G. 1996. "Leadership in Catholic Schools." In *The Contemporary Catholic School: Context, Identity and Diversity.* Terence H. McLaughlin, T. H., O'Keefe, J. and O'Keeffe, B. (Eds.). London: The Falmer Press. Pp 70-88. P. 76.
[32] Kemenade, J. A. van. 1968. *De Katholieken en hun onderwijs*, Meppel: Boom.
[33] Dronkers, *op. cit.*, 296.

observed in a 1965 Lenten letter, "but primarily of living something." This suggested to many educators that they could legitimately replace traditional beliefs – even the most fundamental – with social concerns.

Similar concerns about a weakening of the distinctive character of Catholic schools has been expressed in Britain and in the United States. Timothy Walch has warned that "the basic problem facing Catholic schools in the United States is not a loss of external support, but internal collapse of morale. There is a loss of nerve, a loss of connection, a loss of faith, a loss of enthusiasm. This is the root of the problem of Catholic education."[34]

This may in fact be a "perfect storm" phenomenon, with dramatic changes in the surrounding culture interacting with equally dramatic changes within the Catholic Church. Thus Gerald Grace found that "It became apparent during the course of this study that 'community' as a central value and symbol of Catholic schooling was under attack from the ethic of possessive individualism, from market forces and from a customer culture reinforced by quick recourse to legal procedures." This environmental change, he suggested, had encountered a church whose confidence in its message had been weakened by well-intentioned reforms. "The culture of traditional Catholicism had been constructed to reduce ambiguity and paradox by the strong framing of its teaching. Post Vatican II Catholicism has resulted in greater realizations of ambiguity and paradox in moral codes."[35]

Let us concede at once that many of the reforms were commendable and indeed necessary, while recognizing their unintended consequences on Catholic education in countries like the United States, where the number of pupils enrolled today is half that of the peak at the time of Vatican II. To some extent, indeed, the wavering about school distinctiveness may be a response to competitive pressures and the successful effort, in recent decades, to raise the academic status of Catholic education and the professional qualifications of its teachers and (at the university level) its professors.

The openness promoted by Vatican II, itself to some degree a response to the successful experience of the Catholic Church in the religiously-pluralistic environment of North America, has perhaps made it more difficult for educators with limited theological sophistication to articulate and put into practice a distinctive worldview permeating the entire curriculum and school life.

> Underlying this trend for Catholic schools to be less readily distinguishable from schools of other kinds are complex factors of many sorts, in which wide ranging theological, philosophical, sociological and cultural considerations are prominent. Catholic belief in general, and the personal beliefs and behaviour of individual Catholics, have become less sharply distinguished from other beliefs and lifestyles, and it is no surprise that this is true also of Catholic educational principles and policies.[36]

The consequence, however, is that the distinctiveness of Catholic schools may be more associated with their academic quality – which is of course very important – than with their ability to promote a distinctive understanding of the nature of a flourishing human life. Ideally, it may remain true that "Catholic education is based on, and seeks to promote, a particular view of the nature of human beings and of human life in general. Catholic education is therefore based on a 'substantial', 'thick' or 'comprehensive' theory of the good in contrast to the 'procedural', 'thin' or 'restricted' theories of the good which are typically invoked as underpinnings of public education and the 'common

[34] Walch, *op. cit.*, 182.
[35] Grace, *op. cit*., 76, 77.
[36] McLaughlin, *op. cit*., 137.

school' in pluralistic liberal democratic societies."[37]

The reality, however, may be closer to what was revealed by a recent study of the "religious and spiritual life of American teenagers":

> According to J. Fraser Field, executive officer the Catholic Educator's Resource Center: . . . "most Catholic schools ... depend on the same textbooks and other resources as those used in the public schools, and, staffed, for the most part, by graduates of the same universities as the public schools, are, outside of the subject of religious education, teaching almost exactly the same content as the public schools, content that is decidedly impoverished in the rich heritage and meaning of Christian faith and culture."[38]

Sociologist Christian Smith suggests that his finding that Catholic teenagers in the United States have a particularly low level of religious knowledge and commitment may, in part, be attributable to the fact that many Catholic schools "have grown into college prep academies with competitive admissions standards and hefty tuition rates, serving the more privileged of their communities, whether Catholic or not, and more dedicated, by demand of parents, to getting their students admitted to prestigious colleges than to teaching them about the Trinity."[39] Similarly, Feinberg's study of several Catholic schools noted, of one of them, that "[d]espite the efforts to maintain the Catholic character of the school, some of the religion teachers feel that its highly charged academic climate interferes with its Catholic mission, and the theology teachers lament that too many parents view the Catholic side of the school as less important than its reputation for academic excellence." On the other hand, "[i]n the traditional school, Church doctrine stands as a platform from which to gain distance from and to critically examine the norms and practices of the larger society."[40]

After all, it does not seem mysterious that "Catholic schools who model curricula after a state curriculum framework (often done in preparation for performance testing) risk losing the value-laden strength of the Catholic school curriculum."[41] We may expect this tendency to become all the more pronounced as public schools become increasing value-neutral in the name of non- judgmentalism.

This erosion of distinctiveness does not seem to have afflicted Evangelical schools (at least in North America where they are a relatively recent large-scale phenomenon) to the same extent. A large-scale study of the characteristics of American adults found distinct differences (holding constant a wide range of background factors) depending upon whether they had attended Catholic, Evangelical, private non-religious, or public schools a dozen or more years earlier. Consistent with other studies, this found that Catholic schools produced unusually strong academic outcomes in terms of enrollment in selective universities and long-term career outcomes. However, the researchers found that "Catholic schools are providing high quality intellectual development but at the expense of developing faith and commitment to religious practices in their graduates." Thus "students graduating from Catholic schools divorce no less than their public school counterparts, and significantly more than their Protestant Christian and nonreligious private school peers. Similarly, having attended Catholic school has no impact on the frequency with which those graduates will

[37] McLaughlin, *op. cit.*, 140-1.
[38] Smith and Denton, *op. cit.*, 212.
[39] Smith and Denton, *op. cit.*, 212.
[40] Feinberg, W. 2006. *For Goodness Sake: Religious Schools and Education for Democratic Citizenry*. New York: Routledge. Pp. 58, 82-3.
[41] Schuttloffel, M. J. 2000. "Promises and Possibilities: The Catholic Elementary School Curriculum." Youniss, J.; Convey, J. J.; and McLellan, J. A. (eds.). *The Catholic Character of Catholic Schools.* University of Notre Dame Press: Notre Dame, Indiana. P. 114.

attend church services, and Catholic school graduates are less likely to serve as leaders in their churches."[42]

By contrast, adults who had graduated from Evangelical schools had had significantly less brilliant careers, but were more committed to family, community, church, and charitable endeavors.

> In most areas measuring commitment to the church and faith, Catholic school graduates responded no better, and sometimes with less fervor, than their public school peers. From volunteering to giving, the Catholic school is having little impact on the behavior of its graduates within their churches despite having a substantial positive impact on academic achievement . . .. The value of charity commonly ascribed to the Catholic church does not appear to be translating into behaviors of graduates of Catholic schools. With Catholic school graduates earning more money net of their parents' incomes, and the upward economic stability of these graduates, in combination with the church's value on charity, we expected a more generous disposition than the data reveal.[43]

The researchers suggest that the difference in outcomes may be affected by the different historical situation of the Catholic and Evangelical schools in the United States. The Catholic school network developed in the 19th and early 20th centuries in reaction against the overwhelmingly Protestant character of public schools. As this was replaced in the mid-20th century with the banishment of any mention or expression of religion from public schools, together with the dramatic drop in religious vocations after Vatican II, Catholic schools lost their protest character and were transformed into academic alternatives for the emerging Catholic middle class. The researchers ask whether

> the longer history of Catholic schools and the focus on academic excellence as a means of social and economic mobility has caused an apathy among Catholic school leaders as relates to developing the faith, whereas the more recent history of [Evangelical] schools, coupled with their graduates' belief that U.S. culture is hostile towards their values, is promoting a greater emphasis on overtly strengthening the faith of their students.[44]

As this suggests, Evangelical schools on a large scale are a relatively new phenomenon in North America (and in Britain and elsewhere), emerging in reaction to the dramatic secularization of public schools in the 1960s and since. This has given them the character of a deliberate alternative. Sociologist Alan Peshkin, in his study of such a school, points out that, "If most public school statements of philosophy and goals are misleading guides to what actually happens in classrooms . . . the converse is true at BBA. What this school's educators say and write about their philosophy and goals is the basis of today's lesson and tomorrow's lesson plan." He quotes the school principal telling the students, "We try to be different in everything we do. We make no apology for that." Peshkin concludes that, "Seldom . . . has any American school been as professedly, unabashedly, unremittingly absorbed by normative considerations as the [Evangelical] school."[45]

At present, there is a movement among Evangelical schools in North America to raise their academic quality, with some outstanding examples of success. It remains to be seen whether this will have the effect of weakening their focus on "normative considerations," as seems to have

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[42] *Cardus Education Survey: Do the Motivations for Private Religious Catholic and Protestant Schooling in North America Align with Graduate Outcomes?* 2011. Hamilton, Ontario. P. 13.
[43] *Ibid*. P. 19.
[44] *Ibid*. P. 19.
[45] Peshkin, *op. cit*. Pp. 38-9, 49, 61.

occurred with many Catholic schools. It remains to be seen, also, whether recent efforts to revive the distinctiveness of Catholic schools will be successful.

A new factor has arisen, however, which I did not anticipate in my book fifteen years ago, and which could either confirm both Catholic and Protestant schools in a determination to express their distinctiveness, or induce them to compromise further with the prevailing culture. It is the militancy of the determination to remove all barriers based upon sexual orientation or gender identity, the so-called SOGI agenda. The June 2015 decision by the United States Supreme Court in *Obergefell v. Hodges,* providing a constitutional right to state recognition of single-sex marriage, is the culmination of a nationwide campaign to use the courts to overturn decisions made by the voters through referenda, or by elected state legislators, to preserve the traditional understanding that marriage must be between a man and a woman.

The decision was immediately accompanied by warnings that it was likely to affect the freedom of religious organizations, especially those requiring public accreditation or enjoying public funding and tax exemptions, to continue to teach and to act on the basis of the traditional understanding.
Indeed, Chief Justice Roberts (writing on behalf of Justices Scalia and Thomas as well) in their dissent from the decision, warned that

> [t]oday's decision . . . creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is
> -- unlike the right imagined by the majority -- actually spelled out in the Constitution.
> . . . There is little doubt that these and similar questions will soon be before this Court.
>
> Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.

As Mark Stern of the American Jewish Congress has put it, the "question is whether champions of tolerance are prepared to tolerate proponents of a different ethical vision. I think the answer will be no. . . . I am not optimistic that, under current law, much can be done to ameliorate the impact on religious dissenters."[46]
We have already seen, in North America and in Western Europe, many challenges to the employment practices of faith-based schools – especially Catholic schools – that "discriminate" against individuals openly engaged in same-sex relationships. Reactions in the media have tended to deplore the "intolerance" of the schools involved. But after all, as legal scholar Jonathan Turley has pointed out, "many religions are based on distinctions between the faithful and the unfaithful, the pure and the impure, the chosen and the unchosen, discrimination is at the heart of many faiths. Central to the idea of purity is often the exclusion of individuals or practices viewed as impure."[47]
In fact, our "tolerant" contemporary culture has no tolerance at all for limits on sexual self-expression, and redefines religious freedom as no more than the right to hold opinions privately, so long as they do not infringe on the activities or even the self-regard of others.

[46] Stern, M. D. 2008. "Same Sex Marriage and the Churches." In *Same-Sex Marriage and Religious Liberty: Emerging Conflicts*. Laycock, D., Picarello, A. R., Jr. and Wilson, R. F. (eds.) Lanham, MD: The Becket Fund for Religious Libertyand Rowman and Littlefield. Pp. 1-57. P. 57.
[47] Turley, J. 2008. "An Unholy Union: Same-Sex Marriage and the Use of Governmental Programs to Penalize Religious Groups with Unpopular Practices." In *Same-Sex Marriage and Religious Liberty: Emerging Conflicts*. Laycock, D., Picarello, A. R., Jr. and Wilson, R.
F. (eds.). Lanham, MD: The Becket Fund for Religious Liberty and Rowman and Littlefield. Pp. 59-76. P. 63.

Faith-based schools are under special threat from the assertion of the primacy of sexual liberty over religious freedom. They seek, in collaboration with families, to shape the loyalties, the life-perspectives, the settled dispositions of young children and of adolescents. Long before the SOGI agenda emerged in its present form, influential educational and political theorists were asserting that the State had an obligation to ensure that children be liberated from the limited perspectives of their families to become truly autonomous "choosers". If willing to concede that schools with a religious character might be permitted to continue to exist, these theorists insisted that this be under strict governmental supervision to ensure that the education provided promoted the requisite free-floating personalities.

We need not comment here on the shallowness of this "comprehensive liberal" view of human nature, but simply to point out that it is no trouble at all for such theorists to add to the agenda of un-predetermined religious and moral choice that of sexual orientation and gender identity. Any school which seeks to promote, in its students, loyalty to traditional beliefs, shared moral expectations, or the sexual norms held (though not always obeyed) by countless generations is to these theorists by definition oppressive and a threat to the dawning age of sexual freedom and self-congratulation.

The issue constantly arises, as a result, whether a school with a religious character can maintain that character when under pressure to comply with public norms about what it is acceptable and unacceptable to teach. This issue has been playing out in Ontario recently over what Catholic schools may teach about homosexuality. Donlevy notes that the "current Canadian secular view of law appears to be . . . that if one does not agree with an aspect of the law, then one is acting immorally, unethically, unjustly, unfairly, or undemocratically." There are consequently "some in Canadian society who, for what they sincerely believe to be good, moral, and compelling reasons, seek to compel Catholic institutions and some individuals to comply with a secular view" of a number of values prevalent in the wider society, or at least in its opinion-making circles. This has led to the "possibility that Catholic schools might have to teach their Catholic students the secular interpretation of those values, even though such an interpretation goes against the teachings of the Catholic faith" as a result of the provincial government's "Equity and Inclusive Education Strategy and . . . its successor initiative for teaching inclusiveness in Ontario's schools."[48]

There is a close parallel between this controversy and what occurred several years ago in Spain, when the Socialist government sought to impose a curriculum of citizenship education on Catholic schools; there were massive demonstrations by parents objecting to the elements of that curriculum in conflict with Catholic teaching, and these in turn contributed to the fall of this government. Its successor in power offered a carefully-revised curriculum that was acceptable for Catholic schools.

Douglas Laycock suggests that the "ultimate goal for those seeking to suppress dissent would be to use hate-speech laws to prohibit any public expression of traditional moral teachings on same- sex sexual relations,"[49] and there is much evidence that public opinion is moving toward the view that religious motivations are commonly unworthy of a free society. As noted above, this is inconsistent with the great body of research about religious people, but it is serving to put great pressure on religious schools and colleges to abandon traditional moral teachings.

[48] Donlevy, J. Kent. 2013. "Canadian Catholic Schools: Sacred and Secular Tensions in a Free and Democratic Society." In McDonough, G. P., Memon, N. A., and Mintz, A. I. (eds.). *Discipline, Devotion and Dissent: Jewish, Catholic, and Islamic Schooling in Canada*. Waterloo, Ontario, Canada: Wilfrid Laurier University Press. Pp. 121-43. Pp. 133-4.

[49] Laycock, D. 2008. "Afterword." In *Same-Sex Marriage and Religious Liberty: Emerging Conflicts*. Laycock, D., Picarello, A. R., Jr. and Wilson, R. F. (eds.). Lanham, MD: The Becket Fund for Religious Liberty and Rowman and Littlefield. Pp. 189-207. P. 193.

Federal law in the United States, and at least some state and local laws, provide explicit protections for schools with a religious character, provided that character and its requirements are clearly articulated up-front, and not as an after-the-fact justification for an employment decision. Mark Stern suggests that it may be necessary "to stay small and intensely parochial if an institution wants to be absolutely certain of its eligibility for recognition as a religious institution."[50] The danger is that schools will be insufficiently explicit about the "doctrinal and moral practices" on which they depend and to which they seek to remain faithful. It is not enough, in our litigious climate, to have a general statement about expecting staff to support the mission of the school or to behave in ways consistent with biblical standards. There are excellent examples and advice available from both Catholic and Evangelical sources, and no doubt from Jewish and Islamic sources as well, on how to state expectations for staff – and for students and parents – in a way that makes clear their religious (and thus protected) basis. These expectations, in turn, need to be related directly to a careful definition of the role of each employee as promoting the religious mission of the school, whether by teaching science or by answering the telephone.

In the present situation, peer accreditation will be a particular danger point. We should be aware, also, of the messages that prospective teachers will be exposed to and be expected to express agreement with in their professional preparation programs. Faith-based colleges with teacher education programs need to do a much better job of articulating what is distinctive about teaching in faith-based schools, and there is a need for intensive supplemental training programs for prospective teachers in faith-based schools who have been trained in programs without that focus.

III. **Conclusion**

But I have said enough about dangers and vulnerabilities; let me conclude with a measure of optimism about the future of faith-based schools, *if* they provide a distinctive alternative to what is available in public schools. We should anticipate that parents concerned about the direction that the culture of their society, whether American or European, is taking will look to faith-based schools as providing a positive environment for their children. Evidence from both Europe and North America is that such schools are often a preferred choice for parents who do not themselves belong to the faith-community supporting the school; they tell researchers that they *trust* these schools. Why? Because faith-based schools are able to provide a sense of what matters in life that can compete with the consumerist youth culture to which public schools, whatever their academic quality, offer no credible alternative.

But this will require greatly-increased efforts to define and protect the qualities that make Catholic or other faith-based schools distinctive, the alternative vision of a flourishing and purposeful human life that they offer. This *caractère propre*, this *richting*, this *ideario*, must be clear and unapologetic, not just for the sake of the education provided (though this is of course essential), but also to provide protection against charges of illegal discrimination. Educators who believe deeply in the mission of faith-based schooling need to become consistent in translating that into every detail of school life.

[50] Stern, *op. cit*. P. 11.

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A Meta-Analysis on the Effects and Contributions of Public, Public Charter, and Catholic Schools on Student Outcomes

William H. Jeynes

Abstract

An extensive meta-analysis, including 90 studies, was undertaken on the effects of Catholic and other religious private schools, charter schools, and public schools to what is the relationship between each of these school types and student outcomes. Additional analyses were done to determine, in the broadest sense, what are some of the strengths and weaknesses of these institutions. The results indicate that for students, attending Catholic schools is associated with the highest level of academic achievement and among the three school types, even when sophisticated controls are used such as adjusting for socioeconomic status. However, students from public charter schools performed no better than their counterparts in other public schools. Supplementary analyses indicate several ways that educators from Catholic and public schools can learn from one another.

Over the last forty-five years, there has been a considerable amount of debate on the effects of faith-based schools and charter schools have on the academic achievement of children (Bryk, Lee, & Holland, 1993; Chubb & Moe, 1990; Coleman, Hoffer, & Kilgore, 1982; Garcia, Barber & Molnar, 2009). Different authors have come at this debate from a number of different angles. Sociologists such as James Coleman have focused on the social capital and cultural aspects of Catholic education as explaining much of the faith-based school advantage (Coleman, Hoffer, & Kilgore, 1982; Jeynes, 2003b). Bryk and his associates concurred with Coleman and this led the debate to the next logical step of asking whether there are certain moral dynamics and self-disciplinary practices extant in faith-based schools that can also be applied in part in the public sector (Bryk, Lee, & Holland, 1993; Jeynes, 2010). To be sure, these debates had a considerable impact on the school choice debate and also whether public schools could at least partially mimic some of the qualities that have made faith-based schools successful both in terms of scholastic outcomes and student behavior (Ireland, 2005). This has, in part, led to the popularity of public charter schools. Public charter schools each exist under a separate charter that allows them to exhibit some of the flexibility that people do not normally associate with traditional public schools (TPS) (Bifulco & Ladd, 2006).

REVIEW OF THE LITERATURE: THE JOURNEY THUS FAR

There is little question that by the mid-1960s, the American system of elementary and secondary school education in many respects was much more monolithic than the system had ever been (Gatto, 2001). Specifically, by the mid-1960s and in every decade since that point, approximately 90% of school children in the U.S. attended public schools (U.S. Department of Education, 2015). Most Americans do not recall living in a nation in which other expressions of education, mostly in the private sector, enjoyed much more influence than they do now. Intellectually, most of the nation's citizenry understand that for those who established the nation's first colleges and schools, they viewed education as the responsibility of the church much more than the state (Jeynes, 2007; Stewart, 1969). Consequently, nearly a century and a half elapsed between the founding of Harvard College (1636) and the first government college in Georgia (1785). Beginning in the 1600s, religious charity schools became the primary mode instruction to help ensure that people (especially in the North) who desired to receive an education could receive one (Cornog, 1998). Students were only asked to pay what they could afford to pay and for 80% of the students that meant that they paid little or nothing. Charity schools thrived well into the middle 1800s, supported largely by a generous

upper class that believed in giving back to society and an economically efficient system that was ultimately improved on by an Englishmen named Joseph Lancaster (Cornog, 1998).

With the rise of immigration in the 1830s and 1840s, however, it became increasingly hard for religious charity schools to continue to charge little or no tuition (Bourne, 1870). Concurrently, public school advocates led by Horace Mann, Emma Willard, and Henry Barnard called for taxes to be raised to ensure a continued emphasis on educating as many children as possible (MacMullen, 1991). From about 1837 until the 1860s, many charity schools increasingly turned to tax money from governments to supplement charitable giving, so that eventually many charity schools became public schools and other new public schools were founded. Even by the Civil War, however, most Americans believed that education was a responsibility of the church and not the government. By 1861, seven of the original thirteen states still did not have a state university, although they had a plentitude of Christian colleges (Tewksbury, 1932). Even by 1874, nearly 67% of American students attending high school attending a private school (Jeynes, 2007; King, 1964). In 1874, a key Supreme Court case in Kalamazoo, Michigan upheld public taxation for high schools (King, 1964). This decision set the stage for the number of public high schools to eventually exceed the number of private high schools and by 1892, about 70% of American high school students attended public schools (Jeynes, 2007; King, 1964).

The percentage of school population attending public schools continued to steadily rise through the remainder of the 1800s and into the 1900s. Public schools taught the Bible and allowed prayer, even as the Christian schools did (Westerhoff, 1982). In addition, with these facts in mind and with school taxes steadily rising and the formidable cost of tuition, parents increasingly sent their children to public schools (Gant, 2005). Generally, the wisdom of 90% American children attending public schools rather than private ones was not especially questioned until the infamous decline in most national and statewide test scores during the 1963-1980 period (Wirtz, 1977). However, at that time nations that had ordered plenteous literature on American schooling, suddenly reduced or ceased the ordering of materials on America's public school system (Jeynes, 2007).

Beginning in the mid-1960s researchers took note of viable alternatives to traditional public schools (TPS). The U. S. Supreme Court's 1962 and 1963 decisions to remove voluntary prayer and Bible reading from the public schools likely contributed to social scientists examining faith-based schools, in particular. Especially to the extent that schools, in the advent of these decisions, were now hesitant to risk teaching character traits in the schools such as love, forgiveness, the golden rule, and turning the other cheek, which in the views of some were infused with Judeo-Christian values, some theorists believed that the absence of these teachings could have behavioral and academic effects (Jeynes, 1999, 2003b). Some believed that these teachings and expressions created a culture of love and self-discipline in the schools that might enhance achievement (Jeynes, 2003b, 2014; Wirtz, 1977). In terms of examining the religious school culture and discipline probably no two researchers have done a more thorough job than James Coleman and Thomas Hoffer. In their book, *Public and Private High Schools: The Impact of Communities*, Coleman and Hoffer use their examination of the High School and Beyond data set to expound on why they believe that Catholic schools do possess high levels of social capital that enhances student performance and behavior (Coleman, Hoffer & Kilgore, 1981). In other writings of his Coleman (1988) further elaborates on this concept that is called the "social capital theory." In this theory Coleman posits that students attending Catholic schools have a higher degree of social capital invested into them. He argues that social capital represents the degree to which certain key members of a society invest their time, energy, wisdom, and knowledge in an individual or institution. It could also very well be more than coincidence that SAT scores started their decline at almost the exact same time that Catholic school enrollment started to decline (Jeynes, 2007).

With the above findings in mind, some educators argued that some of the qualities most apparent in explaining the success of Catholic schools could be incorporated into the public school orientation (Hudolin, 1994). Under the guidance of Anthony Bryk, the Chicago public school system was much the first to attempt to model several aspects of the Catholic school system (Bryk, Lee, & Holland, 1993; Hudolin, 1994). Although some character and other factors that contribute to the success of Catholic schools may be difficult to imitate, many social scientists believe that Catholic schools serve as a useful model for the public schools (Bryk, Lee, & Holland, 1993; LePore & Warren, 1997; McEwen, Knipe, & Gallagher, 1997).

IMPORTANCE OF DETERMINING WHICH SCHOOL PARADIGMS WORK BEST AND HOW THEY CAN LEARN FROM ONE ANOTHER

In the last two decades the debate has become even more complex as educators and politicians have considered the possibility that a greater level of competition should be allowed among schools in order to spur greater advancement. Perhaps the most notable of these arguments was propounded by as Chubb and Moe (1990) in their work *Politics, Markets, & America's Schools*. In this work, the authors ask a very logical rhetorical question. That is, why is it that educators and world leaders, almost universally, acknowledge that the United States has the best system of university education in the world and yet concurrently these same experts agree that the American system of public elementary and secondary schools is mediocre at best. And indeed, if one looks at the world rankings with any degree of objectivity, on this point at least Chubb and Moe are quite correct. If one examines the world rankings of universities that have been regularly disseminated out of China, Great Britain, and Germany over the last twenty years, American universities dominate the list (BBC, 2010). There is fairly strong recognition that if one states that he or she is a graduate of Harvard University, for example, it is almost equivalent to saying that one attended the best university in the world (BBC, 2010). The only real competition that Harvard, Princeton, and Yale receive for the top slots have generally come from Cambridge and Oxford universities in England (BBC, 2010). Equally impressive is the fact that universities such as Columbia, M.I.T., Stanford, Duke, Dartmouth, and Chicago are usually in the world's top 6-15 (BBC, 2010). Chubb and Moe answer their question by asserting that American public schools do not possess a good reputation, because there is no little competition in the elementary and secondary school sphere, when compared to universities. Technically, Chubb and Moe insisted that private schools be allowed to compete against public schools, but in the limitations of the real world Presidents George H. W. Bush and Bill Clinton especially embraced the idea of competition and advocated the establishment and expansion of charter schools.

The notion that there may be better alternatives to the TPS rubric, most notably religious private schools and charter schools, has received a great deal of attention because the number of charter schools in the United States has been surging. There is an ongoing debate regarding whether students from schools using these alternatives to the TPS paradigm perform better in class. Some researchers believe there is no difference and others assert that students from religious schools outperform public school students simply because public schools have a high percentage of low-SES and racial minority children (Baker, 1999). Moynihan (1989), however, presents evidence that suggests that the racial distribution of students in Catholic schools is similar to that found in public schools.

As important as this debate is, there has never been a meta-analysis undertaken that collectively considers TPS, public charter schools, and Catholic schools. A meta-analysis statistically combines all the relevant existing studies on a given subject in order to determine the aggregated results of said research. A meta-analysis is a quantitative approach to statistically summarizing the body of research on a given topic and therefore is extremely practical and useful for educators, academics,

government leaders, parents, and students who certainly do not have the time to read all of these individual studies, but want insight into what the overall body of research indicates. There are clearly enough studies that have been done on these educational paradigms to make a meta-analysis on this topic very valuable.

Three Research Questions Addressed In This Study

Three research questions, therefore, will rest at the heart of this meta-analysis that are especially pertinent to parents, educators, and government leaders. The first analysis determines the effect sizes of school types (i.e., Catholic and public charter versus traditional public schools). This approach does not utilize sophisticated controls that might have changed the effect sizes, but instead is designed to obtain a sense of what the overall effects of these schools actually is (research question 1). The second analysis assessed effect sizes using sophisticated controls, to get an idea of the influence of these schools when certain other factors, such as socioeconomic status, race, and individual history are considered in the analysis (research question 2). The third analysis examined the association between practices in these schools with student achievement (research question 3).

METHODS

Analytical Approach

This meta-analysis examined the relationship between the types of school (TPS, Catholic, and public charter) and kindergarten-12th grade school student achievement. The procedures employed to conduct the meta-analysis are outlined under this heading (Analytical Approach) and the following headings below: Data Collection Method, Statistical Methods, Study Quality Rating, and Effect Size Statistics, and Defining of Variables. Three research questions were addressed. The first analysis determined the effect sizes school types (i.e., Catholic, religious private and public charter versus traditional public schools) (research question 1). The second analysis assessed if effect sizes different for studies using sophisticated versus less sophisticated controls (research question 2). The third analysis examined the association between practices in these schools with student achievement (research question 3).

Each study included in this meta-analysis met the following criteria:

1) It needed to examine school type in a way that could be conceptually and statistically distinguished from other primary variables under consideration. For example, if a study examined schools generically or if two types of schools were somehow combined (e.g., semi-religious with charter), and the influence of school type could not be statistically isolated from the other features, the study was not included in the analysis.

2) It needed to include a sufficient amount of statistical information to determine effect sizes. That is, a study needed to contain enough information so that test statistics, such as those resulting from a t-test, analysis of variance, and so forth, were either provided in the study or could be determined from the means and measures of variance listed in the study.

3) If the study used a control group, it had to qualify as a true control group and therefore be a fair and accurate means of comparison. Moreover, if the research utilized a control group at some times but not others, only the former comparisons were included in the meta-analysis.

4) The study could be a published or unpublished study. This was to reduce the likelihood of publication bias.

Due to the nature of the criteria listed above, qualitative studies were not included in the analysis. Although qualitative studies are definitely valuable, they are difficult to code for quantitative purposes and any attempt to do so might bias the results of the meta-analysis.

Data Collection Method (Coding and Rater Reliability)

In order to obtain the studies used in the meta-analysis, a search was performed using every major social science research database (e.g., Psych Info, ERIC, Dissertation Abstracts International, Wilson Periodicals, Sociological Abstracts, and so forth), totaling 60 data bases, to find studies examining the relationship between school type (TPS, religious, and public charter) and the academic achievement of children from grades pre-kindergarten-12. The search terms included religious schools, achievement, Christian schools, Evangelical schools, Jewish schools, Lutheran schools, charter schools, competition, public school choice, magnet schools, community schools, neighborhood schools, Protestant schools, Islamic schools, raising achievement, faith-based schools, socioeconomic, urban schools, urban education, and many other similar terms. Reference sections from journal articles on school type's relationship with student outcomes were also examined to find additional research articles. E-mails were also sent to each of the Education department chairs of the over 100 Research 1 universities in the United States asking them if there were any faculty in their department who had either recently completed or was just about to complete a study examining the relationship between school type and student achievement and behavior. Although this comprehensive search yielded hundreds of articles and papers on school types and achievement, nearly all of these articles were not quantitative in nature. The research team obtained a total of over 148 studies that addressed the relationship under study and found 90 studies that had a sufficient degree of quantitative data to include in this meta-analysis.

A number of different characteristics of each study were included for use in this study. These characteristics included: (a) report characteristics, (b) sample characteristics, (c) intervention type, (d) the research design, (e) the grade level or age of the students, (f) the outcome and predictor variables, (g) the length (in weeks) of the school type assessment, (h) the attrition rate, and (i) the estimate of the relationship between school type and academic achievement. Two coders, who had been coding for at least 10 years, coded the studies on these characteristics and had 96% agreement on their coding of the following study characteristics.

Report Characteristics- Each study entry began with the name of the author of the study. Then the year the study was recorded, followed by the type of research report. Research reports were defined either as a journal article, book, book chapter, dissertation, Master's thesis, government, school or private report, conference paper, or other type of report.

Sample characteristics included the number of students sampled, their locations, and how they were selected, e.g., via random selection, stratified random selection, or via advertisement.

Intervention Type- the experimental or procedural manipulation used, if any, was recorded to determine the effects of school type on student achievement.

Research Design- The studies in this meta-analysis were categorized into three basic types of designs. First, it was noted the studies that employed some type of manipulations to assess the effects of the three school types under study.

The second type of design included studies that took cross-sectional measures of the effect of a school type without utilizing any type of manipulation. The third type of design involved the calculation of a correlation coefficient between the school type and student educational outcomes.

For the cross-sectional studies and correlation studies, if it was available, the following were also recorded: (a) the socio-economic status of participants in the sample and (b) the types of behavioral and academic measures that were used.

The grade level or age of the students was coded, including means and standard deviations when they were available.

The outcome and predictor variables from each study were coded to include the different ways that achievement was measured.

Attrition Rate- When available, the attrition rate of each study was coded.

The estimate of the relationship between school type involvement and student achievement- The process of the effect size estimation is described in the next section.

Statistical Methods and the Effect Size Statistic

Effect sizes were computed from data in such forms as t tests, F tests, p levels, frequencies, and r-values via conversion formulas provided by Glass and his colleagues (Glass, McGaw & Smith, 1981). When results were not significant, studies sometimes reported only a significance level. In the unusual case that the direction of these not significant results was not available, the effect size were calculated to be zero.

For studies with manipulations I used the standardized mean difference to estimate the effect of school type. The *d*-index (Cohen, 1988) is a scale-free measure of the separation between two group means. Calculating the *d*-index for any comparison involves dividing the difference between the two group means by either their average standard deviation or by the standard deviation of the control group. In the meta-analysis, I subtracted the experimental group mean from the control group mean and divided the difference by their average standard deviation. Hence, positive effect sizes indicated that various factors were successful in reducing the achievement gap. As a supplement to these analyses, the Hedges' "g" measure of effect size was used (Hedges, 1981). Since it employed the pooled standard deviation in the denominator, it customarily provided a more conservative estimate of effect size. Hedges also provided a correction factor that helped to adjust for the impact of small samples.

For studies that involved cross-sectional measures of the relationship between school type and achievement, the following procedures were undertaken. For those studies that attempted to statistically equate students on other variables, the preferred measure of relationship strength was the standardized beta-weight, . These parameters were determined from the output of multiple regression analyses. If beta-weights could not be obtained from study reports, the most similar measures of effect (e.g., unstandardized regression weights) were retrieved.

For studies that involved cross-sectional measures but included no attempt to statistically equate students on third variables, the results from the t-tests, F-tests, and correlation studies provided by the researchers in the study were used. Probability values were used as a basis for computation only if the researchers did not supply any of information on the test statistics just mentioned.

Calculating average effect sizes. A weighting procedure was used to calculate average effect sizes across all the comparisons. First, each independent effect size was first multiplied by the inverse of its variance. The sum of these products was then divided by the sum of the inverses. Then, 95%

confidence intervals were calculated. As Hedges and Vevea (1998) recommend, all the analyses were conducted using fixed-error assumptions in one analysis and applied random-error assumptions in the other. The numerical results listed in this article are based on, the more conservative, random-error assumptions, unless otherwise noted. However, it was noted in the text when the fixed-error results differed considerably from those using the random-error assumptions.

If there was more than one effect size presented in the results section, the effect size that was chosen was based on that which referred to: a) the overall sample and b) the purest measure of school type. In the case of results that included clear statistical outliers, the presence of these outliers was acknowledged and then supplemental analyses were run without such an outlier in order to estimate the degree to which the presence of an outlier might have affected the results.

Tests of homogeneity were completed on the school types to gain a sense of the consistency of specific school type measures across studies.

Study Quality Rating

Two researchers coded the studies independently for quality, the presence of randomization, and whether the schools being examined satisfied definitional criteria for that school type. Study quality and the use of random samples were graded on a 0 (lowest) to 3 (highest) scale. Quality was determined using the following:

1) Did it use randomization of assignment? 2) Did it avoid mono-method bias? 3) Did it avoid mono-operation bias? 4) Did it avoid selection bias? 5) Did it use a specific definition of school type?

We calculated inter-rater reliability by computing percentage of agreement on: school type, issues of randomization, and quality of the study. Inter-rater reliability was 100% on school type, 92% for the quality of the study, 95% for randomization, 96% for avoiding mono-method bias, 94% for avoiding mono-operation bias, 92% for avoiding selection bias.

Two supplementary analyses were done to include first, only those studies with quality ratings of 2 and 3 and second, only those studies with quality ratings of 1-3.

Defining of Variables

For the purposes of this study, attending a *Catholic school* was defined as a student attending a private school that was sponsored by the Catholic church and was defined to meet certain religious and educational goals. A *Charter school* was defined as a public state legislated school that operates independently from the local school board and operates under a separate charter.

Regarding the factors that will be used to assess some of the distinguishing factors (strengths and weaknesses) between public- and Catholic- schools, the following definitions were utilized:

Taking Harder Courses- Defined as students being more likely to take higher-level courses such as Advanced Placement (AP) and Honors courses, when compared to students at their same academic levels.

High Expectations- Defined teachers in this manner when they anticipated that students could achieve and accomplish at higher levels, when compared to teachers who instructed students at the same academic levels in other schools.

Achievement Gap- For the purposes of this study, the achievement gap was defined as the difference in academic achievement that exists between the average white student and the average African American and/or Latino student.

Classroom Flexibility- The degree to which students reported that they could engage in classroom discussions that took place in the class or could easily choose electives as their course choices.

Types of Analyses and Models Utilized

Two sets of statistical procedures were done to distinguish between studies. First, one analysis distinguished between those analyses that included sophisticated controls in their analyses (e.g., socioeconomic status, race, and gender) and those studies that did not. This was the primary way that studies were distinguished, in comparing school types. Second, supplementary analyses were undertaken to distinguish between two models researchers utilized in their studies. The first model, Model A, included all the studies that examined the impact of Catholic versus public schools. The second model, Model B, looked at a similar sample of studies but excludes those studies controlling for some of the educational emphases that are often used to explain the differences in achievement. These studies were excluded in Model B, because if a study controlled for some of the specific educational emphases that often explain the academic differences, then they would tend to understate differences that exist between religious and public schools. Specifically, studies were excluded from Model B, if they controlled for whether a school had a high percentage of students on the academic track and if they controlled for parental involvement. The problem with controlling for these variables is that many social scientists believe that the fact that religious schools insist that more of their students be on the academic track and that parents be strongly involved in education are two of the reasons why parochial school students outperform their counterparts in public schools (Gamoran, 1992; Sander, 1996). Although, for the purposes of this meta-analysis, academics were the primary focus, behavioral variables were also examined.

RESULTS

The effects for Catholic schools ranged from +.70 to -.07 standard deviation units. The effects for charter schools showed a considerably greater variation, spanning from +.75 to -.87 standard deviation units. In the case of charter schools 53% of the studies indicated a negative association between charter schools and education outcomes, when compared to students attending traditional public schools (TPS). The difference between the highest and lowest effects for Catholic schools (.77 standard deviation units) was considerably smaller than for charter schools (1.62 standard deviation units).

In table 1 are listed findings regarding the studies included in this meta-analysis, as well as the correlations between the quality of the study and whether a random sample was used on the one hand and the year the study was done and the overall effect ("d") on the other. The results listed in table 1 indicate that the mean year of the studies examined was 1995.1. The average quality rating for all the studies examined, using the 0 (lowest) to 3 (highest) scale was a 2.17. This rating would indicate a pretty high average quality rating, with 1.5 considered about average. The ratings for the extent a random sample was used (which was also one component of the quality rating) was 1.81 for all the studies overall. Although numerically speaking higher quality studies were slightly associated with positive effect sizes, this amount (.12, $p>.05$), did not reach statistical significance. The correlation between using a random sample and positive effect sizes was also not statistically significant (.06, $p>.05$).

TABLE 1- Means for Measures Assessing the Quality of Study, whether a Random Sample was used, Year of Study, and Sample Size for the 90 studies included in the meta-analysis

	Mean	Number of Studies in Each Category	Range	Correlation Coefficient
Year of Study	1995.1	2002+= 39 1992-2001= 18 1982-1991= 26 1972-1981= 3 before 1972= 4	1960-2011	
Quality of Study	2.17	3= 47 2= 18 1= 18 0= 7	0-3	
Random Sample Used	1.81	3= 25 2= 30 1= 28 0= 7	0-3	
Correlation Between Quality of Study & Effect Size				.12
Correlation Between Study Year & Effect Size				.06

Note for correlation coefficients: * = p<.05, ** = p<.01. Otherwise the Correlation coefficient was not statistically significant

Table 2 indicates the effects for students attending Catholic schools and public charter schools, examining academic achievement overall and standardized tests specifically, as well as behavioral outcomes. All of the effect size measures for religious schools were statistically significant. In contrast, none of the effect sizes for public charter schools were statistically significant in *either* the positive *or* negative direction. For both U.S. and foreign schools combined the effect sizes for religious schools for both models A and B were .26 standard deviation units for all measures of academic achievement combined and .27 for standardized tests specifically (p<.01). For American schools alone the effect sizes were somewhat higher. For both models A and B, for overall achievement the effect sizes were .29 and for standardized tests specifically they were .30 standard deviation units for standardized tests specifically (p<.01). For those studies that used sophisticated controls, the effect sizes were smaller, but were still statistically significant at the .05 level of probability. For both U.S. and foreign schools combined the effect sizes for Catholic schools for model B and A were .14 (p<.05) and .12 (p<.05) standard deviation units, respectively, for all measures of academic achievement combined and .15 (p<.05) and .13 (p<.05) for standardized tests. For American schools alone the effect sizes were somewhat higher. In this case, the effect sizes for Catholic schools for model B and A were .15 (p<.05) and .13 (p<.05) standard deviation units, respectively, for all measures of academic achievement combined .16 (p<.05) and .14 (p<.05) for standardized tests.

Analyses were also done excluding the two studies undertaken by the author. These studies both involved utilizing the National Education Longitudinal Study (NELS) data set. The exclusion of these

two studies had no change on the statistical significance levels of the meta-analysis and had little or no impact on the effect sizes, with the smallest impact being .00 of a standard deviation unit change and the largest impact being .01 of a standard deviation unit change. In the case of analyses that did not include sophisticated controls, for both U.S. and foreign schools combined, the effect sizes for parochial schools for model B were .26 standard deviation units for all measures of academic achievement combined and .26 for standardized tests specifically ($p<.01$). When sophisticated controls were included, the effect sizes were for all measures of academic achievement combined and .13 ($p<.05$) and .14 ($p<.05$) for standardized tests.

For behavioral outcomes, students from Catholic schools were more likely to show more positive behavior than their counterparts in traditional public schools. For those studies that did not utilize sophisticated controls the effect size was .37 ($p<.01$) of a standard deviation unit. For those studies that did utilize sophisticated controls the effect size was .36 ($p<.01$) of a standard deviation unit.

In the case of charter schools no statistically significant differences emerged. All the studies that were done on charter schools focused on American schools. When the studies did not use sophisticated controls, the effect sizes were near zero, at .01 and when there were sophisticated controls employed the effect sizes were slightly negative, but not to a statistically significant degree at -.03.

TABLE 2- Effect Sizes for Catholic School Students and Public Charter School Students Compared to their Counterparts in Traditional Public Schools (TPS) for the 90 Studies in the Meta-analysis. Effect Sizes Include those for Overall Achievement & for Standardized Tests

	CATHOLIC SCHOOLS Overall Academic Achievement	CATHOLIC SCHOOLS Achievement on Standardized Tests	CHARTER SCHOOLS Overall Academic Achievement	CHARTER SCHOOLS Achievement on Standardized Tests
U.S. & Foreign Without Sophisticated Controls using Model B	.26** (.07, .45)	.27** (.07, .47)	.01 [b]	.01 [b]
U.S. & Foreign Without Sophisticated Controls using Model A	.26** (.06, .46)	.27** (.07, .47)	.01 [b]	.01 [b]
American Schools Without Sophisticated Controls using Model B	.29** (.08, .50)	.30**(.08, .52)	.01 [b]	.01 [b]
American Schools Without Sophisticated Controls using Model A	.29** (.07, .51)	.30** (.08, .52)	.01 [b]	.01 [b]
U.S. & Foreign Using Sophisticated Controls using Model B	.14* (.02, .26)	.15* (.03, .27)	-.03 [b]	-.03 [b]
U.S. & Foreign Using Sophisticated Controls using Model A	.12* (.01, .23)	.13* (.02, .24)	-.03 [b]	-.03 [b]
American Schools Using Sophisticated Controls using Model B	.15* (.03, .27)	.16* (.03, .29)	-.03 [b]	-.03 [b]
American Schools Using Sophisticated	.13* (.01, .25)	.14* (.02, .26)	-.03 [b]	-.03 [b]

Controls using Model A				
U.S. & Foreign Without Sophisticated Controls using Model B excluding author's 2 studies	.26** (.06, .46)	.26** (.06, .46)	.01 [b]	.01 [b]
U.S. & Foreign Using Sophisticated Controls using Model B excluding author's 2 studies	.13* (.01, .25)	.14* (.02, .26)	-.03 [b]	-.03 [b]
Behavioral Measures	.35** (.11, .59)	.34** (.10, .58)	Not applicable	Not applicable

Note: b= All the charter schools were in the United States

* = p<.05, ** = p<.01

Table 3 reflects the same analyses undertaken in Table 2 except including only those studies rated 2-3 in quality. Analyses were also undertaken including only those studies rated 1-3 in quality, but as one might expect, because there were so few studies rated "0" in quality, the results were almost identical to those presented in table 3. Using the higher quality (2-3) studies, the effect sizes for religious schools were somewhat higher than those in table 3. All of them rose in the range of .01 to .02 standard deviation units. But none of them rose to a degree sufficient to increase the level of statistical significance. For both U.S. and foreign schools combined, where sophisticated controls were not employed, the effect sizes for Catholic schools for model B was .28 standard deviation units for all measures of academic achievement combined and .29 for standardized tests specifically (p<.01). For American schools alone the effect sizes were somewhat higher. For model B, for overall achievement the effect size was .31 and for standardized tests specifically they were .32 standard deviation units (p<.01). For U.S. and foreign schools combined, studies that used sophisticated controls for model B yielded an effect size of .15 (p<.05) for all measures of academic achievement combined and .16 (p<.05) standard deviation units for standardized tests. For American school studies that used sophisticated controls, for model B the effects were .16 (p<.05) for all measures of academic achievement combined and .17 (p<.05) standard deviation units for standardized tests.

For behavioral outcomes, assessing only the studies rated 2 and 3 in the analysis did not change any of the effect sizes. The effect sizes remained.35 (p<.01) of a standard deviation unit, for those analyses that did not utilize sophisticated controls and .34 (p<.01) of a standard deviation unit for those studies that did use sophisticated controls.

For charter schools, including only the studies rated 2 and 3 in the analysis did not change any of the effect sizes, when rounded to the nearest one hundredth. This is largely because so many of the studies of charter schools were rated 2 and were similar to each other in quality.

TABLE 3- Effect Sizes (ES) for Catholic School Students and Public Charter School Students Compared to their Counterparts in Traditional Public Schools (TPS) for the Studies Rated 2-3 in Quality (N=65). Effect Sizes Include those for Overall Achievement & for Standardized Tests

	CATHOLIC SCHOOLS Overall Academic Achievement	CATHOLIC SCHOOLS Achievement on Standardized Tests	CHARTER SCHOOLS Overall Academic Achievement	CHARTER SCHOOLS Achievement on Standardized Tests
U.S. & Foreign Without Sophisticated Controls using Model B	.28** (.08, .48)	.29** (.09, .49)	.01 [b]	.01 [b]

U.S. & Foreign Without Sophisticated Controls using Model A	.28** (.07, .49)	.29** (.08, .50)	.01 [b]	.01 [b]
American Schools Without Sophisticated Controls using Model B	.31** (.09, .53)	.32**(.09, .55)	.01 [b]	.01 [b]
American Schools Without Sophisticated Controls using Model A	.31** (.09, .53)	.32** (.09, .55)	.01 [b]	.01 [b]
U.S. & Foreign Using Sophisticated Controls using Model B	.15* (.02, .28)	.16* (.03, .29)	-.03 [b]	-.03 [b]
U.S. & Foreign Using Sophisticated Controls using Model A	.13* (.01, .25)	.14* (.02, .26)	-.03 [b]	-.03 [b]
American Schools Using Sophisticated Controls using Model B	.16* (.03, .29)	.17* (.03, .31)	-.03 [b]	-.03 [b]
American Schools Using Sophisticated Controls using Model A	.14* (.01, .27)	.15* (.02, .28)	-.03 [b]	-.03 [b]
U.S. & Foreign Without Sophisticated Controls using Model B excluding author's 2 studies	.28** (.06, .50)	.29** (.06, .50)	.01 [b]	.01 [b]
U.S. & Foreign Using Sophisticated Controls using Model B excluding author's 2 studies	.14* (.01, .27)	.15* (.02, .28)	-.03 [b]	-.03 [b]
Behavioral Measures	.37** (.11, .59)	.35** (.10, .58)	Not applicable	Not applicable

Note: b= All the charter schools were in the United States

* = p<.05, ** = p<.01

Table 4 addresses the results of comparisons that are even more specific than those focused on in tables 2 and 3. Table 4 examines comparisons at the elementary and secondary level, as well as for African American and Latino students. The pattern for table 4 was similar to that of tables 2 and 3 in that all of the effect size measures for religious schools were statistically significant. In contrast, none of the effect sizes for public charter schools were statistically significant in *either* the positive *or* negative direction. Numerically speaking, the effect sizes for secondary school students attending religious schools were slightly higher than for those attending elementary schools, but these differences were not statistically significant. For American elementary schools, when sophisticated controls were not used, the effect sizes for Catholic schools for both models A and B were .28 standard deviation units for all measures of academic achievement combined and .29 for standardized tests specifically (p<.01). For American secondary schools the effect sizes were somewhat higher. For both models A and B for overall achievement the effect sizes were .31 and for standardized tests specifically they were .32 standard deviation units (p<.01). For those studies that used sophisticated controls, the effect sizes were smaller, but were still statistically significant, but at the .05 level of probability. For elementary schools the effect sizes for parochial schools for model B and A were .14 (p<.05) and .12 (p<.05) standard deviation units, respectively, for all measures of academic achievement combined and .15 (p<.05) and .13 (p<.05) for standardized tests. For

secondary schools the effect sizes were somewhat higher. In this case, the effect sizes for religious schools for model B and A were .16 (p<.05) and .14 (p<.05) standard deviation units, respectively, for all measures of academic achievement combined and .17 (p<.05) and .15 (p<.05) for standardized tests.

Among African American and Latino students, the effects sizes for attending Catholic schools were .36 (p<.01) for overall academic achievement and .40 (p<.01) for standardized tests, when there were not sophisticated controls employed. When sophisticated controls were applied, the effects sizes for African American and Latino students attending religious schools rather than public schools were .19 (p<.01) for overall academic achievement and .22 (p<.01) for standardized tests.

In the case of charter schools, once again no statistically significant differences emerged. When no sophisticated controls were employed the effect sizes for elementary and secondary schools were -.04 (p >.05) and .06 (p >.05), respectively. When sophisticated controls were used the effect sizes for elementary and secondary schools were -.06 (p >.05) and .00 (p >.05), respectively.

TABLE 4- Effect Sizes for Catholic School Students & Public Charter School Students, at Different Grade Levels and for Different Ethnicities, Compared to their Counterparts in Traditional Public Schools for the 90 Studies in the Meta-analysis. Results Listed for Overall Achievement & for Standardized Tests

	CATHOLIC SCHOOLS Overall Academic Achievement	CATHOLIC SCHOOLS Achievement on Standardized Tests	CHARTER SCHOOLS Overall Academic Achievement	CHARTER SCHOOLS Achievement on Standardized Tests
American Elementary Schools Without Sophisticated Controls using Model B	.28** (.07, .47)	.29** (.08, .48)	-.04 [b]	-.04 [b]
American Elementary Schools Without Sophisticated Controls using Model A	.28** (.07, .47)	.29** (.08, .48)	-.04 [b]	-.04 [b]
American Secondary Schools Without Sophisticated Controls using Model B	.30** (.09, .49)	.31** (.09, .51)	.06 [b]	.06 [b]
American Secondary Schools Without Sophisticated Controls using Model A	.30** (.09, .49)	.31** (.09, .51)	.06 [b]	.06 [b]
American Elementary Schools With Sophisticated Controls using Model B	.14* (.03, .25)	.15* (.03, .27)	-.06 [b]	-.06 [b]
American Elementary Schools With Sophisticated Controls using Model A	.12* (.01, .23)	.13* (.02, .24)	-.06 [b]	-.06 [b]
American Secondary Schools With Sophisticated	.16* (.03, .29)	.17* (.03, .31)	.00 [b]	.00 [b]

Controls using Model B				
American Secondary Schools With Sophisticated Controls using Model A	.14* (.01, .27)	.15* (.01, .29)	.00 [b]	.00 [b]
African American and Latino Students Without Sophisticated Controls using Model B	.36** (.11, .59)	.40** (.12, .66)	.01 [b]	.01 [b]
African American and Latino Students With Sophisticated Controls using Model B	.19* (.03, .33)	.22* (.06, .36)	-.03 [b]	-.03 [b]

Note: b= All the charter schools were in the United States

* = p<.05, ** = p<.01

The third research question regarding the association between practices in Catholic- and public-schools is addressed in table 5. For three of the four practices examined, the effect sizes favored students attending faith-based private schools. When sophisticated controls were not used in the study, the effect sizes favoring children from Catholic private schools were .24 (p<.05) for taking harder courses, .24 (p<.05) for teachers having high expectations of their students, and .15 (p<.05) for a reduction in the achievement gap (between white students and African American and Latino students). When sophisticated controls were used in the study, the effect sizes favoring children from parochial schools were .19 (p<.05) for taking harder courses and .20 (p<.05) for teachers having high expectations of their students. The effect size for a reduction in the achievement gap was no longer statistically significant and .07 (p>.05), although it was numerically in the same direction as the effect size without the use of sophisticated controls. For all the studies combined, the effect sizes favoring children from faith-based private schools were .21 (p<.05) for taking harder courses, .21 (p<.05) for teachers having high expectations of their students, and .10 (p<.05) for a reduction in the achievement gap.

In contrast, the results for classroom flexibility, as defined in the Methods Section, showed an advantage for traditional public school students (TPS) when compared to their counterparts attending parochial schools. When sophisticated controls were not used in the study, the effect sizes favoring children from public schools was -.16 (p<.05). When sophisticated controls were used in the study and for all the studies combined, the results were similar at -.14 (p<.05) and -.15 (p<.05) respectively.

TABLE 5- Effect Sizes Indicating Strengths and Weaknesses of Religious Private Schools and Traditional Public Schools for the 90 Studies

Variables Examined	Overall Effect Size	Effect Size for without Sophisticated Controls	Effect Size for without Sophisticated Controls
Taking Harder Courses	.21*	.24*	.19*
High Expectations	.21*	.24*	.20*
Reduction of Achievement Gap	.10*	.15*	.07
Classroom Flexibility	-.15*	-.16*	-.14*

* = p<.05, ** = p<.01

DISCUSSION

The results of the study suggest rather mixed results for schools that are not Traditional Public Schools (TPS). This meta-analysis indicates that students who attend Catholic schools perform better than their counterparts who are in public schools. They achieve better both in terms of academic and behavioral outcomes at statistically significant levels. In contrast, youth attending charter schools on average did not do any better than their counterparts in traditional public schools.

FIRST AND SECOND RESEARCH QUESTIONS

The findings for the first research question indicated that the effect sizes for Catholic schools tended to be slightly over a quarter of a standard deviation unit favoring these schools in academic measures and .35 of a standard deviation unit for behavioral measures. For the second research question, which utilized sophisticated controls, the religious school advantage tended to be reduced to just below .15 standard deviation units for academic measures. However, for behavioral measures it remained above one-third of a standard deviation unit. Statistically different results emerge even when sophisticated controls are used, that consider the influence of socioeconomic status (SES), selectivity, and other factors. Although the differences vary somewhat depending on the age of the students and the measure utilized, the overall academic difference for all the studies combined appears to be approximately two-tenths of a standard deviation, favoring Catholic schools. The behavioral measures, on the other hand, were roughly the same whether or not sophisticated controls were used at nearly .35 of a standard deviation unit.

In contrast, however, statistically significant differences did not emerge when students in public charter schools were compared with children in traditional public schools. Not only were the differences not statistically significant, but also the differences were very close to zero that there appeared to be no hint at a general direction that for some reason might not have reached statistical significance.

These results clearly have significance in their own right, but the findings also have ramifications for the school choice debate. Over the last several decades the school choice debate has emerged as one of the most intriguing discussions in education (Chubb & Moe, 1990; Jeynes, 2000, 2014). There is little question that two simultaneous realities caused the school choice debate to intensify. First, student achievement in public schools dropped 17 consecutive years from 1963-1980 and SAT verbal scores have continued to break all time lows in the last few years (U.S. Department of Education, 2015). Second, taxes to support American public schools soared from the 1950s until the present time, far outpacing rises in inflation (U.S. Department of Education, 2015). This made private schools unaffordable to myriad citizens who otherwise would have utilized them (Glenn, 2011; Peterson, 2006; Wells, 2002). As a result, the calls increased for some relief from the tax burden imposed on American parents (Chubb & Moe, 1990; Peterson, 2006; Wells, 2002).

Moreover, this deliberation has reached such intense levels that school choice became a central topic of conversation among many of America's foremost leaders (Jeynes, 2007; Glenn, 2011; Wells, 2002). At earlier stages in this debate, most of the focus was on the effects of youth attending faith-based schools versus those attending TPS, controlling for SES and other factors (Bryk, Lee, & Holland, 1993; Chubb & Moe, 1990; Jeynes, 2003b). Nevertheless, Presidents H. W. Bush and Clinton concluded that a strategy of limiting school choice to the public sector was an easier and less complex way of incorporating the benefits of additional competition (Jeynes, 2007; Glenn, 2011; Wells, 2002). Consequently, the nation inaugurated a public school choice program that was designed to incorporate at least some of the recommendations of Chubb and Moe and others to make the U.S. school system more competitive. This decision, made by President Bush and especially

President Clinton, caused the number of charter and magnet schools to surge (Imberman, 2011a). Concurrently, however, there was a considerable decrease in the percentage of students attending faith-based schools, particularly in the inner city (White House, 2008). Once again, parents point to the rising rates of taxation to support American public schools as being one of the primary reasons for this trend (Glenn, 2011; Wells, 2002).

Given that a meta-analysis essentially quantifiably summarizes the existing body of research, there are some reasons for both encouragement and concern based on the results of this study. In terms of encouragement, there are several findings that should either inspire or at least calm those individuals most concerned about the state of American education. First, the Catholic sector appears to produce students that have pretty strong academic and behavioral outcomes. One should be able rejoice of any major sector of education that appears to be benefiting students. Second, the Catholic sector appears to be associated with high scholastic outcomes even though it costs far less per student to schoolchildren than any of the other competing public school sector.

Third, these results suggest that educators would be wise to at least investigate the possibility of expanding school choice programs to include the private sector, not only with educational and behavioral outcomes in mind, but also as a means of alleviating budgetary pressures that are commonly exerted upon various levels of government. The reality is that educational expenditures often represent about half of state and local government outlays at the state and local level (California State Government, 2006). As a result, the current budgetary crisis that pervades virtually every level of the U.S, government is indubitably impacting the quality of instruction that is available to all American students (U.S. Department of Education, 2011). Ultimately, numerous Americans could be faced with a very difficult quandary. That is, they must either become resolved to the notion that their children are bound to experience a steady decline in educational standards until America's budgetary problems are resolved or they can open up their minds to a greater diversity of schooling options than is presently the case. As difficult a situation as this might be, one can argue that it is inevitable.

Admittedly, the public sector maintains almost a monopoly on the institutional training and preparation of the nation's youth and that is too considerable a level of dominance for any institution to be expected to uphold. In addition, in a nation that espouses diversity and variety as much as it supposedly does, there is a certain degree of irony that public educators are often so resistant to various and sundry expressions of non-public instruction (Glenn, 2011; Jeynes, 1999). Sometimes it takes crises to cause people to open up their minds to tolerate and embrace other ideas (Gatto, 2001; Jeynes, 2007). Perhaps with the threat of almost perpetual budget deficits facing federal and state governments for as far as forecasters can see, the idea that there are others who would like to help educate the nation's children, who can potentially alleviate some of these fiscal tensions, may not seem so distasteful. It may also be that as public instructors allow those in the faith-based sector a place at the table, in terms of formulating government policy, it might make it easier for teachers in the private sector to have a more open attitude toward those in the public sector as well.

Equally true, however, is that these results also raise certain concerns. First, this meta-analysis accentuates the fact that TPS are likely not satisfying the expectations of many American parents. The TPS rubric does not fare particularly well either when compared to religious schools or public charter institutions. Public school student achievement trails that of their counterparts in faith-based schools and fares no better than youth in charter schools. These results are especially disconcerting when one considers that students in TPS receive far more funding than youth in religious schools generally and somewhat more than those in charter schools (U.S. Department of Education, 2011). In fact, the gap between public- and faith-based schools is so great that even students in inner city public schools receive considerably more education funding than the average student at a religious

school (Glenn, 2011; U.S. Department of Education, 2011). This is particularly worthy of note because countless public school advocates point to inadequate funding as the primary reason why inner city children under-perform other youth (Berliner & Biddle, 1995; Bracey, 1997). This is not stated to discourage additional funding on education, but it does appear to support the idea of educational efficiency (Glenn, 2011; Jeynes, 1999; Peterson, 2006). That is how well school and government officials spend money may be more important than how much is spent (Jeynes, 2008). These financial facts, in conjunction with the results of this meta-analysis, also suggest that there are likely factors beyond money that explain the Catholic school advantage in achievement (Jeynes, 1999, 2003a, 2005).

THIRD RESEARCH QUESTION

The third research question regarding the association between practices in Catholic and public-schools is worthy of much discussion, In the case of three of the four practices examined, the effect sizes favored students attending parochial schools. Nevertheless, the one area where traditional public schools held an advantage (classroom flexibility) is also thought provoking. From the meta-analysis, it appears that teachers from Catholic schools are more demanding and expect higher levels of attainment from their students of equal status scholastically. In addition, it appears that the achievement gap is narrower at Catholic schools than it is at traditional public schools. It is conceivable that these three variables may overlap to some extent. That is, the achievement gap might be narrower at Catholic schools, in part, because religious educators are more likely to believe that children, no matter what their color and background, can achieve and reach great potential. Consequently, they are more likely to have high expectations and insist that these students take demanding courses.

In spite of the possible hypothesis just presented, giving some elaboration on why these findings emerged, there are copious alternative explanations. For example, Sander (1996) asserts that one reason why African Americans perform better in religious schools is that Christians are more likely to see people as equal because they are made in the image of God. Others argue that a sense of purpose in life, which is often associated with faith is a plausible explanation for the high standards common in faith-based schools (Jeynes, 2003b; McKnight, 2003). Still other social scientists point to Weber's notion of an ethic of a strong motivation to work hard as a means of showing love to others and fulfill a heavenly calling as possible explanations (Jeynes, 1999, 2003b). An alternative view, given by some, is that Catholic schools promote parental involvement more than public schools do (Bryk, Lee & Holland, 1993; Coleman, 1988; Coleman, Hoffer, & Kilgore, 1982). One might ask why it is that Catholic schools are more likely to be associated with parental involvement and also caring teachers. Coleman asserts that religious and public schools have very different orientations that result in religious school students eventually being endowed with higher levels of social capital.

One problem that emerges in studying the effects of religious schools, however, is that increasingly researchers try to control for the very qualities that likely contribute to the academic advantage enjoyed by youth from faith-based schools. Some studies control for whether students took more demanding courses, had teachers with higher standards, and the self-reliant attitudes that religious people often possess that leads them to refuse to take government help or what some term "hand outs." Some studies examining high school achievement also control for "past achievement," but if attending religious schools for eight or ten years, for example, is largely responsible for producing that achievement edge, it seems ill-advised to say the least, to control for past achievement in such a simplistic way. In addition, should social scientists have blanket controls for parental involvement and whether students are English Language Learners, when faith-based schools go to great lengths to involve parents and help their students master English.

This meta-analysis attempted to adjust to the tendency for certain studies to "over control" for variables that likely explained, in part, the faith-based advantage by using Models A and B.

Nevertheless, this meta-analysis quite possibly still understated the effects of faith-based schools to some degree. This possibility may be increased somewhat by the decision to report effects sizes using a random effects model rather than a fixed effects model. The former approach tends to yield more conservative effect sizes than in the latter case. However, it should be noted that in the case of this meta-analysis, the differences between these two models was not especially large for faith-based schools and was almost not existent in the case of public charter institutions. It should be noted, however, that there is perhaps greater wisdom in understating the effects of a given instructional paradigm than in possibly overstating its influence.

It should also be noted that in terms of classroom flexibility, traditional public schools had the edge of Catholic ones. Public school students believed that they had more opportunity to engage in classroom discussion and choose elective courses than their counterparts in religious schools. The difference in the perception of access to elective courses in public schools is probably pretty accurate. By their sheer enrollment advantage and employment base, it seems intuitive that public schools might possess a greater inherent ability to offer a wider array of classes to their students (Gatto, 2001). Concurrent to this reality though is the fact that by an emphasis on the basics, a strong academic foundation, and more advanced courses than one typically witnesses in public schools, that focus will tend to yield an emphasis on the basics and intellectual advancement in key subjects and a curriculum that emphasizes preparation for the real world (Coleman, 1988; Gatto, 2001). Indeed, some social scientists have pointed out that a child-centered curriculum filled with a plethora of electives may not best serve the long-term interests of the children; and therefore a preparation-centered curriculum might be more appropriate. While one might argue whether there is room for a centrist position in this debate, the meta-analytic data suggest that public schools have a Deweyian child-centered approach versus the preparation-centered orientation espoused by most Catholic schools.

To be sure, faith-based teachers might be more inclined to embrace certain aspects of classroom flexibility more than others (Boyer, 1995; Gatto, 2001). That is, to the extent that traditional public schools are more likely to encourage class discussion, religious instructors might find that this component of classroom flexibility might be worthy of emulation. Although technically one might argue that a large amount of time spent on classroom discussion runs the risk of a de facto reduction in instruction time, one would think this does not necessarily have to be the case if the discussion is specifically designed to: 1) complement the material taught and 2) occurs at intervals of time in which students would absorb more, if there was a brief respite from the usual instruction time (Boyer, 1995).

THOUGHTS FOR CONSIDERATION

What this meta-analysis, and the studies that follow, suggest is that Catholic and public schools of various types have something to learn from one another. And to the degree that is the case, there is something to be said for viewing education more holistically than hoping the best for their own sector and considerably less than that for competing sectors. The nation's children likely deserve better. It would seem that both the public and private sector can learn from one another, work more cooperatively, and together build a better American school system. For their part, it would seem that public school advocates, including many academics might do well to admit some of the advantages maintained by faith-based schools and see to what extent some of their strengths can be emulated. Similarly, faith-based schools might do relatively well comparatively speaking, but greater classroom flexibility would likely make their school systems that much better.

Limitations of Study

The primary limitation of this meta-analysis, or any meta-analysis, is that it is restricted to analyzing the existing body of literature. Therefore, even if the researcher conducting the quantitative integrations sees ways the studies included could have been improved, there is no way to implement those changes. A second limitation of a meta-analysis is that the social scientist is limited to addressing the same research questions addressed in the aggregated studies. One can only address the questions that have been asked by researchers and cannot fully manipulate the variables in the same way as if he or she was conducting an original study.

RECOMMENDATIONS FOR FURTHER RESEARCH

There is clearly more that the academic community needs to know regarding the effects of charter schools and religious private schools, in particular. For example, Hoxby (2004) as well as Carpenter and Medina (2011), argue that in school districts with a relatively large number of charter schools, the presence of charter schools causes a more competitive environment. Consequently, they assert that there is evidence that the educational outcomes of other public schools rise. One might recall that Chubb and Moe (1990) argued that if private schools are allowed to compete with public schools, via school choice programs, it would cause public schools to raise their standards and perform at higher levels academically. The assumption by Chubb and Moe, however, is that this would occur because students from faith-based and other private schools achieved at such high levels. It is not intuitive, however, why public charter schools would cause TPS students to increase their educational outcomes. Most studies indicate that the presence of charter schools do not raise student achievement in the TPS environment (Bifulco & Ladd, 2005). Nevertheless, the hypothesis advanced by Hoxby (2004) is interesting and worthy of further examination. Even if Hoxby is incorrect and charter schools, because they tend to post less than impressive results, have no competitive effect on TPS students her logic might apply to faith-based schools, if they were allowed via school choice, to increase in number.

Second, to the extent that this study suggests that faith-based schools and public schools have qualities to learn from one another, it would be interesting to undertake research designed to examine if there are measurable benefits from educators viewing education more holistically and working together to try to make American schooling overall more effective in accomplishing its goals. To be sure, this recommendation opens up a broad range of research ideas from both sectors working together to fulfill common objectives to implementing ideas that the other sector does well to actually functioning as a collaborative supporter rather than a competitor who might actually want something less than the best for the other sector. This recommendation for further research could radically change the way many people perceive the American educational landscape.

A third suggestion is based on a statement made by Paul Hill. Hill (2005, p. 141) notes that, “Growth can bring dangers if choice implemented carelessly.” This would seem to be a logical statement. But what constitutes a carefully planned choice system, especially when so few that include faith-based schools have even been implemented? It would seem reasonable to assert that all of the claims on either side of the choice debate that would include private schools are mostly hypothetical and have limited merit, unless the nation ceases to be so reluctant to at least experiment with the idea in selected cities throughout the country. After decades of debate on this issue, the time has come to at least experiment to see what hope, if any, school choice programs might have for the quality of American schooling (Jeynes, 2000). And the truth of the matter is that academics, educators, parents and other leaders should care what the answer is, if in fact they view schooling holistically.

CONCLUSION

There are several conclusions one can reach from this meta-analysis that are worthy of special attention. First, educators would be unwise to dismiss the contributions of Catholic schools. There is certainly a substantial enough body of knowledge available, as reflected in this meta-analysis,that demonstrates that parochial schools contribute something vital to the academic wellbeing of millions of American students. Even if one is not particularly religious, Catholic schools should therefore be a source of national joy rather than a target of resentment or of reluctant resignation. The United States is a nation that claims to celebrate diversity. And if it is to conduct itself in a way that is consistent with that claim, it needs to also be tolerant of the presence and successes of faith-based schools (Bryk, Lee & Holland, 1993). And indeed, to the degree that there is evidence that faith-based schools are more like to reduce the racial and socioeconomic (SES) achievement gaps, Americans should rejoice that this is taking place without regard to whether the gap is being bridged in a faith-based or public school.

Second, there is evidence that public- and Catholic schools can indeed learn from each other. There are certain areas where Catholic schools flourish and others where public schools excel. Religious school educators tend to have high expectations and insist that their students take an advanced course load, whereas public schools are more likely to encourage classroom discussion and the taking of elective courses. It is plausible that teachers from both sectors would do well to learn from these successful practices in the other sectors and learn from them.

Third, as much as there has been a major government push to encourage the establishment and continuance of public charter schools, it is not clear whether the push toward charter schools is a wise use of time and effort given that it appears that these students, on average, do not show any scholastic benefit. Perhaps its time to examine alternative means of improving American schools, including extending school choice to include the private sector, most of which are faith-based schools.

Fourth, faith-based educators should have a place at the table. It is apparent that these schools contribute important educational attributes. And to actively oppose them not only discourages educational diversity, but also diminishes the prospects for the nation's schooling system. Both faith-based schools and public institutions have a prodigious array of ideas that could potentially strengthen the American education system. The leaders and families of the United States have every reason to encourage increased communication and cooperation between these two sectors.

It is not in the best interests of America's children for public school educators to hope that the public sector's percentage advantage to go from 90% of the nation's schoolchildren to 100%. Nor does it benefit the country for those in the private sector to think that the struggles of the public sector are not important.

This meta-analysis should cause us to ask some very practical questions that ultimately could cause the exercise of greater and wisdom and cooperation in American education. One might also hope that the results of this meta-analysis will provide greater insight into the increased diversity that many Americans clearly desire in their schools. Concurrently, these data will also provide guidance so that the greater diversity can also increase student achievement.

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Educating Today and Tomorrow- a Renewing Passion
The Heart of the Church: Educating in Christian Virtue

Christine de Marcellus Vollmer

Abstract

The Holy Father has called the world to a year of mercy. This entails compassion and responding to the needs of others. As educators we must respond generously to those in need of education. Education in Christian virtue is the most important education, as health, wealth and opportunity without these avail a person nothing toward happiness or salvation.

The Church, and most recently the Synod on the Family, has demanded better preparation for marriage, and in particular, remote preparation. This remote preparation for marriage, or indeed for life in any capacity, requires learning to live the Christian virtues, particularly loyalty, generosity, patience, justice, understanding, perseverance, solidarity, and commitment, among others.

The XXth century has seen great upheavals, including 2 World Wars, a great financial disturbance, the cultural revolution of the 1960s and the ensuing sexual revolution. The traditional transmission of virtues and values has been interrupted. Christian virtue has ceased to be the ideal and norm of law and the accepted culture.

Children and adolescents are suffering the consequences in tragic numbers. Not only through family breakdown, but also because they are not understanding the Christian virtues nor how to live them.

Our Lord taught by parables, as have done other great teachers, before and since His time. Therefore we have devised a new method of making virtue understandable, attractive and so practicable in today's complicated world.

The principles of St. John Paul's anthropology of love have been used as the basis for a continuous story of a group of children as they grow from age 5 to 18. This attractive story, written in 13 successive age-appropriate books, to be used in schools, follows a pedagogy of the development of the personality through virtue, and takes into consideration sound psychology, and the latest knowledge of brain development. It is proving very effective in 14 countries and is in 5 languages so far.

Each student text, consisting of 35 chapters, or lessons, per year, or 1 hour per week, is accompanied by a complete teacher guide, facilitating its use by the teacher, with suggested activities and discussion points. Some results and method of measuring them.

I. Introduction

The Holy Father has called the world to a year of mercy. The works of mercy are several, but the one which particularly behooves us educators to exercise is of course to 'Instruct the Ignorant." As we look about us, beyond our centers of education, we can see enormous suffering due to lack of knowledge. And in this respect it is my conviction that the greatest lack in this century is the lack of learning and understanding the Christian Virtues and..... especially...how to apply them in daily life.

As educators we must respond generously to those in need of education of every kind, but today I would like to focus on this particular area, which is, as my title suggests, the Heart of the Church. Education in Christian virtue must certainly strike us as inordinately important, because health, wealth and opportunity without these avail a person nothing toward happiness or salvation.[1]

In this year that the Congregation for Catholic Education is celebrating the fiftieth anniversary of the Second Vatican Council's Declaration *Gravissimum Educationis* and the twenty-fifth anniversary of the Apostolic Constitution *Ex Corde Ecclesiae,* the importance of the Church's commitment to education has been repeatedly invoked as a part of the New Evangelization. With 'globalization' and a new connectedness in the world, there are new opportunities for facing today's obvious, and often critical, "educational emergency". Now is the time to put in practice new methods of *education for living*, and of openness to others, with a view to the *common good*.

II. The problem

The well-known problems of marital and family breakdown, young people with no clear idea of marriage or family as part of their future, and the poverty arising from single motherhood are undermining to a horrifying degree the attainment of happiness and perhaps sometimes even of salvation in our modern cities. Studies concerning the incidence of these weak points in our culture point more and more clearly to the distancing of our culture from what have been known as universal values, or Judeo-Christian virtues. Justice and solidarity are perhaps the most obviously absent. But the fabric of society requires others that are also undermined by the current tendency to materialism, egotism and relativism. These new tendencies have weakened not only the fabric of society, leading to growing statistics of juvenile crime and drug use, but are destabilizing human relations and particularly marriage, causing a vicious cycle of behaviours contrary to human thriving.

The Church, Pope Benedict, the Pontifical Council for Family and most recently the Synod on the Family, have demanded better preparation for marriage, and in particular new methods of "remote preparation." This remote preparation for marriage, or indeed preparation for life in any capacity, requires learning to live the Christian virtues, particularly loyalty, generosity, patience, perseverance, justice, understanding, solidarity, and commitment.[2]

The 20th century has seen great upheavals, including two horrific World Wars, a great financial disturbance, the cultural revolution of the 1960s and the ensuing sexual revolution.[3] The traditional transmission of virtues and values has been interrupted.[4] In fact, many parents today are themselves children of the "60's generation" and were educated to believe that intention is all that counts and that the very notion of virtue was unacceptably judgmental. University campuses gave impulse to this idea to the point that today many parents in the West feel quite lost as to whether or not to give their children guidance of any kind. Sadly, it must be admitted that Christian virtue has ceased to be

[1] An excellent analysis of this process can be seen in Jeynes, W.H.; Robinson, D. (2010). 'Character Education in Christian Higher Education: A Historical Analysis and Contemporary Challenge (Part I)', *Christian Higher Education,* 9 (no. 4), p. 295-315.; Robinson, D.; Jeynes, W.H. *Ibid.*'Character Education in Christian Higher Education: A Historical Analysis and Contemporary Challenge (Part II)', p. 316-335.

[2] To understand these virtues and how to teach them today, cfr. Pieper, J. (1991), *A brief reader on the virtues of the human heart*, Ignatius Press, San Francisco; Lickona, T. (2004), *Character matters: how to help our children develop good judgment, integrity, and other essential virtues*, Simon & Schuster, New York

[3] See Lickona, T. (2007). 'Educating for Character in the Sexual Domain ', *Second International Congress on Education in Love, Sex, and Life Manila, Philippines November 20,*

[4] Cfr. Hunter, J. D. (2000), *The Death of Character: Moral Education in an Age without Good or Evil*, Basic Books, New York; Smagorinsky, P. and Taxel, J. (2005), *The discourse of character education: culture wars in the classroom*, Lawrence Erlbaum Assoicates, Mahwah, N.J..

the ideal and norm of law and the accepted culture as it was for 12 centuries. Christians are often bewildered and feel very alone.

Children and adolescents are suffering the consequences of all of this in tragic numbers. Not only through family breakdown, but also because they are neither understanding the Christian virtues nor how to live them. [5] These are no longer the accepted code of behavior. And so we see increasing numbers in the West of young people dropping out of school, taking drugs, cohabitating and opting to have their children out of wedlock. The toll is great, and growing. Simply in terms of sexually transmitted diseases, infertility and low birth rates the news is very sad.

III. Researching a method

Living in Latin America, where these problems and their effect on societal breakdown are more evident than in Europe, it was our goal to find an effective way to put these tendencies into reverse. Ambitious as it may seem, this goal is not impossible because new generations of children are constantly being born. Children tend naturally to wanting to know what is right and to learning to do it. The difficulty for these new generations of children is that they are given inadequate models of behaviour; and virtues, which all people recognize instinctively, are not taught in a coherent way. The in-born desire for transcendence[6] is smothered by the policies of uniformity. The media, the advertising industry and others overwhelm children and young people with encouragement to become materialistic, egotistic and immoral. We have, however, discovered that when exposed young enough and accompanied by a succession of consistent and coherent reinforcements, the logic of virtue appeals to children and adolescents as the way they would like to live. All children and adolescents, regardless of their surroundings, wish to "be somebody" and to be respected and recognized for who they are in their uniqueness.

We sensed an enormous need to offer a holistic formation to all those involved in the various sectors of education, but especially in primary and secondary, when the formation of young minds is the most effective.

In essence, as we teach how to live the universal values and virtues, we can, at the same time as forming the individual, create an environment of *mutual appreciation* as part of an understanding of the dignity of every human person as the student comes to see the workings of these virtues in him or herself as well as in others. Our goal was to delineate and make real in the minds of the students the respect and appreciation due to each and all in their uniqueness, irrespective of cultural differences. This required a firm basis in Christian and universal anthropology.

The first labor of our interdisciplinary and international team was to diagnose and list the values or virtues most evidently lacking where social and family weakness is present, as well as analyzing those which are present in strong communities, families and tribes.

In view of the increasing social chaos, success in life has become a major area of social studies recently and in fact the work of Martin Seligman and Angela Duckworth at Pennsylvania University have borne out our analysis. Today a new turn in psychology, as in these representatives of positive psychology, is returning to a recognition of a concept of virtue and strengths, regarding principally the importance for success in life, greater than IQ, of such virtues as gratitude, generosity, self-discipline and hope.[7] In another study researchers at the University of Michigan and West Point

[5] Cfr. Kilpatrick, W. (1992), *Why Johnny can't tell right from wrong*, Simon & Schuster, New York
[6] Cfr. Frankl, V. E. (1991), *Man's search for meaning. An introduction to logotherapy*, Hodder and Stoughton, London
[7] Cfr. Duckworth, A.L. and Seligman, M.E.P. (2005), 'Self-discipline Outdoes IQ in Predicting Academic Performance', *Psychological Science*, Volume 16-Number 12.

showed that perseverance and a zeal for long range goals was a more important factor in success than academic prowess. [8] Another interesting contribution in this direction, regarding a return to the notion of the importance of virtue, or at least character building, is Walter Mischel and his famous experiment with the marshmallows.[9]

Our team's challenge was to devise a method of making virtue understandable, attractive and therefore practicable in today's complicated world. Our method is called ***Alive to the World,*** a 13-level curriculum (K-12) to not only teach values and 'turn them into virtues'[10], but to form right reasoning in the boys, girls and adolescents, utilizing the windows of opportunity that occur naturally as the child's brain develops.[11]

Our Lord taught by parables, as have done other great teachers, before and since His time. And this was the pedagogical method that we chose for ***Alive to the World***. The principles of St. John Paul's anthropology of love[12] have been used as the basis for this continuous story of a group of children as they grow from age 5 to 18. This attractive story,[13] written in 13 successive age-appropriate books to be used in schools, follows a pedagogy of the development of the personality through virtue[14], and takes into consideration sound psychology, and the latest knowledge of brain development.[15] It is proving very effective in 14 countries and is in 5 languages so far.

In developing ***Alive to the World***, our team developed what came to be called the Pedagogy of the Integration of the Human Person (PIHP)[16]. This pedagogy is the theoretical framework of a general pedagogical view which justifies a process of teaching/learning which gives equal attention to, and integrates, the corporal, affective and spiritual dimensions, and which proposes a path toward the *integrum,* fostering that interior balance which we know as integration.[17]

Integration is the need to harmonize the various dynamisms or levels of action which make up the human person. When the spiritual level, with its intelligence and will, the affective level, with its competing emotions and sentiments, are integrated with the corporal effectivity of consciously-taken actions, the individual is living as a cohesive whole. Maturity and felicity will be the result. This integration is certainly one of the ends of education, and is not only a desired result, but becomes useful as a guiding element in evaluating the progress of our students.[18] To be able to say that a student is integrated, or is advancing well in that direction, allows us to better evaluate our own

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[8] Cfr. Duckworth, A.L., Peterson, C., Matthews, M.D. and Kelly, D.R. (2007) 'Grit: Perseverance and Passion for Long-Term Goals', *Journal of Personality and Social Psychology*, Vol. 92, No. 6, 1087–1101

[9] Cfr. Kurti, A.N. (2015). 'Hot thoughts, cold thoughts, and harnessing self-control: Walter Mischel's the marshmallow test and the other half of the equation', *American Journal of Psychology,* (no. 3), p. 414.

[10] Cfr. Salls, H. S. (2007), *Character education: transforming values into virtue*, University Press of America, Lanham; Sandin, R. (1992), *The rehabilitation of virtue: foundations of moral education*, Praeger Publishers, New York; Character Education Partnership, (2012). 'CEP's Eleven Principles of Effective Character Education' Character Education Partnership, http://info.character.org/Portals/139743/docs/ElevenPrinciples_new2010.pdf (accessed 08/21, 2012).

[11] Cfr. Isaacs, D. (2001), *Character building. A guide for parents and teachers*, Four Courts, Dublin.

[12] Cfr. Wojtyla, K. (1981), *Love and responsibility*, Ignatius Press, San Francisco.

[13] For the application of Story Telling in moral education, see Leming, J.S. (2000). 'Tell Me a Story: An Evaluation of a Literature-Based Character Education Programme', *Journal of Moral Education,* 29 (no. 4), p. 413-427; Kilpatrick, W. (1992) 'Moral Character: Story-Telling and Virtue', In: McLean, G.F. y Knowles, R.T. (eds.) *Psychological Foundations of Moral Education and Character Development, an Integrated Theory of Moral Development*, Council for Research in Values and Philosophy, Washington DC, pp. 170-183

[14] Cfr. Murphy, M.M. (2001) 'Three Essential Components of Character Development', In Naval Durán, C. y Urpí Guercia, C. (eds.), *Una Voz Diferente En La Educación Moral,* Eunsa, Pamplona, pp. 111-129

[15] Cfr. Siegel, D. J. (1999), *The developing mind*, Guilford Press, New York; Schore, A. N. (1994), *Affect regulation and the origin of the self: the neurobiology of emotional development*, Lawrence Erlbaum Associates, Hillsdale, N.J.

[16] Cfr. Beltramo, C. (2013), *La Pedagogía de la Integración de la Persona Humana*, Tesis doctoral, Pamplona

[17] Cfr. Wojtyla *Love and responsibility*, Ignatius Press, California.

[18] Cfr. Bernal, A.; Beltramo, C. (2010). 'La educación emocional entre las ciencias positivas y la filosofía', *Comunicación Presentada en el 12º Congreso International Network of Philosophers of Education (INPE), Bogotá, Colombia.*

pedagogical efforts. All our teaching efforts are reinforced and enhanced when we have this definite and coherent goal and parameters by which to evaluate it.

So, we can say that integration of the personality permeates the entire educative process: the various transversal axis of education should collaborate in this goal, contributing to the internal coherence which allows the student to grow and flourish through the harmonization of his or her inner world. An integrated person is better able to accept diversity, globalization, and legitimate differences between persons, institutions, things and ideas because she or he understands and accepts her or his own identity. In the integrated person, diversity and plurality do not cause insecurity nor doubt, but lead to understanding her or his own complementarity and dynamic role in the larger community.

Thus integration overcomes artificial divisions and categories and allows a vision of the person as a holistic entity, where nothing needs to be hidden or suppressed. Integration is also the affirmation of the personality which implies and leads to action and is reflected in the phenomenology of this person because it is only in the harmonization of the different levels of action of the person that he or she finds her or his full splendor.

Virtue itself is essentially this plenitude of the whole person, acting in sovereign freedom according to the coordinated dictates of emotion, knowledge and will, guided by what is known to be right.[19]

This is real freedom and very different from a simple conditioning of behavior in accord with paradigms which have been determined by the environment as convenient or correct.[20]

IV. The method

It is with these things in mind that were composed each student text, consisting of 35 chapters, or lessons, per year, or one hour per week. As the children progress through the story, understanding the different facets of the situations which are universal to all children, a healthy cohesion, born of understanding, appears in the classroom. After the first two books where they explore identity, the person inserted within nature, a family and a greater neighborhood, they reach a level where they can read about the mechanics of teamwork, the rewards of effort and the process of understanding the need for accepting others as persons as worthy as themselves.[21] Book 3, for the 7-8 year-old, centers on sports and the virtues learned through them, mainly team work and the adherence to rules with perseverance and the rewards of success.[22] The following year, girls and boys learn the various facets of solidarity, generosity, care of possessions...their own and those of others...and service to others.[23] The 5th book, for the 9-10 year-olds leads them to understand the beautiful diversity and complementarity of talents and tastes which make the world so rich a place. Important in this text is learning to recognize the strengths and weaknesses of oneself and others, while these neither diminish nor increase the dignity of each, but that working to become better is the positive

[19] Cfr. Pinckaers, S. (1964), *Le renouveau de la morale. Etudes pour the morale fidèle à ses sources et à mission présente*, Casterman, Paris

[20] Cfr. Altarejos, F. (2004). 'Autorregulación e integración: dos propuestas en la educación de la afectividad (D. Goleman y Tomás de Aquino)', *Estudios Sobre Educación,* 007, p. 62.

[21] Cfr. de Marcellus de Vollmer, C. et al. (2006), *Empiezo a conocerme (Aprendiendo a Querer, Libro 1)*, ALAFA Ediciones, Lima; de Marcellus de Vollmer, C. et al. (2006), *Estoy creciendo feliz (Aprendiendo a Querer, Libro 2)*, ALAFA Ediciones, Lima

[22] Cfr. de Marcellus de Vollmer, C. and Beltramo, C. (2006), *Somos un gran equipo (Aprendiendo a Querer Libro 3)*, ALAFA Ediciones - UCSC, Concepción (Chile)

[23] Cfr. de Marcellus de Vollmer, C., Saunders, J. and Beltramo, C. (2006), *Qué bueno es compartir (Aprendiendo a Querer Libro 4)*, ALAFA Ediciones - Biocolor, Buenos Aires

attitude.[24] The following text is dedicated to the facets of friendships of different kinds and is, in the opinion of the authors, an important part of the base for future marriage.[25]

The following text, for the 12-13 year-olds, examines the changes of attitudes and feelings which are common at puberty, or adolescence. These are lived by the characters in the story in a normal variety of ways which help the readers to place themselves and their companions in a comprehensible light, and to see their parents' points of view.[26] Following this, the remaining texts include different situations of attraction, of infatuation, love and loyalty which are lived through the story without forgetting the virtues learned in earlier friendships. Negotiation and decision-taking, with considerations of talents and interests as well as contributions to the common good, make the high school texts very fascinating to boys and girls alike.[27] Service to the community, even in elected office, is explored in the final texts of this series of books for students. *Service learning* as an outgrowth and application of the understanding that the ego is not the center of all interest, but that the common good is the where happiness and self-realization can be attained, is gradually inserted in several different manifestations which are practicable anywhere.

Among the transversal values throughout this curriculum, the virtuous cycle of humility is applied to different themes as is the vicious cycle of pride. And a constant, although not obvious, theme is the Golden Rule of doing to others as one would be done by.

Each student text of ***Alive to the World*** is accompanied by a complete teacher guide, facilitating its use by the teacher, with explanation of the objectives for each chapter and suggested activities and discussion points.

V. Results since inception in 2000

The results of this innovative and scientific approach to teaching virtue, values, relationships, a sense of community and equal dignity has been altogether surprising. What was originally hoped to be a better preparation for sexuality and marriage, has turned out to be as well an extraordinary tool for restoring a sense of worth and an understanding of virtue in students, with an ambition to be a positive influence in their world.

The most satisfying results have been in areas of extreme social and family breakdown, where hope has all but disappeared. In these situations it is extraordinary to see the joy in the students who discover inside themselves their God-given identity as marked for the good and their enthusiasm to see that they also are called to be a positive contributor to the world and an object and subject of reliable love.

With over a million children and adolescents having been part of this experiment, we can say with confidence that it is considered effective in the Latin American countries, including Cuba. Several

[24] Cfr. de Marcellus de Vollmer, C., Saunders, J. and Beltramo, C. (2006), *Diferentes y Complementarios (Aprendiendo a Querer, Libro 5)*, ALAFA Ediciones, Lima

[25] Cfr. de Marcellus de Vollmer, C., Saunders, J. and Beltramo, C. (2006), *¡Amigos! (Aprendiendo a Querer Libro 6)*, ALAFA Ediciones, Lima; de Marcellus de Vollmer, C., Saunders, J. and Beltramo, C. (2006), *Vamos hacia la madurez (Aprendiendo a Querer Libro 7)*, ALAFA Ediciones, Lima

[26] Cfr. de Marcellus de Vollmer, C. and Beltramo, C. (2000), *Construyendo mi personalidad (Aprendiendo a Querer Libro 8)*, ALAFA Ediciones, Lima; de Marcellus de Vollmer, C. and Beltramo, C. (2000), *Construyendo mi futuro (Aprendiendo a Querer Libro 9)*, ALAFA Ediciones, Lima

[27] Cfr. de Marcellus de Vollmer, C. and Beltramo, C. (2000), *Hechos para amar (Aprendiendo a Querer Libro 10)*, ALAFA Ediciones, Lima; de Marcellus de Vollmer, C. and Beltramo, C. (2000), *Mi futuro es importante hoy (Aprendiendo a Querer Libro 11)*, ALAFA Ediciones, Lima; de Marcellus de Vollmer, C., Beltramo, C. and Ballón, M. (2000), *Frente a las grandes decisiones (Aprendiendo a Querer Libro 12)*, ALAFA Ediciones, Lima; Saunders, J., de Marcellus de Vollmer, C. and Beltramo, C. (2014), *Listos para el futuro (Aprendiendo a Querer Libro 13)*, Learnex de México, México, DF

have opted to publish, such as Argentina, Chile, Peru, Ecuador, Colombia, El Salvador, Mexico and Brazil (as ***Caminhos de Vida)***, as well as recently non-Latin nations such as the UK, Korea, Poland, Hungary, Germany and France. An African version is due to be published shortly in Kenya, while in Latvia, Croatia, Rumania and the Czech Republic groups are organizing in order to translate and publish these texts as a healthy national substitute for programs teaching Gender Ideology and birth limitation. The simple language used avoids overtly religious terminology, making this product acceptable to governments seeking courses in 'sex education' which do not offend families. These reasons, as well as the need for Remote Preparation for Marriage, have also guided the decision of a group in Trinidad and Tobago and the Diocese of Arecibo in Puerto Rico.

As requested by this important World Congress, "we must also offer a holistic formation, developing a whole range of skills that enrich human beings: their imagination; their capacity to assume responsibility and to love the world; their capacity to promote justice and compassion; and their capacity to design goals that can change the future. Within such a rapidly changing society, the idea of a holistic education means reflecting continuously on how to renew this society, making it ever richer in quality, humanity and mercy."

It is my hope that the Association for Family Policy and Law will find in this 26 volume material and the Teacher Training Course which accompanies it, an academic and practical instrument to propose to governments who desire to form the next generations as strong, happy individuals ready to form strong, happy families to produce succeeding generations of Europeans and renew this continent after the terrible effects of the bloody 20th Century.

Thank you.

Prof. dr. Ihor Kruk, Executive Staff Officer at the Alberta Teachers' Association (Canada)

"The teacher acts in a manner which maintains the honour and dignity of the profession"—Teaching in Catholic Schools

Ihor Kruk[28]

When asked to write an article about problems teachers faced, I myself was faced with the problem of where to begin. I thought back to my early days of teaching in Alberta and remembered a comment that was passed to me two years after I had left the first school I taught at in Alberta. I was astounded at the comment because it indicated that the community believed that my reputation was having a much better time than I ever did.

I realized that as a young teacher in a rural community, I had become a focus of attention. People were naturally curious, not only because I was male—the majority of their previous new teachers had been female, but also because I was from overseas. The point I wish to make is that teachers new to a community become a focus of attention. This, when we couple it with the Supreme Court of Canada's decision that teachers wear their teacher hat 24/7, puts a particular onus of responsibility on not only our normal on-duty conduct, but also on our "off-duty" conduct, wherever we may be.

In Alberta, Roman Catholic separate school boards have a constitutional right to exist as publicly funded school boards, respecting their Catholic faith. This is well established under the law. This also means that a Catholic board has the right to ensure that its teachers respect and reflect religious doctrine and, over time, various employment decisions have been made and referred to the courts and judgements rendered.

A Catholic board certainly has an argument that such employment decisions are protected by their constitutional rights. In recent times, we have not had teachers in these circumstances initiate a process through the Board of Reference, and possibly the courts, to force a judgement on the limits of a Catholic board's constitutional rights. About one – third of our members are employed by Catholic school boards.

Many precedents exist both from the Professional Conduct Committee and from the court system (provincial and federal) regarding what is deemed to be unacceptable professional conduct.

In general we can say that such activities as impersonating Lady Godiva while riding on a horse through the local bar after a rodeo are unprofessional conduct. Similarly the courts have ruled that employers can take disciplinary action against teachers who fail to act responsibly.

John and Ilze Shewan were husband and wife and were employed as school teachers by the Abbotsford, British Columbia (BC) School District. Mr. Shewan took a photograph of his wife which displayed her nude from the waist up. The photograph was published in the February 1985 edition of Gallery Magazine, with the permission of both Mr. and Mrs. Shewan, who had entered the picture in a contest. The contestants were women, posing in the nude and in a variety of positions. They were to be paid $50 if their photograph was published and were eligible to win a prize.

The school board became aware of the publication and suspended the teachers for a period of six weeks.

[28] Ihor Kruk, Executive Staff Officer, Member Services, The Alberta Teachers' Association.

After appeals, the case came before the BC Court of Appeal which ruled that the publication of such a photograph of a teacher in such a magazine was bound to have an adverse effect upon the educational system to which these two teachers owed a duty to act responsibly. The suspension was upheld, although for a period of four weeks. The reduction from six weeks to four was the outcome of appealing the decision to the Supreme Court of British Columbia.

Approximately ten years later the Supreme Court of Canada upheld a decision which found a school board liable because it failed to take appropriate action against a teacher for off duty conduct. The teacher, *Malcolm Ross*, made repeated public attacks on Jewish people. A parent complained to the employer, School District No 15 in New Brunswick, that Mr. Ross publicly made racist and discriminatory comments about Jewish people during his off-duty time and that this created a "poisoned environment" in the school district, negatively affecting the Jewish children and other minority students. Mr. Ross's writings and statements included books, letters and interviews with local media.

A Board of Inquiry determined that Mr. Ross's activities, even though they had occurred out of school, had poisoned the school environment and removed him from the classroom. The school district continued to employ him in a non-teaching capacity in central office. After appeals in the court system of New Brunswick, the case came before the Supreme Court of Canada. Here, the Supreme Court made compelling statements regarding the role of the teacher and specifically regarding off-duty conduct.

"The standard of conduct that a teacher must meet is greater than the minimum standard of conduct otherwise tolerated given the public responsibility that a teacher must fulfill and the expectations of the community. In addition, a teacher's freedoms must be balanced against the right of a school board to operate according to its own mandate."

The last statement is particularly telling in light of the existence of Catholic school jurisdictions in Alberta as part of the "regular" provincial school system. (Some provinces force Catholic schools to operate in a fashion akin to private schools). This perforce places an additional responsibility on teachers employed by Catholic school jurisdictions to maintain conduct in keeping with the teachings of the Catholic Church.

What then is conduct in keeping with the teachings of the Catholic Church and what examples are to be set? We know that some Catholic churches allow married priests.

A number of years ago, I received a phone call from a superintendent of a Catholic school board who wanted to alert us that we may get complaints about two teachers in the district. The two teachers, a married female and a single male were living in one apartment. The superintendent informed that there was a housing shortage in the community and that the two new teachers had become "flat mates." The superintendent said there was no concern from the employer as "the female teacher went home to her family on the weekend, and the male teacher was gay."

Notwithstanding the above, teachers signing contracts with Catholic school boards usually have additional clauses they agree to. These are commonly referred to as Faith Requirements and normally include the following:

Acknowledging as fundamental principles that:

a) *Catholic schools are mandated to provide to their students a fully-permeated Catholic education that is Christ-centered, an instrument of the Catholic Church, dedicated to development of the student as a whole person, mentally, physically and spiritually: and*

b) *Teachers and Administrators of Catholic schools are expected to be an example of and witness to the theology, philosophy, values and practices of the Catholic Church, modeling Catholic and teaching to their students.*

The following expectations with regard to Catholicity are established for teachers and administrators. As part of the teaching ministry to the students and children of the faith community in each school of the Division, each Teacher and Administrator shall:

a) *attest that he/she is a practicing Catholic;*
b) *represent that e/she is capable and willing to teach a fully permeated Catholic faith both in and outside of formal religion classes, celebrations and exercises;*
c) *undertake to follow, both in and out of school, a lifestyle and deportment in harmony with Catholic Church practices and beliefs which include, among other things, participation in the Sacraments of the Church and living in harmony with the principles of the Gospel and teachings of the Catholic Church;*
d) *acknowledge and agree that either the Board, Teacher or Administrator may seek the interpretation and assistance of the local Bishop in order to clarify what are the principles of the Gospel and teachings of the Catholic Church;*
e) *provide the Division with a testimonial from a priest or member of the pastoral team attesting to his/her faith commitment; and*
f) *understand and be committed to the responsibility to undertake periodic professional development related to Catholicity and to fully support the spiritual development of students.*

For the purpose of this provision "Catholic" shall mean "a baptized member of the Roman Catholic Church, or one of the Eastern Catholic Churches."

The failure of the Teacher or Administrator to meet the requirements of Article 7 may lead to disciplinary action, up to and including termination of the Teacher's or Administrator's contract of employment or contract of designation.

So what problems have Catholic teachers in Catholic schools faced?

The first one that comes to mind is an individual who claimed they were Catholic, signed the contract and then became baptized in another faith community. No matter what our faith, in contract law an individual's signature on the contract indicates that what they are signing is true. If any misrepresentation occurs, it can be grounds for termination of the contract.

The most common concerns come from female teachers around pregnancy. Boards have terminated contracts of teachers when they were single and discovered they were pregnant, even if the pregnancy occurred because of a medical procedure. One Board of Reference dealt with this issue when a teacher became pregnant for the second time without being married. The Board of Reference agreed the school board had acted reasonably when upon the first pregnancy they had directed the teacher to ensure that in the future she adhere to the teachings of the Catholic Church. They were also deemed to have acted reasonably when, upon the second pregnancy the board terminated the teacher's contract.

An interesting case presented itself when a Catholic school board wished to terminate a teacher's employment based on evidence gathered from personal e-mails which had passed through district servers. The teacher admitted to their mother that they would be at fault if their marriage broke down. The school board also discovered evidence of dating which had occurred with another employee while the teacher was married.

The LGBT question has manifested itself too. Catholic school boards have terminated or attempted to terminate the employment of a teacher who changed their gender and of a teacher who claimed to be living with his brother.

Most recently a teacher was terminated before beginning work when the board discovered they were including their same sex partner on the benefits plans. This case is presently being litigated.

Notwithstanding the above, we look forward to what appears to be new directions for the Catholic Church most recently initiated by Pope Francis in the Synod on the Family.

Friday 20 November 2015

Morning Session

Prof. dr. Jaap Dronkers, Chair International Comparative Research on Educational Performance and Social Inequality, Maastricht University (the Netherlands)

Islamic Primary Schools in the Netherlands

Jaap Dronkers[1]

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I. Introduction

Founding and maintaining religious schools in the Netherlands is relatively quite simple, since the great political compromise of 1917 (the so-called school-pacification). Since that year, the equal funding for all non-public schools but also equal quality-standards and curricula for public and non-public schools was a part of the constitution. This was a constitutional right not only for one dominant religion, but for all religions in the Netherlands: Roman-Catholic and several orthodox-protestant churches (and even religiously neutral schools). This constitutional right to found schools is however older: the liberal constitution of 1848 said that "teaching was free", provided that the teachers' ability and state supervision. But it stated also that sufficient public education should be provided by the national government. The Dutch constitutional "freedom of education" is thus foremost the right by religious and non-religious foundations and association (not churches) to found schools within the state parameters of educational quality and supervision. The parental right to choose a school for their children is a consequence of this founder "freedom of education", but the right to refuse children of non-public schools is limited by state regulations and jurisprudence (Dijkstra, Dronkers and Karsten, 2004).

"Freedom of teaching" dates back to the time of the French Revolution in which freedom of teaching without interference by church or state was one of the fundamental human rights. This "freedom of education" right became an issue between more or less secular European states and the church (mostly but not only the Catholic church), during most of the 19th century until the mid of the 20th century. This explains why many European states (including France) have reached a political compromise of funding of religious schools by the state, and some (for instance Germany) have also a constitutional freedom of education (Dronkers, 2004). But in most European state only one dominant church was involved in this political battle and thus only a restricted option for religious schools exist. The Netherlands however have been a multi-religious society since it establishment in the 16th century and thus does not have a restricted list of religious schools. As a consequence Dutch state primary schools can have different religions: Catholic, Protestant-Christian, Reformed Orthodox, Reformed Liberated, Anthroposophy, Combined Protestant and Catholic, Islamic, Inter-confessional, Evangelical and Hindu (see table 1). Nowhere in Europe one will find this large variety of religious state funded schools. Neither anywhere in Europe exist Islamic schools, which are state funded and supervised. Therefore the functioning of the Dutch Islamic schools are interesting for a wider international audience, because there is a demand for Islamic schools in some other European countries (for instance Belgium).

After brief sketches of the Dutch systems of religious schools and the history of Dutch Islamic schools, I address four aspects of the quality of Islamic schools: minimum quality; attitudes and values; administrative problems; Islam religion.

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II. The Dutch system of religious schools

Because there is sufficient literature on the Dutch system of religious schools (Glenn and de Groof, 2004; Dijkstra, Dronkers and S. Karsten, 2004), I summarize here only its most important characteristics, which are relevant for Islamic schools.

Religious schools have to be founded and are owned by associations or foundations, if they want to receive financial grants from the state. As a consequence religious schools are not owned or run by churches or mosques and thus independent legal identities. For instance, late 20th century a very orthodox Catholic bishop could not remove the adjective Catholic from more liberal Catholic schools in his diocese, because they were owned and run by independent institutions (also not after legal battle).

Religious state funded schools have the same curriculum as public schools, but they can add religious teaching to the slate. The quality criteria of the national educational inspectorate apply to all state funded schools. Nation wide publications of quality of all primary and secondary schools by the inspectorate and daily papers have become common since the early 21st century.

Although the Dutch do not use the term often, they have a voucher-system: each non-public school gets the same amount of grants per pupils as the public schools get by the government per pupil. As a consequence, if pupil numbers of a school drop, the amount of state money for that schools decrease as well (although with some delay). Substantial sponsoring of schools by churches, firms or other agencies will be deducted from the state grant, although the strict rules have been somewhat relaxed last year. Parents to state funded schools are not obliged to pay a school-fee and the non-obligatory parental school-fee should not be used for core activities of the school (teaching; building). Schools (both public and non-public) get additional funding for pupils with low-educated parents in the same way. But because most parents at Islamic schools have very low education, Islam schools are an important beneficiary of this additional money.

School choice by parents within municipalities is more or less free, depending whether schools want to increase their number of pupils. Non-public schools cannot be obliged by the public authorities to increase their number of pupils above a funding threshold. The housing for primary schools is a task of the municipality and can be a reason for the delay of opening new religious schools or their further expansion. Housing of the growing and diminishing schools is often a hindrance for a quick adjustment of school to the changing demand by parents and demographic population changes. But municipalities have never been successful in thwarting infinitely school founders with enough involved parents or delaying enlargement of the housing of popular schools. A common strategy of schools with increasing numbers of pupils is to establish a new location of their school elsewhere in the municipality under the same school board. Municipalities tried often to restrict parental school choice, because it increases school segregation. They try to form catchment areas of several schools, which parents can choose. Most attempts have failed in the long run due to the constitutional impossibility to force these schemes on all schools and parents.

Early 20th century most non-public schools were Catholic, Protestant-Christian or Neutral non-public. Their school boards were closely related to the protestant and catholic political parties, which were member of all Dutch governments since 1919. The number of Catholic and Protestant-Christian schools and their pupils increased until the ’60 and became stable, despite widespread secularization of Dutch society in which at the beginning of the 21st century more than 50% of the adult population does not belong to any church or religious association. Despite this secularization of Dutch society the variation of religious schools increased, mainly by the foundation of school of smaller orthodox protestant schools, like Reformed Orthodox, Reformed Liberated and Evangelical. These smaller orthodox protestant schools had not political backing by influential national Christian-Democrat parties, but despite this opposition they could enlarge their numbers during the second

half of the 20th century. In that later period also the number of anthroposophical schools increased strongly, despite that anthroposophy is not a religion. This reflects the increasing influence of non-religious views on education.

Table 1: Most important denominations of Dutch primary school in 2014

Denomination primary school	N schools	Absolute score final test	Socio-economic status pupils	Added value
Public	2350	533,51	37,4	-0,36
Catholic	2064	534,72	34,5	0,29
Protestant-Christian	1785	534,39	37,0	0,00
Neutral non-public	340	535,88	34,9	0,45
Reformed Orthodox	165	535,33	29,1	0,75
Reformed Liberated	113	534,70	27,8	-0,59
Anthroposophy	68	535,86	24,8	-0,03
Protestant and Catholic	56	533,55	27,1	-0,31
Islamic	**43**	**530,79**	**10,6**	**1,57**
Inter-confessional	10	534,23	27,8	-0,97
Evangelical	10	533,22	13,9	-0,78
Hindu	6	533,71	-9,1	1,69

Note: only schools with pupils in the last grade of primary school (age 11/12)

III. The history of Dutch Islamic schools

During the last 20 years of 20th century two non-Christian religious schools were founded: Hindu and Islamic.[2] Hinduism came to the Netherlands via their former colony Suriname (North Latin-American) where they were imported from British-India after the abolishment of slavery in the 19th century (just like in the British parts of the Caribbean). Before or shortly after the independence of Suriname substantial numbers Hindu migrated to the Netherlands, thanks to their Dutch passport. Among the Surinamese migrants were also Islamists, who also originated from British-India (34.000).[3] But the number of these Surinamese migrants was dwarfed by the large numbers of Islam migrants coming since the 1960s as guest-workers from Turkey (285.000) and Morocco (296.000), of which the majority settled themselves with their families in West-Europe. Later smaller groups of migrants came from Afghanistan (31.000), Iraq (27.000) and Somalia (20.000).

The first attempts to founding Islamic primary schools were made in 1980, and in 1988 the first Islamic two schools opened their doors. Now in 2014 there are 46 Islamic primary schools, three of which have not yet pupils in their last grade. There were two Islamic secondary school founded as well (in Rotterdam and Amsterdam), but both were closed by the Dutch educational authorities due to their insufficient quality and large administrative problems. After this failure the Christian School Foundation in Rotterdam decided in 2014 to establish an Islamic secondary school under its legal umbrella and auspices.[4]

There is no easy explanation for the successful foundation of Islamic primary schools and the failure of the foundation of secondary schools. One possibly explanation is that the foundation of a secondary school is more difficult, because they have to contain a number of hierarchal tracks (from

[2] Before the World War II there were also Jewish schools in the Netherlands. The nearly massacre of Dutch Jews during German occupation and the departure of the few survivors to Israel and the USA did not allow for Jewish primary schools any more.

[3] Numbers refer to an estimation of the Islam population in the Netherlands in 2008 (Maliepaard and Gijsberts, 2012).

[4] http://www.avicenna-college.com/

grammar-school to vocational training) with more specialized teaching, more administrative burdens and more pupils. Another explanation might be that the two secondary schools were founded mainly because of orthodox Islam reasons, while the primary schools had more often also an emancipation aim. And when the focus of the school founding was on combating the educational disadvantage of Muslim children, the Dutch local authorities were rather more accommodating than when the focus was on the religious character of the school (Driessen and Merry, 2006).

IV. Do Islamic schools meet minimum school quality?

The political compromise of 1917 was also an effort to create equal conditions and equal quality of all schools, public and non-public. One of the elements was the creation of the same final examination of secondary education and equal rules for the transition from the common primary school into one of the tracks of secondary school. The score on a final test at the end of primary school and the teacher's recommendation about the most fitting track are the essentials for admission to the higher tracks. The aggregates of these final scores (measures of language and math) and the teacher recommendations per school are public and published by national and local media. Table 1 shows these aggregated scores for all schools in 2014. Islamic schools have on average the lowest score: 531, but that is above the official minimum score. The Dutch inspectorate applies 527-529 as lower band for schools with more than 60% low educated parents. Schools with lower scores and without a prospect of quick improvement will be called publically a weak or very weak school by Dutch inspectorate. These schools will lose pupils (in most cases by less new pupils) and thus funding and run the risk to be closed by the Dutch authorities. Table 1 also shows the parental socio-economic status, based on the postal code of the homes of the pupils. Pupils of Islamic schools have also a very low parental socio-economic status, although their average is not the lowest. I computed the added value of all schools, based on their final test score average, the average parental socio-economic status and the percentages parents with very low education. This computation shows that Islamic schools have a higher final test score then one might expect given the social background of the parents of the pupils, around 1,6 points. Only Hindu schools have a higher added-value of 1.7 points. A difference of one point on this final test can give a better chance to enter a higher track in secondary education (Korthals, 2015). A comparable positive added-value of Islamic schools is also found by Merry and Driessen (2014). So, there is a paradox: pupils at Islamic primary schools have very low final test scores, but given their parental background these low final scores are higher then to be expected.

According the education inspectorate 4% of all primary schools were weak or very weak in September 2011 and 3% in September 2012 (Inspectie, 2013: 63). Twenty percent of the Islamic schools were weak or very weak in 2011, against 7% in 2012. It is important to note that the inspectorate takes the parental social-economic background into account when they formulate their verdict, but given their very low parental socio-economic background, Islamic schools runs a higher risk that their average final test score and other quality indicators are below the lowest admitted band used by the inspectorate. The substantial change in the percentage weak and very weak primary schools illustrates clearly that schools make a big effort to improve as soon as possible after a negative inspectorate verdict (Koning and van der Wiel, 2013). Weak schools are often helped by their national organizations (for instance the Islamic School Board Organization ISBO) or by special pedagogical teams.

Are there explanations of the paradox of Islamic schools: the combination of low final test scores or (very) weak verdict, but positive added-value and strong improvements? There is no systematic research to solve this paradox. But I can offer some possible explanations. First, according the reports of the inspectorate the didactical and pedagogical approach of Islamic schools is relative conservative compared with other Dutch primary schools: they use more often front-class teaching

and homework. The effectiveness of modern didactics is highly debatable, but most scholars agree that pupils with few parental cultural resources are more helped by structured teaching and clear curriculum requirements. Second, the same inspectorate reports suggest that Islamic schools tend to invest more teaching and learning time to the basic skills (Dutch language; math; geography; history) and avoid spending much time on non-core activities (music, discussion, swimming). In this way they increase the amount of time actually spent on learning the knowledge and skills measured in final tests (time-on-task: Slavin, 2003). Third, Islamic primary schools tend to have a low ethnic diversity (number and size of ethic groups). In most case they serve only two or three ethnic different groups (Turks; Moroccans, Indian-Suriname), in strong contrast of urban public schools, which have a high level of ethnic diversity (Veerman, van de Werfhorst and Dronkers, 2013). Although there is no agreement whether ethnic diversity is only bad for scholastic achievements, there is agreement that high levels of ethnic diversity is an extra challenge for schools and that it might hamper quality. Fourth, most Islamic schools are situated in an urban context and have pupils from poor neighborhoods. The Islamic religious activities of their schools and the active Muslim community of their parents might act as an extra protection against the temptations of that urban context and neighborhoods (comparable to the Catholic school effect: Bryk, Lee and Holland, 1993; Coleman, Hoffer and Kilgore, 1982; Coleman and Hoffer, 1987).

V. Attitudes and values of Islamic schools

The Netherlands was been a multi-religious country since the 17th century with a small protestant majority and a large catholic minority, which live alongside each other. The protestant majority broke in the 19th century into different streams ranging between a liberal one and very orthodox ones. As a consequence at the end of the 19th century Dutch society was “pillarised”, that means a politico-denominational segregation of Dutch society in Catholic, Protestant, Social-Democrat and Neutral segments or “pillars”. The Netherlands was "vertically" divided into several segments or according to different religions or ideologies. These pillars all had their own social institutions: their own newspapers, broadcasting organizations, political parties, trade unions and farmers' associations, banks, schools, hospitals, universities, scouting organizations and sports clubs. Political compromises were reached through compromises hampered out by the elites of these “pillars”. The great political compromise of 1917 (the so-called school-pacification), which allowed religious schools funded by the state and equal quality-standards and curricula for public and non-public schools is an example of such a compromise between the elites of these “pillars”(Lijphart, 1968). Only in the ’70 and ’80 this “pillarization” started to give way. Now pillarisation of Dutch society has disappeared, but remnants can still be seen in the 21st century: religious schools, funded by the state being one of these remnants. The breakdown of pillarisation lead not lead to Moreover, some communities continue to behave as small 'pillars'. Members of the Reformed Churches (Liberated) have their own primary and secondary schools, their own national newspaper, and some other organizations, such as a labor union. Members of several Orthodox Reformed Churches have also founded their own schools, newspaper and political party. Muslim immigrants in the Netherlands are also using the legal possibilities created for the pillarised structure of society, by setting up their own schools.

As a consequence of these religious differences and the following pillarization, there was no national consensus or standards about the values and norms, which should taught in schools. These non-cognitive educational goals are left to the schools within the former “pillars”.

Merry and Driessen (2014: 15-17) provide information about citizenship of primary school pupils from a nation-wide study. Four components of citizenship are measured knowledge, reflection, skills and attitudes and they refer to four central societal tasks: acting democratically, acting in a socially responsible manner, dealing with conflicts and dealing with differences. Table 2

provides insight into the citizenship competences of pupils of Islamic schools and compares these with the scores of pupils of comparable schools (SES-composition) and the average school.

Table 2: Comparison citizenship knowledge, reflection, skills and attitudes in 2011 (mean scores of grade 8, final grade Dutch primary school)

	Knowledge	Reflection	Skills	Attitudes
Islamic schools	0.70	2.57	3.25	3.20
Comparable schools	0.71	2.38	3.10	3.05
Average schools	0.78	2.25	3.01	2.95

Source: Merry and Driessen, 2014: 17

With regards to three dimensions (reflection, skills, and attitudes) pupils at Islamic schools score considerably higher than pupils at comparable schools, and still higher than pupils at the average school. Only with regard to the Knowledge competence pupils at Islamic schools score nearly the same as pupils at comparable schools, but significantly lower than pupils at the average school. These findings directly challenge the assumption that pupils at Islamic schools are less likely to cultivate the relevant civic virtues for Dutch society at large. To be sure, some schools manage to cultivate civic competences beter than others, but this is not related with their religious or private background (also Avram and Dronkers, 2011).

An older article (Driessen, 1997) contains also information about the parental background of pupils of Islamic schools. Table 3 summarize some of the most salient differences between parents of Islamic school pupils and pupils in comparable schools, which Driessen (1997: 56) found.

Table 3: Family and pupil characteristics of pupils on Islamic schools, comparable school (=SES composition) and average school.

	Islamic school	Comparable school	Average school
Foreign nationality mother %	82	62	5
Foreign nationality father %	78	58	5
Foreign language at home in %	84	73	5
Importance religion in upbringing	3.9	3.4	2.6
Importance parent language in upbringing	2.8	2.6	2.6
Length stay in Holland (years)	3.8	5.2	4.2
Pre-school care % yes	21	40	81
Koran classes % yes	83	42	3
Home work frequency	2.0	1.6	1.7

Source: Driessen, 1997: 56

The differences shown in table 3 are generally not very large. The largest is that pupils at Islamic schools attend Koran classes more often than pupils at comparable schools. Koran classes are part of the regular curriculum at Islamic schools, in the same way than Bible-classes are a part of the regular curriculum at Protestant schools. Not all pupils in Islamic school attend Koran classes because schools might have trouble finding qualified Koran teachers or some pupils get exemption from these classes. Another significant difference is that pupils at Islamic schools are far more frequently given homework. This might be a part of a specific strategy at these schools to make more of an 'authoritarian' effort to reduce the educational disadvantage of immigrant children than 'regular', more liberal primary schools tend to make. A third difference is the importance attached to religion as an important aspect of upbringing. Parents of pupils at Islamic schools attach more importance to religion than parents in other schools (remember that parents at most catholic and protestant schools are far more secularized). Also parents of pupils at Islamic have more often not the Dutch

nationality, although obtaining Dutch nationality by immigrants from less developed countries is far more common than by immigrants from within the European Union (Dronkers and Vink, 2012).

VI. Administration problems

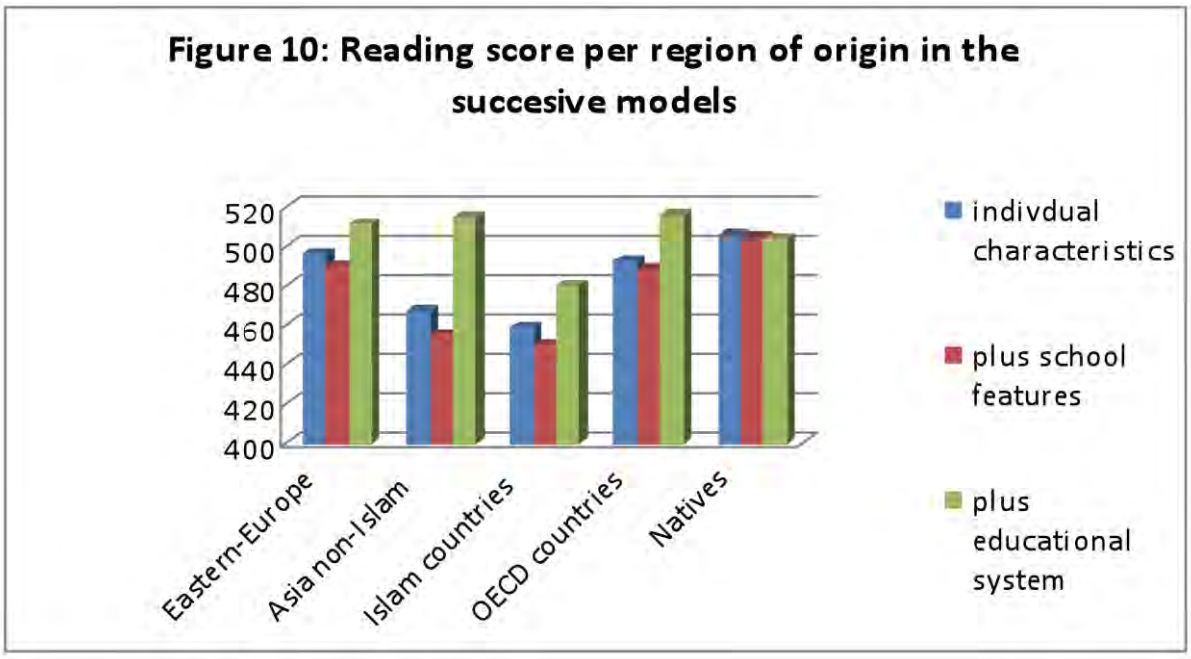
Non-public schools are administrated by foundations or associations with their own legal status, independently from churches, religious organizations, employers' organizations, etc.. The ground for this rule is the separation between church and state, and thus the impossibility to grant state-money to religious schools. As a consequence boards of non-public schools need members who can run their schools, who can negotiate with local and national authorities, etc. Catholic and orthodox-protestant schools could find enough well-educated and well-connected members for their school-boards. The large catholic minority had enough higher-class believers to recruit efficient school-board members in the 19th century and the same held for the smaller orthodox-protestant groups in the 20th century. But what was true for these indigenous religious groups, is not necessary true for the Islamic and Hindu groups. The later two religions were endogenous religions in the Netherlands until 1960s (if we ignore the Dutch colonies) and given their migration-history (unskilled labor migration into a society which was not very open to non-European newcomers) lacked well-educated and well-connected believers for their own organizations, like boards of their religious schools. As a consequence of this lack of well-educated and well-connected believers, there were many serious administrative problems in Islamic school, due to mismanagement of the school boards: misuse of educational money for other purposes, fraud, mismanagement of nominating teachers, serious conflicts within boards, etc. The quality of the (financial) administration is scrutinized by the education-inspectorate and if that quality is too low without prospects of improvement the school will be closed down (formally they do not receive the state grant anymore, and are thus insolvent). However, this lack of well-educated and well-connected believers also means that Islamic schools also miss a common network with the Dutch authorities and society at large. This weak network between Islamic school board members and the Dutch political and administrative authorities means also that the Dutch usual way to solve administrative problems with schools (strike a compromise between board and authorities) cannot be applied. This lack of well-educated and well-connected members of Islamic school boards and thus their failure to run their school properly according the national norms of the education inspectorate are important explanations for the closedown of the only two Islamic secondary schools in the Netherlands.

However, most teachers at Islamic schools are not Muslims, but non-Islamic teachers. There are too few qualified Islamic teachers available, so schools are forced to nominate non-Islamic teachers, because too many non-qualified teachers is not acceptable to the education inspectorate. This lack of believing teachers is not unique for Islamic schools. Catholic and protestant schools have the same problem of attracting believing teachers, due to the high level of secularization in the Netherlands (more than 50% is not member of any religion; among higher educated even more). The secularized parents of pupils attending catholic and protestant schools do not care much whether the teachers believe or do not believe (Dijkstra, Dronkers and Karsten, 2004), but the parents of Islamic schools value far more the religion as important in upbringing of their children (see table 3). The need to use non-Muslim teachers by Islamic schools adds additional tensions within these schools, more than in other religious schools.

VII. Islam religion

Although individual socio-economic differences between migrant-pupils and their families are the most important explanations of difference in their educational performance, there remain - despite all controls for these backgrounds - substantial differences between migrant-children originating

from different origins. These origin differences, which become best visible in a double comparative perspectives of both multiple destination and origins countries (Van Tubergen, Maas and Flap, 2004), can be summarize as follows (Dronkers and Heus, 2013): "Migrants' pupils from Islamic origin countries (Turkey, Morocco, Pakistan) have lower scores than comparable migrants' pupils from Christian origin countries (Yugoslavia, Poland, Russia), who have lower scores than comparable migrants' pupils from non-Islamic Asia (India, Vietnam, Korea, China)". The next figure illustrates these origin differences in educational performance, the decline of these differences by controlling for individual, school and educational systems effects and the remaining differences in educational performance by groups of origin countries.



Source: Dronkers and Heus, 2013

Educational performances of all migrant groups are lower than those of the native pupils of their destination countries, even after control for individual characteristics (blue columns). But after control for school- and educational system differences (green columns) the performances of nearly all migrant groups are higher than those of the native pupils of their destination countries. Only those originating from Islamic countries still have lower educational performances than those of the natives.

This is an outcome that is repeatedly found in research. Further analyses show that this outcome is related with Islamic religion, not with an origin from a country with a majority of Islamic believers. Dronkers and Fleischmann (2010) show that individual religion is related to lower educational attainment of second-generation Islamic men in Europe, not their origin from a dominantly Islamic country. Without any doubt Islamic migrants feel and are discriminated in Europe (André, Dronkers and Fleischmann, 2009), but they feel not more discriminated than migrants who adhere other non-western religions (Jews; Eastern religions). Thus solely discrimination cannot be a valid explanation of the lower educational performance of Islamic migrants, because otherwise the migrant pupils originating from Asian non-Islamic countries should also high a low educational performance. Migration to West-Europe from Islamic countries like Turkey and Morocco started in the 1960s with guest-workers, temporary labour-migrants recruited for unskilled work in dwindling industrial sectors (textile, coal, shipbuilding; Icduygu, 2009). They followed earlier waves of labour-migration to West-Europe from Italy, Spain and Yugoslavia in the 1950s, which also came for unskilled work. The possible negative selectivity of these guest-workers programs (firms and

immigration organisation were seeking young, low-educated workers) seems not to be unique for immigrants from Turkey or Morocco, but negative selectivity seems also true for guest-workers from Italy, Spain and Yugoslavia (Dronkers and Heus, 2010).

It is possible that some values and norms related with Islam religion are a possible explanation of the low educational performance of pupils from Islamic countries. These countries score very low at the Gender Empowerment Measurement (GEM). The GEM evaluates women's participation and decision-making ability in political and economic forums (Klasen, 2006). Ranging from 0 to 100, it combines variables such as women's share of parliamentary seats and ministerial positions, as well as managerial, senior official and legislative jobs; their share of technical and professional jobs; and gender income differences. The very low Gender Empowerment Measurement of Islamic countries explains not only the low educational performance of female migrant-pupils from Islamic origin countries, but also the low performance of male migrant-pupils from Islamic origin countries (Dronkers and Kornder, 2015)[5]. This shows that the unequal gender norms in the Islamic countries offers a valid explanation for the low educational performance of both male and female migrant pupils from countries with Islam as the dominant religion. Religion need not be a 'black box' of cultural phenomena, its various aspects can be analysed (gender equality, economic values, authority) and their importance in adherents' behaviour estimated. It can imply that values and norms, which are related to a religion, can be adjusted to new circumstances and challenges. A example of such an adjustment is Catholicism, which can adjusted itself to capitalist societies without losing their critical stance in relation to gluttony. Islamic schools in Europe might be instrumental for that adjustment of Islam to modern societies. An indication of their possible success ad such an instrument is the positive added-value of Islamic schools in the Netherlands.

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The role of Catholic schools in education for human rights and social justice: a view from Australia

Sally Varnham

Abstract
The role played by schools in educating for human rights and social justice cannot and should not be underestimated. Both the content of formal schooling and the manner in which schools behave, provides a crucial template for the life of citizens and the welfare of the nation.

The notion of educating about human rights has formed part of an international human rights framework since the adoption of the Universal Declaration of Human Rights in 1948, and the urging of State Parties by the United Nations to disseminate the Declaration and to educate citizens about its contents. All major UN human rights treaties since the Universal Declaration of Human Rights have incorporated human rights education. The international focus on human rights education culminated in 2011 with the United Nations Declaration on Human Rights Education and Training, and the institution of the three phases of the World Programme for Human Rights Education with the Third Phase to be undertaken from 2015 to 2019.

In Australia, the *Melbourne Declaration on Educational Goals for Young Australians* (2008) provides, within its two overarching goals, for an education system which promotes equity and equality and ensures that all young Australians become active and informed citizens. A number of recent initiatives, the National Human Rights Consultation in 2009, and the Australian Human Rights Framework of 2010, acknowledged the importance of human rights education in schools.

Despite these ideals, research in Australia shows an absence of concerted government drive for human rights education. However, in many areas it may be seen that Catholic schools, which make up 20% of the Australian compulsory education sector, are taking the lead. This is particularly through their commitment to social justice and principles of inclusion. Curriculum and classroom teaching is at the centre of formal teaching in any school environment, but a school comprises a myriad of relationships. It is those relationships that, it is argued, are at the centre of education for human rights and social justice. Put simply, it is how all members of the school community interact with each other and the culture of the school, which provides the blue print for future relationships within society. Importantly, the focus on teaching and in school communities generally must embrace the norms set out in international human rights instruments, and in domestic legislation which sets out the parameters for the way we treat each other in school and in society. This presentation draws on the findings from two research projects which considered practising citizenship and human rights education in the compulsory school sector in New South Wales, and in the national Australian education environment. This included research in a cohort of Catholic schools. It considers the contribution of Catholic education towards the development of an equal and just society, with a strong awareness of the essential part played by human rights and social justice in ensuring the health and wellbeing of the nation.

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RELIGIOUS EDUCATION AND SECULAR STATE: AN OVERVIEW IN LATIN AMERICA

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Introduction

The establishment and development of the Nation States in Latin America can not be dissociated from the influence of the Catholic Church, particularly in education. The secularization of those States was not linear; there were contradictions, retrocessions and breakthroughs.

In Brazil, this began during the Empire, with the struggle for religious freedom in a Catholic confessional State. It continued after the proclamation of the Republic, with the separation of the Catholic Church and the State, in order to eliminate the privileges of the former and the limitations imposed on the others religions. This continues up to today, with demands for state impartiality with regards to religions. In general, this pattern is observed all over Latin America, despite some differences in the historical configuration of law and politics among its regions.

The objective of this paper, prepared jointly by undergraduate and postgraduate students of University of São Paulo's Law School, is to present an overview of the legal provisions related to religious education in public schools in Brazil, Argentina, Chile, Mexico, Venezuela and Uruguay. Education, and particularly public education, is one of the main areas of r contemporary debates about the meaning of secularism and the management of religious differences, as well as being a crucial field in the interplay between religion and law.

All countries analyzed are constitutionally secular. With the exception of Venezuela, none of them postulates anti-religious or anti-clerical positions, or even atheism. All of then offers religious education, except for Uruguay - which does not offer religious instruction in public schools, and Venezuela - which doesn't allow religious education either in public or in private schools. Although the offering of religious education in public schools has never been a decision pertaining to the education sector, the most frequent form is optional, during in regular school hours, in compliance with the Secular Clause. Brazil is highlighted in the group, since church-state relations are currently under the appreciation of the Supreme Court, with implications for public education. Besides, when compared to other countries, Brazil is extremely complex as it comprises religions with different degrees of institutionalization and distinct cultural traditions, in addition to several syncretism.

For the purposes of this paper, we use the following definitions:

a) Secular state – one in which government actions are legitimized by popular sovereignty, not by religious power. It is based on the secular, non-sacred concept of political power as a manner of ensuring the autonomy of civil power. Therefore, the laws of secular states do not sanction

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ethical-religious principles or rules of a certain religion, ensuring freedom of religion, of speech and of thought.

b) Public schools – educational institutions created, funded or administered by the Government.

I – Comparative Study

A. BRAZIL

The Secular Clause

Article 19, I of the 1988 Federal Constitution states that: " The Union, the States, the Federal District and the Municipalities are forbidden to establish religions or churches, subsidize them, hinder their functioning or maintain dependent relations or alliances with them or their representatives, with the exception of collaboration in the public interest, as provided by the law.' The Secular Clause in the Brazilian legal system derives from these words, which explicitly prohibits State-church relations.

Historically, the relations between the Brazilian State and the Catholic Church have always been complex. Catholicism was the official religion during the colonial period and the Empire, providing rulers with a series of prerogatives in the religious are, such as the appointment of bishops and priests and the awarding of ecclesiastic benefits.[4] After the proclamation of the Republic, the Constitution of 1891 secularized the State (Article 72, § 6), a principle maintained in all the other Brazilian Constitutions, of 1934, 1937, 1946, 1967 and 1988, conjointly with the principles of religious freedom, freedom of thought and speech, equality, human dignity and the rejection of any form of discrimination.

As such, the state should maintain neutrality toward religion – by not establishing or granting certain religions or to religion in general – while protecting religious practices or manifestations. The paradox seems to be inherent to the church-state relations, despite the secular clause.

Recent judicial controversies illustrate the contemporary face of this paradox. In *Attorney General's Office v. the President of the Federal Republic of Brazil (ADIn* 3510/ 2008) - a case which claimed interpretation of the Biosafety Act, and in *National Confederation of Workers in Health* v. *the President of the Federal Republic of Brazil* (ADPF 54/DF) – concerning the decriminalization of the abortion of anencephalic fetuses, the Court ruled that: 'Brazil is a secular republic, hence absolutely neutral when it comes to religion.'[5]

Moreover, in *Liberal Party v. the President of the Federal Republic of Brazil* (ADI 2566), a case involving the interpretation of the freedom of speech and the freedom of religion, the Court stated that: 'The State does not have–nor can it have–confessional interests. The State has to be indifferent to the content of religious ideas preached by any religious group, for the Government can neither forbid nor censor them. In case it does so, it would be an unacceptable interference in a field naturally foreign to state activities'.[6]

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[4] Such prerogatives originate from the *padroado* [patronage] system, established in the Ordinations of the Kingdom of Portugal. It remained effective in Brazil after the Independence, throughout the Empire of Brazil.

[5] ADPF 54, Justice Marco Aurélio, decision on April 12, 2012, Full Court, Electronic Court Register of April 30, 2013. http://www.stf.jus.br/arquivo/cms/publicacaoLegislacaoAnotada/anexo/constituicao.PDF

[6] ADI 2566-0, DF. Justice Celso de Mello; decision on May 25, 2002, Full Court. http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=347623

The importance given by the Supreme Court to state neutrality, as the organizing principle in the intersection of religion and the state, seems to reflect the need for an ethic of respect and practices of tolerance in matters of religious difference. Viewed in that light, tolerance could implies, indirectly, the idea of privilege or counsels acceptance of certain departures from the norm, in the name of political peace or mutual respect. Nevertheless, the principle of state neutrality offers more: it speaks to the evenhandedness necessary in a religiously and culturally plural society. In other words, public neutrality toward religion forbids special accommodation for religion.[7]

The legal grounds of religious education

One of the immediate consequences of the secularization of the State was the suppression of religious education in public schools, in spite of the strong pressure of many political and religious segments. The debate placed on opposite sides the supporters of secularism, or separationists, who demanded a neutral position on the part of the State, and the supporters of religious education, demanding correspondent schools activities.

It was only in the 1934 Constitution that religious education was reintroduced in public schools. Since then, it has been part of all the subsequent constitutions, thought on an optional basis (note that religious education is the sole school subject mentioned in Brazilian Constitutions).

The 1988 Federal Constitution states that "Religious education shall be an optional course during the regular school hours of public elementary schools." (Article 210,§ 1). Additionally, the National Education Act - NEA (Law 9394/1996) forbids any form of proselytism in the offering of religious education, and demands respect for the Brazilian religious and cultural diversity. [8] In the present educational system, religious education is restricted to primary school, under the responsibility of state and local educational bodies, who are in charge of defining the content, as well as qualifying and hiring teachers, without dominance of one religion over others.

Based on these grounds, the prevailing administrative and educational interpretations concerning religious education in public schools is that it cannot be confessional. In other words, public schools cannot become sites for catechesis or religious proselytism, whether Catholic or any other religion. Therefore, the only manner to make State secularism compatible with the teaching of religion in public schools would be via a non-confessional curriculum, which includes history, philosophy and social aspects of different religions. As such, teaching about religion is the perspective most often associated with the state and local education bodies.

It ought not to be surprising that neutrality is the prevailing principle in these matters. The religious profile of the Brazilian people was predominantly Roman Catholic Apostolic until the 1970s, a legacy of colonization; the other religions were significantly lower in numbers. However, since the 1980s, an 'explosive religious polysemy' has been witnessed (official data indicates almost 300 different religious denominations in the 2010 Brazilian Census[9]).

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[7] Kutoroff, Arthur - First Amendment versus *Laicite:* Religious Exemptions, Religious Freedom, and Public Neutrality. Cornell International Law Journal,, vol 48, p. 247. HeinOnline (http://heinonline.org) Thu Nov 5 06:58:17 2015

[8] 'Article 33 - The enrollment in religious education is optional; it is an integral part of citizens' basic education, a subject to be offered during the regular school hours of public elementary schools. The respect for the religious and cultural diversity of Brazil must be ensured. Every form of proselytism is forbidden.'

[9] Scholars of religions in Brazil, like Carlos Rodrigues Brandão, say that 'Aside from traditional, more visible religions, worships and churches, like the Catholic and the Evangelical (both non-Pentecostal and Pentecostal) Christianity, Judaism, Kardecist Spiritism and others, the presence of old eastern religions–both revisited and recently established in Brazil– is

Thus, how to deal with the complexity of offering religious education, in view of the difficulties in preparing qualified personnel? Additionally, the States and the Municipalities have come up with different solutions for the teaching of religion, such as confessionals options and classes intended to convey moral values or notions of social integration.[10] Nonetheless, what is noticed very often is the predominance of Catholicism and Protestantism in religious education, and the absence of alternate activities for students who do not have teachers available for their religion or who do not want to attend religion classes.[11]

New controversies on church-state relations with implications for public education

The controversy between secularism and religious education received a boost in November 2008, when the Federal Republic of Brazil signed a Concordat with the Holy See, intended to establish the legal regime of the Catholic Church in the country. [12]

Article 11, § 1 of the Concordat says that: "The teaching of religion–Catholic and other religions– is optional, it is a subject to be offered during the regular school hours of public elementary schools. The respect for the religious cultural diversity of Brazil is ensured, as provided for in the Constitution and in other laws in force, with no form of discrimination."

As such, while the NEA states that religious education in public schools cannot be confessional, in the light of the secular clause and the prohibition of any form of proselytism, the Concordat states it can be. Some scholars attribute the inclusion of the provision related to the religious education to strategies devised to preserve the Catholic hegemony in Brazil.[13]

In the political arena, particularly in the National Congress, the resistance of other religious groups against the Concordat was strong enough to push the Chamber of Deputies to introduce a bill called 'General Law of Religions', still pending at the Senate. The objective is to create a religious exemption, which aid all religions, providing for the offer of inter-confessional religious

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stronger and stronger (Buddhism with its different variations is the best example), together with new religions of eastern traditions and, with low numbers, the western ones.' BRANDAO, Carlos Rodrigues. Fronteira da fé: alguns sistemas de sentido, crenças e religiões no Brasil de hoje. **Estud. av.**, São Paulo, v. 18, # 52, p. 261-288, Dec 2004. Available on http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0103-40142004000300017&lng=en&nrm=iso. accessed on October 24, 2015. http://dx.doi.org/10.1590/S0103-40142004000300017.

In accordance with the Brazilian Institute of Geography and Statistics - IBGE, the main religions mentioned in the 2010 Census are: Orthodox Catholic, Brazilian Catholic, Evangelical, Jehovah's Witnesses, Judaism, Islam, Spiritism, Buddhism, new eastern religions, esoteric traditions, Indian traditions, Spiritualism, Hinduism, *Umbanda* and *Candomblé,* and other religions.

[10] CAVALIERE, Ana Maria – O mal estar do ensino religioso nas escolas públicas. Cadernos de Pesquisa, v. 37, # 131, p. 303-332, May/August 2007. www.scielo.br/pdf/cp/v37n131/a0537131.pdf

[11] Prova Brasil 2011 http://sistemasprovabrasil2.inep.gov.br/resultados/

[12] Agreements entered with the Holy See, when the purpose of which is the organization of worship, ecclesiastic discipline, apostolic missions, etc., are called 'concordat', a technical legal term equivalent to a bilateral agreement. Originally, concordats were the usual means of settlement between the Church and the State in power disputes after the thirteenth century, when the principle of reciprocal independence between the Church and the State was not strict anymore. After the sixteenth century, the meaning changed to designate the unilateral will of the Church–a pontifical act of a privileged nature. It was not until the twentieth century that it became a bilateral act. The Lateran Pacts entered with the Italian Republic in 1929 are examples of this new meaning. Today, they refer to a specific form of agreement, entered with a subject of international law (the Holy See).

[13] CUNHA, Luiz Antonio – Quando o rabo abana o cachorro: o ensino religioso nas escolas públicas. http://www.seminarioredes.com.br/adm/diagramados/luiz_cunha.pdf

education in public schools.[14] However, if the Chamber of Deputies passes a law that aid one religion or all religions, it violates the Secular Clause. Besides, if the bill is enacted, its content will conflict not only with the NEA but also with the Concordat: the later establishing confessional education, the former, an inter-confessional one.

In the judiciary branch, article 11 of the Concordat is the object of a lawsuit at the Supreme Court involving religion and public education on the merits of a Secular Clause claim in Attorney General Office v. the Federal Republic of Brazil (ADIn 4499/2010).

Attorney General Office v. the Federal Republic of Brazil (ADIn 4499/2010)

Attorney General Office v. the Federal Republic of Brazil involves a decree that confirms the ratification of the Concordat by the National Congress and its inclusion in the Brazilian law (Decree 7107/2010). The Attorney General's Office claims the unconstitutionality of article 11 of the decree (which is identical to article 11 of the Concordat), on the ground that it violates the constitutional Secular Clause by permitting confessional religious education in public schools. The Supreme Court has not ruled yet.

This is not the first time the STF examines cases on the teaching of religion in public schools. In *National Confederation of Workers in Education – NCWE v. the Governor of the State of Rio de Janeiro* (ADI 3268), the NCWE challenges a state law (no. 3459/2000) which allows confessional religious education in state public schools in accordance with the preferences of those responsible for the students. The Court has not ruled yet.

In ADI 3264 and ADI 4499 many legal questions are raised. How to interpret Article 210, § 1 of the Federal Constitution, in the light of the Secular Clause? Is it possible to provide similar protection to the Secular Clause and religious belief? What is the legal nature of religious education? What does "confessional education" mean, in legal terms? What is the difference between it and religious education? How to define the content of religious/confessional education? What does optional enrollment mean in legal terms? What is the reach of the sentence 'every form of proselytism is forbidden' stated in Article 33 of the NEA? What are the possible solution for the educational systems? Which principle should be prioritized: Religious freedom or state neutrality? In short: how are issues of religious diversity handled through law?

Far from "state neutrality", Courts play an important role in answering these questions and ensuring impartiality treatment of religion. They also have become the focal point for debates about challenges of civic belonging in conditions of religious diversity. This fact is highly positive. In recent years, submitting educational problems to courts has shown a broad view of the processes providing the right to education and rights in education. Moreover, this shows the good functioning of political and legal institutions, which is a relevant aspect in democratic countries. In fact, the quality of democracy is a condition to promote fundamental rights, besides the continuous improvement of the quality of democracy enhances the conditions for the democratic legitimacy of the States, especially after periods of transition from non-democratic regimes, as in Brazil.

Therefore, due to all these reasons, the future decision of the Supreme Court in the case of religious education will be of great importance and opportunity.

[14] Bill 5598/2009, submitted by Deputy Jorge Hilton (PP-MG), providing on the fundamental guarantees and rights of the free exercise of beliefs and religious cults as established in Items VI, VII and VIII, Article 5 and § 1, Article 210 of the Constitution of the Federative Republic of Brazil. http://www.senado.gov.br/atividade/materia/getPDF.asp?t=65283&tp=1

B. Uruguay – Angela Limongi

Uruguay is a secular state that does not have any constitutional or legal provisions related to religious education. Article 5 of the current Constitution–effective since 1967–is clear concerning state secularism, which is a principle of public education (General Education Act – Law 18437, of January 16, 2009, Articles 15 and 17).

However, the freedom of education sanctioned by the 1934 Constitution was the outcome of a long battle between the Church and the State, beginning in 1877 with the enactment of the Decree Law on Common Education, which established the secularization of education in public institutions. Afterwards, Law 3441 of April 6, 1909, defined *'(…) every religious education and practice is suppressed in public schools'. These laws recognized the secular education in* Uruguay, confirmed in the Republic Constitutions of 1918, 1934 and 1967.[15]

Thus, secularism became a fundamental principle of the ideology and of the republican and democratic praxis in Uruguay[16]. However, secularism in Uruguay cannot be understood as antireligious, because Article 5 sanctions the freedom of worship, although as anti-dogmatic, once the State is not entitled to interfere with the freedom of thought of individuals.

On its turn, the public education–funded with taxpayers' money–is also anti-dogmatic, as a manner to guarantee the separation between State and religion and, especially, the republican principle. Everybody pays for the public school by means of taxes. Therefore, it cannot and must not represent dogmas of any religion[17].

Religious beliefs are part of the private sphere of individuals. The State cannot interfere with this, except–as it does–to allow for parents who want to educate their children in accordance with a certain religion, that can do it. However, such practice is carried out on their own account and out of school[18], although there is a clear provision on freedom of education and academic freedom in Articles 10 and 11 of Law 18437/2009.

However, there are movements fighting for the insertion of the religious education in public schools of Uruguay, as result of the action of religious groups from Brazil, both related to Umbanda[19] and to the Neo-Pentecostal Christianism[20] [21]. In addition to the Catholic Church, intending to reestablish the teaching of religion in public schools[22], now distinct religions are requesting for the State to include in the curriculum a subject that gives students information on all the religions without proselytism intentions.[23] This was the content of the document that representatives of fifteen religions, participating in the Uruguayan Inter-Religious Forum–held in June 2011–forwarded to the Ministry of Education, asserting that State secularism must be maintained, although changing

[15] Greising, C. (2013), El estado laico en debate: laicistas radicales y una propuesta de monopolio estatal de la educación, Universidad Católica del Uruguay, Montevideo.
[16] Caetano, G. (2013), *El Uruguay laico*: matrices y revisiones, Taurus, Montevideo.
[17] GARCHITORENA, J., (2015). *En defensa de la educación laica.* Available on: http://eltelescopio.com.uy/en-defensa-de-la-educacion-laica/. Accessed on October 14, 2015.
[18] Greising, op cit.
[19] An African-Brazilian Religion, cf., BRASIL (2010), Brazilian Institute of Geography and Statistics. *Tabulação Censitária do Ano de 2010*. Available on http://censo2010.ibge.gov.br/. Accessed on October 14, 2015.
[20] Denominations gathering dissenting religions of the U.S. Pentecostal/Charismatic movement, cf., BRASIL, ibid.
[21] OLE. *Observatório da Laicidade na Educação*. Available on: http://www.edulaica.net.br/artigo/396/no-mundo/paises/uruguai/. Accessed on October 14, 2015.
[22] GARCHITORENA, J., op cit.
[23] OLE, op cit.

from a position of exclusion to one of inclusion, i.e., comprehending all the religions. Atheists, agnostics and non-institutionalized religions were not mentioned[24].

On its turn, the Catholic Church, in a much more intense movement than the reestablishment of the teaching of its religion in public schools, demand taxpayers' funds for Catholic schools. With the argument that many non-governmental organizations receive taxpayers' funds intended to the non-formal education, the Catholic Church in Uruguay considers that, with many more reasons, there are not obstacles to the supply of taxpayers' funds for the formal Catholic education. According to the Constitutional Law expert José Garchitorena, this case has a direct reference to CAIF Centers in Uruguay. The CAIF Plan, created in 1988, is an inter-sectorial policy among the State, civil society organizations and Municipalities, with the purpose of guaranteeing the protection and promotion of the rights of children until 3 years old, with priority access to those belonging to families under social vulnerability. In accordance with the same author, this is not related to the compulsory formal education as of 4 years old in Uruguay[25].

C. Venezuela – Danilo Rossi

The Organic Education Law of 2009[26] abolished religious education in Venezuela's public and private schools.

Until then, the religious education–mostly Catholic–was strongly established in public and private schools, especially due to the colonization process of that region, conducted by Jesuit missionaries.

The Chávez administration prepared said Organic Education Law to be the opposite of the Organic Education Law then in force. Its Article 50 provided on the teaching of religion in elementary public schools to the students whose parents made such request. By abolishing religious education, the government wanted to indoctrinate Venezuelan students in the 'twenty-first century socialism', away from 'bourgeois' tendencies[27].

The supporters of the religious education uprose against the bill of the new Organic Education Law of 2009, grounded on Article 59 of the Bolivarian Constitution of Venezuela that sets forth the freedom of religion and worship, allowing the teaching of such practices on private or public sites whenever they are not against the moral, good practices and the public order. By resorting to such provision, Catholic authorities said that the State supposedly has the duty to allow and enable the existence of religious education in schools, because this is not against the principle of state secularism or individual rights, as the State is supposed to enable the exercise of such right to students of every religion. They also emphasized the Organic Law was unconstitutional, because it harmed the rights of parents to educate their children in religious matters in accordance with their convictions.[28]

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[24] OLE, op cit.
[25] GARCHITORENA, J., op cit.
[26] Artículo 7: 'El Estado mantendrá en cualquier circunstancia su carácter laico en materia educativa, preservando su independencia respecto a todas las corrientes y organismos religiosos...'
[27] HARRINGTON, O. R., (2015). La nueva ley de educación revolucionaria en Venezuela. Available on https://orhpositivo.wordpress.com/2009/08/18/conozca-la-nueva-ley-de-educacion-revolucionaria-en-venezuela/. Accessed on October 14, 2015.
[28] CAÑA, D. A. V. (2014), *La libertad de consciencia, libertad de religión y libertad de culto en Venezuela*. Available on http://cidar.uneg.edu.ve/DB/bcuneg/EDOCS/TESIS/TRABAJOS_DE_ASCENSOS/TASKV37C352010VargasDaniel.pdf. Accessed on October 14, 2015.

Under the bill, even religion-oriented private schools would be forbidden to offer religious education to their students. According to the Venezuelan Archdiocese, once such bill was passed, 'we would be forbidden to teach religion even in schools belonging to some religious denomination'. They also stated that, 'a religious institution entitled to educate and that opened schools has the right to convey also its religion to the children who attend and need such school'[29].

Despite the existence of opposite positions, the law-making process was developed quickly and the National Assembly enacted the new Organic Education Law of 2009[30]. It was addressed to all public and private schools. Among other provisions, the law established that families are responsible for the religious education, and it was excluded from schools or universities. In its Article 3, the new law defined education principles and values, emphasizing the secular character of education.

Article 7 of said law reinforces the ban on the religious education in educational institutions, as it established that the State will preserve its secular character as for education under any circumstance, with full independence from religions. Additionally, it states that families are in charge of promoting religious education.

Therefore, the teaching of religion was fully forbidden in schools as result of the provisions in Articles 3 and 7 of the Organic Education Law, although some Constitutional Law experts claims that such prohibition is in non-compliance with Article 59 of the Constitution of that country. On the other hand, some authors assert that the new law has as purpose the independence of the State from religions, especially Catholicism, that had 'reigned' for centuries, and that this is a construction under the Constitution[31].

D. Argentina – Meire Cristina Souza

Religion is part of the history of Argentina, like many Latin countries that underwent colonization processes. The protection and support to the Roman Catholic religion are defined in its Constitution: '*Artículo 2º. - El Gobierno federal sostiene el culto católico, apostólico, romano*.' ['Article 2. The Federal Government supports the Roman Catholic Church financially.']

Enacted on May 1, 1853, the Constitution of Argentina underwent several amendments. The main one of them is the reform in 1994, which among other modifications, removed from the Constitution the requirement of being Catholic in order to become head of the Executive.[32] Although constitutional provisions establishing the financial support of the Catholic Church are still effective, the freedom of worship or religion is also guaranteed by the Constitution in its Article 14.

In a country where the majority of the population describes itself as Catholic, the teaching of religion does not have specific constitutional or non-constitutional provisions. Such matter is under the jurisdiction of the provinces, in view of the organization and assignment of the

[29]CARMADÉLIO, (2015), *Venezuela e o ensino religioso nas escolas*. Available on http://blog.comshalom.org/carmadelio/2215-oremos-pela-venezuela. Accessed on October 14, 2015.
[30]RAYMOND, A. Rodríguez, (2015), *LOE genera descontento y preocupación entre la sociedad venezolana*. Available on http://w2.ucab.edu.ve/loe-genera-descontento-y-preocupacion-entre-la-sociedad-venezolana.html. Accessed on October 14, 2015.
[31]CAÑA, ibid.
[32] Artículo 76: Para ser elegido Presidente o Vicepresidente de la Confederación, se requiere haber nacido en el territorio Argentino, o ser hijo de ciudadano nativo, habiendo nacido en país extranjero; pertenecer a la comunión Católica Apostólica Romana y las demás calidades exigidas para ser elegido Senador. Constitución de la Confederación Argentina, available on: https://es.wikisource.org/wiki/Constituci%C3%B3n_de_la_Naci%C3%B3n_Argentina_(1853), accessed on October 23, 2015.

jurisdiction related to national education, in accordance with regional peculiarities. This is what results from Articles 5 and 125 of the Constitution of Argentina, together with its Article 14, which establishes the freedom of worship or religion and the public right to teach and learn.

In the national scope, the National Congress is in charge of legislating on the basic laws of education, in order to consolidate the national unit, in accordance with the particulars of each province. The present National Education Law (Law 26206 of December 28, 2006) has nothing specific on religious education. In addition to the purposes of the national education policy, it presents the general guidelines on the constitution right to teach and learn, reiterating the provision that each province is responsible for planning, organizing and supervising the national educational system[33], consolidating the importance of the academic freedom in education.

Thus, the provincial constitutions of La Pampa (1960), Córdoba (2001), Salta (1998), Jujuy (1986), San Luis (1987), Catamarca (1988), Formosa (2003), Tucumán (2006), La Rioja (2002) and Tierra del Fuego (1991) have provisions on the teaching of religion in public schools to students who make such choice, respecting the religious convictions of their parents.[34.] On the other hand, the provinces of Entre Ríos (2008), Mendoza (1997), Neuquén (2006) and San Juan (1986) establish the secularism of education in their constitutions, stating that religion is part of individuals' private sphere. There are also provinces that do not have any provision related to the religious education in its constitutions, for instance, the provinces of Santa Fe (1962), Río Negro (1988), Misiones (1988), Chubut (1994), Chaco (1994), Buenos Aires (1994), Santa Cruz (1998), Santiago del Estero (2005) and Corrientes (2007).

Although each province has autonomy as for religious education, the Argentine State is in charge of supporting the confessional education financially concerning the payment of teachers' wages, both Catholic and of other religions, duly registered by Law 21745/1978. Such law regulated the National Registry of Churches and their schools accredited and authorized by the pertinent educational bodies.

Articles 62 and 63 of Law 26206/2006 set forth the private educational services are subject to authorization, accreditation and supervision by the pertinent jurisdictional educational authorities, giving the Catholic Church and other religions registered in the National Registry of Churches the right to supply such services, among other rights. Its Article 64 also sets forth that teachers of accredited private schools are entitled to a minimum compensation equal to the one of teachers of public schools, in accordance with the equal pay regime defined by law and the holding of officially accredited degrees.

The establishment of financial contributions by the State intended to pay for the wages of teachers in private accredited and authorized schools, as provided for in Article 65 of the law, is based on objective social justice criteria, considering the activities performed in them, the type of establishment, the educational project or experimental proposal, as well as the fee to be defined.

E. Chile – Elisa Lucena

[33]Artículo 12. - El Estado Nacional, las Provincias y la Ciudad Autónoma de Buenos Aires, de manera concertada y concurrente, son los responsables de la planificación, organización, supervisión y financiación del Sistema Educativo Nacional. Garantizan el acceso a la educación en todos los niveles y modalidades, mediante la creación y administración de los establecimientos educativos de gestión estatal. El Estado Nacional crea y financia las Universidades Nacionales.

[34] GENTILE. J. H., (2010). 'La libertad religiosa en la educación', *Academia Nacional de Ciencias Morales y Políticas, Buenos Aires*. Available on http://www.maritainargentina.org.ar/articulos/libertadreligiosa.html, Accessed on October 18, 2015.

In a comparative study on state secularism in four Latin American countries (Uruguay, Mexico, Chile and Ecuador), Pizarro describes Chile as the least secular of them[35]. The author says that Chile is more similar to a confessional state, due to the great influence of the Catholic Church in institutions and in the society of this country. Not for other reasons, the attempts to secularize education led by José Guillermo Guerra in 1925, Salvador Allende in 1970 and Michelle Bachelet in 2005 faced a great resistance by the Catholic Church and more conservative sectors of society, and failed.

However, it must be pointed out that after intense struggles of education-related social movements, the Chilean Congress passed at the beginning of 2015 the first cornerstone of the education reform in Chile, strengthening the public education and changing education's funding system. Such recent decision might mean relevant changes towards the secularization of education.

Although some transformations towards a stronger state secularism may be noticed, the Catholic Church holds a differentiated position among the religious institutions, what is proven by the fact that it is a legal entity of Public Law, whereas the non-Catholic churches are legal entities of Private Law.

Articles 10 and 11 of Chile's Constitution of 1980 are about education, stating that parents are preferably the ones with both the duty and the right to educate their children. The State has the duty to grant protection towards the exercise of such right. The freedom of education is guaranteed with no limitations other than those imposed by moral, proper practices, public order and national security.

Chile's Constitution also set forth that a Constitutional Organic Law was to establish the rights and duties of the educational community members, define minimum requirements to be demanded at each level of education, as well as the objective authority allowing for the State to inspect the compliance with such rules. In this regard, Law 20370/2009 was enacted, the so-called *Ley General de Educación* [General Education Act].

Articles 2, 9, 19, 29 and 30 of said law mention that the spiritual development of students is among the educational purposes. About the meaning given to the word *spiritual*, Chile's national education guidelines in 2012 state that the spiritual dimension of education ought to foster the reflection on human existence, its meaning, finitude and transcendence, making students recognize and reflect on the transcendent and/or religious aspect of human life.

On its turn, the Supreme Decree 220/1998 from Chile's Ministry of Education, as amended by Decree 254/2009, establishes the fundamental objectives and the mandatory contents for elementary and high schools. This law defines that elementary and high schools are required to offer religious education (even if they are technical schools) as part of the general formation content. Finally, Decree 924/1984 from Chile's Ministry of Education regulates religion classes in Chilean schools. It is interesting to point out that the preamble of this decree somehow associates the full development of human beings with religious education, justifying thus its regulation.

In general, the decree establishes that the study plans of the different child, elementary and high schools have to include two weekly religion classes, to be offered during the official school

[35] PIZARRO, J. E. P., (2006), 'La laicidad del Estado en cuatro constituciones latinoamericanas', *Estudios Constitucionales*, year 4, # 2, pages 697-716. Available on http://www.cecoch.cl/htm/revista/docs/estudiosconst/4n_2_2006/27.pdf. Accessed on October 17, 2015.

hours[36]. Such classes must be offered in all the schools of the country on an optional basis to students and their families. The parents must make a statement in writing upon the enrollment, saying if they are interested in such classes or not. If yes, they inform what their religion is.

The study plans for these classes must be proposed by the pertinent religious authorities and approved by Chile's Ministry of Education. Students will be evaluated in religious education, but they cannot be prevented from advancing in their studies in case they fail in religion classes. The teachers of such subject should be appointed and hired for such purpose. They are under the same hiring and compensation system as the other teachers of the school.

The decree defines that non-confessional state, local and private schools must offer their students options related to different religions. For such, they must have a suitable professional and a study program approved by the Ministry of Education. On their turn, the confessional private schools will offer religious education related to the faith they follow, once this is supposedly one of the reasons for which parents enrolled their children there. Article 5 of said decree emphasizes that such schools have to respect parents and students of other religions who would rather their children not to attend religion classes. However, those parents cannot demand a confessional school to offer classes related to other religions.

This provision ought to have special attention, considering that although the recent education reform (2015) prioritizes the state public education, government-funded private schools currently supply 66% of the education of elementary school students in Chile. Among them, confessional schools.

F. Mexico – Michel Lutaif

Like all the other Latin countries, Mexico's history is associated with Christianity. However, the State adopted secularism in the second half of the nineteenth century, with a strong resistance of the Catholic Church[37].

The original provision was part of the 1857 Constitution and was preserved in the still-effective 1917 Constitution. Its principle of separation between the State and churches (Article 130)[38] reverberates in education, which is secular and away from any religious doctrine (Article 3)[39]. Article 24 establishes the freedom of religion and worship on public or private sites, provided they do not violate the law. The part two of such article sets forth that acts of religious freedom cannot be used for political or advertising purposes, forbidding the Congress to ban or create any religion.

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[36] Artículo 1º.- Los planes de estudio de los diferentes cursos de educación pre-básica, general básica y de educación media, incluirán, en cada curso, clases semanales de religión.

Artículo 2º.- Las clases de Religión se dictarán en el horario oficial semanal del establecimiento educacional.

[37] OLE. *Observatório da Laicidade na Educação*. Available on: http://www.edulaica.net.br/artigo/92/no-mundo/paises/mexico/. Accessed on October 17, 2015.

[38] Artículo 130.- El principio histórico de la separación del Estado y las iglesias orienta las normas contenidas en el presente artículo. Las iglesias y demás agrupaciones religiosas se sujetarán a la ley.

[39] Artículo 3º.- Todo individuo tiene derecho a recibir educación. El Estado - Federación, Estados, Distrito Federal y Municipios - impartirá educación preescolar, primaria, secundaria y media superior. La educación preescolar, primaria y secundaria conforman la educación básica; ésta y la media superior serán obligatorias. La educación que imparta el Estado tenderá a desarrollar armónicamente todas las facultades del ser humano y fomentará en él, a la vez, el amor a la Patria, el respeto a los derechos humanos y la conciencia de la solidaridad internacional, en la independencia y en la justicia. El Estado garantizará la calidad en la educación obligatoria de manera que los materiales y métodos educativos, la organización escolar, la infraestructura educativa y la idoneidad de los docentes y los directivos garanticen el máximo logro de aprendizaje de los educandos. I. Garantizada por el artículo 24 la libertad de creencias, dicha educación será laica y, por tanto, se mantendrá por completo ajena a cualquier doctrina religiosa; [...]

In addition to the Political Constitution, there are other two important regulations on education in Mexico: the General Education Act and the State Education Act. Article 5 of the former establishes that the education supplied by the State is secular. Therefore, it remains apart from any religious doctrine, in compliance with the provisions in Article 3 of the Political Constitution [40]. The latter has a similar provision in its Article 8, guaranteeing the freedom of worship[41].

Originally, Article 3 of the Political Constitution of Mexico, enacted in 1917, established that education had to be secular both in public and in private schools. It forbade any kind of religious teachings at school, subject even to punishment by law in case such education was supplied. The former wording of Article 3 forbade even religious corporations or ministers from running elementary schools[42].

However, there was in 1999 a decision of the full bench of the Supreme Court of Justice that classified the international treaties at a supralegal level, at the same time that it was non-constitutional[43]. That decision had influences on the religious education, once a series of treaties entered on such matter are in force in Mexico, such as the Covenant on Civil and Political Rights, the American Convention on Human Rights and the International Covenant on Economic, Social and Cultural Rights, that are above the General Education Act, for instance[44]. Therefore, Article 18 of the former covenant, which establishes that every person has the right to manifest his religion in teaching, would be in force in Mexico, as well as Article 12-1 of the Convention, setting forth the right to disseminate one's religion. Finally, the Law of Religious Associations and Public Worship allows religious associations to own or manage schools[45].

The conclusion is that in Mexico every person has the right to religious education in the private sphere, as the associations are free to manage schools and the State cannot define or control the content of religious education. Hence, the right to religious education in the country is rather restricted, because is it necessary to go to a private school, with access limited to less than 10% of the Mexican population in elementary and high schools. These schools are free to create the content and the program for such education, in accordance with the Law of Religious Associations and Public Worship. The State is forbidden to interfere with or fund this industry.

III. CONCLUSIONS

In the international scope, the laws enacted by the States mentioned in this paper include religion education in the group of individual rights, associating them with the integral formation of the person and with parents' discretion (Declaration of Human Rights, Article 26; Covenant on Economic, Social and Cultural Rights, Article 13). The American Convention on Human Rights, in particular, provides as follows in its Article 12.4: 'Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord

[40] Artículo 5º.- La educación que el Estado imparta será laica y, por lo tanto, se mantendrá por completo ajena a cualquier doctrina religiosa.
[41] Artículo 8.- La educación que el Estado imparta será laica y, por lo tanto, garantizará la libertad de creencias y se mantendrá por completo ajena a cualquier doctrina religiosa.
[42] Art. 3º.- La enseñanza es libre; pero será laica la que se dé en los establecimientos oficiales de educación, lo mismo que la enseñanza primaria, elemental y superior que se imparta en los establecimientos particulares. Ninguna corporación religiosa, ni ministro de algún culto, podrán establecer o dirigir escuelas de instrucción primaria.
[43] Semanario Judicial de La Federación. t. X, November 1999, tesis del Pleno LXXVII/99, page 46.
[44] GOODARD, J. A, *El Derecho a la Educación Religiosa en México* in UNAM. *Diez Años de Vigencia de la Ley de Asociaciones Religiosas y Culto Público*. Mexico, 2003. pages 23-44.
[45] GOODARD, J. A, op. cit.

with their own convictions.' The private schools have been meeting this provision in different manners.

The solutions adopted concerning the offer of religious education in schools vary for each country. In Uruguay, there is no religious education in public schools. In Venezuela, neither in public schools nor in private ones. In Argentina, the compulsory offer depends on each province; there is no single national solution. In Chile, the offer is compulsory, but the enrollment is optional. In Brazil, the content of the religious education is pending judicial proceedings in view of the provision on the offer of confessional religious education in public schools, as defined in the Concordat entered with the Vatican in 2008.

With the exception of Venezuela, the analyzed States have never stated or supported antireligious or anticlerical positions, not even atheistic ones. In Brazil, Argentina and Chile, for instance, the pleading for God's protection is written in the preamble of their Constitutions. In Argentina until the mid-1990s, the President had to be Catholic.

Evidently, the relations between the State and the several religions go beyond legal aspects. Hence, this matter is still topical. However, the freedom of belief and religion and the limits of State performance are one of the most relevant issues of the Fundamental Rights.

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CONFERENCE DRAFT

NAVIGATING A STORMY CONCEPTUAL SEA

Paper prepared for the Conference of European Education Law Association on the occasion of the World Congress "Educating Today and Tomorrow: A Renewing Passion" of the Congregation for Catholic Education: Rome, 18 – 21 November 2015

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INTRODUCTION

It is an extraordinary privilege for me to have been invited to attend and speak at the World Congress during which the Congregation for Catholic Education celebrates the fiftieth anniversary of the Second Vatican Council's Declaration *Gravissimum Educationis* and the twenty-fifth anniversary of the Apostolic Constitution *Ex Corde Ecclesiae*. I noted with special appreciation in the invitation letter that the Congregation "aims to re-energize the Church's commitment to education, by means of this World Congress."[46]

CAVEATS

There are many reasons why I should have declined the kind invitation extended to me:

1) I am a believer (a Christian) and an active and committed member of a Protestant / Calvinist church namely the Dutch-Reformed Church of South Africa. However, I am not of the Roman-Catholic persuasion. As such I am not (I have to admit) familiar with the two documents under discussion at the Congress. It would therefore be inappropriate for me to venture opinions on the two documents let alone providing advice to a church with a history as long and as rich as the Roman-Catholic Church.

2) I am not a theologian. I cannot even profess to have even a basic knowledge of the world's major religions (including traditional African (Christian) religions in South Africa). A newspaper report related to the death (murder) of Senzo Meyiwa, at the time of his death the captain of the South African national soccer (football) team (Bafana Bafana) sounds as strange to me as I am sure it does to many members of the audience

> "Almost a year since their son and brother was killed, the family of Senzo Meyiwa appears to be without hope and begging for help to perform a crucial traditional ritual. Meyiwa's father, Samuel, told City Press this week that the family could not afford to perform the ceremony for the late Bafana Bafana captain. He said that to perform Ukubuyisa, they needed to slaughter a cow and a goat. But they could not afford R10 000 for a cow and R650 for a goat. … 'If I don't do this ritual, my son is not going to rest in peace,'" said an emotional Meyiwa. Ukubuyisa is a ceremonial reincorporation of a departed relative into the family of the living and the dead." [47]

[46]

[47] Ntombizodwa Makhoba.2015. The Meyiwas are flat broke. News24 2015-10-19. The Meyiwas are flat broke. News24.html, accessed on 19 October2015.

When I did research in rural areas in a South African province (Limpopo), I discovered that some school leavers who did not prepare well for their final examination paid a traditional (faith) healer for a potion that would make them pass the examination despite their lack of preparation.[48]

3) I am not a jurist. However, I do know that we have not had a large number of court cases in South Africa dealing with the issue of education and religion. The cases include:

A Christian Education South Africa v Minister of Education (CCT13/98) [1998] ZACC 16; 1999 (2) SA 83; 1998 (12) BCLR 1449 (14 October 1998). In this case parents whose children attend Christian independent schools approached the court to set aside the provisions of Section 10 of the South African Schools Act, 84 of 1996 (SASA) which completely forbids the administering of corporal punishment by anybody at a school. The court upheld the specific provision of SASA which means that parents cannot delegate their authority to apply corporal punishment to the children to teachers.

B Thornton and Others v Accelerated Christian Education South Africa and Another (9038/11) [2012] ZAKZDHC 59 (2 October 2012). Essentially this case concerned the ownership of an independent school with "a religious educational curriculum based on Christian principles".

C MEC for Education: Kwazulu-Natal and Others v Pillay (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007) dealt with the action a school took against an Indian learner who had decided to wear a nose stud to demonstrate her solidarity with her Indian cultural roots. The school prohibited the wearing of the nose stud in terms of its code of conduct (adopted by the School Governing Body in terms of Section 8 of the South African Schools Act, 84 of 1996 (SASA)). The court emphasised the close link between religion and culture and found that the diversity found in South Africa in this regard has to be embraced and not feared. Codes of conduct of schools should make provision for exemptions from the provisions of codes of conduct and should also set out procedures in terms of which School Governing Bodies could consider applications in this regard. The court ruled in favour of the girl.

D *A v Governing Body, The Settlers High School and Others* (3791/00) [2002] ZAWCHC 4 (8 February 2002) was a similar case which concerned a girl who had converted to Rastafarianism and wanted to wear her hair in accordance with the requirements of this religious group. In this case the court found that the School Governing Body had, in acting against the girl, acted against its own code of conduct and it found the school's action wrongful.

E Randhart & Others Case No 29847:2014[49]

The plaintiff in this case is the Organisasie vir Godsdienste-onderrig en Demokrasie (Organisation for Religions Education and Democracy) (OGOD) it is a voluntary organisation with legal capacity in terms of its constitution. There are six "Respondent schools" namely

[48] Beckmann, Johan. 2014. Whose school is it any way? Community-school relations in a new educational environment-a narrative from South Africa's Limpopo province. In: Kanervio, Pulkkinen and Halttunen (Eds.) Mind the gap. Creating social justice through education policy. Proceedings of the ninth symposium of the International Symposium on Educational Reform (ISER) , held in Jyväskylä and Helsinki in Finland, June 2013. Pp 120-135, at page 132.

[49] https://www.dropbox.com/sh/421i2sm3cgt408r/AADtBG5NjfU0m-80ODaAmNH_a?dl=0, accessed on 29 October 2015 contains five documents filed by the respondents in this case: 1) Filing Notice_Answering Papers_30 April 2015.pdf; 2) Randhart School and Others Answering Papers Final 28 April 2015 Compressed.pdf; 3) Randhart_Rule 13 Notice_Annexure FINAL.pdf; 4) Randhart_Rule 13 Notice_FINAL.pdf and 5) Randhart_Rule 16A Notice_FINAL.pdf. The information in the text was taken from these documents.

Laerskool Randhart, Laerskool Baanbreker, Laerskool Garsfontein, Hoërskool Linden, Hoërskool Oudtshoorn and Langenhoven Gimnasium.[50]

The applicant launched this application in September 2014. It seeks the relief set out in the Notice of Motion, which document is already in the Third Party's possession as part of the papers which the Applicant served on the Third Party[51] (at the time being cited as the Seventh Respondent only.) [52]

The relief sought encompasses the declaration of certain conduct and religious observances allegedly present at the Respondent schools as being contrary to the Constitution and the National Religion Policy. It also seeks such a relief against all other public schools in the country. Interdictory relief is also claimed against the respondent schools.[53]

The seventh and eighth respondents[54] did not oppose the application. They filed a notice that they abide by the decision of the court.[55]

The Respondent schools oppose the matter. They have filed a comprehensive answering affidavit.[56]

The relief sought by the applicant indicates that this case could have far-reaching and profound consequences for education in South Africa and that it could affect all religious groups and all types of schools. It invokes constitutional as well as policy issues. That said, it is appropriate to quote from Section 15 of the Constitution of the Republic of South Africa of 1996 that will inevitably come under close scrutiny during this case:

(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
(2) Religious observances may be conducted at state or state-aided institutions, provided that-
    a. those observances follow the rules made by the appropriate public authorities;
    b. they are conducted on an equitable basis; and
    c. attendance at them is free and voluntary.

As far as policy is concerned, Section 7 of SASA will be of particular importance in the arguments put forward by the parties in the case:

> Subject to the Constitution and any applicable provincial law, religious observances may be conducted at a public school under rules issued by the governing body if such observances are conducted on an equitable basis and attendance at them by learners and members of staff is free and voluntary

[50] Randhart_Rule 13 Notice_FINAL.pdf, para 1 -8. http://goo.gl/oBwoSt, accessed on 28 October 2015.
[51] The Minister of Basic Education.
[52] Randhart_Rule 13 Notice_FINAL.pdf, para 16. http://goo.gl/oBwoSt, accessed on 28 October 2015.
[53]. Randhart_Rule 13 Notice_FINAL.pdf, para 17. http://goo.gl/oBwoSt, accessed on 28 October 2015.
[54] The Minister of Justice and Correctional Services.
[55]Randhart School and Others_Answering Papers Final 28 April 2015 Compressed, para 18, http://goo.gl/oBwoSt, accessed on 28 October 2015.
[56] Randhart_Rule 13 Notice_FINAL.pdf, para 19, http://goo.gl/oBwoSt, accessed on 28 October 2015.

From the above one can deduce that the South African Constitution allows freedom of religion in general and also in state or state-aided institutions including public schools. The freedom is regulated and it seems it may be under attack.

4) I am based in a country coming out on epoch of severe fragmentation and injustice. The Afrikaans and Protestant (Calvinist) dominated regime in power before 1994 obtained and retained their hold on political power largely by exploiting the fear of the White people in the country. The fears could be summarised as fear of **BLACK** people, communism (the **RED** danger) and of the Roman-Catholic church (the **ROMAN** danger). Many previously-advantaged people in South Africa had to make a life-changing mind shift to begin seeing Black people, communists and Roman-Catholics as ordinary people capable of as much good as the old regime was capable of evil ones. Distorted views of Christianity were forced on all through the Christian National Education policy (CNE)[57]

POSSIBLE CONTRIBUTION

I have indicated that I feel unworthy of a place on the podium on this occasion. Apart from the invitation which justifies my presence here to some degree, I believe that I could, from my perspective as a believer and an educationist interested in education reform in a developing country facing severe educational challenges, offer some broad Christian perspectives on the concepts relevant to the Congress theme such as: religion, spirituality, education, church, renewal, the state of the world's youth and the drivers of renewal. My comments need to be understood against my background as set out above. The fact that I am only going to refer to Christianity is natural and should not be construed as disrespect for the other religions.

BACKGROUND: RENEWED INTEREST IN SPIRITUALITY (RELIGION)

The theme of the Congress speaks to religion, education and a renewal of passion. One would expect such renewal to be driven and owned by the church as an institution as we have come to know it through the ages. However, it seems possible that renewal of spirituality may to a degree be driven to forces and groups outside beyond churches and affiliations and confessions as we know them. Potgieter, van der Walt, Wolhuter and Valenkamp[58] make a number of telling points about spirituality (religion) and education when they say that-

> Spirituality refers to a sincere respect for, appreciation of and adherence to a sacred dimension in the life-world of people. It is a lived passion; a state of being focused and energetically motivated; a condition characterised by a feeling of being totally captured. It is the conduit through which a transcendental, ultimate reality impacts on human beings, transforming them so that they increasingly tend to live their lives in service of these ultimate realities. It is the manner in which one more or less methodically relates beliefs and experiences of inspiration and/or transcendence, to the actual practice of life by orienting oneself on sources of spirituality.
>
> The educator should in body the desired form of spirituality by being committed to and captured by some inspirational force or other that may be of religious or nonreligious nature.

[57] Randhart School and Others_Answering Papers Final 28 April 2015 Compressed, paras 75 – 115, http://goo.gl/oBwoSt, accessed on 28 October 2015.

[58] Potgieter, van der Walt, Wolhuter and Valenkamp, (2013). Towards an integrated theory of core concepts in education. *Tydskrif vir Geesteswetenskappe*, Jaargang 53 No. 3: September 2013, pp 288-289.

> By emulating the spiritual example set by the educator, educands may either acquire the same spirituality for their own journey as human beings, or reject the example set by the educator; in which case the educands (the individuals who are being educated) orientate their own selves towards a new spiritual principle.
> The 'organic individual' (person with integrity close brackets is one who has made a conscious ideological choice. The spirituality associated with, and flowing from, such an ideological choice helps them to transcend self-centredness. They do not serve the interests of the rich and powerful at the expense of the poor and weak but for one to serve the interests of change for the better of all. Spirituality is a pre-requisite for inspirational education since it connects at the deepest level with the most fundamental manner-of-being of being human. Without education no person can go up to become a fully organic person imbued with a particular spiritual or ideological directness and openness the role of education is to inculcate the values and norms of social justice in a sense of fairness, and to the benefit of all.
> As human beings we are subjected to a moral compulsion to search for a better and more just world-a world that arguably is best attainable through education.[59]

I believe that it is this moral compulsion to search for a better more just world that leads people to explore the way in which they can express their religious convictions in the regarding to the improvement of other people's lives through education.

There can be little doubt that there is a renewed interest in spirituality in the modern world. This is evidenced by concerns expressed among others by political leaders who express their concern about moral decay, a lack of values, phenomena such as corruption and greed. In my own country a previous president (the late Mr Nelson Mandela) was instrumental I creating a moral regeneration movement and the leadership of this initiative was given to our current president, Mr Jacob Zuma in 1999 when he was still Deputy-President of the country.[60] The renewed interest in (a new) spirituality is also apparent in the mushrooming of smaller religious groupings next to or out of the traditional "major religions". The search for new manifestations of spirituality is also fuelled by problems with which the modern church is confronted and to which answers are not readily forthcoming such as celibacy, homosexuality, the role of women in leadership, how to address poverty, child labour, unfair discrimination against women, to alleviate the health and educational problems of the majority of people on the planet, to improve the quality of life of most people and to add to the social justice that is available to people.

In the search for spirituality, people can turn to the exploration of terms with which they are more familiar like culture. But, as in the case of Zhang,[61] there is often little difference between their cultural dictums and spiritual obligations. Zhang begins with the following characteristic of educational tolerance: "The sea can hold the water from thousands of rivers. Its hugeness is due to its capacity. This point emphasizes that people should be open-minded and magnanimous, be able to accept diversities and respect differences". The second characteristic of tolerance is to educate in an approach with flexibility and appreciation and not to "make reprisals towards the insolent". Part of the third characteristic is to "feel happy if somebody points out my mistakes" and the fourth is to "requite grudge with fairness and honesty, and repay injury with kindness". Since the tone of this Congress is Christian, one can draw attention to the similarities between what Zhang raises and what is found in the Biblical injunctions regarding compassion, the treatment of strangers, retaliation, the obligation to correct those that have "gone astray".

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[59] Free translation from the Dutch by the author.
[60] http://www.mrm.org.za/index.php?option=com_content&view=article&id=1231&Itemid=619, accessed on 9 November 2015.
[61] Zhang, JunHua. 2008. Four characteristics of educational tolerance. China Education Daily: 24 June 2008.

Potgieter *et al*.[62] report on research findings indicating that in among others Australia and the Netherlands young people long for forms of spirituality that go beyond confession, sect and institution. They won it to experience a spiritual dimension which all people share with one another irrespective of their religious views or other life views or mouth moral attitudes. For them the term *spirituality* encompasses the views beliefs and customs which helps people open themselves up to meaningful relationships with observable and differentiating the realities which belong to the field of mysticism, including the super natural. They refer to authors that indicated that the increasing popularity of this new kind of spirituality is attributable among others to its beneficial effect on the lives, communities, wealth and welfare of the followers of these views. Those who seek this new kind of spirituality emphasise that they are modern multicultural society offers no spiritual direction, security or certainty to those who remain unquestioningly loyal to the dogmatic, confessional religions and theologies and institutions of the past.[63]

In an article in a literary studies journal, Romylos and de Lange[64] focused on" the return and revitalisation of traditional Christian themes, such as sacrifice, guilt, sin and redemption, and the manifestation of supernatural phenomena, such as visions, faith healing and stigmata in three selected contemporary postmodern novels (*Atonement* by Ian McEwan, *Keeping Faith* by Jodi Picoult and *Mariëtte in Ecstasy* by Ron Hansen)".[65]

After examining the three contemporary novels, Romylos and de Lange[66] conclude by agreeing with Graham Ward who "maintains that religion is not just back as a re-enchantment, but manifests in fundamentally new and productive ways". Ward "qualifies this re-enchantment as a 'return not signalled by theologians but by filmmakers, novelists, poets, philosophers, political theorists, and cultural analysts'".[67]

The above suggests that one needs to examine the apparent developments of related concepts and their interdependence before embarking on strategies aimed at renewing education from a religious perspective and from the church as an institution. Confusion about concepts and the meanings they are acquiring in modern society can hamper the realisation of education renewal ideas born from a religious passion. One reality that may prove to be difficult to come to terms with is the one that renewal might not originate from the church alone.

Having suggested that one should perhaps look at the Congress theme through new lenses, it is apt to examine the concepts prominent in the theme before commenting on the idea of Educating Today and Tomorrow: A Renewing Passion.

Frist we will make a brief comment on the interrelatedness of the concepts and on new understandings that seem to be emerging.

THE RELATIONSHIPS BETWEEN EDUCATION AND KEY SOCIAL CONCEPTS INCLUDING RELIGION INTERCONNECTEDNESS

[62] Potgieter, van der Walt, Wolhuter and Valenkamp, (2013). Towards an integrated theory of core concepts in education. *Tydskrif vir Geesteswetenskappe*, Jaargang 53 No. 3: September 2013, p 293.
[63] Free translation of the text of Potgieter *et al*. (above) from the Dutch by the author.
[64] Romylos, Salome and de Lange, Attie. 2015. The Convergence of Sacred and Secular Spaces in Three Selected Contemporary Novels. *Journal of Literary Studies*.
[65] *Ibid*, p 1.
[66] *Ibid*, p 15.
[67] *Ibid*.

Potgieter, van der Walt, Wolhuter and Valenkamp[68] report that since 2006 they have been busy with an investigation into the relationships between education and teaching on one hand and spirituality / religion, quality of life and welfare, social capital, social justice, human rights and morality on the other hand. Their purpose has been to relate education and teaching to the needs of modern society. They did that because they believed that education and teaching should embrace all aspects of daily life.

They[69] quote with approval John Dewey who observed that education touches on every aspect of our lives. It is through education that we become who we are.

Potgieter *et al*.[70] report they developed a heuristic model to explain a cluster of educational concepts as well as their connectedness. They see education as the main concept in the sense that pedagogical imperatives from all the other concepts. At the same time education contributes among others to a higher quality of life, welfare, happiness, spirituality and respect for human right.

They conclude[71] that the optimal realisation of the social concepts may be viewed as the aims of education and as such the concepts are intimately interwoven in a changing but timeless relationship. When these concepts are given due attention, they could lead to more effective education. Put differently, the renewing passion for educating today and tomorrow could be realised. I would also propose that, to justice to the theme of the conference, its constituent elements need to be clarified and integrated properly in order to avoid get caught up in a web of unrelated unclarified concepts

RELIGION

If one talks about religion, church, spirituality end related concepts today a mushroom of confusing and confused concepts immediately explodes even if one limits oneself to one religion namely the Christian one. The quote below illustrates the conceptual mushroom –

> Today the Christian church is fragmented across the world. In many Eastern European countries there are the churches called 'Orthodox'. Then there is the global body of Catholicism, centred in Rome. There are 'mainline Protestant Churches', the Anglican communion, Pentecostal and Charismatic churches, and many groups and fellowships that fit into none of these classifications.
>
> In Paul's day there were only Christian groups under the guidance of the apostles, each group being designated by its geographical location. There was 'the church in Antioch'; the 'church in Philippi'; the 'Church in Corinth', and so on. It is difficult to determine where Paul was when he wrote to the Galatians, but it could have been Ephesus. Galatia was a large area in the centrefold of the country we now call Turkey.[72]

As long ago as 1912 Sarah Hoyt[73] conducted an excellent etymological analysis of the word "religion" which can still inform our thinking today. She points out that *religion* is connected to

[68] Potgieter, van der Walt, Wolhuter and Valenkamp, (2013). Towards an integrated theory of core concepts in education. *Tydskrif vir Geesteswetenskappe*, Jaargang 53 No. 3: September 2013, p 200.
[69] *Ibid*.
[70] *Op cit*, p 301.
[71] *Op cit*, p. 302.
[72] *Faith for Daily L*iving, 4 November 2015,
[73] Hoyt, Sarah F. 1912. The Etymology of Religion. Journal of the American Oriental Society. Vol. 32, No. 2 (1912), pp. 126 - 129

religare (to bind). Ligare (to bind) is therefore the root of *religion.* As such it is allied to the word *ligament*. Some rare English words like *religate* and *religation* both share the root *to bind*. *Religion* also shares a stem with *obligatio*.[74]

Hoyt[75] says that, according to Cicero,*religion* is derived from *relegere* meaning to go through or over again in reading, speech and thought. *Relegere* is identical to the Greek meaning to have, heed or have a care for. According to Skeate's *Etymological Dictionary* it is connected with the English words *rack,* to heed, to have a care for. The Teutonic base of these words is *rak* and the Aryan one is rag. It is found in the Gospel according to St Mark 12:4 "Thou carest not".

In the Authorised King James Version *religion* is used to denote outward forms rather than the inner spirit. It refers to the rights and ceremonies of religion.[76]

The general linguistic stance is that religion means to bind. It should be noted, however, that it also refers to care and to go over thoughts again (to re-examine them or reflect on them) and the process of reflection seems to be an inevitable part of the process of renewing passion for educating today and tomorrow. Furthermore, whatever stragy is chosen should be able to bind all believers together organically.

I will deal with the concept "church" before I get to my conclusion about the conundrum of renewing the passion for education and its connectedness with religion and spirituality. First I want to briefly examine the notion of renewal.

RENEW

The word *renew* is obviously central to the success of initiatives that may come out of this Congress to re-energise the efforts of the church to restore and strengthen the passion for education today and tomorrow. However, the first question that comes to mind is why this topic of renewal should be addressed at this point in time. Obviously it is an opportune time for the Congregation to celebrate and assess the existence of two important policy documents in the Roman Catholic Church. However, one should not let the opportunity pass of considering other factors that may also play or have played a role in this strategy to re-energise the passion such as the question wthether the renewing contemplated should be veiwed as a once-off effort or as a continuous imperative.

It is of course true that the factors that necessitate the renewal of the passion could be internal to the church and religion but could also be external and one has to take this possibility in mind in exploring the topic.

What triggered this thinking?

As a Christian that would like to see Christianity fulfil its role in the world namely to be salt and light for the world and to bring the message of hope to all parts of the world, one would like to believe that the idea of renewal is based first and foremost on the New Testament concept of transformation by the renewal of one's mind as expressed for example in Romans 12:12 in the 21st century King James Version of the Bible: "And be not conformed to this world, but be ye transformed by the renewing of your mind, that ye may prove what is that good and acceptable and perfect will of

[74] *Ibid*, p 126.
[75] *Ibid*, p 127.
[76] *Ibid*, p 128.

God". The Amplified Bible, Classic Edition puts it like this: "Do not be conformed to this world, but be transformed by the renewal of your mind, so that you may prove what is the good and acceptable and perfect will of God, even the thing which is good and acceptable and perfect." The Darby Translation puts it this way: "And be not conformed to this world, but be transformed by the renewing of [your] mind, that you may prove what [is] the good and acceptable and perfect will of God." From all of these it is clear that renewing first has to do with one's mind first and then with one's actions. One cannot have one without the other.

To my mind the above paragraph spells out the preferred reason for the desire to renew the passion for education and for religion. However, certain worrying trends and questions cannot be ignored.

Table 1 below contains some statistics about religions and their growth which could serve as a "negative" trigger for reform within religious circles:

Table 1: Islam and Christianity[77]

ISLAM		**CHRISTIANITY**	
World	22.9%	World	32.3%
Africa	41.5%	Africa	48.5%
South Africa	1.73%	South Africa	75.2%
Estimated growth of world population to 2050 35%			
Islam	1.6 to 2.8 billion (73%)	**Christianity**	Christianity growth rate 34%

May be the renewed passion is also indicative of a sense of survival along with the "new evangelization" and the reaching of unreached areas.

Definitions [78]

A study of the definitions of "renewal" reveals that it has internal as well as external components. Furthermore one can determine its meaning from its *synonyms* as well as its antonyms. Among the synonyms of the word one finds words like stimulate, freshen, overhaul, reconstruct, regenerate, remould, restitution, revamp, take up again, restore or replenish, revive, re-establish, restore to a former state, make new as if you begin again and recommence. All of these are verbs worthy of consideration in connection with the renewing of the passion for education today and tomorrow.

However, one should also take heed of the fact that if one does not succeed in renewing the passion for education, one might be giving effect to its *antonyms* which include the following; and, impair, kill , finish, stop, conclude, deplete, end, terminate, annihilate, curtail, discontinue, you raise, finalise and liquidate.

The word *renew* seems to be derived from the late 14th century re-("again") and the Middle English "newen" meaning "resume, revive, renew" and is formed on an analogy of the Latin word "renovare" meaning "renewed or renewing".[79] Naturally one would wish that the outcome of this Congress would be the realisation of the synonyms of renewal and not that of the realisation of its antonyms which could mean the beginning of the end of education of a Christian nature as we know it.

[77] *Die Kerkbode*, 7 August 29015. This religious journal of the Dutch Reformed Church in South Africa cites the following internet sources as its sources: (www.opendoors.org.za; www.operationworld.org; www.pewresearch.org; joshuaproject.net)

[78] https://www.powerthesaurus.org/renew/narrower/2, accessed on 28 October 2015; http://dictionary. reference.com/cit.html?qh= renew+ia=etymon2, accessed on 28 October 2015.

[79] http://dictionary. reference.com/cit.html?qh= renew+ia=etymon2, accessed on 28 October 2015.

PASSION – EXITEMENT, PAIN [80]

It is fully understandable why the Congress chose to team the word *renew* with *passion* as the former does not seem to be achievable without the latter which refers among others to strong and barely controllable emotion; an intense desire or enthusiasm for something; a thing arousing great enthusiasm; a state of outburst of strong emotion.

The other side of the coin is that the word *also refers to the* suffering and death of Jesus. Viewed together the two meanings of the word *passion* suggest that the aim of renewing the passion for Christian education encompasses the promotion of both a barely controllable emotion as well as the willingness to sacrifice oneself and one's belongings for its achievement. Although the word *renew* is in itself primarily a positive word, it gains its strength from being teamed with a word that has negative implications.

EDUCATION

Potgieter *et al*. [81] observe that:

> Education should contribute to the social capital of the communities it serves, because individuals should not only understand their position as an individual with in a particular group, but should also have a notion of what to contribute to the group in terms of social capital. …
>
> As human beings we are subjected to a moral compunction to seek for a better and more just world - a world that arguably his best obtained through education. …
>
> Education is a pivotal activity that reads all these (and other related) phenomena as pedagogical aims, thereby reinforcing itself as a formative experience.

An etymological dictionary[82] provides five definitions of the word "education":

1) the process of receiving or giving systematic instruction, especially at the school or university (it has synonyms such as teaching, schooling, tuition, schooling, tutoring, schooling, instruction, pedagogy, coaching, training, tutelage, enlightenment, edification, bettering)
2) the theory and process of teaching
3) a body of knowledge acquired while being educated (with synonyms like learning, knowledge, literacy, schooling,'s collar ship, enlightenment, culture, refinement whilst ignorance can be regarded as the antonym of this concept)
4) information or training in a particular subject (for example health education)
5) an enlightening experience (the dictionary gives this example: it is an education to watch a good workman)

The origin of the word "education" is in the Latin words "educare" and "educatio".

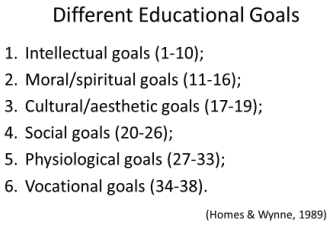
The above definitions do not emphasise clearly enough that education can be underpinned and borne by the precepts of a religion such as Christianity. It can in other words be the vessel through

[80] Https: www.Google.co.za/#q=etymology+of+passion, accessed on 28 October 2015.
[81] Potgieter et al 2013 page 289
[82] https://www.google.co.za/#q= etymology+ of+ education, accessed on 28 October 2015.

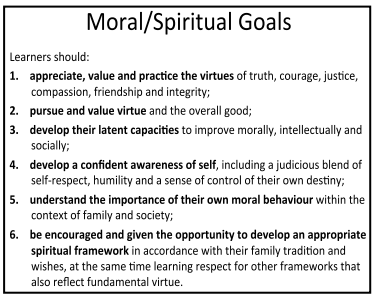
which the tenets and the aims of a particular religion are realised. It also needs to be remebered that the concept education refers to a lifelong process from the cradle to the grave and that it impoverishes the meaning of the idea significantly to equate education with what happens in aformal educational institution like a school only.[83] Education is also a societal or community phenomenon which should, in the case of a religion involve all members of the persuasion either as educators or as educands. In this regard parents must be recognised as the primary and principal educators of their children and that this position gives special obligations while it also gives them access to a particular set of rights regarding their child's education.[84]What must also not be forgotten is that the aim of education should be to turn those that are being educated into responsible and mature adults accountable for actions and capable of pursuing God's purpose with their individual lives.

The role and value of religion in the education of the child as implicitly and explicitly articulated in the *Gravissimum* is no longer universally and uncritically accepted especially in public school circumstances. However, I am of the opinion that withholding a religious basis from a child's education impoversihes the child's decision making possibilities later on. I agree fully with Muavia Gallie's exposition of the goals of schooling:[85]

Slide 11



Slide 12



CHURCH

I deal with this concept last as it is obviously crucial in any discussion about renewing the passion for education and religion. Furthermore, I believe that the radical re-understanding of the word church is necessary to underpin a strategy that can facilitate and sustain a renewed passion for religion and education.

Although I do it with a great deal of hesitancy I feel that I have enough reason to suggest that the church is indeed open to the temptation and falls believe that it is still in control of society at large as it used to be in mediaeval times. The growth of secular governments has of course put a stop to that and even in countries which still identify closely with a religion (like Islam) have to make allowances for the fact that not all people living in that country are followers of Islam.

Richard Anthony undertook a study in which he compared Christ's ekklesia and the church,[86] he identifies several aspects of the church which are central to our understanding of the topic addressed by this Congress.

[83] *Gravissimum Educationis* 2 – 3.
[84] *Ibid*, p 14 – 15.
[85] Gallie, Muavia. "School turnaround". Presentation at a JET Advisory Committee meeting on 1 October 2015. Slides 11-12.
[86] Richard Anthony. Christ's Ekklesia and the Church Compared. Htttp://www.eccelsia.org/truth/ekklesia.html. accessed on 28 October 2015.

1. The Greek word ekklesia is used 115 times in the New Testament and, in most bibles, it is always translated as "church" (except in Acts 19:32, 39, 41 where it is properly translated as "assembly". The first complete English Bible was the Tyndale Bible (circa 1524). It didn't use the word "church" anywhere but used the word "congregation close quote. Sometime after this Bible, they started replacing the word "congregation" with the word "church"[87]
2. Anthony points out that the difference between congregation and Bible is not just word mincing
3. In dictionaries the word church is defined as a place of worship of any religion as a Jewish or heathen temple. When thinking of church they are thinking of building or structure which is the original meaning of church. However somehow transferred over as being the body of Christ[88]
4. The word ekklesia means to be called out to be part of a congregation called out for a reason
5. In the original Greek church means to be called out from the midst in other words the self[89]
6. Anthony means that the word "church" first popped up in the writings of the patristics and after that when the church joined the state under Constantine. Importantly this signified the ability of worldly rulers to have jurisdiction over churches.
7. Still we do not know exactly how the word church got in to the language of the Bible[90]
8. the courts have ruled that the word church is used interchangeably did his designated society of persons who professed that question religion and the place where such persons regularly assemble for worship[91]
9. Anthony ask why the Bible falsely uses the word "church" instead of "Ekklesia" and comes to the conclusion that it is because all churches are businesses under the control of man[92]
10. Churches localize God[93]
11. The Internal revenue Service identifies the 14 characteristics of the church:[94]
    a. A distinct legal existence
    b. a recognised creed and form of worship
    c. a definite and distinct ecclesiastical government
    d. a formal code of doctrine and discipline
    e. a distinct religious history
    f. a membership not associated with any other church or denomination
    g. an organisation of ordained ministers
    h. ordained ministers selected after completing prescribed courses of study
    i. a literature of its own
    j. established place of worship
    k. regular congregations
    l. regular religious service
    m. "Sunday schools" for the religious instruction of the young
    n. schools for the preparation of its ministers

It is clear that the formal characteristics of the church as opposed to the *ekklesia* could harm and limit the efforts of the church to reach the world through Christian education and that the church should think of ways of dealing with the bonds of its external organisations so that its congregation / assembly / people / followers could be free to spread the message that each of them is called on to spread.

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[87] *Ibid*, p 1.
[88] *Ibid*, p 2.
[88] *Ibid*, p 3
[88] *Ibid*, p2.
[89] *Ibid, p 3*
[90] *Ibid*, p 4 *et seq.*
[90] Ibid*, p 5.*
[91] Ibid*, pp 5-6.*
[92] *Ibid*, p 6.
[93] *Ibid*, p 7
[94] *Ibid, p 8-11.*

The following paragraph deals with the history of the church and its engagement with social issues and would seem to suggest that a tendency to look at the church as an organisation or an institution too much could contribute to the seeming failures of the church in history.

The history of the church and social issues

I have already said there is a false belief among some believers that the church is still as much in control of the entire world as it used to be in mediaeval and prior times when it controlled even the state government. The church's record in its engagement with the world and its problems (the broken world that will be renewed when Christ comes again) is far from impeccable. Just thinking of issues such as the following necessitates the church rethinking and re-assessing its modus operandi in engaging with the world's problems: Nazism, Communism, poverty, apartheid, crusades, slavery, the position of women, sexual identity, war, political issues and missionaries that did much good but did not leave the colonies much better than they were before the missionaries got there. There was often a tendency to get drawn into debates on issues of minor importance while pressing and urgent broad social issues were avoided.

In his book *The hole in our* gospel Richard Stearns[95] makes telling points out how the church in the USA has failed and is failing the world. He refers to the USA as the richest country in the world and mentions three clear principles that separate the scriptural view of riches from the so-called "American dream" -

1 It's not our money – it all comes from God
2 We are not *entitled to* it but *entrusted with* it
3 God expects us to use it in the interest of His kingdom.

To Stearns's mind the modern American church is the wealthiest church in history. Yet the church is committing only five ten-thousandths of its income to the world.[96] He continues that if "every American churchgoer tithed, we could literally change the world…. $65 billion – less than 40 percent of the extra $168 billion – could eliminate the moist extreme poverty on the planet for more than a billion people".[97] Stearns remarks on how wonderful it would be worth for the image of the world's Christians if the world could watch Americans give so generously that it –

1 Brought an end to world hunger
2 Solved the clean water crisis
3 Provided universal access to drugs and medical care for the millions suffering from AIDS, malaria and tuberculosis
4 Virtually eliminated the more than twenty-six thousand daily child deaths
5 Guaranteed education for all the world's children, and
6 Provided a safety net for the world's tens of millions of orphans[98]

It seems that the church needs to refocus on its main objective which is to spread the love of Jesus throughout the world, and to educate Jesus people to understand Jesus loving to become the best they can be in the service of Jesus. If the above is what American Christians can do, all the Christians

[95] Stearns, Richard. *The hole in our gospel*. 2009. Nashville: Thomas Nelson, 203 – 220.
[96] *Ibid*, p 215.
[97] *Ibid*, p 218.
[98] *Ibid*, pp 218 – 219.

in Christian churches all over the world could foreseeably achieve much more in the field of education and in connection with other social issues.

CONCLUSION

I am going to end off by putting a few of the challenges before the world and before the church to illustrate the types of agendas that could, beside the need to spread the gospel, occupy a major part of the church's efforts in this world**.**

Besides the clearly diminishing number of church-goers and the slowing growth rate of believers and the resultant loss of money, the church and religions *per se* have to cope with an apparent loss of relevance and a dissatisfaction with existing confessions and structures evidenced by the search for a new spirituality. This dark picture is offset by the huge opportunities that present themselves to the church as challenges to facilitate a renewal of passion among other regarding education. Some extracts from the United Nations Children's Fund (UNICEF) 2014 Report on the State of the World's Children 2014[99] could help quantify the challenges facing project contemplated to renew the passion for education.

1 Under five mortality rates

Child mortality estimates
Each year, in *The State of the World's Children*, UNICEF reports a series of mortality estimates for children – including the annual neonatal mortality rate, infant mortality rate, the under-five mortality rate (total, male and female) and the number of under-five deaths – for at least two reference years. These figures represent the best estimates available at the time of printing and are based on the work of the United Nations Inter-agency Group for Child Mortality Estimation (IGME), which includes UNICEF, the World Health Organization (WHO), the World Bank and the United Nations Population Division. IGME mortality estimates are updated annually through a detailed review of all newly available data points, which often results in adjustments to previously reported estimates. As a result, consecutive editions of *The State of the World's Children* should not be used for analysing mortality trends over time. Comparable global and regional under-five mortality estimates for the period 1970–2013 are presented on page 90–95. Country-specific mortality indicators for 1970–2013, based on the most recent IGME estimates, are presented in Table 10 (for the years 1970, 1990, 2000 and 2013) and are available at <data.unicef.org/child-mortality/under-five> and <www.childmortality.org>.

Under-five mortality rate (per 1,000 live births)

UNICEF Region	1970	1975	1980	1985	1990	1995	2000	2005	2010	2013
Sub-Saharan Africa	246	219	201	187	179	172	156	129	103	92
Eastern and Southern Africa	212	193	188	174	165	157	140	112	85	74
West and Central Africa	279	249	220	205	197	190	175	149	122	109
Middle East and North Africa	205	165	126	90	70	60	50	42	34	31
South Asia	213	195	171	149	129	112	94	77	64	57
East Asia and Pacific	117	94	76	63	58	51	41	30	23	19
Latin America and Caribbean	119	102	84	68	54	43	32	25	23	18
CEE/CIS	97	74	69	56	47	48	37	29	22	20
Least developed countries	243	230	211	190	174	158	139	113	91	80
World	**147**	**129**	**117**	**100**	**90**	**85**	**76**	**63**	**51**	**46**

Under-five deaths (millions)

UNICEF Region	1970	1975	1980	1985	1990	1995	2000	2005	2010	2013
Sub-Saharan Africa	3.2	3.2	3.4	3.6	3.8	4.0	4.1	3.8	3.3	3.1
Eastern and Southern Africa	1.3	1.4	1.5	1.6	1.7	1.7	1.8	1.5	1.3	1.1
West and Central Africa	1.7	1.8	1.8	1.9	2.0	2.2	2.2	2.1	2.0	1.9
Middle East and North Africa	1.3	1.1	1.0	0.8	0.6	0.5	0.4	0.4	0.3	0.3
South Asia	5.9	5.7	5.6	5.1	4.7	4.0	3.5	2.8	2.2	2.0
East Asia and Pacific	4.8	3.6	2.4	2.5	2.5	1.6	1.2	0.9	0.7	0.6
Latin America and Caribbean	1.2	1.1	1.0	0.8	0.6	0.5	0.4	0.3	0.2	0.2
CEE/CIS	0.6	0.5	0.5	0.4	0.4	0.3	0.2	0.2	0.1	0.1
Least developed countries	3.3	3.5	3.6	3.6	3.6	3.5	3.4	2.9	2.5	2.3
World	**17.3**	**15.5**	**13.9**	**13.3**	**12.7**	**10.9**	**9.7**	**8.2**	**6.9**	**6.3**

STATISTICAL TABLES 29

[99] New York: UNICEF.

2 Nutrition

TABLE 2. NUTRITION

Countries and areas	Low birthweight (%)	Early initiation of breastfeeding (%)	Exclusive breastfeeding <6 months (%)	Introduction to solid, semi-solid or soft foods 6-8 months (%)	Minimum acceptable diet 6-23 months (%)	Breastfeeding at age 2 (%)	Underweight (%)	Stunting (%)	Wasting (%)	Overweight (%)	Vitamin A supplementation, full coverage[a] (%)	Adequately iodized salt consumption (%)
							moderate & severe[a]					
	2009-2013*			2009-2013*			2009-2013*				2013	2009-2013*
SUMMARY												
Sub-Saharan Africa	13	47	36	65	10	51	21	37	9	6	73	59
Eastern and Southern Africa	11	60	51	73	–	62	18	39	7	5	67	–
West and Central Africa	14	39	25	60	10	44	23	36	11	6	85	65
Middle East and North Africa	–	–	34	–	–	36	7	18	8	10	–	–
South Asia	28	39	47	58	–	75	32	38	15	4	53	69
East Asia and Pacific	–	44	30	79 **	–	21	5	12	4	6	85	86
Latin America and Caribbean	9	49	32	88	–	27	3	11	1	7	–	–
CEE/CIS	6	–	–	–	–	–	2	11	1	16	–	–
Least developed countries	14	53	46	62	–	63	22	37	9	4	81	50
World	**16 ******	**44**	**38**	**65 ******	–	**49**	**15**	**25**	**8**	**6**	**65**	**75**

For a complete list of countries and areas in the regions, subregions and country categories, see page 32 or visit http://data.unicef.org/index.php?section=regional-classifications.
It is not advisable to compare data from consecutive editions of *The State of the World's Children*.

DEFINITIONS OF THE INDICATORS

Low birthweight – Percentage of infants weighing less than 2,500 grams at birth.

Early initiation of breastfeeding – Percentage of infants who are put to the breast within one hour of birth.

Exclusive breastfeeding <6 months – Percentage of children aged 0–5 months who are fed exclusively with breast milk in the 24 hours prior to the survey.

Introduction of solid, semi-solid or soft foods (6–8 months) – Percentage of children aged 6–8 months who received solid, semi-solid or soft foods in the 24 hours prior to the survey.

Minimum acceptable diet (6-23 months) – Percentage of breastfed children aged 6–23 months who had at least the minimum dietary diversity and the minimum meal frequency during the previous day AND percentage of non-breastfed children aged 6–23 months who received at least 2 milk feedings and had at least the minimum dietary diversity not including milk feeds and the minimum meal frequency during the previous day.

Breastfeeding at age 2 – Percentage of children aged 20–23 months who received breast milk in the 24 hours prior to the survey.

Underweight – Moderate and severe: Percentage of children aged 0–59 months who are below minus two standard deviations from median weight-for-age of the World Health Organization (WHO) Child Growth Standards.

Stunting – Moderate and severe: Percentage of children aged 0–59 months who are below minus two standard deviations from median height-for-age of the WHO Child Growth Standards.

Wasting – Moderate and severe: Percentage of children aged 0–59 months who are below minus two standard deviations from median weight-for-height of the WHO Child Growth Standards.

Overweight – Moderate and severe: Percentage of children aged 0-59 months who are above two standard deviations from median weight-for-height of the WHO Child Growth Standards.

Vitamin A supplementation, full coverage – The estimated percentage of children aged 6–59 months reached with 2 doses of vitamin A supplements approximately 4-6 months apart in a given calendar year.

Adequately iodized salt consumption – Percentage of households consuming adequately iodized salt (15 parts per million or more).

MAIN DATA SOURCES

Low birthweight – Demographic and Health Surveys (DHS), Multiple Indicator Cluster Surveys (MICS), other national household surveys, data from routine reporting systems, UNICEF and WHO.

Infant and young child feeding – DHS, MICS, other national household surveys and UNICEF.

Underweight, stunting, wasting and overweight – DHS, MICS, other national household surveys, WHO and UNICEF.

Vitamin A supplementation – UNICEF.

Adequately iodized salt consumption – DHS, MICS, other national household surveys and UNICEF.

NOTES

– Data not available.

w Identifies countries with national vitamin A supplementation programmes targeted towards a reduced age range. Coverage figure is reported as targeted.

x Data refer to years or periods other than those specified in the column heading. Such data are not included in the calculation of regional and global averages, with the exception of 2005-2006 and 2007-2008 data from India, and 2008 data from China. Estimates from data years prior to 2000 are not displayed.

y Data differ from the standard definition or refer to only part of a country. If they fall within the noted reference period, such data are included in the calculation of regional and global averages.

Δ Full coverage with vitamin A supplements is reported as the lower percentage of 2 annual coverage points (i.e., lower point between semester 1 (January–June) and semester 2 (July–December) of 2013). Data are only presented for VAS priority countries; thus aggregates are only based on and representative of these priority countries.

θ Regional averages for underweight (moderate and severe), stunting (moderate and severe), wasting (moderate and severe) and overweight (moderate and severe) are estimated using statistical modeling of data from the UNICEF-WHO-World Bank Joint Global Nutrition Database, 2013 revision (completed September 2014). For more information: http://data.unicef.org/resources/2013/webapps/nutrition

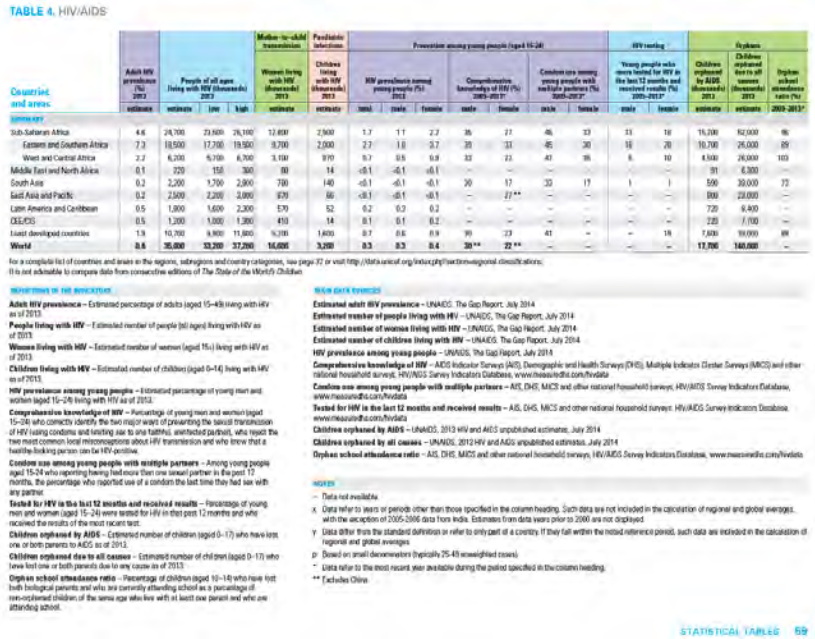
† The most recent survey for this country uses an indicator definition that is not in line with the international standard. If available, a previous data point which conforms to the standard definition is presented instead.

* Data refer to the most recent year available during the period specified in the column heading.

** Excludes China.

3 HIV/AIDS

TABLE 4. HIV/AIDS



4 Education

TABLE 5. EDUCATION

Countries and areas	Youth (15–24 years) literacy rate (%)		Number per 100 population		Pre-primary school participation		Primary school participation								Secondary school participation			
					Gross enrolment ratio (%)		Gross enrolment ratio (%)		Net enrolment ratio (%)		Net attendance ratio (%)		Out-of-school children of primary school age		Survival rate to last primary grade (%)		Net enrolment ratio (%)		Net attendance ratio (%)	
	2005–2013*		2013		2005–2012*		2005–2012*		2005–2013*		2008–2013*		2005–2013*		2005–2012*	2008–2013*	2005–2013*		2008–2013*	
	male	female	mobile phones	internet users	male	female	male	female	male	female	male	female	rate (%)	number (000)	admin. data	survey data	male	female	male	female
SUMMARY																				
Sub-Saharan Africa	75	64	66	17	20	20	104	96	81	75	71	69	22	32,711	58	88	35	30	34	30
Eastern and Southern Africa	79	72	60	15	25	25	112	104	86	83	75	76	15	10,980	48	–	34	32	24	24
West and Central Africa	71	54	72	18	15	15	100	90	77	69	67	63	27	18,829	70	91	36	28	42	35
Middle East and North Africa	94	89	107	37	27	26	107	101	92	89	90	87	9	4,301	85	94	72	67	–	–
South Asia	86	73	71	14	55	56	110	111	94	94	82	78	6	9,810	63	94	55	48	56	47
East Asia and Pacific	99	99	96	41	67	67	119	117	95	95	96	96	5	6,853	92	–	75	76	80	80
Latin America and Caribbean	98	98	115	47	74	75	110	107	93	94	93	94	6	3,759	77	90	71	75	73	78
CEE/CIS	100	99	126	51	61	60	100	99	95	95	96	95	5	1,008	95	–	–	–	–	–
Least developed countries	76	67	55	7	16	16	110	102	84	79	74	72	18	23,802	55	–	36	32	34	32
World	**92**	**87**	**92**	**38**	**55**	**53**	**110**	**107**	**92**	**90**	**84**	**82**	**9**	**57,781**	**75**	**92 ****	**66**	**63**	**60**	**56**

For a complete list of countries and areas in the regions, subregions and country categories, see page 32 or visit http://data.unicef.org/index.php?section=regional-classifications.
It is not advisable to compare data from consecutive editions of *The State of the World's Children*.

DEFINITIONS OF THE INDICATORS

Youth literacy rate – Percentage of population aged 15–24 years who can both read and write with understanding a short simple statement on his/her everyday life.
Mobile phones – The number of active subscriptions to a public mobile telephone service, including the number of prepaid SIM cards active during the past three months.
Internet users – The estimated number of Internet users out of the total population. This includes those using the Internet from any device (including mobile phones) in the last 12 months.
Pre-primary school gross enrolment ratio – Number of children enrolled in pre-primary school, regardless of age, expressed as a percentage of the total number of children of official pre-primary school age.
Primary school gross enrolment ratio – Number of children enrolled in primary school, regardless of age, expressed as a percentage of the total number of children of official primary school age.
Primary school net enrolment ratio – Number of children enrolled in primary or secondary school who are of official primary school age, expressed as a percentage of the total number of children of official primary school age. Because of the inclusion of primary-school-aged children enrolled in secondary school, this indicator can also be referred to as a primary adjusted net enrolment ratio.
Primary school net attendance ratio – Number of children attending primary or secondary school who are of official primary school age, expressed as a percentage of the total number of children of official primary school age. Because of the inclusion of primary-school-aged children attending secondary school, this indicator can also be referred to as a primary adjusted net attendance ratio.
Survival rate to last primary grade – Percentage of children entering the first grade of primary school who eventually reach the last grade of primary school.
Out-of-school children of primary school age – Children in the official primary school age range who are not enrolled in either primary or secondary schools. Children enrolled in pre-primary education are excluded and considered out of school.
Rate of out-of-school children of primary school age – Number of children of official primary school age who are not enrolled in primary or secondary school, expressed as a percentage of the population of official primary school age.
Secondary school net enrolment ratio – Number of children enrolled in secondary school who are of official secondary school age, expressed as a percentage of the total number of children of official secondary school age. Secondary net enrolment ratio does not include secondary-school-aged children enrolled in tertiary education owing to challenges in age reporting and recording at that level.
Secondary school net attendance ratio – Number of children attending secondary or tertiary school who are of official secondary school age, expressed as a percentage of the total number of children of official secondary school age. Because of the inclusion of secondary-school-aged children attending tertiary school, this indicator can also be referred to as a secondary adjusted net attendance ratio.
All data refer to official International Standard Classifications of Education (ISCED) for the primary and secondary education levels and thus may not directly correspond to a country-specific school system.

MAIN DATA SOURCES

Youth literacy – UNESCO Institute for Statistics (UIS).
Mobile phone and Internet use – International Telecommunications Union, Geneva.
Pre-primary, primary and secondary enrolment and rate and number of out-of-school children – UIS. Estimates based on administrative data from national Education Management Information Systems (EMIS) with UN population estimates.
Primary and secondary school attendance – Demographic and Health Surveys (DHS), Multiple Indicator Cluster Surveys (MICS) and other national household surveys.
Survival rate to last primary grade – Administrative data: UIS; survey data: DHS and MICS.

NOTES

– Data not available.
x Data refer to years or periods other than those specified in the column heading. Such data are not included in the calculation of regional and global averages, with the exception of 2005-2006 data from India and 2006 data from Brazil. Estimates from data years prior to 2000 are not displayed.
y Data differ from the standard definition or refer to only part of a country. If they fall within the noted reference period, such data are included in the calculation of regional and global averages.
z Data provided by Chinese Ministry of Education. The UIS dataset does not currently include net enrolment rates or primary school survival for China.
* Data refer to the most recent year available during the period specified in the column heading.
** Excludes China.

4 Women

TABLE 8. WOMEN

Countries and areas	Life expectancy: females as a % of males	Adult literacy rate: females as a % of males	Enrolment ratios: females as a % of males		Survival rate to the last grade of primary: females as a % of males	Contraceptive prevalence (%)	Antenatal care (%)		Delivery care (%)			Maternal mortality ratio[†]		
			Primary GER	Secondary GER			At least one visit	At least four visits	Skilled attendant at birth	Institutional delivery	C-section	2005-2013*	2013	
	2013	2005-2013*	2005-2013*		2005-2013*	2005-2013*	2005-2013*		2005-2013*			Reported	Adjusted	Lifetime risk of maternal death (1 in:)
SUMMARY														
Sub-Saharan Africa	104	75	92	84	100	23	76	45	47	46	4	–	510	38
Eastern and Southern Africa	105	81	94	91	105	33	77	39	42	41	4	–	420	49
West and Central Africa	103	66	90	77	98	17	76	50	53	51	4	–	590	30
Middle East and North Africa	106	83	94	95	98	58	86	59	79	75	23	–	110	300
South Asia	105	69	100	93	106	53	71	35	50	45	10	–	190	190
East Asia and Pacific	105	95	99	101	102	64 **	94	80 **	93	87	28	–	74	720
Latin America and Caribbean	109	99	97	107	105	75	97	90	93	91	43	–	85	510
CEE/CIS	115	99	100	97	101	63	–	–	99	–	–	–	27	1,900
Least developed countries	104	76	93	87	102	35	74	38	47	44	6	–	440	51
World	**106**	**91**	**97**	**97**	**103**	**55 ****	**82**	**51 ****	**68**	**63**	**16**	–	**210**	**190**

For a complete list of countries and areas in the regions, subregions and country categories, see page 32 or visit http://data.unicef.org/index.php?section=regional-classifications.
It is not advisable to compare data from consecutive editions of *The State of the World's Children*.

DEFINITIONS OF THE INDICATORS

Life expectancy – Number of years newborn children would live if subject to the mortality risks prevailing for the cross section of population at the time of their birth.
Adult literacy rate – Percentage of the population aged 15 years and over who can both read and write with understanding a short, simple statement on his/her everyday life.
Primary gross enrolment ratio (GER) – Total enrolment in primary school, regardless of age, expressed as a percentage of the official primary-school-aged population.
Secondary gross enrolment ratio (GER) – Total enrolment in secondary school, regardless of age, expressed as a percentage of the official secondary-school-aged population.
Survival rate to last grade of primary – Percentage of children entering the first grade of primary school who eventually reach the last grade (administrative data).
Contraceptive prevalence – Percentage of women (aged 15–49) in union currently using any contraceptive method.
Antenatal care – Percentage of women (aged 15–49) attended at least once during pregnancy by skilled health personnel (doctor, nurse or midwife) and the percentage attended by any provider at least four times.
Skilled attendant at birth – Percentage of births attended by skilled heath personnel (doctor, nurse or midwife).
Institutional delivery – Percentage of women (aged 15–49) who gave birth in a health facility.
C-section – Percentage of births delivered by Caesarean section. NB: C-section rates between 5 per cent and 15 per cent expected with adequate levels of emergency obstetric care.
Maternal mortality ratio – Number of deaths of women from pregnancy-related causes per 100,000 live births during the same time period. The 'reported' column shows country-reported figures that are not adjusted for under-reporting and misclassification. For the 'adjusted' column, see note below (†). Maternal mortality ratio values have been rounded according to the following scheme: <100, no rounding; 100–999, rounded to nearest 10; and >1,000, rounded to nearest 100.
Lifetime risk of maternal death – Lifetime risk of maternal death takes into account both the probability of becoming pregnant and the probability of dying as a result of that pregnancy, accumulated across a woman's reproductive years. Lifetime risk values have been rounded according to the following scheme: <100, no rounding; 100–999, rounded to nearest 10; and >1,000, rounded to nearest 100.

MAIN DATA SOURCES

Life expectancy – United Nations Population Division.
Adult literacy rate – UNESCO Institute for Statistics (UIS).
Primary and secondary school enrolment – UIS.
Survival rate to last grade of primary – UIS.
Contraceptive prevalence – DHS, MICS and other nationally representative sources; United Nations Population Division.
Antenatal care – DHS, MICS and other nationally representative sources.
Skilled attendant at birth – DHS, MICS and other nationally representative sources.
Institutional delivery – DHS, MICS and other nationally representative sources.
C-section – DHS, MICS and other nationally representative sources.
Maternal mortality ratio (reported) – Nationally representative sources, including household surveys and vital registration.
Maternal mortality ratio (adjusted) – United Nations Maternal Mortality Estimation Inter-agency Group (WHO, UNICEF, UNFPA, The World Bank and the United Nations Population Division).
Lifetime risk of maternal death – United Nations Maternal Mortality Estimation Inter-agency Group (WHO, UNICEF, UNFPA, The World Bank and the United Nations Population Division).

NOTES

– Data not available.
x Data refer to years or periods other than those specified in the column heading. Such data are not included in the calculation of regional and global averages, with the exception of 2005-2006 and 2007-2008 data from India, and 2006 data from Brazil. Estimates from data years prior to 2000 are not displayed.
* Data refer to the most recent year available during the period specified in the column heading.
** Excludes China.
† The maternal mortality data in the column headed 'reported' refer to data reported by national authorities. The data in the column headed 'adjusted' refer to the 2013 United Nations inter-agency maternal mortality estimates that were released in May 2014. Periodically, the United Nations Maternal Mortality Estimation Inter-agency Group (WHO, UNICEF, UNFPA, The World Bank and the United Nations Population Division) produces internationally comparable sets of maternal mortality data that account for the well-documented problems of under-reporting and misclassification of maternal deaths, including also estimates for countries with no data. Please note that owing to an evolving methodology, these values are not comparable with previously reported maternal mortality ratio 'adjusted' values. Comparable time series on maternal mortality ratios for the years 1990, 1995, 2000, 2005 and 2013 are available at < http://data.unicef.org/maternal-health/maternal-mortality >.

5 Child protection

TABLE 9. CHILD PROTECTION

Countries and areas	Child labour (%)* 2005–2013*			Child marriage (%) 2005–2013*		Birth registration (%)** 2005–2013*	Female genital mutilation/cutting (%)* 2004–2013*			Justification of wife-beating (%) 2005–2013*		Violent discipline (%)* 2005–2013*		
							prevalence		attitudes					
	total	male	female	married by 15	married by 18	total	women*	girls*	support for the practice*	male	female	total	male	female
SUMMARY														
Sub-Saharan Africa	25	25	25	12	40	41	39	17	23	35	52	–	–	–
Eastern and Southern Africa	25	27	24	10	37	36	44	14	20	40	55	–	–	–
West and Central Africa	25	25	25	14	42	45	31	17	23	30	50	90	90	90
Middle East and North Africa	9	11	7	3	18	87	–	–	–	–	–	99	90	98
South Asia	12	13	12	17	45	71	–	–	–	41	46	–	–	–
East Asia and Pacific	8**	10**	7**	2**	16**	79**	–	–	–	–	29**	–	–	–
Latin America and Caribbean	11	13	9	7	29	92	–	–	–	–	–	–	–	–
CEE/CIS	5	7	4	1	10	98	–	–	–	–	–	–	–	–
Least developed countries	22	23	21	15	45	39	–	–	–	–	52	–	–	–
World	**13****	**13****	**12****	**8****	**27****	**72****	–	–	–	–	**32****	–	–	–

For a complete list of countries and areas in the regions, subregions and country categories, see page 32 or visit http://data.unicef.org/index.php?section=regional-classifications.
It is not advisable to compare data from consecutive editions of *The State of the World's Children*.

DEFINITIONS OF THE INDICATORS

Child labour – Percentage of children 5–14 years old involved in child labour at the moment of the survey. A child is considered to be involved in child labour under the following conditions: (a) children 5–11 years old who, during the reference week, did at least one hour of economic activity or at least 28 hours of household chores, or (b) children 12–14 years old who, during the reference week, did at least 14 hours of economic activity or at least 28 hours of household chores.

Child marriage – Percentage of women 20–24 years old who were first married or in union before they were 15 years old and percentage of women 20-24 years old who were first married or in union before they were 18 years old.

Birth registration – Percentage of children less than 5 years old who were registered at the moment of the survey. The numerator of this indicator includes children whose birth certificate was seen by the interviewer or whose mother or caretaker says the birth has been registered.

Female genital mutilation/cutting (FGM/C) – (a) Women: percentage of women 15–49 years old who have undergone FGM/C; **(b) girls:** percentage of girls 0-14 years old who have undergone FGM/C (as reported by their mothers); **(c) support for the practice:** percentage of women 15-49 years old who have heard about FGM/C and think the practice should continue.

Justification of wife-beating – Percentage of women and men 15–49 years old who consider a husband to be justified in hitting or beating his wife for at least one of the specified reasons, i.e., if his wife burns the food, argues with him, goes out without telling him, neglects the children or refuses sexual relations.

Violent discipline – Percentage of children 2–14 years old who experience any violent discipline (psychological aggression and/or physical punishment).

MAIN DATA SOURCES

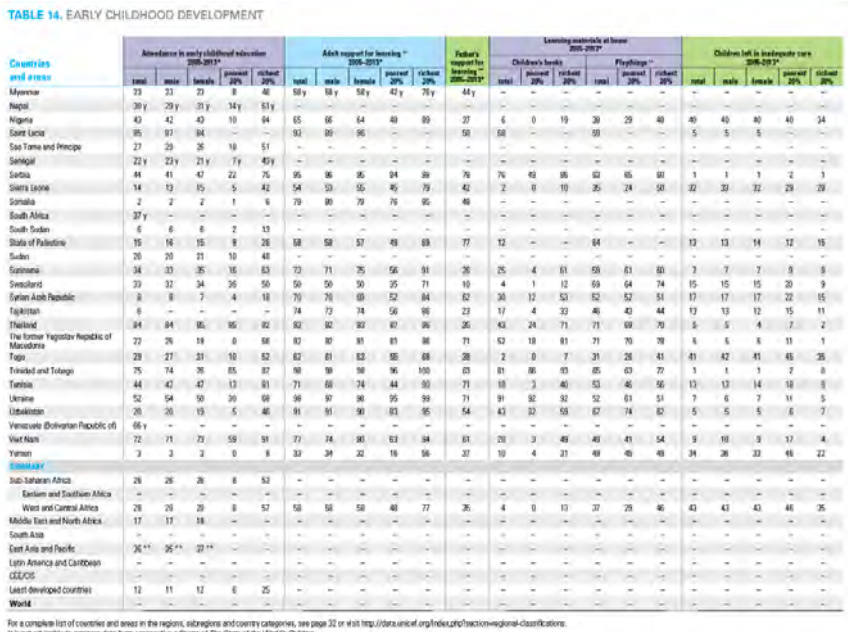
Child labour – Demographic and Health Surveys (DHS), Multiple Indicator Cluster Surveys (MICS) and other national surveys.
Child marriage – DHS, MICS and other national surveys.
Birth registration – DHS, MICS, other national surveys, censuses and vital registration systems.
Female genital mutilation/cutting – DHS, MICS and other national surveys.
Justification of wife-beating – DHS, MICS and other national surveys.
Violent discipline – DHS, MICS and other national surveys.

NOTES

– Data not available.
v Estimates of 100% were assumed given that civil registration systems in these countries are complete and all vital events (including births) are registered. Source: United Nations, Department of Economic and Social Affairs, Statistics Division, *Population and Vital Statistics Report*, Series A Vol. LXV, New York, 2013.
x Data refer to years or periods other than those specified in the column heading. Such data are not included in the calculation of regional and global averages.
y Data differ from the standard definition or refer to only part of a country. If they fall within the noted reference period, such data are included in the calculation of regional and global averages.
+ A more detailed explanation of the methodology and the changes in calculating these estimates can be found in the General Note on the Data, page 28.
++ Changes in the definition of birth registration were made from the second and third rounds of MICS (MICS2 and MICS3) to the fourth round (MICS4). In order to allow for comparability with later rounds, data from MICS2 and MICS3 on birth registration were recalculated according to the MICS4 indicator definition. Therefore, the recalculated data presented here may differ from estimates included in MICS2 and MICS3 national reports.
* Data refer to the most recent year available during the period specified in the column heading.

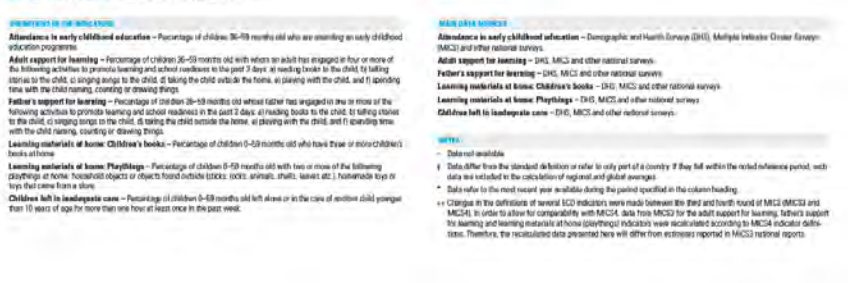
6 Early childhood development

TABLE 14. EARLY CHILDHOOD DEVELOPMENT



For a complete list of countries and areas in the regions, subregions and country categories, see page 32 or visit http://data.unicef.org/index.php?section=regional-classifications.
It is not advisable to compare data from consecutive editions of *The State of the World's Children*.

TABLE 14. EARLY CHILDHOOD DEVELOPMENT



What / who can ignite the renewing?

It seems that there is good reason to believe that it is not only the church of a religion that can ignite the desirable renewal of the passion for education. It also seems that all believers should be involved and not only the church as an institution.

An unavoidable challenge

An unavoidable challenge seems to confront the church / religion: to renew its thinking about education and see it in its interconnectedness with other modern phenomena and to devise an inclusive and comprehensive strategy to lead to the renewal of the passion for education that will also have space for the spiritual / religious / moral dimension of education.

Prof. dr. Cara Candal, Pioneer Institute and Boston University (USA)

Outline: Catholic Schools in the Changing Context of School Choice in Boston, Ma, U.S.A

Cara Candal

Abstract: This work in progress builds off of prior published works describing the changing landscape of Catholic schools in urban Boston, MA and case studies of innovative, high performing Catholic schools. Drawing from research, interview, and anecdotal data, the completed paper will: 1. describe the major challenges facing Boston's Catholic schools in the eyes of various stakeholders, 2.highlight case studies of Catholic schools that are successfully addressing the challenges, and 3. will conclude with recommendations for what other Catholic schools can learn. Assertions in this outline that are not directly cited come from emerging case study evidence and interviews with Catholic school leaders and other stakeholders. The paper on which this new study builds is provided for context.

I. The Challenge *Boston Catholic schools currently experience several related issues:*

A. Difficulty recruiting and retaining teachers and principals, especially *effective* teachers and principals[1]
B. A perceived decline in academic quality in archdiocesan and parish schools, especially as public schools adopt a new, more rigorous curriculum[2]
C. Declines in student enrollment over time, in part due to competition from charter and other public schools

II. Context

Like most American cities, students in Boston are assigned to public schools based on home address. Other than intra-district public school choice and some small programs that "bus" students from the city to the suburbs, students have few schooling options outside of the public system. Traditionally, families have viewed Boston's urban Catholic schools as a low to no-cost alternative to the public system.

Once an attractive option, overall student enrollment in Boston's Catholic schools has declined by roughly twenty-one percent [3]in the past decade. This decline in enrollment is concentrated mainly in parish and Archdiocesan schools—many independent Catholic schools (governed by autonomous school boards) have not suffered the same enrollment declines. This decline should also be placed in the context of an overall decrease in enrollment in all Massachusetts schools in the same time period.[4]

A main source of competition for Catholic schools in the past twenty years has been urban charter schools (publicly funded, privately run schools that admit students via a random lottery). Boston's charters schools are some of the highest performing in

[1] Meyer, Peter (2007) Can Catholic Schools Be Saved? *Education Next* 7(2); see also Prcygocki, W. (2013) "Teacher Retention in Catholic Schools," *Catholic Education: A Journal of Inquiry and Practice* 7(4).
[2] It is of note that Boston's Catholic schools still, on average, outperform many public schools nationally and state-wide on standardized tests of achievement; however it is difficult to compare these tests to those taken by public school students, and case studies reveal a perceived decline in the quality and rigor of instruction in Catholic schools.
[3] Archdiocese of Boston Catholic Schools Office, June 2014, State of the Schools Report
[4] Candal, Cara (2011) "Be Not Afraid, a History of Catholic Schools in Massachusetts," Pioneer Institute White Paper, No. 72.

the nation, as measured by standardized test scores. Some of the most successful of these charter schools have been branded "No Excuses" schools—schools that make no excuses for low student achievement—they do not see poverty and socioeconomic status as impediments. While other, limited, school choice options exist in Boston. Charter schools are very popular, with upwards of 47,000 students on wait lists.[5]

III. Potential Causes of the Problem

A. Some students who might otherwise attend Catholic schools—low-income, minority students—are attending charters in great numbers. The effect of this is difficult to measure: there are absolute numbers of students who leave Catholic schools for charter schools, but the Archdiocese reports that such numbers are low. Rather, overall declines in enrollment are attributed to *potential* students lost.

B. The success of charter schools and the increased success of the public school system are exposing fault lines in urban Catholic schools: specifically, charter schools attract and increasingly retain very highly qualified teachers. They are also creating very sophisticated leadership pipelines and creating high performing schools that hinge on quality teaching and strong, academically focused leadership.

C. Boston's charter schools are experiencing success at a time when Catholic schools are in great transition: 1. The laity is increasingly teaching in and running Catholic schools; 2.The increased costs associated with employing lay teachers and leaders, make it difficult to both keep tuition low and to pay teachers and administrators competitive salaries. 3. Catholic schools have little money left to professionally develop teachers and administrators, nor are these investments they have chosen to make 4. The is no central body with the authority to "reform" these issues in Catholic schools, rather individual schools have great autonomy as to whether and how to address the issue.[6]

IV. Urban Catholic Schools Could Learn from the Past to Move Forward

A. In the past, studies have highlighted several attractive qualities of Catholic schools: superior academic quality as compared to urban public systems, a structured approach to academics and character education, and safe learning environments.[7]

B. In recent decades, some urban Catholic schools have chosen to become less explicitly Catholic in order to attract non-Catholic families. In some cases, this means that these schools have lost the one major thing that can differentiate them from other affordable schools: an explicitly Catholic character. This issue is exacerbated in Boston, where voucher programs and other meaningful private school choice options are not possible.

V. Schools That Are Overcoming: Case Studies

A. Some successful Catholic schools are employing different structures to stand out. Cristo Rey, a network of Jesuit schools for low-income students, utilizes a work-study approach, combining g(increasingly) academic rigor and work training with an education infused with Catholic values.[8]

[5] Massachusetts Department of Elementary and Secondary Education (DESE), Charter School Fact Sheet, Directory and Application History, http://www.doe.mass.edu/charter/about.html

[6] Candal, Cara (2011) "Be Not Afraid, a History of Catholic Schools in Massachusetts," Pioneer Institute White Paper, No. 72.

[7] Archdiocese of Boston Catholic Schools Office, June 2014, State of the Schools Report

[8] Glenn, C and Candal, C (2009) Race Relations in an Evangelical and Urban High Schools, Cardus Foundation.

B. Other schools, with backing from the a community of local funders, are adding pre-kindergarten programming, expanding affordable options for students and families where they don't currently exist and then ushering students into the system

C. Catholic school leaders are spearheading an approach to Catholic schooling that combines academic excellence, religious identity, and pedagogical approaches not commonly found in the world of Catholic schools to increase market attractiveness. They mention the possibility of Catholic Montessori schools, Catholic STREAM (Science, technology, religion, engineering, arts, and mathematics) schools and other "innovative" pedagogical approaches.

D. Local initiatives have focused on leadership development across school sectors, including in Catholic schools.

VI. Conclusions and Considerations

A. Urban Catholic schools in Boston must first think about human capital investments (teacher recruitment, development, and retention), if they are to address issues of academic quality. This should be coupled with a focus on leadership development, perhaps leveraging lay teacher leaders to move into administrative positions.

B. Urban Catholic schools should differentiate themselves, leveraging the one thing they have that other schools do not: an approach rooted in Catholic values.

C. Urban Catholic schools should collaborate with and learn from successful charters schools, specifically with regard to student recruitment, teacher recruitment, and teacher and administrator pipelines and professional development.

D. Massachusetts leaders and policy makers should continue to push for enhanced school choice options that would include Catholic schools, such as vouchers and charter schools with a Catholic outlook.

Friday 20 November 2015

Afternoon Session

Prof. dr. Merilin Kiviorg, University of Oxford, Wolfson College and Professor at University of Tartu (Estonia)

Comparative Analysis of Religious Rights in Education and Church/State Relations on Education

Merilin Kiviorg

Abstract

This article analyzes how current relationships between church and state in Europe influence the scope of individual and collective freedom of religion or belief in education. In this regard it probes a specific case of a conflict between individual rights and collective freedom (broadly defined) and the State's role in solving these conflicts. The article will argue that, roughly speaking, there are two opposite approaches/trends, one arguing for more collective and the other for more individual freedom, which at first glance are irreconcilable, but are not necessarily so upon further reflection. As freedom of religion or belief is not only a domestic matter but also a matter of international and European law one needs to reflect on the effects of this law while analyzing aforementioned relationships and outcomes in the educational environment.

Prof. dr. Charles Russo, Professor at the University of Dayton, Ohio (USA)

A Legal History of American Roman Catholic Schools

Charles J. Russo

Introduction

Gravissimum Educationis (*GE*), celebrating its fiftieth anniversary as the Education law Association meets in Rome, literally, "the Importance of Education," the Second Vatican Council's Declaration on Catholic Education was one of its crowning achievements. *GE* was promulgated in 1965, a time when American Catholic elementary and secondary schools were at about their zenith in terms of student enrollments before heading into a steady decline in numbers of institutions and enrollments.

As could have been expected, *GE* was consistent with the Church's universal teaching in recognizing education as essentially a fundamental human right. Although it was unlikely to have done so intentionally, *GE* reflects from a Catholic perspective much the same message as is contained in such secular international human rights documents as the 1948 *Universal Declaration on Human Rights*, the 1959 *Declaration on the Rights of the Child*, and the 1992 *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*. *GE* thus recognized the right to Christian, specifically Roman Catholic, and the authority of parents to make such free choices for their children.

According to *GE*, "Parents who have the primary and inalienable right and duty to educate their children must enjoy true liberty in their choice of schools" (*GE* 6). The United States Supreme Court's opinion in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary* (*Pierce*, 1925), the Justices' first case involving religion and education, predated *GE* by more than forty years. In *Perce* the Court upheld the rights of parents to direct the upbringing of their children, presaging later developments that impacted positively on religiously affiliated mon-public educational institutions, most notably for this chapter and book, Catholic schools.

Invalidating a law from Oregon that would have obligated parents to send their children to public schools, the *Pierce* Court reasoned that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations (p. 535)." In so ruling, the Court recognized the rights of proprietors of a Roman Catholic school and a secular military academy to operate, setting the stage for further growth and development of religiously affiliated non-public elementary and secondary schools, most notably for this chapter, the vast majority of which were Roman Catholic schools.

As important as *Pierce*, combined with the role religion played both in American history and education, was, the Supreme Court did not rely on the First Amendment Religion Clauses in the fray over religiously affiliated non-public schools until 1947 in *Everson v. Board of Education* (*Everson*). Pursuant to the Religion Clauses of the First Amendment, "Congress shall make no law regarding an Establishment of religion or prohibiting the free exercise thereof." *Everson* was a dispute over the costs of transporting children to their religiously affiliated, mostly Roman Catholic, non-public schools.

Following *Everson* the Supreme Court resolved more K-12 cases on religion under the First Amendment than any other subject involving schooling. It is important to note that insofar as the litigation involving Roman Catholic schools also impacts other religiously-affiliated non-public

schools, this chapter tends to use the latter term unless a case was initially litigated in one or primarily involved Catholic institutions.

Insofar as decisions of the Supreme Court have shaped the parameters of permissible aid that the Federal and state governments can provide to Catholic, and other faith based, schools, this paper examines its major decisions. The paper focuses largely on Supreme Court cases involving elementary and secondary education because they served to help effectuate, albeit without intending to do so, the basic principles proclaimed in *GE*.

Legal Pre-History

The 200 Roman Catholic schools in existence in 1860 grew to more than 1,300 in the next decade. Spurred on by the 1884 Third Plenary Council of Baltimore, which mandated the creation of a parish school near ever Catholic Church to serve the rapidly growing immigrant population that was largely unwelcomed in many public schools, by the turn of the century almost 5,000 Catholic schools operated in the United States (Mahr, 1987). During this same time, the number of Catholics in the United States rose from 7,855,000 in 1890 to an incredible 17,735,553 in 1920 (Buetow, 1990, p. 167 citing the *Official Catholic Directory*).

The rapid growth in the numbers of Catholics and their schools notwithstanding, they were not involved in federal litigation until *Pierce*. At the same time, though, a small number of state cases dealt with ancillary questions as, for instance, courts in New York (O'Connor v. Hendrick, 1906), and Pennsylvania (*Commonwealth v. Herr*, 1910) agreed that Roman Catholic nuns could not wear religious garb if they taught in public schools.

Pierce, the first Supreme Court case implicating Roman Catholic and other religiously affiliated non-public schools relied on the Due Process Clause of the Fourteenth Amendment rather than the Establishment Clause. Later, on entering the modern era of its Establishment Clause jurisprudence in *Everson*, the Supreme Court examined two cases that significantly impacted faith-based schools and their students. In both cases, the Court relied on the Due Process Clause of the Fourteenth Amendment rather than the Establishment Clause.

Pierce v. Society of Sisters of the Holy Names of Jesus and Mary

The more far-reaching, of the Supreme Court's two early cases on religion and non-public schools was *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary* (*Pierce*, 1925). In *Pierce*, the proprietors of a Roman Catholic school and secular school, the Hill Military Academy, in Oregon challenged a voter-approved initiative enacted in 1922, intended to go into effect in 1926, resulting in a new compulsory attendance law. The law required all students who did not need what would today be described as special education, between the ages of eight and sixteen who had not completed the eighth grade, to attend public schools. Not surprisingly, the proprietors of the schools quickly filed suit challenging of the law as presenting a threat to the continued existence of their institutions.

After a federal trial court enjoined enforcement of the statute, the Supreme Court unanimously affirmed that enforcing the law would have seriously impaired, if not destroyed, the profitability of the schools while diminishing the value of their property. Although recognizing the power of the state "reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils ... (Pierce, 534)," the Court focused on the schools' property rights under the Fourteenth Amendment.

The Pierce *Court* grounded its judgment on the realization that the schools sought protection from unreasonable interference with their students and the destruction of their business and property. The Court also decided that while states may oversee such important features as health, safety, and teacher qualifications relating to the operation of non-public schools, they could not do so to an extent greater than they did for public schools.

Cochran v. Louisiana State Board of Education

Cochran v. Louisiana State Board of Education (*Cochran,* 1930) involved a state law providing free textbooks for all students in the state, regardless of where they attended school. A taxpayer unsuccessfully challenged the law on the ground that it violated the Fourteenth Amendment by taking private property through taxation for a non-public purpose. As in *Pierce*, the Supreme Court resolved the dispute based on the Due Process Clause of the Fourteenth Amendment rather than the First Amendment's Establishment Clause.

In unanimously affirming the judgment of the Supreme Court of Louisiana that insofar as the students, rather than their schools, were the beneficiaries of the law, the United States Supreme Court agreed that the statute had valid secular purpose. In so doing, the Court anticipated the Child Benefit Test that emerged in *Everson v. Board of Education* (1947) As discussed below, while the Supreme Court has consistently upheld similar textbook provisions, state courts have struck them down under their own more restrictive constitutions.

State Aid to Roman Catholic and Other Religiously Affiliated Non-Public Schools

The Supreme Court's Establishment Clause perspective on state aid to K-12 education, sometimes referred to as parochiaid, evolved through three phases. During the first stage, beginning with *Everson v. Board of Education* in 1947 and ending with *Board of Education of Central School District No. 1 v. Allen*, in 1968, the Court created the Child Benefit Test which allows selected forms of publicly funded aid on the ground that it helps children rather than their faith-based schools.

The span between *Lemon v. Kurtman* in 1971, by far the leading case on the Establishment Clause in educational settings, with the Supreme Court applying it in more than thirty of its opinions, and *Aguilar v. Felton* in 1985, the last judgment during the second phase was the nadir the perspective of supporters of the Child Benefit Test. This period represented the low point because during this time the Court largely refused to move beyond the limits it initiated in *Everson* and *Allen*. In *Zobrest v. Catalina Foothills School District* in 1993 the Court resurrected the Child Benefit Test, allowing it to enter a phase that extends through the present day in which more forms of aid have been permissible.

Given this history, the remaining sections examine major Supreme Court cases involving state aid to faith-based schools and their students, essentially in the order in which they were litigated. These topic headings of transportation, textbooks, secular services and salary supplements, aid to parents (divided into tuition reimbursements and income tax returns) reimbursements to faith-based schools (covering instructional materials and support services, and vouchers.

Transportation

As noted, *Everson v. Board of Education* (1947) was the first Supreme Court case on the merits of the Establishment Clause and education. *Everson* involved a law from New Jersey permitting local school boards to enter into contracts for student transportation.

After a local board, authorized reimbursement to parents for the costs of bus fare sending their children to primarily Roman Catholic schools, a taxpayer filed suit challenging the law as unconstitutional in two respects: first, in an approach not unlike the plaintiff's unsuccessful argument in *Cochran*, he alleged that the law authorized the state to take the money of some citizens by taxation and bestow it on others for the private purpose of supporting non-public schools in contravention of the Fourteenth Amendment; second, he charged that the statute was one "respecting an establishment of religion" since it forced him to contribute to support church schools in violation of the First Amendment.

The Supreme Court rejected the plaintiff's Fourteenth Amendment claim in *Everson* in interpreting the law as having a public purpose, adding that the First Amendment did not prohibit the state from extending general benefits to all of its citizens without regard to their religious beliefs. The Court treated student transportation as another category of public services such as police, fire, and health protection.

In what became something of a Trojan Horse because of difficulties it would create for state aid to faith-based schools, the analysis in the majority opinion was proffered by of Justice Hugo Black, a former member of the Ku Klux Klan (Hamburger, 2002, pp. 422ff). Of course, the Klan hated Catholics along with African-Americans, and Jews, among others. Black introduced the Jeffersonian metaphor into the Court's First Amendment analysis, writing that "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach (*Everson*, 1947, 18)."

Following *Everson*, states must choose whether to provide publicly funded transportation to students who attend faith-based schools. Lower courts, relying on state constitutional provisions, reached mixed results on this issue.

In *Wolman v. Walter* (*Wolman*, 1977), the Supreme Court considered whether public funds could be used to provide transportation for field trips for children who attended faith-based schools in Ohio. The Court held that the practice was unconstitutional because insofar as field trips were oriented to the curriculum, they were in the category of instruction rather than that of non-ideological secular services such as transportation to and from school.

Textbooks

Board of Education of Central School District No. 1 v. Allen (1968, *Allen*), another case involving textbooks was litigated at the Supreme Court three years after Catholic schools reached their peak enrollments in the United States. In *Allen*, the Justices relied on the First, rather than the Fourteenth, Amendment in essentially followed its precedent from *Cochran* in affirming the constitutionality of a statute from New York that required local school boards to loan books to children in grades seven to twelve who attended non-public schools.

The law at issue in *Allen* did not mandate that the books loaned to all students had to be the same as those used in the public schools but did require that titles be approved by local board officials before they could be adopted. Relying largely on the Child Benefit Test, the Court observed that the statute's purpose was not to aid religion or non-public schools and that its primary effect was to improve the quality of education for all children.

Other than for the delivery of special education services to individual students as in *Zobrest v. Catalina Foothills School District* (1993) *Allen* represented the outer limit of the Child Benefit Test for large groups of children prior to the Supreme Court's ruling in *Agostini v. Felton* (1997) discussed below. The Justices upheld like textbook provisions in *Meek v. Pittenger* (1975) and *Wolman*, both of which are also examine in more detail below.

Secular Services and Salary Supplements

The Supreme Court's most important case involving the Establishment Clause and education was *Lemon v. Kurtzman* (1971). In *Lemon*, the Court invalidated a statute from Pennsylvania calling for the purchase of secular services and a law from Rhode Island that provided salary supplements for teachers in non-public schools, most of which were Roman Catholic.

The Pennsylvania law directed the superintendent of education to purchase specified secular educational services from non-public schools. Officials directly reimbursed the non-public schools for their actual expenditures for teacher salaries, textbooks, and instructional materials. The superintendent had to approve the textbooks and materials, which were restricted to the areas of mathematics, modern foreign languages, physical science, and physical education.

In Rhode Island, officials could supplement the salaries of certificated teachers of secular subjects in non-public elementary schools by directly paying them amounts not in excess of fifteen percent of their current annual salaries; their salaries could not exceed the maximum paid to public school teachers. The supplements were available to teachers in non-public schools where average per pupil expenditures on secular education were less than in public schools. In addition, the teachers had to use the same materials as were used in public schools.

In striking down both laws, the Supreme Court enunciated the three-part test known as the *Lemon* test. In creating this measure, the Court added a third prong, dealing with excessive entanglement, from *Walz v. Tax Commission of New York City* (1970), which upheld New York State's practice of providing state property tax exemptions for church property that is used in worship services, to the two-part test it created in *School District of Abington Township v. Schempp* and *Murray v. Curlett* (1963), companion cases dealing with prayer and Bible reading in public schools.

According to the *Lemon* test:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion (*Lemon*, 1971, 612-613)."

As to entanglement and state aid to faith-based schools, the Court identified three other factors: "we must examine the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority (*Lemon*, 1971, 615)."

In *Lemon* the Supreme Court maintained that aid for teachers' salaries was different from secular, neutral, or non-ideological services, facilities, or materials. Reflecting on *Allen*, the Court remarked that teachers have a substantially different ideological character than books. In terms of

potential for involving faith or morals in secular subjects, the Court feared that while the content of a textbook can be identified, how a teacher covers subject matter is not.

The *Lemon* Court added that conflict can arise when teachers who work under the direction of religious officials are faced with separating religious and secular aspects of education. The Court held that the safeguards necessary to ensure that teachers avoid non-ideological perspectives give rise to impermissible entanglement. The Court concluded that an ongoing history of government grants to non-public schools suggests that these programs were almost always accompanied by varying measures of control.

Higher Education

The Supreme Court has yet to hand down a judgment directly involving Catholic higher education. In a related development, though, on the same day that it ruled in *Lemon*, the Court upheld the constitutionality of the Higher Education Facilities Act of 1963 which made construction grants available to institutions of higher education, including church related colleges and universities. In *Tilton v. Richardson* (*Tilton*,1971), a case originating in Connecticut, the Court reasoned that while the section of the law that limited recipients' obligation not to use federally-financed facilities for sectarian instruction or religious worship to twenty years unconstitutionally allowed a contribution of property of substantial value to religious bodies, that section was severable.

The Supreme Court was satisfied that the remainder of the statute in *Tilton* did not violate the First Amendment. In upholding the remainder of the statute, the Justices distinguished *Tilton* from *Lemon* insofar as in *Tilton*, indoctrination was not a substantial purpose or activity of church-related colleges because the student body was not composed of impressionable children, the aid was non-ideological, and there was no excessive entanglement since the grants were one-time and single-purpose.

Two years later, in *Hunt v. McNair* (1973), the Supreme Court decided that insofar as religion was not pervasive in an institution, South Carolina was free to issue revenue bonds to benefit the church-related college. The Court was satisfied that this arrangement was acceptable because the bonds were not guaranteed by public funds.

Aids to Parents

Tuition Reimbursement

Two months after *Lemon*, the Pennsylvania legislature enacted a statute that allowed parents whose children attended non-public schools to request tuition reimbursement. The same parent as in *Lemon* challenged the new law as having the primary effect of advancing religion.

In *Sloan v. Lemon* (*Sloan*, 1973) the Supreme Court affirmed that the law impermissibly singled out a class of citizens for a special economic benefit. The Justices viewed this as unlike the "indirect" and "incidental" benefits that flowed to religious schools from programs that aided all parents by supplying bus transportation and secular textbooks for their children. The Court commented that transportation and textbooks were carefully restricted to the purely secular side of church-affiliated schools and did not provide special aid to their students.

The Supreme Court expanded on *Sloan's* analysis in a case from New York, *Committee for Public Education and Religious Liberty v. Nyquist* (*Nyquist*, 1973). The Court ruled that even though

the grants went to parents rather than to school officials, this did not compel a different result. The Court explained that since parents would have used the money to pay for tuition and the law failed to separate secular from religious uses, the effect of the aid unmistakably would have provided the desired financial support for non-public schools.

In so doing, the *Nyquist* Court rejected the state's argument that parents were not simply conduits because they were free to spend the money in any manner they chose since they paid the tuition and the law merely provided for reimbursements. The Court indicated that even if the grants were offered as incentives to have parents send their children to religious schools, the law violated the Establishment Clause regardless of whether the money made its way into the coffers of the religious institutions.

Income Tax

Another section of the same New York statute in *Nyquist* aided parents via income tax benefits. Under the law, parents of children who attended non-public schools were entitled to income tax deductions as long as they did not receive tuition reimbursements under the other part of the statute. The Supreme Court invalidated this provision in pointing out that in practical terms there was little difference, for purposes of evaluating whether such aid had the effect of advancing religion, between a tax benefit and a tuition grant. The Court based its judgment on the notion that under both programs qualifying parents received the same form of encouragement and reward for sending their children to non-public schools.

In *Mueller v. Allen* (*Mueller*, 1983), the Supreme Court upheld a statute from Minnesota that granted all parents state income tax deductions for the actual costs of tuition, textbooks, and transportation associated with sending their children to K-12 schools. The law afforded all parents deductions of $500 for children in grades K-6 and $700 for those in grades seven to twelve.

The Justices distinguished *Mueller* from *Nyquist* primarily because the tax benefit was available to all parents, not only those whose children were in non-public schools. The Court also recognized that the deduction was one among many rather than a single, favored type of taxpayer expense.

Acknowledging the legislature's broad latitude to create classifications and distinctions in tax statutes, and that the state could have been considered as gaining a benefit from the scheme since it promoted an educated citizenry while reducing the costs of public education, the Supreme Court was satisfied that the law met all three of *Lemon's* prongs. The Court paid little attention to the fact that since the state’s public schools were essentially free, the expenses of parents whose children attended them were at most minimal and that about ninety-six percent of taxpayers who benefitted had children enrolled in religious schools.

Reimbursements to Faith-Based Schools

On the same day that it resolved *Nyquist*, in a second case from New York, the Supreme Court applied basically the same rationale in *Levitt v. Committee for Public Education and Religious Liberty* (*Levitt*, 1973). Here the Court invalidated a law allowing the state to reimburse non-public schools for expenses incurred while administering and reporting test results as well as other records. Insofar as there were no restrictions on the use of the funds, such that teacher-prepared tests on religious subject matter were seemingly reimbursable, the Court observed that the aid had the primary effect of advancing religious education because there were insufficient safeguards in place to regulate how the monies were spent.

Wolman v. Walter (1977), a case from Ohio, saw the Supreme Court upheld a law permitting reimbursement for religious schools where officials used standardized tests and scoring services to evaluate student progress. The Justices distinguished these tests from the ones in *Levitt* since the latter were neither drafted nor scored by non-public school personnel. The Court also reasoned that the law did not authorize payments to church-sponsored schools for costs associated with administering the tests.

In *Committee for Public Education and Religious Liberty v. Regan* (1980, *Regan*) the Supreme Court reexamined another aspect of *Levitt* after the New York State legislature modified the law. Under its new provisions, the statute provided reimbursements to non-public schools for the actual costs of complying with state requirements for reporting on students and for administering mandatory and optional state-prepared examinations. Unlike the law in Ohio, this statute permitted the tests to be graded by personnel in the non-public schools that were, in turn, reimbursed for these services. The law also created accounting procedures to monitor reimbursements.

The *Regan* Court conceded that the differences between the statutes were permissible since scoring of essentially objective tests and recording their results along with attendance data offered no significant opportunity for religious indoctrination while serving secular state educational purposes. The Court concluded that the accounting method did not create excessive entanglement since the reimbursements were equal to the actual costs.

Instructional Materials

In *Meek v. Pittenger* (1975, *Meek*), the Supreme Court examined the legality of loans of instructional materials, including textbooks and equipment, to faith-based schools in Pennsylvania. Although the Court upheld the loan of textbooks, it struck down parts of the law on periodicals, films, recordings, and laboratory equipment as well as equipment for recording and projecting because the statute had the primary effect of advancing religion due to the predominantly religious character of participating schools.

The *Meek* Court was concerned that insofar as the only statutory requirement imposed on the schools to qualify for the loans was directing their curricula to offer the subjects and activities mandated by the commonwealth's board of education. The Court thought that because the church-related schools were the primary beneficiaries, the massive aid to their educational function necessarily resulted in aid to their sectarian enterprises as a whole.

The Supreme Court reached similar results in *Wolman v. Walter* (1977, *Wolman*), upholding a statute from Ohio which specified that textbook loans were to be made to students or their parents, rather than directly to their non-public schools. The Justices struck down a provision that would have allowed loans of instructional equipment including projectors, tape recorders, record players, maps and globes, and science kits. Echoing *Meek*, the Court invalidated the statute's authorizing the loans in light of its fear that insofar as it would be impossible to separate the secular and sectarian functions for which these items were being used, the aid inevitably provided support for the religious roles of the schools.

Mitchell v. Helms (2000, *Helms*), a Supreme Court case originating in Louisiana, expanded the boundaries of permissible aid to faith-based schools (Mawdsley & Russo, 2001). A plurality upheld the constitutionality of Chapter 2 of Title I, now Title VI, of the Elementary and Secondary Education Act (Chapter 2, 2010), a federal law that permits the loans of instructional materials including library books, computers, television sets, tape recorders, and maps to non-public schools.

In *Helms*, the Supreme Court relied on the modified *Lemon* test enunciated in *Agostini v. Felton,* discussed below, by reviewing only its first two parts while recasting entanglement as one criterion in evaluating a statute's effect. Insofar as the purpose part of the test was not challenged, the plurality only considered Chapter 2's effect, concluding that it did not foster impermissible indoctrination because aid was allocated pursuant to neutral secular criteria that neither favored nor disfavored religion and was available to all schools based on secular, nondiscriminatory grounds. In its rationale, the plurality explicitly reversed those parts of *Meek* and *Wolman* that were inconsistent with its analysis on loans of instructional materials.

Support Services

In *Meek v. Pittenger* (1975), the Supreme Court invalidated a Pennsylvania law permitting public school personnel to provide auxiliary services on-site in faith-based schools. At the same time, the Court forbade the delivery of remedial and accelerated instructional programs, guidance counseling and testing, and services to aid children who were educationally disadvantaged. The Court asserted that it was immaterial that the students would have received remedial, rather than advanced, work since the required surveillance to ensure the absence of ideology would have given rise to excessive entanglement between church and state.

Wolman v. Walter (1977) saw the Supreme Court reach mixed results on aid. In addition to upholding the textbook loan program, the Court allowed Ohio to supply non-public schools with state-mandated tests while allowing public school employees to go on-site to perform diagnostic tests to evaluate whether students needed speech, hearing, and psychological services. The Court also allowed public funds to be spent providing therapeutic services to students from non-public schools as long as they were delivered off-site. The Court forbade state officials from loaning instructional materials and equipment to schools or from using funds to pay for field trips for students in non-public schools.

The Supreme Court's 1993 decision in *Zobrest v. Catalina Foothills School District* (*Zobrest*) was a harbinger of change to come in its Establishment Clause jurisprudence. At issue was a school board in Arizona's refusal to provide a sign-language interpreter for a student who was deaf, under the Individuals with Disabilities Education Act, after he transferred into to a Roman Catholic high school. In a suit filed as the student entered high school but which was resolved shortly after he graduated, the Court found that an interpreter provided neutral aid to him without offering financial benefits to his parents or school and there was no governmental participation in the instruction because the interpreter was only a conduit to effectuate his communications.

The *Zobrest* Court relied in part on *Witters v. Washington Department of Services for the Blind* (1986), wherein it upheld the constitutionality of extending a general vocational assistance program to a blind man who was studying to become a clergyman at a religious college. Yet, the Supreme Court of Washington later interpreted its state constitution as forbidding such use of public funds and the Supreme Court refused to hear a further appeal (*Witters v. State Commission for the Blind*, 1989).

A year later, in *Board of Education of Kiryas Joel Village School District v. Grumet* (1994), the Supreme Court reviewed a case where the New York State legislature enacted a statute creating a school district with the same boundaries as an Orthodox Jewish community. The legislature created the district in seeking to accommodate the needs of parents of children with disabilities who wished to send them to a nearby school that would have honored their religious customs and beliefs, particularly with regard to dietary practices.

On further review of state court orders invalidating the law, the Court affirmed that it was unconstitutional. The Supreme Court maintained that while a state may accommodate a group's religious needs by seeking to reduce or eliminate special burdens, it went too far. Instead, the Court suggested that he board could have offered an appropriate program at one of its public schools or at a neutral site near one of the village's religious schools.

Within days after the Supreme Court struck down the statute, the New York state legislature amended the statute in an attempt to eliminate the Establishment Clause problem. Still, New York's highest court invalidated the revised law as a violation of the Establishment Clause insofar as it had the effect of advancing one religion (*Grumet v. Cuomo*, 1997; *Grumet v. Pataki*, 1999).

Another set of conflicts arose when officials in public and non-public schools entered into cooperative arrangements. More than a decade after the Supreme Court of Michigan upheld a state constitutional amendment on shared time, officials in Grand Rapids created an extensive program. The program grew to the point where publicly paid teachers conducted ten percent of classes in religious schools and many of them worked in the religious schools. After the Sixth Circuit invalidated the plan, in *School District of City of Grand Rapids v. Ball* (*Ball*, 1985) the Supreme Court affirmed that the released time program was unconstitutional because it failed all three prongs of the *Lemon* test.

On the same day that it resolved *Ball*, in a more far-reaching case, the Supreme Court reviewed a dispute from New York City. In *Aguilar v. Felton* (*Aguilar*, 1985), the Justices considered the whether public school teachers could provide remedial instruction under Title I of the Elementary and Secondary Education Act of 1965 (Title I), enacted the same year as *Gravissimum Educationis* was promulgated, in religiously affiliated non-public schools. The Title I provision of the Act, which passed with considerable support from Catholic leaders (Buetow, 1970), in particular, was designed for specifically targeted children, who were educationally disadvantaged, on-site in their faith-based schools.

In *Aguilar v. Felton* (*Aguilar*, 1985), the Supreme Court affirmed earlier orders that the program permitting the on-site delivery of services to children in their religiously affiliated non-public schools, the vast majority of which were Roman Catholic, was unconstitutional. Even though the New York City Board of Education (NYCBOE) developed safeguards to insure that public funds were not spent for religious purposes, the Court struck the program down based on the fear that a monitoring system to have avoided the creation of an impermissible relationship between Church and state might have resulted in the presence of excessive entanglement under the third prong of the *Lemon* test.

Twelve years later, in *Agostini v. Felton* (*Agostini*, 1997), the Supreme Court took the unusual step of dissolving the injunction that it upheld in *Aguilar* (Russo & Osborne, 1997). The Court reasoned that the Title I program did not violate the *Lemon* test since there was no governmental indoctrination, there were no differences between recipients based on religion, and there was no excessive entanglement. The Court thus ruled that a federally funded program that provides supplemental, remedial instruction and counseling services to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when the assistance is provided on-site in faith-based schools pursuant to a program containing safeguards such as those that the NYCBOE implemented. Perhaps the most important outcome in *Agostini* was the Court's having modified the *Lemon* test by reviewing only its first two prongs, purpose and effect, while recasting entanglement as one criterion in evaluating a statute's effect.

Vouchers

Considerable controversy has arisen over the use of vouchers with courts reaching mixed results in disputes over their constitutionality. Still, the only Supreme Court case on vouchers arose in Ohio. The Ohio General Assembly, acting pursuant to a desegregation order, enacted the Ohio Pilot Project Scholarship Program (OPPSP) to assist children in Cleveland's failing public schools. The main goal of the OPPSP was to permit an equal number of students to receive vouchers and tutorial assistance grants while attending regular public schools. Another part of the law provided greater choices to parents and children via the creation of community, or charter, schools and magnet schools while a third section featured tutorial assistance for children.

The Supreme Court of Ohio upheld the OPPSP but severed the part of the law affording priority to parents who belonged to a religious group supporting a sectarian institution *Simmons–Harris v. Goff*, 1999). Moreover, in finding that the OPPSP violated the state constitutional requirement that every statute have only one subject, the court struck it down. Still, when the court stayed enforcement of its order to avoid disrupting the then current school year, the Ohio General Assembly quickly re-enacted a revised statute.

After lower federal courts, relying largely on *Nyquist,* (1973) enjoined the operation of the revised statute as a violation of the Establishment Clause, the Supreme Court agreed to hear an appeal. In *Zelman v. Simmons–Harris* (*Zelman,* 2002), the Court reversed the judgment of the Sixth Circuit and upheld the constitutionality of the OPPSP (Russo & Mawdsley, 2002).

Relying on *Agostini*, the *Zelman* Court began by conceding the lack of a dispute over the program's valid secular purpose in providing programming for poor children in a failing school system, the Court examined whether it had the forbidden effect of advancing or inhibiting religion. The Court upheld the voucher program because as part of the state's far-reaching attempt to provide greater educational opportunities in a failing school system, the law allocated aid on the basis of neutral secular criteria that neither favored nor disfavored religion, was made available to both religious and secular beneficiaries on a nondiscriminatory basis, and offered assistance directly to a broad class of citizens who directed the aid to religious schools based entirely on their own genuine and independent private choices.

The *Zelman* Court was not concerned by the fact that most of the participating schools were faith-based because parents chose to send their children to them insofar as surrounding public schools refused to take part in the program. If anything, the Court acknowledged that most of the children attended the religiously affiliated non-public schools, most of which were Roman Catholic, not as a matter of law but because they were unwelcomed in the public schools. The Court concluded that insofar as it was following an unbroken line of its own precedent supporting true private parental choice that provided benefits directly to a wide range of needy private individuals, its only choice was to uphold the voucher program.

Conclusion

Roman Catholic schools clearly have the legal right to operate but face an increasingly uncertain future in the face of declining enrollments due to a variety of factors beyond the scope of this paper. Even so, as with most issues involving the law, the one thing to be sure of is that litigation will continue over the status of aid to Catholic schools, their students, and parents.

The extent to which aid may be available to Catholic schools of all levels depends on a combination of legislative action and judicial interpretation by the Supreme Court which, as demonstrated, has gone through three distinct periods of greater or lesser support for the schools.

Whether the Court is willing to continue to support aid to Roman Catholic and other religiously affiliated non-public schools bears constant watching.

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Religious Associations and Public Secondary Schools in Russia. The Legal Basis of Relations

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I. Constitutional Foundations

The Constitution of the Russian Federation says that the Russian Federation is a secular state. No state or obligatory religion may be established. Religious associations shall be separate from the state and shall be equal before the law. Everyone shall be guaranteed freedom of conscience and freedom of religion, which includes the right to profess individually or together with others any religion or no religion at all, as well as to freely choose, possess and disseminate religious and other views and act according to them. The rights and freedoms of man and citizen may be limited by federal law only to the extent necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defence of the country and the security of the state. The joint jurisdiction of the Russian Federation and the subjects of the Russian Federation covers general questions of upbringing, education, science.

The federal laws “On Education in the Russian Federation” and “On Freedom of Conscience and on Religious Associations” regulate the specific relations between religious communities and public schools.

II. The Teaching of Religious Culture in Secular Schools

On 21 July 2009, the ex-president of the Russian Federation *Dmitry Medvedev (Дмитрий Медведев)* held a meeting on the teaching in schools of the basics of religious culture and secular ethics and on the introduction of military and naval clerics into the armed forces of the Russian Federation. The impetus for the meeting came from the heads of the leading Russian confessions.

‘If there are those who want to explore the diversity of Russian religious life, for these pupils can be developed a general course on the history of the major traditional confessions of our country… Finally, a third option: those who have no particular religious belief should be given the right to study the basics of secular ethics... The choice of pupils and their parents, of course, must be completely voluntary. This is the most important thing. Any compulsion on this issue would not only be illegal, but would also be counterproductive. There will be secular teachers to teach these subjects.’ In the preparation of methodical materials, the President offered a number of reasons. The main reason is simple: ‘We need to raise decent, tolerant, honest citizens who are interested in the world and have respect for the views and beliefs of their fellow citizens‘[3].

The order of the government of the Russian Federation of 29 October 2009 No. 1578-R approved measures in 2009-2011 for a comprehensive training course for educational institutions, the "Basics of Religious Cultures and Secular Ethics". This course covers the basics of Orthodox

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[3] URL: http://www.kremlin.ru/events/president/transcripts/4863

culture, of Islamic culture, of Buddhist culture, of Judaic culture, and of world religious cultures and the fundamentals of secular ethics, as well as a list of 19 regions of the Russian Federation participating in the testing.

During 2010-2011, the teaching of this complex educational course "Basics of Religious Cultures and Secular Ethics" was carried out on an experimental basis in the fourth quarter of the fourth grade and the first quarter of the fifth grade. Starting 1 September 1, 2012, the teaching of this comprehensive training course was carried out on a permanent basis in the fourth grades in all regions of the Russian Federation (1 hour per week, 34 hours per year).

The federal law “On Education in the Russian Federation” for the first time in recent history has enshrined in law the participation of traditional Russian religious denominations in training and education, which is implemented in secular educational institutions. The legal regulation of these relations is determined by the norms of Article 87.1-3, 5 and 6.

This Article is named “Peculiarities of Studying the Foundations of Spiritually-Moral Culture of the people of the Russian Federation. Peculiarities of Obtaining Theological and Religious Education”:

‘With the aim of the formation and development of the individual in accordance with family, social-spiritual, moral and sociocultural values, the basic educational curricula may include, including on the basis of the requirements of the respective federal state educational standards, the teaching of subjects, courses, and disciplines (modules), aimed at the obtainment of the spiritual and moral culture of the peoples of the Russian Federation. It may also include the moral principles and historical and cultural traditions of world religions, or alternative teaching subjects, courses, and disciplines (modules).

The parents (legal representatives) of learners choose one of the teaching subjects, courses, and disciplines (modules) included in the basic general educational curricula.

The model basic educational curricula in the part of teaching subjects, courses, and disciplines (modules) is aimed at the obtainment of the spiritual and moral culture of the peoples of the Russian Federation and the obtainment of the moral principles and the historical and cultural traditions of world religions. This curricula is placed under the expertise of a centralized religious organization to ensure the conformity of their content to the creed, historic and cultural traditions of this organization in accordance with its internal regulations provided by item 11 of Article 12 of the aforementioned federal law.

The teaching subjects, courses, and disciplines (modules) in the field of theology shall be taught by pedagogical employees recommended by the corresponding centralized religious organization.

The corresponding centralized religious organization is involved in the educational-methodical provision of teaching subjects, courses, and disciplines (modules), aimed at the obtainment by the learners of knowledge of the spiritual and moral culture of the peoples of the Russian Federation, the moral principles, the historical and cultural traditions of world religions, and teaching subjects, courses, and disciplines (modules) in the field of theology.

Currently religious and secular authorities are working on the issue of teaching the course “Fundamentals of Religious Cultures and Secular Ethics” in grades from the fifth to the ninth state and municipal schools, and further and in grades 10-11.

'The citizens of Russia and other countries of the canonical territory of the Russian Church must be provided with the inalienable right to be taught the foundations of Orthodox culture at all grade levels, in accordance with the free choice of the family, from textbooks and manuals approved by the Church and under the guidance of teachers, who are native speakers of Orthodox culture. The constitutional concept of a secular state given in Article four of the federal law "On Freedom of Conscience and on Religious Associations", does not imply a false interpretation of secularism as a godless, antireligious view and the exclusion of the religious world, equal with others, from public life', - said the Patriarch of Moscow and All Russia *Kirill (Кирилл)* in his speech at the XXII International Christmas educational readings 29 January 2014[4].

III. The Wearing of Religious Clothing and Symbols in Schools

In October 2012, a conflict between the school administration and parents arose in a school of Stavropol region in the North Caucasus. The cause was the appearance at the school of female pupils dressed in clothes that reflected their religious association.

In this regard, the President of Russia *Vladimir Putin (Владимир Путин)* at a meeting with activists of All-Russian National Front suggested thinking about a uniform for students 'at the regional level and maybe even at the municipal level', which would help to smooth social and other differences between students in the classroom[5].

The government decree of the Stavropol region dated 31 October 2012 No. 422-p approved the 'basic requirements for school clothes and appearance of pupils in public educational institutions of the Stavropol territory and municipal educational institutions of the Stavropol region'. In accordance with this act, pupils were prohibited from wearing 'religious clothing, clothing with religious attributes and/or religious symbolism' (section 9.2).

On 21 March 2013, the Stavropol regional court considered in civil proceedings the claim of a number of citizens to invalidate the government decree of 31 October 31, 2012 No. 422–p, which related to female nationals of the Muslim religion. The claimants requested that these women be permitted to dress in accordance with their religious beliefs and cover all parts of the body, except the face and hands. The court ruled against the appeal, deciding that 'requirements of refusal were satisfied'[6].

The decision of the Stavropol regional court was appealed to the Supreme Court of the Russian Federation, which in a decision on 10 July 2013 rejected the appeal, believing that 'a uniform for all pupils in a secular educational institution may not be considered a restriction on the freedom of conscience and religion', stating that 'the validity of the specified legal position is confirmed by the established practice of the European Court of human rights'.

It should be noted that according to the federal law "On Education in the Russian Federation", which entered into force on 1 September 2013, the establishment of dress codes is determined by educational organizations, unless otherwise provided by Federal Law or the law of a region of the Russian Federation (Article 28.3.18). Only the federal law dated 4 June 2014 No. 148-FL made the necessary changes. After which, the federal law "On Education in the Russian Federation" included Article 38.2: "State and municipal organizations, which carry out educational programs in

[4] URL: http://www.patriarchia.ru/db/text/3546711.html

[5] 'Basic requirements for school clothes and appearance of students in public educational institutions of Stavropol territory and municipal educational institutions of municipal formations of Stavropol region', Law journal of the school Director, 2012, 8, p. 8. or URL: http://law.direktor.ru/archive/2013/01

[6] URL: http://www.newsru.com/religy/22mar2013/hijab.html

primary general, basic general and secondary general education, establish dress codes in accordance with the standard requirements approved by the authorized bodies of state power of regions of the Russian Federation".

However, even prior to the amendments to the federal law "On Education in the Russian Federation", the Ministry of Education and Science of the Russian Federation sent out a model legal act of a region of the Russian Federation regarding the establishment of a dress code for pupils in primary general, basic general and secondary general education.[7] This model act contained a provision by which uniform requirements are introduced, including the 'elimination of signs of social, property and religious differences between individual learners' (section one).

Disputes about the wearing of religious clothing in schools continue. On 24 October 2014, the Supreme Court of the Republic of Mordovia (Mordovia is a region in the Volga federal district) considered the application of Muslim parents to invalidate Article ninth, Section third of the model requirements for school clothes and appearance of pupils enrolled at state educational establishments of the Republic of Mordovia and the municipal educational organizations of the Republic of Mordovia.[8] According to these requirements, pupils are prohibited from wearing hats on the premises of educational institutions (with the exception of cases involving the health of pupils). The Court rejected the claim.

A few days before the consideration of the appeal in the Supreme Court of the Russian Federation, the Chairman of the Council of Muftis of Russia mufti Sheikh *Ravil Gainutdin (Равиль Гайнутдин)* appealed to Russian President with a letter calling for the interference of officials in the question of covering the heads of schoolgirls.[9]

On 11 February 2015 Supreme Court of the Russian Federation has considered the appeal to the decision of the Supreme Court of the Republic of Mordovia and affirmed the original decision. In this case, the Supreme Court of the Russian Federation ruled that 'the introduction of the ban on wearing hats on the premises of educational institutions is consistent with one of the fundamental principles of state policy and legal regulation of relations in the sphere of education, namely the priority of life and health. Thus, it is not inconsistent with the provisions of the federal law "On Freedom of Conscience and on Religious Associations", which, like the federal law "On Education in Russian Federation" obliges the state to provide secular education in state and municipal educational institutions'[10]

IV. The Provision of School Premises to Teach Children Religion

According to the federal law "On Freedom of Conscience and on Religious Associations", 'on the written request of the parents or persons *in loco parentis* and with the consent of the children studying in state or municipal educational institutions, these educational organizations, on the basis of the decision of the collegiate organ of management of the educational organization and in agreement with the founders, can provide religious institutions the opportunity to teach children religion outside the framework of the educational program' (Article 5.4).

A religious organization is a voluntary association of citizens of the Russian Federation, or other persons permanently and legally residing on the territory of the Russian Federation. As a

[7] Letter of ministry of education and science of the Russian Federation dated 28 March 2013 No. No. DL-65/08.
[8] Approved by government statement of the Republic Mordovia Мордовия dated 12 May 2014 No. 208.
[9] URL: http://www.muslim.ru/articles/109/6403/
[10] URL: http://www.interfax.ru/russia/423347

registered legal entity, a religious organization is formed for the purpose of joint confession and dissemination of faith in the manner prescribed by law. In this regard, petitions by religious organizations about the opportunity to teach children religion must be accompanied by copies of the certificate of state registration of the religious organization in the judiciary and its charter. Local religious organizations not included in the structure of a centralized religious organization of the same religion are not able to teach children religion in state and municipal educational institutions within ten years from the date of their state registration (Article 8.1 and 27.3 of the above federal law).

Article 5.4 of the federal law “On Freedom of Conscience and on Religious Associations” is subject to the requirements of the federal law “On Education in Russian Federation”, according to which:

1) In state and municipal educational institutions, the establishment and activities of religious organizations (associations) are not allowed (Article 27.12);

2) Teachers do not use educational activities to coerce students to adopt religious beliefs or to deny them, for campaigning, propagandizing exclusivity, superiority or inferiority of citizens on the basis of their attitude towards religion (Article 48.3).

The holding of religious rites and ceremonies should be conducted outside of the state and municipal schools.

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State and Church in Education
special attention to control and support – the Hungarian case

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1. Approaches to church, state and educational rights

There are several constitutional aspects leading to examine the relationship between church and state in education law. One of the issues is the separation of the state and church, which is one of the basic thesis of the contemporary western democratic structures. Another way is the right to education, which, as a human right, is declared by the most significant international treaties and even referred in the social teaching of the Church. Among the multilateral treaties especially great importance is attached to the European Convention on Human Rights (Article 2 and 9), and the International Covenant on Economic, Social and Cultural Rights (Article 13) and the Convention on the Rights of the Child (Article 28 and 29). It is clear that both the right to education and the principle of the secular state has a very strong international legal background that mean definite obligations to the states.

At first sight, the intersection area of the secular state and the right to education may be quite small. However, when we begin to examine how the Church may carry out educational activities and under what circumstances and to what extent shall the government recognize this, or perhaps even support, we get to a sensitive topic that highly differentiated from state to state.

Models are very different in the relationship between church and state.[1] The different legal systems define at least two additional topics regarding the right to education: one is the recognition of the non-state-run schools, the other is education of a religion in public schools. The first may be titled external affairs, the other one as internal affairs.

Educational institutions run by the Church at the same time are thus closely related to the right to education, the freedom of religion as human rights and the secularism as a constitutional principle.
In this study, I would like to introduce one of the models that established a link between human rights and constitutional principle through a special scope of administrative means. Hungary is a secular state that means "the State should remain neutral in matters concerning ideology; there should be no official ideology, be it religious or secular".[2] Nevertheless, since its founding the history of Hungary has been closely linked to the multilingualism and the relationship of peoples with different cultures. Five hundred years later, since the Reformation it is about the co-existence of different religions. (Just to refer the first Act of Peace of Denominations in 1568, Torda.)

Education, in and after the Middle Ages, was provided typically by the Church, later, Queen Maria Theresa (1740-1780) introduced public education (Ratio Educationis, 1777) so the state has continuously and increasingly taken over this task by the second World War. After 1948 the communist dictatorship has nationalized all church schools and all services had been declared to be provided only by the state. Until 1989, the collapse of the dictatorship, no church school could exist,

[1]See especially the country reports in Schanda, B,ed., (2014a) 'The Mutual Roles of Religion and State in Europe - Interférences mutuelles des religions et de l'État dans l'Union Européenne', European Consortium for Church and State Research, Trier 2014.
[2]Schanda, B (2015a), 'Religion and Law Hungary.' Wolters Kluwer Law and Business, 25.

nor even religious education could occur. The atheist state explicitly discriminated the Church and all its members, that is why the fall of the dictatorship brought a significant change particularly in this area.

After the changing of the political system the parliament amended the 1949 Constitution, finally gave a real content to the human rights and democratized the organization of the state. As an important milestone of the reform process, in the 90s the state has recognized that it cannot perform all public services on its own, so it was necessary to involve external actors, particularly the churches and civil society organizations. Of course, the process was not easy, a long way took from the settlement of the nationalized properties to the performance of the actual public tasks, which was accompanied by law and long discussions.[3] Even the Constitutional Court itself had dealt with both the educational rights and the relationship between the Church and the public education - as we shall see later.

In 1989 the Constitution was amended due to the change of political system, however, and major provisions of the right to education remained the same with the previous text, only clarification of the text has been made.[4] Adoption of the new act on freedom of religion added a real democratic value, as we shall see later.[5]

2. Constitutional regulations according to the 2011 Basic Law

Article XI. of the Hungarian Basic Law states, that 'Every Hungarian citizen shall have the right to education.' In the (2) paragraph it says 'Hungary shall ensure this right by providing general access to public culture, free and compulsory primary schooling, free and universally available secondary education, and higher education available for every person on the basis of his or her ability, and, furthermore, through the financial support for students in training, as defined by statute.'

'A novelty regarding the right to education is granting that secondary education shall be free of charge. This was only mentioned earlier in the Act on Public Education, although it was obvious and self-evident as a condition of the fulfillment of compulsory education.'[6] The right to education means a right on the one hand. In a narrower sense it means the right to learn and to teach.[7] The former is related to the quality and availability of teaching and equality. This is a subjective right of access to education, even free access to compulsory education. It means a right to have the freedom to choose a school as well as the freedom of someone to choose a religiously committed school. The latter access, according to the Constitutional Court, is accompanied by a protective right, i.e. the parents are not obliged to take their children to schools that are religiously and ideologically contrary to their convictions.[8]

In an early decision of the Hungarian Constitutional Court is stated that "the state cannot deny the legal possibility to establish either religiously committed or atheist schools; the legislation required should be created. The state does not obliged to set up non-neutral schools."[9] This also means that

[3]Schanda, B (2015a), 84.

[4]Horváth, E. (2009), 'The right to edication' [A művelődéshez való jog], in: Jakab, A (ed), Commentary on the Hungarian Constitution [Az alkotmány kommentárja] 2nd ed, Budapest, Századvég, 2595. From this amendment the Constitution defined itself as 'provisonal' and declared its regulations until Hungary's new constitution comes into force. This latter became the new asic Law of April 2011.

[5]Gerencsér, B (2012) 'Safe educational environment in Hungary' In: Inernational Journal for Education Law and Policy, 2012/2. 111-124.

[6]Balogh, Zs. – Hajas (2012), 'Rights and Freedoms', in: Csink-Schanda-Varga (ed): The Basic law of Hungary - a First Comentary. Clarus, Dublin, 85.

[7]Horváth, E. (2009), 2599.

[8]22/1997 Decision of the Constitutional Court

[9]4/1993 Decision of the Constitutional Court

the ideologically neutral school is the main rule of the system, and religiously committed schools are the exceptions.[10] Any other rule based on this premise.

Later, in relation to the state's obligations in the right to education it also decided that "the right to study, however, does not mean that the state should guarantee to access all schools at all levels and within all ideologies for everyone. States' obligations relating to the operation of the educational institution network in this context means that the state shall not discriminate anyone as maintainer of public institutions." In the same decision, it also found that "securing a human right by the state meet when the state provides the legal conditions for establishing religiously committed educational institutions and it supports them in a ratio far as these institutions undertook state or local government functions."[11]

Thus, the Constitutional Court emphasizes at the same time the subjective and the institutional side of the right to education: "the State has a constitutional obligation while the parents and students have a fundamental right to free education"[12] Public education is therefore a responsibility of the state, which shall be provided not only by the state. "Outsourcing" of public services is possible within appropriate legal guarantees and specific agreements.[13] Under these conditions, the non-state-run schools will be eligible for state aid as well to such an extent as public services are assumed. The limit of this obligation is determined by the Constitutional Court too, when it held that "state is obliged only to establish and maintain non-ideologically-committed schools. We cannot determine that the state should provide free education for everyone to any school of their choice."[14]

Summing up the Constitutional Court's practice, we may therefore see that the right to education cannot be enforced without state guarantees, and the state is entitled to involve external actors, including churches, with the obligation to support them if these are contributing to public services.

3. An international background instrument: agreement between Hungary and the Holy See

Hungary turned to be free to settle its relationship with the churches in 1989. This situation was similar in the most Central, Eastern and South-Eastern European countries in the early 90s.[15] This post-communist period affected both the countries' internal and international relations. Regarding the domestic law, new or revised constitutions and acts add new content to the freedom of religion. The law thus reflected on the transforming state-church relationships. In Hungary, this reflection was expressed for the first time by the first act on freedom of religion and the churches adopted in 1990.[16]

Concerning international law, a number of Central and Eastern European countries have signed a convention with the Holy See, which functioned as a framework about the settlement of their relations. Obviously, states had to restore diplomatic relations first, while such detailed issues as education could then move on later. Among the countries liberated from the communist dictatorship the first such agreement has been elaborated with Hungary on 9 February 1990. The second agreement was in relation with the military chaplaincy, 1994. The third was signed specifically on the

[10]Schanda, B (2013), 'Church Law of the State' [Állami egyházjog], Szent István Társulat, 104.
[11]18/1994 Decision of the Constitutional Court
[12]22/1997 Decision of the Constitutional Court
[13]Just to mention, the concept of *'outsourcing'* is different in this sense as it is used by the anglo-saxon based New Public Management theories.
[14]22/1997 Decision of the Constitutional Court
[15]Schanda, B (2014b) 'The 'Vatican Agreement'. Stabilizing compromises and the freedom of religion' [A 'Vatikáni Megállapodás'. Stabilizáló kompromisszumok és vallásszabadság], In: Pázmány Law Working Papers, 2014/9. 1.
[16]Act IV. of 1990.

promotion of educational tasks in Church-run institutions in 1997.[17]

The 1997 agreement is somehow special in characteristics of this genre in that sense that it "does not refrain from regulating in-depth, sometimes even technical matters"[18] instead of being attached only to theoretical items. The most important element of this agreement is perhaps the declaration of financing of public service activities equally to public bodies (Part I, Article 1). According to the text financial support received by the church for contributing public services (kindergartens, primary and secondary schools, dormitories) is declared to be the same level as similar institutions operated by the state or the municipal (Part I, Article 2). The contract otherwise is not only on educational matters but also deals with the recognition and protection of cultural heritage (part I, Art 4), settlement of church property (Part II, Appendix 2), as well as support concerning taxation policy (II, Part. Article 4).

After several Joint Committee sessions[19] the contract was renewed and comprehensively amended in 2013 after a three-year-long preparatory work.[20] This amendment affected the update of such issues as religious education, support of higher education and other fields.

The Agreement meant an essential assistance in relation to the development of Church-run-education. In Hungary the stable system, which is now characterizes the relationship between the state and religious institutions, could not be developed without the decisions of the Constitutional Court and the international treaties. The Hungarian public educational system regarding the state and Church relationship lies on two bases: the individual agreements and strict control (accreditation), and the funding based on the principle of equality.

Although this study mainly concerns the issue of public education, it is important to note that the 2013 amendment of the Agreement brought significant changes in higher education too. A closer connection has been established between the church-run higher education and the (new) system of state subsidies, which had been changed a lot itself since the educational reforms of 2011-2013.

4. Legal regulation on the right to education regarding church-run institutes

After having reviewed the essential constitutional and international regulations, let us examine the main rules of the domestic law regarding the substantive rights and state obligations in the system of church-run-schools in public education and religious education in public schools.

4.1. Guaranteeing individual rights as an essential element of human rights

As it is cited above, according to Article XI of the Hungarian Basic Law „every Hungarian citizen shall have the right to formal and non-formal education." According to the Basic Law of Hungary, rights and obligations of the pupils are regulated in detail in the act on public education. This regulation is in line with the 1989 New York Convention[21], and to the Hungarian co-regulation, the 1997 Child Protection Act.[22]

[17]This Agreement was ratified by the Act LXX of 1999.
[18]Schanda, B (2014b), 2.
[19]Schanda refers to three Joint Committees and an 'expert opinion', which were designed to dispute resolution. See Schanda (2014b), 8-10. It may be noticed that between 2002 and 2010, Hungary had a center-to-left government, which did not preferred ecclesiastical institutions.
[20]Ratified by the Act CCIX of 2013.
[21]Ratified by the Act LXIV of 1991.
[22]Act XXXI of 1997.

Article XVI. paragraph (2) of the Hungarian Basic Law provides the right to the parents to choose any kind of education they would like to give to their children. So the parents are free to choose either church-run schools or secular public schools. Similarly, the child has a right to choose whether to participate in religious education in public institutions or not. These constitutional rules are highlighted in the law on public education that emphasizes that children have the right to: *„use pre-school, school and hall of residence service at church or private institutions and receive religious and ethics education and instruction organized by a church legal person at state and local government educational institutions"*[23]

With the above regulations the act thus ensures both sides of this substantive right: schools run by church can be chosen and, on the other hand, optional religious education in public schools also can be chosen by the students.

In the recent years due to the educational reform and the revision of the Agreement the issue of religious education in public schools has been clarified. By today, "[r]eligious instruction in public schools is delivered by ecclesiastical entities, not by the school. The instruction is not a part of the school curriculum, the teacher of religion is not a member of the school staff, grades are not given in school reports only participation is registered. Churches decide freely on the content of the religion classes as well as on their supervision. Teachers of religion are in church employment; however, the State provides funding for the churches to pay the teachers. The school has only to provide an appropriate time for religious classes as well as teaching facilities. Churches are free to expound their beliefs during the religious classes: they do not have to restrict themselves to providing neutral education, merely giving information about religion, as do the public schools otherwise. Religious education is not part of the public school's task; it is a form of introduction into the life and doctrines of a given religious community at the request of students and parents."[24]

The protection of children's rights in Hungary is carried out in a complex system of institutions:

- the rights of the pupils are protected by the ombudsman;[25]
- children's rights is represented by the so-called "children's rights advocate" established by the child protection law, as well as a special "alarm-bell-network";
- protection of the safety of the students is a responsibility of the police;
- Psychological control is performed by the school psychologist;
- The compulsory education is controlled by the County Government Office.

4.2. Obligations of the State to ensure human rights

The right to education and freedom of religion, is therefore, not only a right of a person, but also an obligation to the State. Obviously, the state performs public educational tasks (services) primarily through its own institutional system. However, what happens if the state does not have enough capacity but there are external organizations that are willing to and able to provide at least the same level of service?

The answer is obviously begins with the restraint exercised by the state, which realizes that the involvement of religious, civil or other actors into public services under reasonable conditions is justified. Guaranteeing the quality of a certain public duty, however, implies that anyone who wants

[23]Article 46. paragraph (3) ponit e) of the Act on Nantional Education of 2011

[24]Schanda, B (2015b) 'Religion and the Secular State in Hungary', In: Martínez-Torrón Javier, Durham Cole W, Thayer Donlu (eds.), '*Religion and the Secular State: La religion et l'État laique*' Universidad Complutense Madrid, 393.

[25]See for details the Decree No. 40/1999 ME of the Minister of Education on the Tasks and Operation of the Office of the Commissioner for Educational Rights. www.oktbiztos.hu

to step into these public services have to meet stringent requirements.

The government carries out its duties through deconcentrated authorities of education. The Office of Education is a central administrative body that is under the direct control of the ministry responsible of education (now this is the Ministry of Human Resources). This authority deals with the tasks concerning the whole country, while at local level, the County Government Offices are in charge. (In Hungary the Budapest and County Government Offices shall function as the public administration bodies of the Government of territorial jurisdiction.)

Since 2012, in Hungary the state can only establish public schools, while previously the municipalities and county self-governments were able to do so as well. Today, the maintainer is a central body, but the local governments may assume specific responsibilities from the government. Further organs may participate in the sharing of educational tasks, which is also set by law.

The Act on National Education describes a taxonomy (Article 2 para 3) on who may establish and operate public education institutions. These are:

- the State,
- self-governments of nationalities (minorities),
- Churches,[26]
- religious NGOs, as well as
- other organizations or persons on condition that they have obtained the right for conducting such activity as laid down by statutory provisions. Pre-schools may also be established and operated by local governments.

Any educational institution can be created only when the County Government Office issued a *license* and registered the school, so it will be able to control the quality of the educational activity. With this license the authority expresses that the institution meets the requirements of both the infrastructure and the educational content.

According to the decree of the minister, by issuing the license the authority examines “whether the available or obtainable personal, material, labor protection, fire protection, public health and financial conditions are meet the requirements for a continuous, long-term, safe, healthy and professional education.”[27]

The requirement of equality applies to both state and non-state institutions. These, therefore, have to meet the same criteria in performing educational public duties. In addition, I would like to mention that the principle of equality prevail among non-state institutions too, where a some-hundred-years-teaching-tradition church school have to meet the same criteria as a newly established private school and vice versa.

The quality of the educational activities are monitored by the County Government Office regularly but at least in every two years.

Performing a public task relates not only to the infrastructure but to *funding* also. Separation of church and state, however, “does not mean a ban on public funding.”[28] Since education is a public duty, therefore, the state's annual budget is the major source of ensuring its operation. In addition,

[26]According to this regulation Schanda highlights that '*church schools are classed as neither public nor private.*' Schanda (2015a) 97.
[27]Decree 20/2012 of the Minister of Human Resources
[28]Papp, K (2015) 'Financing of church-run public education' [Az egyházi közoktatás finanszírozása], Educatio 2005/3., 592.

the founder and operator has to add extra support for funding extra services or extra staff. These sources may also be supplemented by special fees for specific services, which fall under a separate legal regulation.

The budget shall ensure funding for public education activities of institutions not operated by the state on condition that the institution undertakes activities in compliance with its operating license.[29] The budget otherwise deal with this question among the relations between the central system and the external institutions. The principle of equality is declared in public services provided by both the state and the church.[30]

Until 2013 the budget was based on per capita and additional support with for every church-run institution. After the reformation of the educational system, the yearly budget is now based on the *average salary*, completed with *additional support.* The calculation of the average salary per capita is based on a complex algorithm taking into account the type of institution, the number of students, the number of supported employment and their annual income.

A church shall become entitled to additional support if its schools participate in the duties of compulsory admission. For receiving the support, however, an individual instrument is to be taken in addition to the abovementioned license. The founder and operator may *contract* with the Minister in individual case setting out its wish to attend educational public services. This contract is an agreement between the founder and the ministry under which individual schools, boarding schools, foster homes or other institutions can be established.

The other type of individual instrument can be used if there is already a *framework agreement* between the church and the ministry, which must be specified at the establishment of every single educational institution. In this case, if a church has concluded with the Government an agreement covering, inter alia, the implementation of public education tasks, then it shall undertake, through a *unilateral declaration* sent to the County Government Office (or, in the event of a pre-school, to the local government concerned), to assist in the implementation of state and local government tasks and undertake the obligation to carry out remedial tasks to help students catch up with standards. On the basis of the unilateral declaration, the County Government Office shall register the institution maintained by the church into the public education development plan.[31]

Regarding the Catholic Church, there is no need to establish a contract nor agreement with the state; the Catholic Church is entitled to make a unilateral declaration on the basis of the abovementioned Agreement. The right to make such unilateral declaration shall belong to the organizational unit of the church invested with legal personality according to the internal rules of that church.

If, therefore, a church school is to participate in the public task in the abovementioned way, the access to education shall be free just like in state schools.

5. Conclusion: equality in duties and support as well

Separation of State and Church does not exclude the possibility that the state can co-operate with the churches.[32] This is particularly relevant in such human services, where the Church has a long and

[29]See Article 88 paragraph (3) of the Act on national education of 2011.
[30]Article 5 para (1) of Act CXXIV of 1997 on the financial conditions of churches' religious and public activities.
[31]See Article 32. paragraph (2) of the Act on National Education of 2011
[32]Szabolcs Szuromi mentions the the concept of *'collaborative separation'* in the Spanish system. Szuromi, Sz (2014) 'Spanish public canon law - a new emphases' [Spanyol állami egyházjog – új hangsúlyok] In: Iustum Aequum Salutare, 2014/2. 156.

significant experience and infrastructure. Within this co-operation the interests of both parties are important: the Church is to serve by the ministry, while the State would like to know the outsourced public functions well controlled.

It should also be noted, however, that state control shall not intervene in the Church's internal affairs, rather it should be on the educational activity.[33] Lawfulness is granted when the conditions are laid down in law, since the States should consider (or at least tolerate) internal structural peculiarities of the churches to some extent.

Schools founded by the Church and other non-governmental organizations have a special position in the Hungarian public administration system. The state, on the one hand, guarantees the free exercise of religion and the free functioning of the Church, while the Church undertakes the fulfillment of the conditions laid down by the State. The performance of human public services could only be outsourced, i.e. provided by non-state actors with the same conditions (see: free and compulsory education), if the State pays for it. (Provided, that it is not the free market that determines the prize of that service.)

In Hungary, non-governmental participation in the exercise of public services are typically on a *contractual legal basis*. A similar approach can be found in health services, as well as public utility services, etc. The contract includes, on the one hand, the content and criteria of the particular public service, and on the other hand regulates subsidization (budgetary payments, grants, etc).

In cases where the State entrusts the Church to take care of state responsibilities, it will stand necessarily on the verge of equality and inequality. Since the state may expect the same conditions for the same qualifications to all students. Moreover, it may also specify conditions for budgetary support. However, a Church-run educational institution is so special to openly undertake its religious commitment, that the state has to respect. So, the only solution besides defining the mandatory standards is the establishment of *lex specialis* rules.

[33]We can find an indirect hint on this in the judgments of the European Court of Human Rights. See: Schanda, B-Csiziné Schlosser, A (2009) 'New developments in the practice of the European Court of Human Rights regarding religious freedom' [Újabb fejlemények az Európai Emberi Jogi Bíróság vallásszabadsággal kapcsolatos gyakorlatában] In: Iustum Aequum Salutare, 2009/2. 80-81.

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Right for education in the context of system or structural state issues of concern

Severukhin V.A.

Section 26 of Universal Declaration of Human Rights highlights broad strategic matters related to education. This section stipulates free and statutory primary education, access to higher, technical and special education, as well as leading principles, determining the aim and course of learning activity. UNESCO Convention on the Suppression of Discrimination in the Sphere of Education sets forth more definite rights. Section 2 of the Convention Protocol #1 points out that no one shall be deprived of the right to education. It is necessary to emphasize, that the right to education in Section 2 of the Convention Protocol #1 is worded in form of negation. In other words the section states that the state " shall not deprive", but not that the state "shall guarantee" the right. The context of the right in question allows the state a legal defence against accusations of the breach of the right.

The right for education takes one of the most important places in the system of human rights and is enshrined in constitutions of the majority of contemporary states. Nevertheless, the affordability of this right is considerably various in different countries. It stems from the whole range of historical, political, economical, cultural, religious and other factors.

Constitution of the Russian Federation (sec. 43) stipulates the right to education. Subsection 2 of the given section guarantees free common availability of preschool, basic and secondary vocational education at state or municipal institutions. The Federal law d/d 29.12.2012 N 273-FZ (ed. of 13.07.2015) "About Education in the Russian Federation" (with amendments, effective as of 24.07.2015) couched in practice the amendments that took place in the sphere. We do not set the aim to analyze comprehensively the advantages and disadvantages of the given acts and their application, but to show the dependence of the problem of human and citizen rights enforcement including the right to education on the general difficulties the state faces.

The term "problem" is considered as an obstacle, difficulty, task, question or a set of questions, that arose during the course of scholastic attainments and practice. Globalisation process, which intensified in the end of XX beginning of XXI centuries, contributed to convergence of economies, finances and technologies, as well as to expansion of common principles of the right in legislation of states, including the sphere of education.

Russian authors in their works usually list the following problems in education:
- the crisis of its traditional system;
- low practical trend;
- low level of finance;
- insufficient system of cooperation between different levels of education;
- availability of education for individuals with disabilities, as well as for those having no registration;
- free education and its common availability;
- low status value of education at secondary vocational technical schools;
- corruption.

The listed problems are hard to negate. Although, most of them, as it has already been mentioned, are practically a consequence of overall system problems of the state or, as the European Court of Human Rights (hereinafter "the European Court") names them "systemic or structural problems" of a

state. The very term “systemic or structural problems” was couched for the first time and used in Court practice in 2004.

This term, to our opinion, can be interpreted as follows: a structure is a kind of certain relations among the elements of the system, which are set forth by the authority to achieve certain aims. The structure of a state must represent not a set of elements pro forma, but a functional whole. A structure unites elements forming a system. The term “structure” is in certain cases used to denote not only relations among the elements, but the very elements themselves. This approach leads to interpreting the term “structure” as a system in its entirety.

In terminology of the European Court the term “systemic or structural problems” of a state is a means to draw attention of a state to drawbacks in its system by way of indicating the consequences, i.e. breach of certain provisions of the Convention appearing in different structures or spheres. The Court does not name the reasons but draws attention to certain breaches of Convention.

Russian political and legal lexicon comprises the term “systemic problems”, while in relation to ministries and agencies there is another one - “industrial dimensions”. The term “sphere” is also used, for instance, “sphere of education” or “sphere of healthcare”.

The Court, responding to a great number of cases, that arise in relation to some states as a result of systemic or structural state problems, has started to apply the procedure of so called pilot judgments. This has led to uncovering of systemic problems within a certain case. These problems result in breaches of European Convention on Human Rights. The Court has started to use this procedure while defining systemic problems in cases against a state, that is a signatory to European Convention on Human Rights. the Court orders to take measures to remedy the situation that has led to mass breach of Convention. The procedure of pilot judgments allows the states-respondents to take measures of individual and common overall character in compliance with a Court order. It stimulates the state-respondent to adjudication of similar cases domestically. The essence of the procedure of pilot judgments also involves the fact that *analogous* complaints are considered by the European Court *summarily* (italics by V.S.).

Analysis of the European Court judgements makes it possible to articulate the definition of systemic or structural problems of state. They are *breaches of a repeating and long-term nature*, *related to general public*, caused by imperfection of the state legislation or its implementation. (italics by V.S).

Pilot judgments of the European Court can be classified according to:
1. types of offences;
2. spheres (social, law enforcement, financial, ect.);
3. response of states-respondents to pilot judgements;
4. problems not related to provisions of current national legislation, but financially, technically and in other aspects dependent on the state resources;
5. parties liable for taking measures of a general character;
6. breaches typical for certain states.

Russia is currently leading on the number of citizens’ complaints to the European Court.

The most widespread types of breaches of Convention and national legislation from the point of view of the European Court are:
- unreasonably lengthy legal proceedings;
- failure to enforce judgements, primarily in the social sphere;
- ineffective investigation of deaths, tortures, disappearances, unlawful arrests;

- conditions of keeping in pretrial detention centres;
- partial enforcement of a court order, etc.

The listed breaches are those of a mass and lengthy character. Nevertheless, they should be treated as results of "systemic or structural problems" to a large extent. These problems adversely impact social and economic spheres of the state as well as the whole range of rights of an individual and a citizen, including the right to a maintenance and education.

The situation of the previous year, connected to oil price downturn, Ukraine affairs and sanctions against Russia, has aggravated the problems, including the sphere of education.

The developed democratic states consider *science, education and healthcare* as having a priority character. As for Russia, as well as post soviet states in Europe, most of the complaints from citizens of those countries to the European Court are related to the social sphere.

Problems of a systemic character show themselves most urgent in a legal and law enforcement system. The systemic corruption in the machinery of government, mass breaches of rights and liberties of an individual and a citizen, absence of mass media freedom must be considered as *systemic* breaches. Although, it is wrong to ascribe all the breaches to systemic or structural problems only. Infringements of law occur in any state. It is the task of the science of law, political science and economics to distinguish these infringements from offences and breaches caused by systemic problems.

Scientists, leaders of the Russian state and most citizens understand that a range of mass and lengthy breaches in the Russian Federation are the result of faults in the activity of the machinery of government or, as the European Court puts it, "systemic or structural problems". Nevertheless, understanding of the problem does not contribute to the increase in the real measures to be taken. Here is an exemplary case. The order of consideration of citizens' filings to governmental agencies. In accordance with sound consistency and current legislation, applications shall not be considered by the officials, whose actions are challenged. Nevertheless, this requirement is breached here and there. A complaint, having been reviewed at several levels, is usually sent back to respondents, who are supposed to be brought to account. This practice has existed for a long time and is known very well to population and authorities of the state.

Excessively time-consuming court procedures, failure to enforce court orders, absence of national legal remedy or potential claims for damages for drawbacks in execution of judgment (sec. 6 and sec.13 of Convention). The European Court sees these violations as having mass character and concerning first of all the social sphere. Dozens of thousands of complaints caused by these reasons were filed to the European Court. Hundreds of thousands solutions of the Russian courts concerning payment of various grants, privileges, provision of housing, etc. weren't carried out.

What are the reasons of the situation?

At a specification of standards of the Russian Constitution in federal laws, laws of subjects of the Federation and in other normative legal acts, non-conformity of these laws to its norms and principles are found. The legal mechanisms establishing a mode of operation of constitutional norms, in some cases, significantly limit the rights and freedoms of citizens. Law enforcement in Russia is traditionally carried out on the basis of the current legislation and interpretation of standards of the Constitution from a position of decisions of the Constitutional court. Direct action of standards of the Constitution is allowed at law enforcement, but this order is not a broad practice.

The reasons of such phenomena are known. In the Russian legal literature, it was repeatedly noted: the constitutional principle of division of the authorities is broken, executive power dominates. The scope of powers of the President of Russia has been significantly expanded by the State Duma, decisions of the Constitutional Court and the own President's decrees for the last years. All this allowed to call Russia a superpresidential republic. By definition of the former Minister of Finance of Russia A.L. Kudrin the country is "in a manual control".

Formation of a civil society in our country proceeds rather slowly, public control over activity of government bodies is practically absent. Corruption has a systemic and lasting character, covers all spheres of the state.

Systemic problems of the Russian state negatively influence the situation with human and citizen rights. The optimization, performed in Russia concerning system of the state healthcare and education in general, has not improved opportunities of citizens for realization of the rights in these spheres.

Thus, the opportunities for realization of the right for education, as well as other rights and freedoms of the person and citizen in Russia are to be considered in their interrelation and dependence on the organization of political system.

The real improvement of the opportunities for realization of the right for education is subject the solution of common problems of the Russian state.

Summing up, it is possible to draw a conclusion. A reform must be conducted primarily in the political system of Russia. As for legal system, it also needs essential changes.

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Landscape of Areas of Autonomy or Conflict between State and Catholic Education in the European Member Countries of the CEEC

Guy Selderslagh

1. Introduction[1]

In his article titled "*Religions, laïcité et service public de l'éducation en Europe*"[2], André Legrand, professor of public law at Paris X Nanterre University, draws a picture of the principles governing the relationships between State and religion(s) in Europe. These relationships raise several difficulties, the reasons of which are numerous. On the one hand, there are national specificities. He mentions several examples, namely the French and German cases:

- The French laicity is understandable if we remember the ecclesiastical hostility against the very principle of republican government;
- The relationships between State and religions, established by the Weimar Republic, are the result of the search for consensus between Catholics and Protestants in a country devastated at religious level.

On the other hand, problems also come from the fact that, almost everywhere in Europe, at different speeds, we notice common developments: secularisation of society, new religious heterogeneity, new importance of Islam or proselytism of new movements…

The principles governing relationships between State and religion can be grouped into three main systems (even if none of them is totally impervious to the others):

- State Church, as in the United Kingdom;
- Strict separation between Church and State, like the French model;
- Cooperation and coordination between Church and State, as in Germany.

According to André Legrand, we generally find a rather large recognition of religious freedom in Europe. This may well be for the sake of pacification and equilibrium if a country is strongly influenced by religious diversity, or the manifestation of a desire to protect a minority in countries where there is a particularly dominant religion.

Consequently, "it is not the principles of freedom and equality, but much more the concrete conditions of their implementation, that mark the differences between the various European countries".

The present document is divided into two parts, a first one developing in a more profound way what causes dispute in Catholic education in the French- and German-speaking community of Belgium, such as developed by the Legal Service of the SeGEC and its Director Bénédicte Beauduin.

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[1] Thank you to Edith Devel, from the Study Service of the SeGEC, for the compiling of the answers to the CEEC survey and the status report of Catholic education in Europe.

[2] LEGRAND A., « Religions, laïcité et service public de l'éducation en Europe » in *Services publics et religions : les nouvelles frontières de l'action publique en Europe*, Ed. Presses Universitaires de Limoges, 2006, pp. 156-158.

A second part briefly reviews the institutional situation of Catholic education in a series of CEEC member countries, and makes a provisional summary of an ongoing survey on the autonomy of Catholic education in each European country and the areas of dispute between Catholic education and States.

2. The questions causing dispute in Catholic education in the French- and German-speaking community of Belgium[3]

2.1. A constitutional confirmation

During the constitutional revision in 1988, the legislator introduced in the Constitution a provision concerning education. It provides that:

§ 1. Education is free; any preventive measure is forbidden; the punishment of offenses is regulated only by law or decree.
The community ensures parents' free choice.
The community organises neutral education. Neutrality includes the respect of philosophical, ideological or religious concepts of parents and pupils.
Schools organised by public authorities provide, to the end of compulsory schooling, the choice between the teaching of one of the recognised religions and the teaching of non-denominational ethics.
§ 2. If a community, as organising authority, wants to delegate competences to one or several autonomous bodies, it can only do so by decree adopted by a two-third majority of the votes expressed.
§ 3. Everyone has right to education in the respect of fundamental rights and freedoms. Access to education is free until the end of compulsory schooling.
All pupils of school age have right, at the expense of the community, to moral or religious education.
§ 4. All pupils or students, parents, staff members and schools are equal before the law or decree. The law and decree take into account the objective differences, notably the own characteristics of each organising authority, that justify an appropriate treatment.
§ 5. The organisation, recognition or subsidising of education by the community are regulated by the law or decree.
On this occasion, the powers of the Constitutional Court have been extended to the control of these constitutional principles guaranteeing both freedom of education and equal treatment. It should be noted that a duty of vigilance is essential with regard to the political will to standardise education and thereby try to erase the specificities of Catholic education.

2.2. Defence of the principles of freedom of education: recourse against the "Landscape" Decree

In 2013, the Parliament of the French-speaking Community adopted, at the initiative of the Minister of Education, a decree (dated November 7, 2013) describing the landscape of higher education and academic organisation of studies.

The text comprises on the one hand, the creation of a body (ARES), of which all higher education institutes are automatically a member, a body described as a federation of institutes called to guide higher education through the numerous bodies within which all institutes are not represented. The

[3] This chapter concerning the situation of Catholic education in the French- and German-speaking community of Belgium was drafted by Bénédicte Beauduin, Director of the Legal Service of the SeGEC.

competences given to the ARES are so much extended that it deprives our institutes of their prerogative and management autonomy.

On the other hand, the decree sets up poles imposing groupings of schools only on the geographical basis, within which the Government interferes by enacting precisely the functioning and arrogating the role of arbitrator.

Finally, the decree sets up a complex mechanism of authorisation in the organisation of the education provision, requiring both a favourable opinion from the ARES for any opening and some imposed co-diplomation mechanisms.

Yet, the jurisprudence of the Constitutional Court considers that:

Freedom of education implies that private persons may, without any preliminary authorisation and subject to the respect of fundamental rights and freedoms, organise and provide education in accordance with their own concept, in terms of both form and content.[4]

If it wants not to be theoretical, freedom of education implies *that the organising authorities not directly depending on the Community may, under certain conditions such as requirements of general interest, claim subsidies from the Community. To that extent, freedom of education is limited and does not prevent the decree legislator to impose financing and subsidising conditions that restrain the exercise of this freedom, provided that no essential harm is done to it or to other rights and freedoms, in this case, the freedom of association.*[5]

The SeGEC, in cooperation with higher education schools from all categories (higher institutes, colleges of arts and social promotion) has thus submitted a legal recourse to the Constitutional Court regarding especially the violation of the principles stated in article 24 of the Constitution (freedom of education), but also article 27 (freedom of association). The aim is to obtain the invalidation of the controversial provisions. This recourse is still ongoing; a date for pleading is expected for the end of this year 2015.

2.3. Defence of the principle of constitutional equality in matters of education

In that matter, one can identify two precise debates, one regarding the social advantages that the municipalities have to give to pupils of Catholic schools, and the other regarding more generally the difference of treatment in the subsidising of schools, according to the network to which they belong.
The Constitutional Court has been consulted several times about this question. The following jurisprudence has resulted:
The rule of equality and non-discrimination does not exclude that a difference in treatment can be made between these categories, provided it is based on objective criteria and reasonably justified. The existence of such a justification must be evaluated taking into account the purpose and effects of the controversial measure, as well as the nature of the principles in question.[6]
To justify, as regards the principle of equality and non-discrimination, a difference in treatment between schools and staff members, it is not enough to point out the existence of objective differences between these schools and staff members. It must also be demonstrated that regarding

4 Belgian Constitutional Court, judgement n°48/2005 dated March 1st, 1995. B.6.
5 *Idem* B.9.
6 Belgian Constitutional Court, judgement n° 1/2003 dated January 8th, 2003.

the regulated matter, the alleged distinction is relevant to reasonably justify a difference in treatment.[7]

2.3.1. Social advantages

Social advantages have been a subject of dispute for more than 50 years between municipalities and Catholic schools. The School Pact dated 1957 includes indeed the obligation for the municipality to make pupils of Catholic education profit of the same social advantages as those given to pupils in municipality schools. A dispute has then been developed about the definition of social advantages. The jurisprudence that ensued gave a rather large definition favourable to Catholic schools.

Faced with the additional cost that this represented for the municipalities, a decree was adopted in 2001 to give a definition limited to the notion of social advantage (childcare, hot meals, gifts, etc.), which has led the SeGEC to submit an appeal to the Constitutional Court for violation of the principle of equality. Through a judgement dated May 14th 2003, the Court validated the decree but definitely reminded the principle of equality between all pupils, whatever the education network, inviting the municipalities to observe it.

Since then, the dispute has not ceased. Many cases have opposed and still oppose municipalities and Catholic education organising authorities. We notice that a unanimous jurisprudence emerges, obliging public authorities to pay social advantages to private schools and condemning them to indemnify when this obligation has not been respected in the past.

These numerous actions have also obliged some municipalities to accept negotiating with private education on the question of social advantages, recognising thereby the functional public service of education organised by private education on their territory.

If we have to remain vigilant, we also must notice that the percentage of municipalities refusing, in violation to the decree, to grant social advantages to pupils of Catholic education, has clearly decreased for the last decade.

2.3.2. Education legal framework

The legal framework provides distinct school subsidising according to the education network. So Catholic education receives, per pupil, a subsidy well below what the school from the network organised by the Community would receive for this same pupil. The difference varies, according to levels, between 25 and 40% in compulsory education. This system was originally justified by objective differences that have disappeared in the course of the political will of standardisation of all schools.

The system is particularly unequal in higher arts education where the Government gives its own schools grants in an absolute arbitrary way, creating thereby a discrimination regarding subsidised schools that welcome the great majority of pupils. The difference in subsidising is about 60%.

In 2011, all Catholic higher institutes of arts education introduced an action to the Court of first instance claiming to the French-speaking Community both a just equality for the future and compensation for the damage caused in the past for violation of the constitutional principle of equality. The total estimate of the damage amounts to more than 17 million euros.

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7 Belgian Constitutional Court, judgement, ° 90/2008 dated June 11th, 2008.

In the current state of affairs, only one case has been analysed by the Court. Although the procedure is still ongoing, one can notice a kind of discomfort of the jurisdictions to remark on the one hand, a true unjustified inequality in treatment and on the other hand, budgetary consequences for the French-speaking Community.

2.4. Remaining attentive…

If the Constitution has given some guarantees to Catholic education in Belgium, it is however necessary to remain attentive to the legislative developments that often try to dent the principles of freedom and equality of education.

The very recent debate on the place of the class of Catholic religion in the compulsory hours of pupils shows how much we have to remain attentive to the respect of our specificities. It is to a radical secular militancy that we had to oppose the principle of freedom of education, so that Catholic education could both keep the compulsory character of its class of religion and guarantee citizenship education through all disciplines (and not being obliged to create a specific course in that subject as required by official education).

We also can note that there is a great temptation, especially in the trade unions in the name of equality between all staff members, to erase the specific legal regime of Catholic education in favour of a strictly statutory mechanism close to civil service. In this, there would be violation of the freedom of education that, according to the Constitutional Court, includes especially the right to recruit personnel who meets and agrees with the educational project of the organising authority.

An attentive observer of these developments is the Council of State that, in its notices about drafts of decree, is particularly attentive and proactive regarding the observance of article 24 of the Constitution.

3. A tour of Europe of questions making dispute in Catholic Education

3.1. Albania

In Albania, only two Catholic schools are authorised to organise a class of religion. In all other schools, public or private, there is a class of ethics.[8]

3.2. Germany[9]

The State needs to rely on a plurality of convictions and values experienced by the citizens and different communities of belief. Many citizens make political decisions based on their religious beliefs, which are important resources for the creation of meaning. In Germany, the State gives the Churches a status of public law so that *they can enjoy a positive religious freedom that articulates the individual freedom in a private context and its collective dimension in public life*.

It is possible to learn theology in a State University. We find there two groups of students: those who want to become teachers of religion at school and the future lay collaborators in pastoral work.

[8] CEEC survey on intercultural practices in Catholic schools, 2015.

[9] NIENTIEDT K., "Les relations Églises/État en Allemagne. Une séparation 'boiteuse' " in Etudes, November 2008, pp. 441-451.

According to the *Länder*, the Churches participate or not in the appointment of new teachers and sometimes, they can withdraw permission to teach.

According to the German Constitution, *religion is a normal and compulsory subject in the programme of State schools* (except for 4 *Länder*: Berlin, Bremen, Hamburg and Brandenburg). Although it is compulsory, pupils can be exempted without giving any explanation. In such a case, they have a class of ethics. The class of religion is submitted to State school inspection, but the Church or religious community is responsible for the objectives and contents.[10]

Teachers of religion may also teach other subjects. Trained in theology at the university, the teachers of religion are appointed by the State as other teachers. But Catholic schools may freely hire their teaching personnel. They only have to guarantee that the professional training of their teachers correspond to that of teachers in State schools.[11]

Today, it is not easy to teach religion at school (…) but the presence of Islam in a society increasingly multi-denominational and the debates around religious extremism (…) make religious questions topical and give religious education a new legitimacy. The necessity to treat the religious phenomenon from a rational point of view seems stronger and stronger, even in a secularised society.[12]

According to the principle of subsidiarity, the German State favours private institutions to guarantee some services: if a private institution provides a service requested by the population, it must accept this offer. This is especially the case of some schools. The State then largely finances, mainly at the level of the personnel. *The Churches are the most important non-State institutions capable to provide these services in the social and education field. These activities are very well accepted by society. Everyone knows that it would be veer expensive to replace the Churches in the financing of all these services.*[13]

Thus private schools, including Catholic schools, receive a subsidy of about 60 to 90% of the total costs, according to the *Länder* and the type of education.

3.2.1. Conflicts

According to the recent survey of the CEEC, there is currently no conflict between the State and Catholic education.

However, in 1995, a controversial decision of the Constitution Court of Karlsruhe: atheist parents protest against the presence of a cross in a State school in Bavaria. Judgement: end of the obligation of the Bavarian law to put a cross in classrooms. In each case, the decision is given to those concerned. This is a significant change: *individual decision more and more replaces cultural tradition*.

Another debate is raised with the Islamic veil. The debate not concerns the veil of pupils but that of teachers. Some *Länder* totally prohibit wearing ostentatious religious signs while others make exception for Christian and Jewish symbols. This is not compatible with the legal principle of equality…

[10] CEEC survey on the autonomy of Catholic education, "Germany", 2015.
[11] CEEC survey on the autonomy of Catholic education, "Germany", 2015.
[12] NIENTIEDT K., idem, p. 445.
[13] NIENTIEDT K., idem, p. 447-448.

Nevertheless, **financing** is a problem. *Given that governmental subsidies and Church allocations are decreasing, more and more schools have to ask school fees to families.*[14] Moreover, even if the autonomy of private schools is not called into question, in some *Länder*, there are still conflicts regarding the concrete organisation and the level of financing by the State.[15]

3.3. United Kingdom

3.3.1. England and Wales

The education system in England & Wales is made up of State schools and private (i.e. non-State) schools called independent schools. The State system is made up maintained schools and colleges. These comprise community schools, voluntary aided schools (the majority of which are schools with a religious determination), controlled schools, academies, trust schools and sixth form colleges. Whilst the vast majority of schools with a religious character are Church of England or Roman Catholic schools, the number of other 'faith' schools in the State sector is increasing.[16]

Since the 1944 Education Act, the national education system has been fully funded by national and local taxation. Religious education and a daily act of collective worship were made compulsory for all schools (although parents were given the right to withdraw their children). Since this period, there has been developments in the percentage of costs related to buildings and maintenance, at the expense of the Catholic Church. From 50%, it had decreased to 10% in 2002.[17]

In Catholic maintained schools religious education must be taught in line with the Curriculum Directory, published by the Bishops' Conference of England & Wales in 1996, and the provision of Canon 804. Teachers of religious education are appointed by the governors of Catholic schools, are on the equivalent terms and conditions as other teachers and are supported by advisers from Diocesan Departments of Religious Education. [18]

3.3.2. Scotland

As for State schools, the State funds denominational schools while independent schools do not receive any subsidy (in this case, parents pay school fees).[19]

Teachers of religion are appointed by the school, but their appointment must be agreed by the Church. Parents know that Catholic schools have a particular mission and they are asked to respect that. However, they have the right not to choose religious education for their children.

For as long as Catholic schools remain popular with parents because they offer excellent education and formation, no serious political party will oppose them. The biggest threat [for Scottish Catholic education] may come if the teachers appointed to work in Catholic schools are themselves not adequately formed to understand the mission and purpose of the Catholic school.[20]

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14 CEEC, *L'enseignement catholique en Europe*, Ed. Secrétariat Général de l'Enseignement catholique, Paris, 2010, p.11.
15 CEEC Survey on Autonomy of Catholic Education, "Germany", 2015.
16 CEEC, *L'enseignement catholique en Europe*, Ed. Secrétariat Général de l'Enseignement catholique, Paris, 2010, p. 12.
17 CEEC, *idem*, p. 13.
18 CEEC, *idem*, p. 14.
19 CEEC, *L'enseignement catholique en Europe*, Ed. Secrétariat Général de l'Enseignement catholique, Paris, 2010, p. 12.
20 CEEC, *idem*, p. 32.

3.3.2.1. Conflict

For some time, Scottish Catholic Education has been expressing concern to the Scottish Government about a shortage of teachers for Catholic schools. This is a matter of ongoing negotiation.[21]

3.4. Austria

The Catholic Church is an important partner of the Austrian State in the field of education. Religious education is compulsory for all pupils belonging to a Church or a recognised religious community, both in State schools and in private schools of public law.

At the level of financing, the salaries of teachers (including teachers of religion) are financed by the State, but running costs, renovation and construction costs are under the responsibility of the congregations that run the schools.[22]

In Catholic schools, the class of religion is compulsory while in State schools, the pupils can opt for a class of religion if this last is recognised by the State, but they also cannot follow any course.[23]

According to the recent CEEC survey, there is no particular conflict between Catholic education and the Austrian State.

3.5. Belgium – Flanders

In Flanders, Catholic schools enjoy almost the same funding as State schools. Indeed, official schools are legally obliged to offer several philosophical subjects and they receive a supplement of 4.5% per , to be able to cover the costs concerning these subjects. Moreover, public education receives 3% additional working means to be able to welcome all pupils, guaranteeing thereby the free choice of the school.[24]

Catholic education enjoys good autonomy: it may draw up its own curriculum taking into account the final objectives defined by the Flemish Government. There is no difference between teachers in Catholic education and State education: salaries and pensions are aid by the State.[25]

According to the recent CEEC survey, it seems that there is no particular conflict between Catholic education and the Flemish Government.

3.6. Bosnia and Herzegovina[26]

"Catholic Centres for Europe" welcome all pupils without any discrimination. They were open with the agreement of the Ministers of Education of the cantons financing salaries, but not the buildings. These Catholic schools propose one hour of catechism only for the attention of the Catholic pupils

[21] CEEC Survey on Autonomy of Catholic Education, "Scotland", 2015.
[22] CEEC, *idem*, pp. 15-16.
[23] CEEC, Survey on Autonomy of Catholic Education, "Austria", 2015.
[24] CEEC, *idem*, p. 19.
[25] CEEC Survey on Autonomy of Catholic Education, "Belgium-Flanders", 2015.
[26] Du Closel E., « Les 'centres catholiques pour l'Europe' » in *Enseignement catholique actualités*, n°319, décembre 2007, pp. 46-47.

who wish so, to avoid being suspected of proselytism. They also propose a class of history of religions.[27]

3.7. Croatia

Schools are financed at two levels: at the national level where Catholic schools are funded as well as other State schools (salary of teachers and other personnel) and at the local level (by regional authorities) where there is inequality because every local authorities has the right to decide the extent to which funding Catholic schools. Catholic schools are obliged to follow the curriculum prescribed by the Ministry. In Catholic schools the class of religion is compulsory.[28]

To attend or work in a Croatian Catholic school, one must be Catholic. Pupils have to present a baptism certificate and teachers must provide documents regarding the sacraments that they have received.[29]

According to the recent CEEC survey, there is no conflict between Catholic education and the Croatian State.

3.8. Denmark

Catholic schools receive a subsidy from the State: 75% of the level of the cost of State schools (covering the salaries, maintenance of buildings and running costs). School fees are asked to parents: generally 130€ per month/child.

These Danish Catholic schools do not want to be schools *for* Catholics. Indeed, these schools have a very good reputation and only 16.7% of pupils and staff members are Catholic (the others are Lutheran, Muslim or atheist).[30]

3.9. Spain

Agreements on education and cultural matters signed by Church and State in 1979 oblige State schools to provide optional religious education.[31] In public education, pupils can choose among a denominational religion course, a course of religious culture or a class of "*atención educativa*", which is still to define.

These agreements also stipulate that teachers of religion are nominated by ecclesiastical authorities but are appointed and remunerated by the State.[32]

Schools under contract are subsidised: the State decides on the minimum amount that the Autonomous Communities have to pay. In these schools under contract, the salary of teachers is not

[27] CEEC, *idem*, p. 25.
[28] CEEC Survey on Autonomy of Catholic Education, "Croatia", 2015.
[29] CEEC, *idem*, pp. 26-27.
[30] CEEC, *idem*, pp. 28-29.
[31] RUANO DE LA FUENTE J., « Religions et services publics. L'exemple de l'Espagne » in *Services publics et religions…*, pp. 192-193.
[32] RUANO DE LA FUENTE J., *ídem*, p. 193.

equal to that of teachers in State schools, but this tends to balance. However, there is no subsidy for costs related to buildings (renovation or construction).[33]

The Spanish State has extended to other denominations, having signed the 1992 Agreements, the right to teach religion at school and the right to receive public subsidies.

According to José Ruano De la Fuente, Professor of Political and Administrative Science at Complutense University Madrid, in his article "Religions and Public Services. The Example of Spain", *the teaching of religion in State schools raises two fundamental problems: on the one hand, its nature and place in the general education system: the relevance of its presence, the question of making it a school discipline subjected or not to evaluation, and the question of its denominational or non-denominational character; and on the other hand, the legal status of teachers, which affects the appointment process and the guarantee of their rights in equality conditions with other employees of private law.*[34]

3.10. France

3.10.1. France except for Alsace and Lorraine

1905 Law: Church and State are separated (except for Alsace and Lorraine that are under Concordat regime).

1959 Law: the French State had to rely on private establishments to deal with demographic and school explosion. It thus accepted to fund private schools while leaving them the possibility to keep their own character. In return, these schools had to commit to welcome a wide public, without restriction regarding the origin or belief. Catholic schools are thus associated to the State, i.e. teachers are employees of public law, their salary is fully paid by the State (except for teachers of religion whose salary is paid by the schools, but not in Alsace and Lorraine where it is though paid by the State).

2005 Law: measures aiming that retirement of teachers in private education tend to equality with that of teachers in public education.[35]

The Law stipulates that the financing of Catholic Education should be on the same basis as that of Public Education. Since the funding comes from the State and "Collectivities" (i.e. municipalities, departments, regions), the law obliges these last to calculate the cost of a pupil in public education and to pay on this basis. If this calculation is not correct, the funding of public and private schools would not be equivalent. It is thus necessary to be very attentive.

Since the State and Collectivities are not the owners of the buildings of Catholic schools, they do not provide funding for maintenance or construction of buildings. Catholic education can thus only rely on its own resources, that is to say the contributions of families. However, an 1880 law allows to ask for the support of the Collectivities for investments and repairs (not more than 10% of the annual working budget).

The autonomy of Catholic education is quite important. It only must comply with the programmes and the yearly number of school days. There are no religion classes in the curriculum but optional

[33] CEEC, *idem*, p. 35.
[34] RUANO DE LA FUENTE J., *ídem*, p. 195.
[35] CEEC, *idem*, pp. 37-39.

sessions of catechesis or moral reflexion can be organised outside school hours. Speakers for catechesis are often volunteers.

3.10.2. Conflicts

Since teachers are personnel of public law, their appointment must be agreed by the State and the headteacher. This question is often source of conflict because it concerns the autonomy of recruitment.

Questions of timetable and distribution of services affect the autonomy of the headteachers in their educational organisation.

Disputes relating to the movement of employment (headteacher's agreement or refusal for appointing a teacher) that concern the autonomy of recruitment.

Another source of dispute concerns some financings that affect the working of a school.[36]

3.10.3. Alsace and Lorraine[37]

In Alsace, there are two kinds of religious education at school:

The interdenominational class in primary education: this has been organised by academic authorities for more than thirty years.

Cultural and religious discovery in lyceums: this course is given by Protestant or Catholic teachers. After two months, if they wish so, pupils can be exempted. Two main lines in this course: knowledge of the different religions, and knowledge of ethical and existential questions.

Remark: there is still no Muslim education at school although the request has been made several times by Muslim authorities, with the support of Catholic, Protestant and Jewish authorities (reason of refusal: question of law, but especially problem of teacher formation).

3.11. Grand Duchy of Luxemburg[38]

Law, dated June 2013, regarding the relationships between State and private education: *private schools must follow the programmes implemented in corresponding public education and respect each school hour of public education, while a total difference not exceeding three weekly lessons is allowed.*

Private schools are subsidised from 40 to 90% of the average cost of public education (according to the percentage of lessons given by teachers who have the diploma required in public education and who are linked to the school by a permanent work contract). The salary is paid by the State as well as 40% of the costs. A contribution is asked to parents. The State also contributes to the maintenance of buildings through a special subsidy.

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[36] CEEC Survey on Autonomy of Catholic Education, "France", 2015.

[37] J.-M. MEYER, « Un cours de culture religieuse à l'école. Démarche de l'Union des Églises protestantes d'Alsace et de Lorraine » in *Educatio*, n°1, spring 2013.

[38] CEEC, *idem*, p. 41.

3.12. Greece

In Greece, one does not speak of "Catholic schools". There are public education and private education with school fees. *The functioning of private schools, their programmes and timetables are the same as those of State schools. The owner responsible of a school selects the headteacher and teachers*.[39] *Currently, the Christian schools belong to the local Catholic Church or to Catholic teaching religious congregations of pontifical law. In all these schools, the great majority of the school population, pupils and teachers, are of Orthodox denomination. They experience ecumenism in the daily practice.*[40]

Catholic schools are financed thanks to private funds (school fees paid by parents) and are different from State schools at the level of their organisation and structure. Catholic schools are also better equipped than State schools.

Catholic schools must follow the programmes issued by the Ministry of Education, including for religion classes that are part of the curriculum.[41]

3.13. Hungary[42]

During the interwar period, many Catholic schools have been built with State financing. After the Second World War, the Communist regime took into possession all denominational schools.

In 1950, under pressure of the Communist dictatorship, the Catholic Church signed an agreement with the State, concerning among other things the interdiction of religious congregations, with exception for four congregations who obtained the opening of two lyceums each.

1991 Law: authorisation of partial restitution of the buildings to the Church.

In the 90s: the number of Catholic schools has increased from year to year, but from 1999 to 2010, it has slowed down because of the financing system and especially the financial crisis. Many rural municipalities had to choose between closing their school and transferring it to the Churches.

Today, Hungarian Catholic Education welcomes about 5% of the school population (i.e. much smaller importance than in French-speaking Belgium).

In 1997: signature of an international law agreement between the Holy See and the Hungarian Government: the Parliament established a law on financing of Churches that obliges the State to guarantee, on the national budget, the funding of denominational schools on equal footing with State schools in terms of salary, including the salary of the teachers of religion, and running costs. On the contrary, the renovation and construction costs must be covered by the dioceses or the congregations, except for some schools.

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39 CEEC, *idem*, p. 43.
40 CEEC, *idem*, p. 43.
41 CEEC Survey on Autonomy of Catholic Education, "Greece", 2015.
42 Dr. András GIANONE, "L'enseignement catholique en Hongrie" in *Entrées Libres*, Hors-série Acts of 2012 Congress.

Many schools have financial problems because the amount paid by the Ministry is not sufficient for paying the salary and running costs. It should be noticed that this also affects State schools. Thanks to State financing, Catholic schools are free of charge.

The responsibility of the organising authority is important: approval of the educational project, financing of its school, nomination of headteachers, supervision of the management and pedagogical work of its school. But organising authorities are rarely able to assume this. A special body has thus been created.

The main difference between Catholic education and public education in school life is the commitment of teachers and families, and the religious life. In Hungary, headteachers may select new teachers on the basis of their religious beliefs. Each school has some practicing teachers.

There are two compulsory religion classes per week, but Protestant pupils can have a class of Calvinist or Lutheran religion. In many schools, pupils are prepared to sacraments.

3.14. Ireland

3.14.1. Republic of Ireland

Most Catholic schools are run by groups belonging to the Church. The State subsidises them: 100% of the salary (including that of teachers of religion and headteachers), 80% of the running costs and 90% of the costs related to the buildings.

An observation: there is a lack of State schools for meeting the request of parents who want a service adapted to non-believing families. Some parents have thus to send their children, non-believers, to Catholic schools. This questions Irish Catholic Education about its future: *is it better to have a smaller number of schools with a clearer Catholic character (for Catholics only) and to leave the other schools to the State or is it preferable to enlarge the testimony of the Gospel message to a plural environment, to secularised parents, teachers and children, in a dialogue between faith and culture?*[43]

3.14.2. Northern Ireland[44]

43% of the schools belong to the Government. At the same time, the schools depending on the Catholic Trustees, and open to all, welcome 45% of the school population.

As far as financing is concerned, public authorities cover salaries (including that of the teacher of religion) and running costs of all schools in Northern Ireland (including Catholic schools). A Board of Governors, designated in each school, is responsible for the management of the school budget allocated by the authorities. This Board is composed of members nominated by the Trustees, and others elected by teachers and parents.

3.15. Italy

While being the centre of the Roman Church, Italy, Catholic country, subsidises very little the Catholic school. The Italian Republic recognises the right of all organisations and all individuals to create

[43] CEEC, *idem*, pp. 49-50.
[44] CEEC, *idem*, pp. 51-52.

schools and institutions "without expenses for the State". This restriction strongly limits initiatives to develop schools. The Parliament gives families a yearly "bonus" of 200 to 300 € as partial reimbursement of the expenses related to the registration of a child in a private school, although the Constitution explicitly stipulates that education is open to all and that instruction is compulsory and free of charge. *The effective freedom of education is seriously compromised by economic conditions that prevent many citizens to exercise it.*

The State covers 50% of the salary of primary school teachers in "*parificate scuole*", i.e. schools that welcome pupils freely. At the secondary level, the State gives subsidy for the development of projects linked with the new technologies, the study of a second foreign language or the preparation of teachers in the context of self-training.[45]

Catholic schools are not autonomous because they must comply with a series of rules similar to those of State schools, especially in terms of curriculum and teacher qualification.

In accordance with the Concordat between Italy and the Holy See, there is a class of religion in both State schools and Catholic schools. Although being an optional class, it is attended by 88% of pupils in State schools and almost 100% in Catholic schools. However, it cannot be a class of catechism, but a cultural education in religious matters. The programmes are defined by the ecclesiastical authority, the handbooks are approved by the Bishops' Conference and the teachers are selected by the bishop, too.[46]

3.15.1. Difficulties – conflicts

In Italy, the main problem is economic. Beyond the general questions of financing, teachers are also less stable in Catholic education because they are attracted by public education where the salary is higher.

Some Catholic schools do not respect the Concordat regarding religious education and do not inform the bishop about the teachers responsible for this teaching.

The school system in general becomes more and more secularised. For example, there is currently a debate about the introduction of the gender theory into the schools.[47]

3.16. Lithuania

According to the amendment dated June 28, 2003 to the Education Act, students may choose between ethics and religion, parents making this choice for pupils under 14 years old. In Lithuania, the funding of schools is calculated according to the number of pupils attending them. The State fully funds the *Public Catholic schools* (running costs, maintenance, renovation and construction costs) and covers about 95% of the running costs of *Private Catholic schools* (they have themselves to find funding for renovation and construction of buildings).[48]

3.17. Malta

[45] CEEC, *idem*, pp. 54-55.
[46] CEEC Survey on Autonomy of Catholic Education, "Italy", 2015.
[47] CEEC Survey on Autonomy of Catholic Education, "Italy", 2015.
[48] CEEC, *idem*, p. 60.

In Malta, even State schools are generally Catholic in orientation. The 1988 Education Act gives the Minister of Education the right to establish a minimum curriculum, but this must be "*without prejudice to the specific religious nature of any school*".[49]

Teacher education (including teachers for private and Catholic schools) is administered by the State University.

One of the main issues for Catholic education today is linked to funding. Indeed, according to an agreement between the Church and the State, the Church property is alienated to the State in favour of State subsidy to Church schools to cover salaries of personnel. The two partners are jointly responsible for covering salary and general expenses at 10% of total of salaries (the Church might receive free donations from parents), but the Church remains responsible for all costs regarding maintenance or construction of buildings. This last point makes problem since the Maltese Catholic schools can hardly deal with the heavy costs related to science and technology.[50]

3.18. Norway

In Norway, the salaries of teachers working in Catholic schools are paid by the State. The State also covers 85% of the schools' running costs. The remaining 15% are asked to parents as school fees. Until recently, renovations and constructions were at the expense of Catholic schools, which explains why there is no opening of new schools. But these last years, some small amounts (quite symbolic) have been granted for such expenses.[51]

To be subsidised by the State, denominational schools have to accept several rules implemented in State schools. This can lead to problems regarding the exercise of religious freedom, even if Catholic schools are only little affected.[52]

Each school has a Board of Directors that appoints teachers.

The class of religion is organised for all years in Catholic schools while in State schools there is a class of "neutral" religion.[53]

3.18.1. Conflict

The Norwegian Catholic schools complain that State subsidies are too low to guarantee the universal right of parents to choose the education that they want for their children.[54]

3.19. Netherlands[55]

Since 1920, the State fully funds denominational schools in the Netherlands. The funding takes the form of a single payment, after which the school head and the management committees have to

[49] CEEC, *idem*, p. 62.
[50] CEEC, *idem*, pp. 63-64.
[51] CEEC Survey on Autonomy of Catholic Education, "Norway", 2015.
[52] CEEC, *idem*, p. 66.
[53] CEEC Survey on Autonomy of Catholic Education, "Norway", 2015.
[54] CEEC Survey on Autonomy of Catholic Education, "Norway", 2015.
[55] CEEC, *idem*, p. 68.

decide how to use it according to the needs. In return, Catholic schools must meet the requirement of the State to apply common working criteria with State schools (concerning some disciplines, collaboration with the municipalities about youth support…)

3.20. Poland

The Polish Catholic schools receive State funding per pupil, but the maintenance, renovation and construction of buildings remain to their own expense (they ask for school fees from parents). Yet, it should be noted that *catechists are treated equally with other teachers*.[56] The catechism classes, one hour per week, are compulsory in all secondary education, but the schools must provide a class of ethics for pupils who do not attend the catechism class or, at the parents' request, a class of another religion. The menu of school restaurants is also adapted to the majority religion.[57]

3.21. Portugal[58]

The Portuguese Constitution recognises the freedom of education, and the Church may open Catholic schools. However, funding varies:

- Public education is fully funded by the State.
- Catholic schools "under association contract" are free of charge, but in some cycles only (but the subsidy is always lower than what the State pays for pupils in public education).
- Schools "under simple contract" receive subsidy for underprivileged pupils only (not more than 50% of school fees).

Two main questions and challenges for Catholic education in Portugal: the schools' quality and educational autonomy, and the uncertain public funding.

3.22. Czech Republic[59]

The Czech Law authorises the opening of Catholic schools, but *the teaching of religion is not fully ensured in all Catholic schools or in all classes. In some schools, pupils may opt for Catholic religion or ethics*. However, there is a recent tendency towards the class of religion.

3.23. Romania

Education is provided in (free) State schools or in private schools. *However, the Catholic school is not an elitist school open only to children of rich families.* It also welcome children from poor families. The *Law on Education* stipulates that funding is guaranteed to all pupils, but Catholic schools are not treated equally with State schools (they are some exceptions).[60] The State only rarely contributes to the construction costs of Catholic schools.[61]

Since the end of the Communist period, law authorises the teaching of religion. Catholic pupils are identified so that they can participate in the class of religion, with the consent of their parents. The State provides handbooks on religions recognised by the Constitution. The programme of the courses is established by the same writers who also drafted the handbooks, in accordance with the requirements of the Ministry of Education.[62]

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56 CEEC, *idem*, p. 71.
57 « Table ronde. Religions et service public de l'éducation en Europe » in *Services publics et religions…*, p. 201.
58 CEEC, *idem*, pp. 72-73.
59 CEEC, *idem*, p. 75.
60 CEEC Survey on Autonomy of Catolic Education, "Romania", 2015.
61 CEEC, *idem*, p. 77.
62 CEEC, *idem*, p. 77.

In general, Catholic education enjoys good autonomy. This especially consists in the fact that schools may have their own head and choose their own teachers. But it is sometimes necessary to resort to teaching personnel coming from the Orthodox environment. Indeed, the school head may define appointment criteria based on the training and competences, but not on the religious beliefs.[63]
According to a recent CEEC survey, Romanian Catholic Education does not have particular conflicts with the State.

3.24. Slovakia[64]

According to the law, Catholic schools and State schools are equally subsidised. This is correct regarding the salaries and running costs, but not for renovation and construction of buildings. *60% of Catholic schools rent their buildings to the State, 20% to the city and the remaining 20% belong to the Church*. Each Catholic school organises two hours of religion classes that are evaluated like the other subjects.

3.25. Slovenia

In Slovenia, there are on the one hand, public schools fully funded by the State and on the other hand, private schools. However, the programmes of private schools is recognised by the State. Catholic schools can freely decide on the appointment of teachers, and also on the introduction of specific subjects into their programmes.[65]

In 2007, only four secondary schools were Catholic in Slovenia. Only one, in Ljubljana, has been funded by the State (except for the salary of the teacher of religion and extra-school activities). The other schools are funded to 85%, but construction and renovation works are at the expense of the Church.[66]

Parents are not obliged to declare themselves Christian to register their child in a Catholic school, but they must accept the values and the specific educational project of the school.

3.25.1. Conflict

Currently, Slovenian Catholic Education is expecting that a law be presented and adopted in the Parliament, implementing the decision of the Constitutional Court dated January 2015: a 100% financing of the programme of primary schools on equal footing with the programme of State schools.

Since last year, the Ministry of Education has refused the learning programmes for beginning teachers of all private schools. This learning is compulsory to all teachers before presenting the exam. And despite the fact that, in most cases, this is not a remunerated practice, nobody may do it in a private school even if the curriculum is exactly the same as in a State school.[67]

3.26. Sweden

[63] CEEC Survey on Autonomy of Catholic education, “Romania”, 2015.
[64] CEEC, *idem*, p. 79.
[65] CEEC Survey on Autonomy of Catholic education, “Slovenia”, 2015.
[66] CEEC, *idem*, p. 82.
[67] CEEC Survey on Autonomy of Catholic education, “Slovenia”, 2015.

The State allows a subsidy to the three Catholic schools of the country to cover the running costs and the salaries of the teachers, except for those of religion. Religion is not a subject in the programmes, and is thus taught outside class hours, on a volunteer basis, by teachers involved in their parish.[68]

For four years, regulations in that matter have been reinforced. If Catholic schools were shown to have given religious instruction during class hours, they could lose their right to run a school and lose all State funding. It is forbidden for Catholic schools to favour the registration of Catholic children.[69]

It seems that there is a deep mistrust towards denominational schools in Sweden, probably due to an unfounded fear of sectarianism and a too important belief in the superiority of State schools (at the level of quality of education).[70]

3.26.1. Conflicts

Several conflicts between Swedish Catholic Education and local councils concern the amount of the grant that these councils have to pay to Catholic schools, in comparison with the funding of State schools.

Another conflict comes from the inability of Catholic schools to give priority to Catholic families.

Another problem is linked to the content of curriculum. Indeed, some topics are "anti-Catholic". Contents concern birth control, homosexuality, etc. Catholic schools get around it by adding the Catholic point of view on these matters.[71]

3.27. Switzerland

The Swiss landscape is very varied at the level of religions. Historically, Catholic schools were founded by representatives of congregations. Over time, a process of secularisation has operated and consequently, several Catholic schools have moved under the supervision of the Cantons, without that alarming the Church.

The Law guarantees freedom of education but in general, there is no cantonal subsidy for private schools.[72]

Since 2003, education in the French-speaking part of Switzerland has decided that teachers of State schools should also take into account *the knowledge of cultural, historical and social fundaments, including religious cultures, in order to enable pupils to understand their own origin and that of others, to understand and appreciate the significance of traditions and the meaning of the different values co-existing in the society in which they live*.[73]

3.28. Ukraine

[68] CEEC, *idem*, pp. 84-85.
[69] CEEC Survey on Autonomy of Catholic Education, "Sweden", 2015.
[70] CEEC, *idem*, pp. 84-85.
[71] CEEC Survey on Autonomy of Catholic Education, "Sweden", 2015.
[72] CEEC, *idem*, pp. 86-87.
[73] « Sacrée Suisse ! » in *Enseignement catholique actualités*, n°346, décembre 2011-janvier 2012, pp. 50-51.

In Ukraine, there are State schools and private schools (including Catholic schools). These last do not receive any public subsidy.[74] The Law forbids any subsiding of Catholic schools, even if discussions have started to envisage an amendment of the text. However, any person who wishes to open a school must have a building and contribute to renovations. *These property conditions are the most difficult to overcome*.[75]

Given their private character, Catholic schools are free to appoint their employees. However, for both the curriculum and the programmes, they are obliged to comply with the basic requirements of the Ministry of Education and Science.[76]

3.28.1. Conflict

For many years, Catholic schools have been demanding financial support for Catholic educational institutions from authorities and the State budget.[77]

4. Conclusion: many challenges

As mentioned by Monsignor Christian Kratz, Auxiliary Bishop of Strasbourg and Delegate of the Bishops' Conference of France to the Commission of the Bishops' Conferences of the European Community (COMECE), in the foreword of his book "L'école catholique en Europe*"*, *partnerships with the State are generally satisfactory*. However, the challenges facing the Catholic school are numerous and often common to several countries despite local specificities:

- Openness to new needs little or not enough taken into account by society and public education,
- Welcome of children and young people of other religions (conflicts often arise, in several countries, about the wearing of headscarves and, more generally, convictional signs),
- Financing difficulties,
- Passing the baton to lay people should be done in keeping attention to the preservation of the own character of Catholic education.

Hereunder is an overview of the problems faced by the different European countries, in the context of this note (thus, especially, based on the results of the CEEC Survey on the Autonomy of Catholic Education), regarding the implementation of the principles governing the links between the State and Catholic Education:

Type of problem	**Countries concerned**
Lack of financing	Germany, French- and German-speaking Belgium, France, Hungary, Italy, Malta, Norway, Portugal, Romania, Slovenia, Sweden and Ukraine[78]
No (or small) support for costs regarding renovation or construction of premises	Austria, French- and German-speaking Belgium, Spain, France, Hungary, Malta, Norway, Poland, Romania, Slovakia and Ukraine
Problems regarding convictional signs	Germany

[74] CEEC Survey on Autonomy of Catholic Education, "Ukraine", 2015.
[75] CEEC, *idem*, p. 88.
[76] CEEC Survey on Autonomy of Catholic Education, "Ukraine", 2015.
[77] CEEC Survey on Autonomy of Catholic Education, "Ukraine", 2015.
[78] It should be noted that this does not mean that other countries are not concerned by this type of problem. It is question here of the countries that have explicitly mentioned these difficulties in the recent CEEC survey.

Problem with the content of the programmes	Italy, Sweden
Lack of teachers	Scotland
Autonomy of recruitment	France
Inability to give priority to Catholic families	Sweden

It should be noted that, faced with the problems of insufficient funding of Catholic education by public authorities, one of the alternatives implemented by Catholic education in the countries concerned was to ask parents for financial contribution.

To conclude, being as complete as possible, we should note that Austria, Germany, England and Wales, Belgium-Flanders, Croatia and Romania have mentioned in the CEEC Survey that there were currently no “conflict” between the State and Catholic Education in their country. We will yet notice that this does not prevent these countries to mention funding problems.

Finally, we lack accurate information on the following countries: Albania, Bosnia-Herzegovina, Denmark, Grand Duchy of Luxemburg, Hungary, Lithuania, Netherlands, Portugal, Czech Republic and Switzerland.

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THE NATIONAL AGENDA ON CHALLENGES/CONFLICTS OF CATHOLIC SCHOOLS VIS-À-VIS THE STATE

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I. Introduction

Vatican Council II affirmed the importance of Catholic schools to educate and form young men and women. *Gravissimum educationis* provides in paragraph 5: "Among all the means of education, the school has its own special importance. By virtue of its mission, while it improves the intellectual faculties with assiduous care, it develops the capacity for judging correctly, introduces pupils to the cultural heritage acquired by previous generations, promotes a sense of values, and prepares them for professional life … Therefore all those who help parents to fulfill their duty and represent the community by undertaking the task of education in schools have a noble and indeed a highly important vocation."[1]

Canons 796 to 806 of the 1983 Code of Canon Law primarily regulate the manner in which Catholic schools operate as "Catholic schools." Yet, the Code also recognizes that these schools exist and function in civil society as well. For example, canon 797 maintains that "parents must possess a true freedom in choosing schools; therefore, the Christian faithful must be concerned that civil society recognizes this freedom for parents and even supports it with subsidies; distributive justice is to be observed."

Yet 50 years have now elapsed since the promulgation of *Gravissimum educationis* and 32 years since Saint John Paul II promulgated the 1983 Code of Canon Law. While Catholic schools, as "Catholic schools" must comply with the provisions of canon law, they are also immersed within a civil society and need to exist within the parameters of civil law. Remaining competitive with their secular counterparts, some maintain, present difficulties in implementing the provisions of the respective laws.

This paper will address several legal challenges that Catholic schools in the United States have faced, or are continuing to face, as they strive to fulfill their mission. The paper necessarily includes a consideration of the extent of religious liberty afforded in the United States to institutions such as Catholic schools. Many of these issues arise because of a Catholic school's desire to remain true to its mission while existing within a civil society. Of particular note, the paper will address: the legal challenges that arise from the Catholic school's role as an employer which provides benefits for its employees some of which could be contrary to the moral teachings of the Church; the United States Supreme Court's legalization of same sex unions; and the requirements of the Health and Human Services mandate to provide contraception and potential abortifacients under the Affordable Care Act. Because of the foundational nature of religious liberty to the discussion, we will begin with the consideration of this issue.

[1] Vatican II, decree *Gravissimum educationis* 5, 28 October 1965: *AAS* 58 (1966). English translation from Tanner, N., ed. (1990), *Decrees of the Ecumenical Councils,* Sheed & Ward and Georgetown University Press, London and Washington, 966. All subsequent English translations of conciliar documents will be taken from this source unless otherwise indicated. Also available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651028_gravissimum-educationis_en.html (accessed 15 November 2015).

A. Religious Liberty in the Context of the United States

Religious liberty is a cherished and essential right of the human person. As the Fathers of the Vatican II stated in paragraph 2 of *Dignitatis Humanae*:

> This Vatican synod declares that the human person has a right to religious freedom. Such freedom consists in this, that all should have such immunity from coercion by individuals, or by groups, or by any human power, that no one should be forced to act against his conscience in religious matters, nor prevented from acting according to his conscience, whether in private or in public, whether alone or in association with others, within due limits. The synod further declares that the right to religious freedom is firmly based on the dignity of the human person as this is known from the revealed word of God and from reason itself. This right of the human person to religious freedom should have such recognition in the regulation of society by law as to become a civil right.[2]

In the United States, this most treasured of all rights is set forth in the First Amendment to the Constitution. The First Amendment provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof …"[3] Thus, the First Amendment embodies two distinct religion clauses: the Establishment Clause and the Free Exercise clause.

Under the Establishment Clause, the government is not permitted to establish an official state religion or use government power to support a particular religion while harming other religions. The United States Supreme Court has interpreted the Establishment Clause as intended to erect a clear separation between church and state. Some disagree with this view and suggest that this is not what was intended by the founding fathers. Thus, different facets of American culture advocate for a distinct separation of church and state; others are more welcoming of the government's assistance in promoting religious belief.[4]

The Free Exercise Clause allows each person the right to express his or her religious beliefs and to worship with those who share their common beliefs. It is intended to protect each person's right to teach and promote the faith. The Free Exercise Clause also prevents the government from enacting laws or issuing regulations that are directed specifically toward one religious denomination.[5]

Through the years since the First Amendment was adopted, the right of religious liberty in the United States has been greatly protected and cherished. The significance of the desire to protect religious freedom was underscored in 1990 by the passage of the Religious Freedom Restoration Act, which added additional protections to this most cherished right.[6]

Yet, in recent years, largely in part due to action of the federal government, many people within the United States have observed a gradual eroding of these protections. A recent study highlighted concerns of Americans about religious freedom.

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[2] Vatican II, declaration *Dignitatis humanae* 2, 7 December 1965: *AAS* 58 (1966) 929-941. Also available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html (accessed 15 November 2015).

[3] US Constitution, Amend. 1.

[4] See, Regan, R., (2013) *The American Constitution and Religion,* The Catholic University of America Press, Washington DC, 25-28.

[5] Ibid.

[6] The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (16 November 1993), codified at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4.

> Overall, the research reveals a significant rise in Americans' belief that religious freedom is worse today than 10 years ago (up from 33% in 2012 to 41% today). The research was conducted between August 7 and September 6, 2015, which places the findings after the Supreme Court decision … More than three-quarters (77%) say religious liberty is worse off today than 10 years ago, compared to six in 10 (60%) in 2012. This 2015 figure is the highest among all segments by 18 percentage points.[7]

Thus, while religious freedom remains enshrined in the First Amendment of the United States Constitution, many people believe that this most cherished of rights has been challenged, limited, and perhaps even under attack such that the Establishment Clause and Free Exercise Clause appear to be perceived more as principles that advance a "freedom from religion" with a limited recognition of a "freedom of worship". Challenges for Catholic schools that choose to remain "Catholic" will likely continue, particularly as many aspects of society drift away from a true foundation rooted in faith and a desire to advance the teachings of the Church.

B. Protecting the Mission of Catholic Schools while Acting as an Employer

Gravissimum educationis reminded us of the significant importance of the Catholic school and described its mission in paragraph 8, which provides in relevant part:

> The church's presence in the field of schools is evident in a quite special way through the catholic school. No less indeed than other schools it pursues cultural aims and the development of the young in all that is human. But it is proper to it to create the atmosphere of the school community, animated by the evangelical spirit of freedom and love. Its function is to help adolescents to develop their own personalities in such a way that they may at the same time grow according to the new creation which they have become through baptism. It should relate the whole of human culture ultimately to the message of salvation in such a way that the knowledge which the pupils gradually acquire about the world, life and human culture may be illuminated by faith. Thus indeed the catholic school, while it is open to the challenging conditions of the age, as it ought to be, educates its pupils to promote efficiently the good of the earthly city, and prepares them fro the service of spreading the kingdom of God, so that by the exercise of an exemplary and apostolic life they may become, as it were, the saving leaven of human society.[8]

The Catholic school endeavors to fulfill this mission in communion with and ever faithful to the teachings of the Church. While these truths are universal in the Church, in civil society, they are not always recognized or upheld. Various challenges have arisen in the employment context for institutions that make decisions that are consistent with their mission, but which might seem to be contrary to the manner in which employment decisions are made at other non-faith based institutions.

In 2012, the United States Supreme Court approved a "ministerial exception" to federal anti-discrimination law. *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC,*[9] interpreted the

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[7] Barna Group, (1 October 2015), "Concerns Over Religious Freedom Have Increased in Last Three Years," available at https://www.barna.org/barna-update/culture/733-concerns-over-religious-freedom-have-increased-in-last-three-years#.VkgTTNCRafQ (accessed 15 November 2015).

[8] Vatican II, *Gravissimum educationis* 8, available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651028_gravissimum-educationis_en.html (accessed 15 November 2015).

[9] *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, __ US ___, 132 S.Ct. 694 (2012).

exemptions extended to religious institutions provided under the Americans with Disabilities ACT (ADA) and Title VII of the Civil Rights Act of 1964 that permit such institutions to discriminate on the basis of religion. The EEOC sued on behalf of elementary school teacher Cheryl Perich. The school employed two categories of teachers: lay teachers and those teachers who had been "called". Lay teachers at the Lutheran sponsored school were not required to have any specific theological training or even be practicing Lutherans. But a teacher who was "called" was required to be a Lutheran with theological training, pass a theological examination and receive the endorsement of the Lutheran Synod. A "called" teacher would be commissioned and given the title "Minister of Religion, Commissioned." While Perich began teaching as a lay teacher, she completed the necessary requirements and was commissioned as a "called" teacher. Although she primarily taught secular subjects at the school, she also taught religion and led her students in prayer and led worship services. When she attempted to return to work after a leave of absence for narcolepsy, school officials asker her to resign because they believed her narcoleptic condition posed a risk of harm to her students. When she refused to do so, the school rescinded her "call" and ender her employment.

Writing for a unanimous Supreme Court, Chief Justice Roberts said "[t]he Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."[10] Roberts opined that the ministerial exception was grounded in both clauses. As a result, the Court recognized that a religious employer has the right to determine who to employ as a minister and that the Court will not interfere with such decisions.

In his concurring opinion, Justice Alito urged the Court to focus more on the functions that the minister performed rather than tying their role to any particular title. The ministerial exception

> should apply to any "employee" who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith. If a religious group believes that the ability of such employee to perform these key functions has been compromised, then the constitutional guarantee of religious freedom protects the group's right to remove the employee from his or her position.[11]

Although decided more than 20 years previously, *Little v. Wuerl* [12] addressed the ministerial exception in the context of a Catholic school and provided a helpful framework for analyzing such issues. In *Little*, a teacher, who was not Catholic, brought a claim against the Roman Catholic Diocese of Pittsburgh and Bishop Donald Wuerl, who was the bishop of the diocese at the time. The plaintiff was employed at a parish elementary school within the diocese, but "was not given responsibility for teaching religion … and participated in the school's programs for teachers that were intended to strengthen their ability to impart 'Catholic' values to students."[13] She based her claim on discrimination when her employment contract was not renewed because she divorced and remarried. The Diocese argued that even though the teacher had performed well and had even been granted tenure, she violated her employment contract when she remarried. The relevant portion of the contract stated:

> Teacher recognizes the religious nature of the Catholic School and agrees that Employer has the right to dismiss a teacher for serious public immorality, public scandal, or public rejection of the official teachings, doctrine or laws of the Roman Catholic Church, thereby terminating any and all rights that the Teacher may have

[10] *Hosanna-Tabor*, 132 S. Ct. at 703.
[11] *Hosanna-Tabor*, 132 S. Ct. at 713 (J. Alito, concurring).
[12] *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991).
[13] Ibid. at 945.

> hereunder, subject, however, to the personal due process rights promulgated by the Roman Catholic Church.[14]

In addition to the "Cardinal's Clause," the contract incorporated the Diocese's *Handbook of Personnel Policies and Procedures*, which provided examples of cause for employment termination. The *Handbook* provided,

> One example of termination for just cause is a violation of what is understood to be the Cardinal's Clause. The Cardinal's Clause requires the dismissal of the teacher for serious public immorality, public scandal or public rejection of the official teachings, doctrine or laws of the Catholic Church. *Examples of the violation of this clause would be the entry of a teacher into a marriage which is not recognized by the Catholic Church*, or the support of activities which espouse beliefs contrary to Church teaching, e.g., advocacy of a practice such as abortion.[15]

The court also made an interesting observation that the Diocese "took very seriously its mission to be a Catholic presence in a secular world … [and] changed its policy in 1984 to favor hiring only Catholics and to require that any school hiring a non-Catholic get special permission."[16] This policy did not, however, affect the plaintiff's status since she began working for the Diocese prior to the policy change.

At the time that the Diocese initially hired the plaintiff, she had recently been married in a Protestant religious ceremony. She later divorced her husband from that marriage and attempted to marry a man who had been baptized in the Catholic Church, although he purportedly did not practice any particular religion. The plaintiff did not seek a declaration of nullity of her prior marriage before attempting to marry the baptized Catholic. The Diocese did not rehire the plaintiff "'because she had remarried … without pursuing the proper canonical process available from the Roman Catholic Church to obtain validation of her second marriage.'"[17] The court acknowledged that "Little makes no claim to be Catholic. Nevertheless, if this court were to review the Parish's decision, it would be forced to determine what constitutes 'the official teachings, doctrine of laws of the Roman Catholic Church' and whether plaintiff has 'rejected' them."[18] Thus, the *Little* court concurred with the jurisprudence of other courts to abstain from reviewing a decision of an ecclesiastical nature even though the plaintiff herself was not a baptized Catholic, but chose to subject herself to the canonical laws of the Church by attempting to marry a baptized Catholic. Moreover, the conduct in which she engaged was prohibited by her employment contract.

Following *Hosanna-Tabor*, the United States court of Appeals for the Sixth Circuit applied the ministerial exception in a dispute between a spiritual director who contemplated divorce while employed by InterVarsity Christian Fellowship/USA ("IVCF"), "an evangelical campus mission serving students and faculty on college and university campuses nation wide," with a vision "to see students and faculty transformed, campuses renewed and word changers developed."[19]

The court upheld the application of the ministerial exception as an affirmative defense to Conlon's claims of federal and state discrimination. "Because IVCF is a religious organization and

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[14] Ibid.
[15] Ibid. at 946 (emphasis added in original).
[16] Ibid.
[17] Ibid.
[18] Ibid. at 948.
[19] *Conlon v. InterVarsity Christian Fellowship/USA*, __ F.3d __ (6th Cir. 2015), slip op. 2.

Conlon was a ministerial employee, IVCF's decision to terminate her employment cannot be challenged under federal or state employment discrimination laws."[20]

The ministerial exception permits a Catholic school to make employment decisions that uphold the mission of the religious institution. *Little* significantly points to the importance of including in employment contracts and employee handbooks the terms and conditions for employment at a Catholic school. These terms should address the various circumstances that would promote the school's Catholic identity as well as point to the circumstances that would detract from the school's Catholic identity and serve as just cause for termination. If these terms are properly included in the school's governing documents and employment contracts, *Little* suggests that a Catholic school would be protected in its relationships with all employees, including those that are not baptized Catholics.

The ability of a Catholic school to make employment decision in support of its mission will likely continue to be challenged in the future, particularly as such institutions have turned to lay Catholics to staff them rather than clerics and members of religious institutes.[21] Numerous examples could be considered to evaluate particular circumstances that address whether a Catholic school is entitled to make employment decisions with the benefit of the ministerial exception. For example, as reproductive technologies have advanced in recent years, the question has been raised whether a person employed by a Catholic school can participate utilize these emerging technologies and continue to fulfill a ministerial role at the school.[22] While these decisions continue to evolve, of particular relevance in the Supreme Court's newly issued decision allowing "same sex marriage," to which we next turn.

C. The Supreme Court's Decision on "Same Sex Marriage"

In *Obergefell v. Hodges*,[23] a majority of the United States Supreme Court approved of civil marriages between persons of the same sex. Justice Kennedy wrote for the majority and concluded that states were required to issue marriage licenses to persons of the same sex and that each state is required to recognize marriages entered into between persons of the same sex. After presenting a history of marriage that addresses the importance and centrality of marriage in society, Kennedy stated that

> The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent

[20] Ibid., slip op. 11.

[21] Sacred Congregation for Catholic Education, declaration, "Lay Catholics in Schools: Witnesses to Faith," 15 October 1982 in *Origins* 12/29 (30 December 1982) 457-469. See also Franchi, L., ed., (2007) *An Anthology of Catholic Teaching on Education,* Scepter, NY, 209-246. This document appears to use the term "lay Catholics" in a more generic sense to distinguish such persons from priests and religious men and women who may also teach in a Catholic school, rather than to distinguish in the canonical sense between members of the laity and clerics. See c. 207: "§1. By divine institution, there are among the Christian faithful in the Church sacred ministers who in law are also called clerics; the other members of the Christian faithful are called lay persons. §2. There are members of the Christian faithful from both these groups who, through the profession of the evangelical counsels by means of vows or other sacred bonds recognized and sanctioned by the Church, are consecrated to God in their own special way and contribute to the salvific mission of the Church; although their state does not belong to the hierarchical structure of the Church, it nevertheless belongs to its life and holiness."

[22] See, e.g., *Dias v. Archdiocese of Cincinnati,* 2012 US Dist. LEXIS 43230 (S.D. Ohio 29 March 2012)(woman in same sex relationship who received artificial insemination and became pregnant outside of marriage), discussed in "*Dias v. Archdiocese of Cincinnati*: Deciphering the Ministerial Exception to Title VII Post-*Hosanna-Tabor*," 21 William & Mary Journal of Women and the Law 473 (2015).

[23] *Obergefell v. Hodges*, No. 14-556, 576 US ___, (26 June 2015).

> in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right. [24]

Kennedy also recognized that certain persons would prefer to a more traditional understanding of marriage and acknowledged that they have the right to teach and advocate that understanding.

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. [25]

Chief Justice Roberts and Justices Scalia, Thomas and Alito submitted extensive dissenting opinions. The dissenting opinions pointed to a number of ongoing significant concerns that were raised by the majority's opinion. Chief Justice Roberts wrote:

> Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.[26]

Chief Justice Roberts went on to point to the important issues that the majority opinion fails to resolve, which have the potential to put at risk the ability of Catholic schools to continue to exist.

> Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. See Tr. of Oral Arg. on Question 1, at 36–38. There is little doubt that these and similar questions will soon be before this Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today. [27]

The significance of the *Obergefell* decision will continue to be studied and litigated. Legislation to protect the right to religious liberty in light of this decision is also needed to address

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[24] Ibid., slip op. at 19.
[25] Ibid., slip op. at 27.
[26] *Obergefell v. Hodges*, No. 14-556, 576 US ___, (26 June 2015)(Roberts, C.J., dissenting), slip op. 3.
[27] Ibid., slip op. 28.

the issues that the Court did not reach. For Catholic schools seeking to remain true to their mission, important and difficult decisions will likely arise as the resolution of these issues unfolds.

D. The Affordable Care Act

1. The Act, In General

On 23 March 2010, President Barack Obama signed into law the Patient Protection and Affordable Care Act (ACA). Among other provisions, the Affordable Care Act embodies a requirement that all Americans obtain coverage for health care services, which can be provided through a number of different options. The "mandate" to have health care coverage has already been adjudicated before the United States Supreme Court. On 28 June 2012, Chief Justice John Roberts opined that since the requirement to purchase health insurance was a tax rather than a mandate, it was constitutional. He stated:

> The Affordable Care Act is constitutional in part and unconstitutional in part. The individual mandate cannot be upheld as an exercise of Congress's power under the Commerce Clause. That Clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it. In this case, however, it is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance. Such legislation is within Congress's power to tax ...[28]

> The Federal Government does not have the power to *order people* to buy health insurance. Section 5000A [of the Internal Revenue Code] would therefore be unconstitutional *if* read as a command. The Federal Government *does* have the power to *impose a tax* on those without health insurance. Section 5000A is therefore constitutional, because it can reasonably be read *as a tax.* [29]

Thus, the mandate to purchase health insurance was upheld as a tax to be imposed on those who failed to comply. Additionally, according to the federal government, the Affordable Care Act ends pre-existing condition exclusions for children, provides for coverage for young adults under their parents' plan to the age of 26, bans lifetime limits on most benefits, and encourages the use of premium dollars to be spent on health care rather than administrative costs.

2. The HHS Mandate to Provide Contraceptives and Potential Abortifacients

In August 2011, the Secretary for the Department of Health and Human Services added contraception to a list of preventive services that the ACA covered without requiring a patient co-payment. With limited exceptions, this federal mandate to provide contraception applies to all new health insurance plans. The federal government has maintained that ACA coverage for contraception does not include: (1) drugs that the FDA approves solely for use as abortifacients, i.e., drugs and devices that terminate a pregnancy after implantation of the embryo in the uterus, or (2) surgical abortion. Yet, some FDA-approved contraceptives may prevent implantation of a fertilized egg, and at least one FDA-approved contraceptive, Ella, is thought to be capable of causing an abortion after implantation has occurred. The FDA has approved RU-486 only to induce first-trimester abortion, but if approved as an "emergency contraceptive," it could become part of mandated coverage as well.

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[28] *National Federation of Independent Business v. Sebelius,* slip op. 58.
[29] *National Federation of Independent Business v. Sebelius,* slip op. 44.

Failure to provide such coverage exposes employers to fines of $100 a day per affected beneficiary. 26 U.S.C. § 4980D(b). Dropping coverage altogether subjects covered employers to annual penalties of $2,000 per employee and/or other negative consequences.

The federal government provided for an "exemption" to the contraception mandate for those institutions that qualify as a "religious employer". The definition is very narrowly tailored. A religious employer has as its purpose to inculcate religion; it primarily serves people of the same religion; and primarily employs people of the same religion. The definition is essentially restricted to "group health plans established or maintained by churches, synagogues, mosques, and other houses of worship, and religious orders." 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013); 45 C.F.R. § 147.131(a).

Many institutions and organizations that are religiously affiliated do not appear to qualify as religious employers, and thus, would not be entitled to the exemption. When this was brought to the attention of the Obama administration, the government responded with an "Accommodation for Eligible Organizations". "Eligible Organizations" are non-profit religious entities that do not meet the test to qualify as a "religious employer". An "eligible organization" must self-certify its objection to contraceptive coverage. The EBSA Form 700 requires the religious employer to certify that "on account of religious objections, the organization opposes providing coverage for some or all of any contraceptive services that would otherwise be required to be covered; the organization is organized and operates as a nonprofit entity; and the organization holds itself out as a religious organization." The self-certification triggers an obligation for the eligible organization's insurance company or third party administrator to provide coverage for "contraceptive services at no cost … for so long as the participant or beneficiary remains enrolled in the [eligible organization's] plan." In summary, pursuant to the accommodation, Petitioners must designate a third party to provide the very coverage they find morally objectionable.

Lastly, although for-profit organizations that would not qualify as "Religious Employers" or "Eligible Organizations" were initially required to comply with the mandate and provide for contraception as a preventative health care benefit, the Supreme Court declared the provision unconstitutional in *Burwell v. Hobby Lobby*.[30] Since the Hobby Lobby case was decided, the federal government extended to such for-profit employers the accommodation originally offered for non-profit non-religious employers.

3. Current Status of Legal Challenges

Legal challenges to the HHS mandate to provide contraception as a preventative health care benefit have been filed by 37 universities, 40 religious charities and 16 dioceses in the United States.[31] Many non-profit institutions or organizations have been successful in obtaining preliminary injunctions to allow them not to comply with the mandate. Among the numerous non-profit organizations that have legally challenged the HHS mandate are Catholic universities who provide health care coverage to their employees and some to students. The Catholic universities involved are: Belmont Abbey College; Ave Maria University; The Catholic University of America; Thomas Aquinas College; Franciscan University of Steubenville; University of Notre Dame; University of Saint Francis; Aquinas College; and Wyoming Catholic College. Various other faith-based institutions have felt compelled to challenge the contraception mandate. The responses from the courts have varied.

[30] *Burwell v. Hobby Lobby*, 34 S. Ct. 2751, 573 US __, 189 L. Ed. 2d 675 (2013).
[31] Becket Fund, "HHS Information Central" available at http://www.becketfund.org/hhsinformationcentral/ (Accessed 15 November 2015).

Franciscan University's 2012 complaint was dismissed 22 March 2013 because the judge determined that the University had not incurred any harm due to the regulation because it has not yet been required to comply with the mandate. The University's plan was in existence at the time of the Act's adoption and is "grandfathered" and exempt from the Mandate. 42 U.S.C. § 18011; 26 C.F.R. § 54.9815-1251T(g)(1)(v).[32] The University's grandfathered status would be jeopardized if changes were to be made to the plan.

For Catholic institutions, compliance with the mandate would be contrary to their religious beliefs even if the institution were not to directly fund the objectionable products and services. The penalties for not complying with the Affordable Care Act's contraceptive mandate are severe and could quickly drain any non-profit institution of its resources and force it evaluate its continued existence. Significant fines and other negative consequences that would flow from a refusal to provide access to the objectionable products and services would place substantial pressure on Catholic institutions to violate its sincerely held religious beliefs.

On 6 November 2015, the United States Supreme Court agreed to consider the issue of whether the HHS Mandate violates the religious liberty of non-profit religiously affiliated institutions and the insufficiency of the government's proposed "accommodation". Oral argument in the seven consolidated cases is anticipated in March 2016 followed by a June 2016 decision.

II. CONCLUSION

The challenges that Catholic schools and universities face today are diverse and significant. In *Ex corde Ecclesiae'*s conclusion, Saint John Paul II recognized the important task entrusted to Catholic colleges and universities. He wrote: "The mission that the Church, with great hope, entrusts to Catholic Universities holds a cultural and religious meaning of vital importance because it concerns the very future of humanity. The renewal requested of Catholic universities will make them better able to respond to the task of bringing the message of Christ to man, to society, to the various cultures."[33] In the 25 years since Saint John Paul II issued *Ex corde Ecclesiae*, engaging the culture in a dialogue about the truths of the faith has become even more relevant. Engaging the culture, which necessarily includes aspects of challenging and influencing the culture through dialogue about truths of the faith, is different than "embracing" or "accepting" the culture through which the Church might become just an extension of the culture. As John Paul II pointed out, a Catholic college or university is a highly appropriate place for this dialogue to occur.

In his recent book entitled, *Seeds of the Word: Finding God in the Culture*,[34] now Bishop Robert Barron of the Archdiocese of Los Angeles commented on the place of a Catholic university within the culture of our society. And although he makes his comments specifically about Catholic universities, in large part, the same argument applies equally to Catholic schools.

Bishop Barron stated that:

> [W]hat a Catholic university should never do is to surrender its own identity or to make apologies for its own deepest commitments. A Catholic center of higher

[32] 42 U.S.C. § 18011; 26 C.F.R. § 54.9815-1251T(g)(1)(v).
[33] John Paul II, constitution *Ex corde Ecclesiae,* Conclusion, August 15, 1990. Translation in English by National Conference of Catholic Bishops in *Origins* 20/17 (4 October 1990) 265-276. See also, Committee on Education, Bishops' and Presidents' Subcommittee, United States Conference of Catholic Bishops (2006) *Catholic Identity in Our Colleges and Universities: A Collection of Defining Documents*, United States Conference of Catholic Bishops, Washington DC, 51-74.
[34] Robert Barron, *Seeds of the Word: Finding God in the Culture* (Skokie IL: Word on Fire, 2015).

> learning should never acquiesce in its own secularization in order to participate in the public conversation.[35]

He went on to recall the tradition of the great Catholic universities that provided the foundation for engaging the teachings of the secular world through the lens of Catholicism.

> This is why the first universities – Bologna, Paris, Oxford, Cambridge – emerged precisely out of the milieu of the Church. In the thirteenth century, St. Bonaventure, professor at the University of Paris, composed an extraordinary text called *Christ the Center*, the gravamen of whose argument is that Jesus the *Logos* is at the heart of physics, mathematics, history, and metaphysics. In the mid-nineteenth century, John Henry Neman, in a series of lectures entitled *The Idea of a University*, made much the same assertion. The Jesus reverenced by the great tradition belongs, therefore, very much in the public sphere and around the table of intellectual conversation. In that context, he poses no threat to legitimate expressions of reason, and he serves as a trump to the unreason that can surface easily enough in the sciences, in politics, or in philosophy. A Catholic university worthy of the name is a place where Jesus the *Logos* has this essential regulating role.[36]

Catholic schools should strive to follow the example of these early Catholic institutions in the manner in which we embrace the search for truth in the dialogue between faith and reason, while recognizing that the source of all truth is God himself. Catholic educational institutions place themselves in the middle of the dialogue between faith and reason, an interaction that would not be found in a typical secular educational institution. All of us have a role to play in educating ourselves, in living our faith, and in drawing others to Christ. May we be able to continue to uphold these beliefs and continue to practice our faith each and every day of our lives.

[35] Ibid., 188.
[36] Ibid., 188-189.

RESEARCH PROJECT: Landmark Cases concerning "Religious, Philosophical and ideological rights in education".

General coordinator - Prof Pablo Meix Cereceda, Professor of Administrative Law at the University of Castilla-La Mancha

Coordinator for Africa - Drs. Georgia Du Plessis, Lecturer at University of the Free State (South Africa)

Intervention by Rapporteurs

Overview of Project

Ideological and Religious Convictions in the Education System – An Approach to National Landmark Decisions

Introduction

In the summer of 2015 professor Jan de Groof, president of ELA, suggested a group of researchers to work on a joint project on ideological and religious convictions in the education system. The first stage of this research would focus on selecting and discussing capital decisions issued by national Courts on the matter. The aim of this phase is therefore to publish a joint volume that will bring together the most significant judicial approaches to ideological and religious pluralism from all over the world.

Development and topics

Researchers are currently working on their individual papers from October 6 a preliminary review by the coordinators will take place, followed by an online discussion on the papers. Some of the topics under study are the following: religious and cultural symbols in schools, religious teaching, denominational schools and teachers' rights, denominational universities and students' rights, compulsory schooling…

The congress on education that will take place in Rome on November 18-21 (*Educating today and tomorrow – a renewing passion*) will provide the opportunity to present the project and disseminate some of its preliminary findings.

Countries and researchers involved

Researchers involved come from the academic world, although some are also practising lawyers. The group is so far composed of 14 researchers. However, and especially considering future development of the group's activities, researchers from other countries are welcome to join the discussions and participate with their own research (please contact pablo.meix@uclm.es in this respect). We would have special interest in the **USA, Canada, Mexico, India, Australia, New Zealand, France, Turkey**, but the group is of course open to participations from other countries. Countries and researchers currently involved are the following:

Europe

Spain	*Pablo Meix Cereceda* (general coordinator)
Albania	*Heliona Miço*
Austria	*Florian Lehne*
Germany	*Pablo Meix Cereceda*
Italy	*Claudio di Maio*
The Netherlands	*Jacob Philipsen*
Portugal	*Rui Lanceiro*
Russia	*Maria Smirnova*
UK	*Martin Browne*

Africa

South Africa	*Georgia du Plessis* (coordinator for Africa)
Somalia	*Ahmed Kyeyune*
Uganda	*Yusuf Kasumba*

South America

Argentina	*Sebastián Scioscioli*
Brazil	*Carina Calabria*
Chile	*Rodrigo Céspedes*

Austria

Sweet Harmony? – The Relationship between Parental Convictions and the Education system through the lens of the Austrian Constitutional Court

Florian Lehne[1]

I. Introduction

Traditionally, case law on conflicts between the state and parents that explicitly deal with the latters' philosophical, religious or ideological convictions and their correspondence in Austrian education law has been traditionally scarce. However, recently there has been a certain rise of relevant disputes, and henceforth more relevant judicial judgements and appeal decisions have been issued. The reason for that can be found in a bundle of socio-legal factors that cannot all be pinned down precisely – at least not in this contribution. Nevertheless, this development is surely related to a general juridification trend in Austrian education law that has been extending to increasingly more school and education matters since the 1960s.[2] Parents have been enhanced with more legal tools to counteract different forms of state measures within education. This slowly seems to have come along with more "legal awareness". Parents now seem to be more conscious about their rights and their status as stakeholders within the education system. Last but not least, the most extensive state reform in the II Republic, the Administrative Judiciary Reform of 2014, has to be mentioned. The creation of 11 new administrative courts of first instance has also led to a considerable extension of judiciary control in education law. Although this development's impact on parental conviction cases cannot be foreseen so far, we can already observe that the new Administrative Courts have been already invoked in such matters. Most interesting, however, are those cases that pierce through both – court instances and ordinary statutory law because they enter the constitutional sphere, since this is probably one of the best indicators to see when parents really try to challenge the "system". In view of that, the two following judgements of the Constitutional Court shall be presented and discussed.

II. Instruction at home and its equivalence to (public) school tuition

Austrian Constitutional Court, Judgment of 10 March 2014, E 1993/14

Keywords: home schooling; compulsory school, equivalence to public education system, external student exam, mandatory schooling decision.

Region: Vienna

Parties: Two applicants (a father and his daughter)[3]; as respondent state parties the City School Council of Vienna and the Federal Administrative Court

Court: Constitutional Court

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[2] This represents not only the enactment of several school acts but also the rather slow transition from the foremost monarchist structure of supra-legal education law characterized by numerous monocratic ordinances issued by the competent ministry or the competent regional school authorities. For more details see Hofstätter, C. (2013), *Der Erlass im Schulrecht,* NWV, Graz, pp. 107-25.

[3] Austrian case denominations and published decisions do not contain private party names.

A. Description

Application

Complaint of unconstitutionality according to Article 144 Federal Constitution Act (hereinafter B-VG[4]) concerning Section 11 Para 2 and 4 Compulsory School Act (hereinafter SchPflG[5]); claim to set aside the judgement of the Federal Administrative Court and accessory claim to subrogate the cause to the Supreme Administrative Court if no constitutional problem should arise.

Facts and Norms

In summer 2013, the applicant informed the competent schooling authority, the City School Council of Vienna (*Stadtschulrat*), that his 6-year old daughter (henceforth the second applicant) would fulfil her first compulsory school year, 2013/14, by means of home schooling. The respective form the applicant had to fill in referred to the obligation to take an external student exam at a public school or a private school with public status by the end of the school year (Section 11 Para 4 SchPflG) to prove that the received education was at least equivalent with one that is gained at one of a public or public status school (Section 11 Para 2 SchPflG). The applicant was also informed that he would have to present a certificate testifying the successfulness of the second applicant's performance in the said exam, otherwise the latter would have to fulfil the compulsory school year in a public school or a private school with public school status (Section 11 Para 4 last sentence SchPflG) The applicant did not hand in the exam certificate and being reminded about possible consequences by the authority, he replied that he would instead send a letter of acknowledgement by a Primary school teacher. In consequence, the City School Council issued an administrative act which prescribed the exclusive fulfillment of compulsory school in 2014/15 at a public school or a school with public status. Additionally, the administrative act contained the order that the second applicant had to repeat the school year 2013/14 at a public school or a school with public status. Against this administrative act the applicant submitted a complaint to the Federal Administrative Court, which held up the decision of the City School council. By appealing the administrative court's judgment the applicant submitted the objective complaint of constitutionality to the Austrian Constitutional Court.

Parties observations

Firstly, the applicant argued that Section 11 Para 2 and 4 SchPflG would represent „surveillance measures" that – in his view – violate the fundamental right to homeschooling enshrined in Article 17 Para 3 Basic Law 1867 (hereinafter StGG[6]), namely by "depriving this right of any space for pedagogic alternatives and special educational needs of determined groups". Secondly, the applicant claimed that Section 11 Para 4 SchPflG would infringe several other fundamental rights, such as the obligation of the state to respect parents' philosophical and religious convictions in education according to Article 2 1st Prot. ECHR as well as Article 14 Section 3 CFREU, Article 18 StGG (freedom to choose occupation and professional training) and the principle of equal treatment. Finally, the applicant argued that the objective procedure under Para 11 Section Para 4 SchPflG led by the City School Council had violated Article 6 ECHR due to the lack of a public hearing and that also children rights (Article 1 and 4 Federal Constitutional Children's Act [hereinafter BVG-Kinderrechte[7]]) would have been infringement due to denial of procedural participation by the second applicant.

[4] Bundes-Verfassungsgesetz 1920, Federal Law Gazette 1930/1 as amended by Federal Law Gazette I 2014/102.
[5] Schulpflichtgesetz, Federal Law Gazette 1985/76 as amended by Federal Law Gazette I 2015/104.
[6] Staatsgrundgesetz 1967, Imperial Law Gazette 1867/142 as amended by Federal Law Gazette 1988/684.
[7] Bundesverfassungsgesetz über die Rechte von Kindern, Federal Law Gazette I 2011/4.

Government Observations

The City School Council and the Federal Administrative Court submitted the files. Additionally the City School Council replied that it considers Section 11 Para 4 SchPflG constitutional, since both the provisions of Article 17 StGG and compulsory schooling according to Article 14 Para 7a B-VG hold constitutional and therefore equal rank. The City School Council reaffirmed that Section 11 SchPflG would not interfere with the form of homeschooling. Moreover, its provisions would solely regulate the question whether a child fulfilled compulsory schooling under Article 14 Para 7a B-VG already my means of home schooling or whether attendance of a school competent for compulsory schooling was required to fulfil the said purpose. The annual evaluation of homeschooled children through state organs as well as the mandatory order to attend a public school or a school with public status would be in line with the parental right to homeschooling under Article17 Para 3 StGG.

Court Decision

The Court holds that the complaint was admissible but not justified and that – at least in the objective case – no concerns as to the alleged inconstitutionality of Section 11 Para 2 and 4 SchPflG have emerged. The Court begins its reasoning by holding that the applicant's concerns in view of Section 11 SchPflG (especially the annual exam ordered in Para 4) "actually oppose the *system of compulsory public schooling* that is realized within the Austrian legal framework". According to the Court it is already on the grounds of the obligation to compulsory schooling enshrined in Article 14 Para 7a B-VG that an infringement of Article 17 Para 3 StGG, Article 2 1st Prot. ECHR and Article 1 and 4 Federal Constitution Act on Children's Right has to be denied.

Furthermore the Court denies the applicability of Article 14 CFREU, because school regulation does not fall inside the scope of CFREU. Secondly, an infringement of Article18 StGG is excluded, since neither questions of occupation nor professional training are involved in the relevant case. Thirdly, also the application of Article 6 ECHR is denied because according to the Court education and school law do not fall into the scope of this provision.

Finally, also the argued infringement with the fundamental right/principle of equality is denied. In view of the Court, instruction through home schooling cannot be compared with instruction at private schools: The "fundamental difference" between these two tuition models can firstly be found in Article17 StGG (the Court refers to Para 2, 3 and 5) that regulates schools and instruction at home in a different manner. Secondly, in the case of (private) schools state organs are enabled to regularly supervise the fulfilment of educational provisions.

B. Discussion

The merits of the said judgement are remarkably brief. Still, the reasoning can be qualified as succinct, when the Court convincingly denies applicability concerning Article 14 CFREU, Article 18 StGG and Article 6 ECHR. If the Court had briefly referred to respective ECtHR case-law, especially *Konrad*[8], it could have as well concisely denied an interference with Article 2 1st Protocol ECHR, since from this provision no (parental) right to homeschooling can be derived.[9] It is nevertheless surprising that the Constitutional Court completely refrains from assessing the complaint under the domestic fundamental right to homeschooling according to Article 17 Para 3 StGG.

[8] Konrad et al v Germany App. No. 35504/03 (ECtHR, 11 September 2006).

[9] Cf Palmstorfer, R. (2013), Homeschooling in Austria: A Fundamental Right, *International Journal for Education Law and Policy*, pp. 41

Instead – in a rather nonchalant manner – a system of compulsory public education is derived from Article 14 Para 7a B-VG. The Court holds that this system is founded within Austrian legal and (henceforth constitutional) order and rules out any infringement of Article 17 Para 3 StGG by means of the objected provisions Section 11 Para 2 and 4 SchPflG right from the beginning. The wording of Article 14 Para 7a B-VG solely expresses that "compulsory school lasts at least for nine years". Applying a generous historical interpretation – i.e. in favour of the Court's long tradition of judicial self-restraint – it can be argued in my view that Article 14 Para 7a B-VG implies the obligatory equivalence of private tuition and home schooling with public school instruction.[10]

Yet, this does not discard possible constitutional doubts in view of the annual mandate to undergo an exam as external student and the sanction of mandatory public schooling under Section 11 Para 4 SchPflG. The irrefutable tool to solve this issue is Article 17 StGG Para 3 StGG. The provision reads as follows: "Instruction at home is subject to no such restriction." It is generally supported that thereby a) a fundamental right granted by our constitution according to Article 144 B-VG is enshrined and b) non-institutional tuition *extra scholam* is protected.[11] Concerning b) the obligation to attend an exam at a public school or a school with public school status typically once at the end of the respective school year cannot be seen as restriction or interference under Article 17 StGG Para 3 StGG. Neither the fact that the exam is taken by a state teacher nor that it is – typically – to be held inside a (public) school building do affect the non-institutional character of the tuition itself, which can be maintained throughout the whole school year.

The authority mandate of mandatory public schooling under Section 11 Para 4 last sentence SchPflG is certainly the secondary norm to the prescription of the said exam and grants its efficiency. Still, this measure interferes with Article 17 Para 3 StGG. It is clearly a foreclosure to the non-institutional instruction at home, but nonetheless justified by a legitimate aim. Certified education is not only essential for any further education, be it on secondary or on post-secondary level, it is also THE demanded good on the job market. Future adults cannot be withheld from certified education. A correspondent obligation of the state not only to set curricula but also to monitor and certify their fulfillment by all children has to be derived from Article 17 Para 5 StGG that reads as follows: "The right to supreme direction and supervision over the whole instructional and educational system lies with the state". Moreover a right to receive certified education is surely in line with Article 2 1st Protocol first sentence and surely serves the best interest of the child that according to Article 1 BVG Kinderrechte holds constitutional rank. The said measure is additionally proportionate when temporally restricted, which depends on the proof in due time that instruction according to state curricula has been successful. In general, this means that mandatory public schooling against the will of parents who are in favour of homeschooling cannot last longer than one school year, given that this year is successfully passed by the child.

As to Court's reasoning concerning an alleged infringement of the right to equality, the reasoning could have been even briefer. It is true that the tuition via home schooling cannot be compared with instruction at school, since the main feature of homeschooling is its already mentioned non-institutional character. This factual difference legitimates the alleged different legal treatment of children that suspend in (public) schools and home-schooled children that are not able to pass the exam as external students.

[10] For more details see Lehne, F. (2015), Die Gleichwertigkeit des häuslichen Unterrichts gem § 11 SchPflG, *Schule & Recht* (forthcoming).
[11] For references see *Lehne* (2015).

III. Mandatory affixation of crucifixes in Lower Austrian kindergarten classrooms

Austrian Constitutional Court, Judgment 9 March 2011, G 287/09

Keywords: crucifix, Lower Austrian Kindergarten Act, religious convictions, separation of state and church, freedom of conscience and religion, cultural affairs;
Region: Lower Austria
Parties: Two applicants (father and his daughter); as respondent state party the regional government of Lower Austria
Court: Constitutional Court

A. Description

Application

Application according to Article 140 para 1 B-VG (constitutional review of legislative acts) alleging inconstitutionality of Section 2 para 1 and Section 12 para 2 Lower Austrian Kindergarten Act (hereinafter NÖ KindergartenG[12]) due to violation of fundamental rights guaranteed under the Austrian Constitution.

Facts and Norms

From September 2009 onwards the first applicant's 4 year old daughter (hereinafter second applicant) attended a Public Kindergarten in Lower Austria. In the respective classroom a crucifix was attached to the wall. According to Section 12 para 2 NÖ KindergartenG a "cross" has to be affixed to a wall of each kindergarten classroom, as long as the majority of attending children have Christian denomination. Furthermore, it was alleged that the second applicant had to participate at harvest celebrations and celebrations on the occasion of Saint Martin and Saint Nicholas. Section 3 Para 1 NÖ KindergartenG lists among other educational goals that the assignment at kindergartens has to make a "fundamental contribution to the children's religious and ethical education".

Parties observations

As to the admissibility of the application the first applicant stated to be a "self-confessed atheist and therefore without any religious affiliation" and that also the second applicant would be raised "without any confession until being religiously major but liberal-minded and committed to pluralism". The applicants argued that the affixed crucifix in the second applicant's classroom could possibly not be ignored and that the cross in general would not only represent a "clear symbol of Christian faith" but also "historically seen – a sign of catholic hegemony". Furthermore, the applicants alleged that the celebrations the second applicant had to attend as well as the respective preparation for those events would represent religious – concretely Christian – education. The underlying provisions, Section 12 para 2 and Section 3 para 1 NÖ KindergartenG, would directly object to the applicants' legal sphere without any additional state measure or decision.

According to the applicants, the objective provisions infringed Article 2 1st Prot. ECHR together with Article 9 ECHR. Deducing from the connection of the said fundamental rights, the applicants argued it to be the first applicant's parental right to have his child educated without any religious denomination, and the right of the second applicant herself to grow up in the said manner. Given "the circumstances" in the respective kindergarten the second applicant would moreover have the impression of a state preference for the Christian faith, precisely in the sense that the latter would

[12] Lower Austrian Land Law Gazette 5060-2 as amended by Land Law Gazette 2015/70.

"enjoy a privileged status as state church". Nevertheless, it would be the duty of the state to communicate "values of a pluralistic and democratic society".

Government observations

Due to the transcendent importance of the said decisions not only the respondent government of Lower Austria but also governments of other regions (some of them with similar provisions) as well as the federal governments replied to the application. The different observations can be summed up in three points. As to the admissibility of the application it was firstly argued that for the applicants neither an obligation to attend a public kindergarten would exist, nor would there – concretely – have been an obligation for the second applicant to attend any religious or other ceremonies. Secondly, it was stated that concerning the alleged infringement of "passive" freedom of religion, the mere affixation of a crucifix would not interfere with the passive religious freedom of non-Christians according to Article 9 ECHR. On the one hand, according to the governments the affixed cross could not create any coercion to act in a specific religious way – such as to worship the cross – nor the need for children to identify or distance themselves consciously from it. On the other hand, the federal Government argued that if there was an infringement of passive religious freedom it would be legitimate, because the affixation of a cross would then consequently represent positive religious freedom of children with Christian denomination. Finally, it was stated that the provision of Section 3 Para 1 NÖ KindergartenG would not refer to religious education in a strict sense but moreover hint at the conveyance of objective knowledge about religion(s) according to Article 14 Abs 5a B-VG.

Decision of the Court

Departing from the assumption that Section 3 Para 1 NÖ KindergartenG does not oblige to attend religious celebrations, the constitutionality of this provision was no preliminary question for the Court. Therefore, regarding Section 3 Para 1 NÖ the Court denied the admissibility of the application. Concerning the constitutionality of Section 12 Para 2 NÖ KindergartenG the Court reaffirmed the governmental argument that there is no legal duty to attend a kindergarten for children younger than five years. Still, it can it cannot be reasonably expected to abstain from the attendance of a kindergarten "just to evade the confrontation with religious symbols". Consequently, the application – as to this provision – was found admissible.

Article 9 ECHR

At the beginning of the merits the Court refers to previous case law when stating that the essence of freedom of religion and conscience under the Austrian constitution is to exclude "state coercion in religious contexts". It can furthermore be derived that both, the freedom not to hold and the freedom not to practice any religious belief, are protected under Article 9 ECHR. According to the Court this negative dimension of freedom of religion entails the prohibition of any constraint by the state to participate at religious activities and ceremonies.

The Court argues that the crucifix "without any doubt" has become a symbol of "occidental history of ideas" and that "furthermore it has always been a religious symbol of Christian churches". Yet, this cannot lead to the assumption that the legislator enacted Section 12 Para 2 NÖ KindergartenG with the intention to communicate any state preference for a determined religion or faith. Moreover, such a view has to be excluded by adopting a systematic constitutional interpretation of the objected provision. As to that the Court firstly states that several (constitutional) provisions within the domestic legal system (Article 14 Para 5a B-VG, Article 29 CRC, Article 4 Lower Austrian Constitution[13]

[13] Niederösterreichische Landesverfassung, Lower Austrian Land Law Gazette 0001-0 as amended by Land Law Gazette 0001-21.

refer to the educational goal of tolerance and openness towards the religion and the culture of others. It is, secondly, added that within the Austrian system, "a System of Separation of state and church, an interpretation of the crucifix as expression in favour of a state church can be ruled out from the beginning". Finally, the Court holds that Section 12 Para 2 NÖ KindergartenG leaves the "sovereignty of interpretation", i.e. how to interpret the symbol of the crucifix to the parents and the respective children.

Since it is therefore not clear how the mere display of a crucifix can create an obligation of reverence or religious activity or any coercion for the children to identify with a certain religious belief or faith, the Court denies that there is an interference of Section 12 Para 2 NÖ KindergartenG with the right to not hold and to practice any religious belief or faith and accordingly there can be no interference with Article 9 ECHR.

Even under the assumption that the crucifix would interfere with the mentioned right – the Court adds – it would be justified, since it serves the "protection of the right and freedoms of others" according to Article 9 Para 2 ECHR, namely the freedom of religion of children and parents with Christian faith. Furthermore, through its embeddedness within the educational mandate of the state Section 12 Para 2 NÖ KindergartenG cannot be seen as a measure of indoctrination or mission and is therefore proportionate.

Article 2 1st Prot. ECHR

As to an alleged interference with Article 2 1st Prot. ECHR the Court holds that the latter provision does not entail an obligation of the state to grant public education that is according to parents' determined religious and philosophical convictions. Though, instruction and education must be conveyed in an objective, critical and pluralistic manner (i.e. prohibition of indoctrination), the second sentence of Article 2 1stProt. ECHR does not hinder the state to disseminate information or knowledge of religious content. Referring to its reasoning considering Article 9 ECHR the Constitutional Court therefore holds that the mandate to affixate a crucifix in the classroom of a kindergarten does not interfere with Article 2 1st Prot. ECHR. Even assuming that there was an interference with parents' right it would be justified, since it lies within the margin of appreciation to regulate education *inter alia* according to common societal needs and resources. Taking into account the restricted effect of the crucifix and the necessity to find a balance between the competing interests of Christian children and their parents on the one hand and parents and children reproaching Christian symbols on the other hand a possible interference would be justified and proportionate.

B. Discussion

It is remarkable that the outlined decision was pronounced just a few days before the Grand Chamber of the ECtHR rendered its judgment on *Lautsi vs Italy*. Apparently, there are several parallels between the two judgements, which do not only relate to their similar outcome. However, there are also differences regarding the structure and the reasoning within the two courts' merits.[14] A major variation is that the Austrian Constitutional Court prioritizes an examination under Article 9 ECHR and only afterwards moves on to the assessment under Article 2 1st Prot. ECHR.[15] It is concluded – after remarkable hermeneutic effort – that the crucifix mandate in Lower Austrian

[14] See Trofaier-Leskovar, V. (2011) The Crucifix in the kindergarten, *Vienna International Constitutional Law-Journal*, pp. 248-9.

[15] On the contrary the Grand Chamber undertakes mainly an examination under Art 2 1st Prot. ECHR; cf Lautsi v Italy App. No. 30814/06, para 59, 78. (ECtHR 18 March 2011); cf. Trofaier-Leskovar (2011) p. 249.

kindergarten classes can neither represent an interference with Article 9 ECHR nor with Article 2 1st Prot. ECHR. Nevertheless, the *Verfassungsgerichtshof* apparently deems necessary to argue that a possible interference is justified and proportionate. This "logic" is applied concerning an alleged unconstitutionality of Section 12 Para 2 NÖ KindergartenG according to Article 9 and Article 2 1st Prot ECHR. This is, admittedly, a parallel to the ECtHR's reasoning in *Lautsi*, and it may be argued that thereby a court competent for fundamental rights under the ECHR does not shut the door completely to a possible interference of stricter crucifix provisions in future.

Assessment under Article 9 ECHR

Furthermore, in view of the Constitutional Court the symbolic effect of crucifixes is apparently highly ambivalent, since it can be either a symbol of occidental history of ideas and/or a symbol of Christian churches. [16] Without any doubt a crucifix is above all a Christian and therefore a religious symbol. This does not mean that it is by default a symbol of Christian hegemony – as it is alleged by the applicant. What is truly ambivalent is the Austrian court's excurse concerning the constitutional interpretation of the objected legal mandate of the crucifix-affixation. It is hard to see why the extensive citation of several provisions – partly of constitutional rank – that enshrine the educational value of (inter)religious tolerance and respect has any impact on the factual symbolic impact of a wooden crucifix on children in a kindergarten classroom and their and their parents' right not to have and not practise any religious belief. The clear wording of Section 12 Para 2 NÖ KindergartenG leaves no room for a constitutional interpretation of this mandate. Either the religious symbol of the crucifix has to be affixed to the kindergarten's class' wall or not. Neither is it overwhelmingly convincing that the alleged impact of the crucifix as an expression for a state-church preference can be ruled out from the beginning, because Austria is constitutionally a state following the principle of separation of church and state. The mere statement of a rule does not prove its fulfilment.

Besides, it is accurate when the Court states that the display of a crucifix in the objected context does neither create a (factual) coercion of reverence or religious activity nor a pressure to identify or distance from it. This goes along with the ECtHR's interpretation of the crucifix in school classes as a passive religious symbol.[17] It is merely because of that that there is no interference with the "passive dimension" of Article 9 ECHR, i.e. the right of the children and their parents not to hold and not to practise any religious belief.

Assessment under Article 2 1st Prot. ECHR

Concerning the assessment of Article 2 1st Prot. ECHR the Constitutional Court's reasoning can be qualified as more determined. However, the insinuated premise that the display of the crucifix has to be (automatically) seen as the conveyance of information and knowledge in an objective, critical and pluralistic manner seems in the Austrian case – where a system of separation between church and states exists – rather short-sighted.[18] Again, the constitutional embeddedness of Section 12 Para 2 NÖ KindergartenG cannot preclude that there is no interference. On the contrary, in our view the assumption of an interference with Article 2 1st ECHR is arguable. The affixation of the crucifix resembles at least the priority of this Christian symbol towards other (religious) symbols or a total absence thereof in Lower Austrian kindergartens. In spite of that and – thereby the Court is right –

[16] It is questionable whether those symbolic meanings can be disentangled, since the "Occidental history of ideas" has "without any doubt" been strongly characterized by the influence of Christian churches. The crucifix is just one example for this empirical fact.

[17] Lautsi vs Italy App. No. 30814/06, para 72 (ECtHR 18 March 2011).

[18] It is a difference when the ECtHR refers to a possible interference briefly with the "limits of the margin of appreciation left to the respondent state in the context of its obligation" (Lautsi v Italy, App. No. 30814/06, para 76 [ECtHR 18 March 2011]). As a regional human rights tribunal that has to address to a variety of states with heterogeneous configurations of the relationship between the state and one or several churches such reasoning is highly reasonable.

the balancing of interests between the interests of Christian parents[19] and those who repudiate the affixation of a crucifix serves as legitimate aim for such a mandate, as long as it is proportionate. In the case of Section 12 Para 2 NÖ KindergartenG the proportionality of the interference can be affirmed, since it is made dependent on the concrete configuration of the kindergarten class. Only given a majority of Christian children in the respective class a crucifix shall be affixed (Section 12 Para 2 NÖ KindergartenG).

IV. Conclusion

The outlined cases show that cases on parental convictions have already reached a certain protagonism within the Austrian Court's Constitutional Case law. Especially the crucifix-decision illustrates that the Court now puts considerable effort in keeping up with the dynamic development of ECtHR case-law. Although several passages of the reasoning can certainly be criticized, the Court neatly knits together several – sometimes parallel – lines of argumentation. Although the outcome is certainly appropriate, the more recent judgement considering the equivalence of homeschooling tuition could might have been more elaborated. One can hardly shake off the impression that there is some correlation with the small (but recently increasing[20]) number of home-schooled children in Austria and the Court's brief and partly terse reasoning.

[19] It can be left open whether Christian parents automatically deem a crucifix in class necessary for their children's education.
[20] For more information see *Lehne* (2015).

Belgium

Compulsory choice in public schools between a non- confessional or a religious subject in the curriculum? Right to opt out?

Kurt Willems

- Case Title : *Constitutional Court 12 March 2015, no. 34/2015*
- Parties: Carlo de Pascale and Véronique de Thier, in their capacity of legal representatives of their under aged daughter Giulia de Pascale v City of Brussels and Walloon Community
- Keywords: neutrality – public schools – non-confessional subject – choice to opt out - privacy
- Region – country: City of Brussels – Walloon Community / Belgium
- Court : Constitutional Court
- Description: Prejudicial question raised by the Council of State before the constitutional court: "Does the applicable regional law[1], violate the principle of non-discrimination, in so far that it does not include the right for parents to opt out of religious classes of non-confessional moral philosophy classes by a simple, unmotivated request, and does the regional law as a consequence introduce a discrimination in the application of the articles 19 (freedom of religion) and 24 (freedom of education) of the Belgian constitution, art. 9 ECHR, article 2 first protocol of the ECHR and article 18, § 4 ICCPR?

o Application

o Facts. The city of Brussels refused to grant an exemption to the daughter of the applicants from having to take a non-confessional moral philosophy subject in a public school. Although the city of Brussels didn't disagree with the claim that a possibility to opt out should exist, it refused to grant the exemption nonetheless as the Walloon region (of which the French-speaking Brussels' schools are part) made it clear that the choice between the two types of subjects was compulsory. The city of Brussels thus feared they would jeopardize the diploma of the pupil by granting an exemption. The parents appealed this decision before the Council of State, and the Council, on the request of both the parents and the city of Brussels, brought the above mentioned prejudicial question before the Constitutional Court.

o Parties observations: The parents submitted that the non-confessional moral philosophy subject was not neutral, so that an exemption from this subject should be possible. Moreover, the right to a private life entails that such an exemption should be given without the parents having to give any kind of justification. The applicants thus complained that the refusal to grant their daughter an exemption amounted to a violation of their right to respect for private life, Article 9 ECHR (right to freedom of thought, conscious and religion) and First Protocol-article 2 ECHR, particularly their right to have their daughter taught in conformity with their own convictions.

o Government's Observations. The City of Brussels followed the plaintiffs on this point. The city stated that a compulsory non-confessional moral philosophy subject (without a right to opt out) is only possible if it is given in an objective, critical and pluralistic way (Pursuant to *Folgero v. Norway*, 29 June 2007). That was not the case for the moral philosophy subject at hand, according to the city of Brussels. Note however that the city of Brussels hopes to install a single objective, neutral subject

[1] Article 8 of the Act of 19 May 1959 ("Schoolpactwet)"and article 5 of the regional Act of 31 March 1994 on the principle of neutrality for Community schools.

on citizenship in the curriculum of secondary schools (instead of the current choice between various ideology-driven religious or non-confessional classes). A rejection of the current system by the Constitutional Court would serve this purpose.

The Walloon Government on the other hand, interpreted the Belgian Constitution in view of the system of the principle of compulsory education, and concluded that parents had to choose between either one of the two types of subjects. Furthermore, they submitted that a possible violation would not result from the cited regional legislation, but from a possible defective implementation of the neutral non-confessional subject in certain schools (which would fall outside of the scope of competence of the Constitutional Court).

o Court decision: According to the constitutional Court, the Belgian Constitution states that a public school has an obligation to offer religious classes in all the official religions in Belgium, and has to offer non-confessional classes as well. The Constitution also states that parents have the right to choose between these classes. The Constitution however does not impose a compulsory choice.

Pursuant to art. 24 §3 of the Belgian Constitution, one has the right to education in accordance with fundamental rights and freedoms, including the right of parents to ensure education and teaching in conformity with their own religious and philosophical convictions (article 2 First Protocol ECHR). The Constitutional Court refers to the Jurisprudence from the European Court of Human Rights in this regard (*Folgero v. Norway* 29 June 2007, § 84; *Hasan and Eylem Zengin v. Turkey* 9 October 2007, §§ 51-52 and § 71; *Mansur Yalçin v. Turkey* 16 September 2014, § 72).

The Constitutional Court then concludes that the non-confessional subject at hand cannot be seen as neutral, as it is organized by the non-confessional community in Belgium, which is recognized by the Belgian constitution as an official ideology (in the same way some religions are). Moreover, teachers of this non-confessional subject are not obliged to adhere to the same principle of neutrality as teachers of "normal" subjects (just as religious teachers are not). The applicable legislation in the Walloon region thus makes it possible for teachers of non-confessional subjects to defend a certain philosophical point of view. As a result, the applicable legislation, by offering a choice between those classes, does not guarantee that information and knowledge will be transferred in an objective, critical and pluralistic way. In order to guarantee the rights of article 2 of the First protocol ECHR, a right to opt out of these classes must exist.

Moreover, to protect the right of the parents not to divulge their religious or philosophical convictions, the school cannot ask any motivation for this choice. Once again, the Constitutional Court points towards jurisprudence from the European Court of Human Rights to justify this reasoning (*Hasan and Eylem Zengin v. Turkey* 9 October 2007, § 73 and 76; *Mansur Yalçin v. Turkey* 16 September 2014, §§ 76-77).

o Note

To understand the case better, first a brief historical note: The development of a non- confessional moral philosophy subject, which was designed as an alternative for religious education, has given rise to important case-law in the past. The initial federal Act of 19 May 1959 (Schoolpactwet) introduced a compulsory choice between a non-confessional moral philosophy subject or a religious subject. It was difficult to reconcile this compulsory choice with article 9 ECHR, so that several exemptions *contra legem* were granted to followers of non-official religions.

The non-confessional subject is indeed not objective, critical and pluralistic in the sense of *Folgero v. Norway*, as is clearly indicated by the history of this subject. The liberal non-confessional communities in Belgium have always had a growing interest in the development of the subject (as it

was their legally guaranteed 'escape' from religious education), especially after recognition for non-confessional ideologies was included in the Belgian constitution in 1993. After the Act of June 21 2002[2] had installed a "Central Secular Council", the content of the non-confessional moral philosophy subject was officially controlled by this community.

The Council of State developed jurisprudence dating back to 1985 (long before *Folgero v. Norway*) judging that a pupil has a right to be exempted from the non-confessional subject, if neutrality was not guaranteed (which was not the case, as the Council of State pointed out with regards to the Flemish legislation).

The northern Flemish lawmaker and the southern Walloon lawmaker have subsequently taken a different approach. The Flemish lawmaker gradually developed a set of Acts allowing parents to opt out, without having to give any justification. In the Walloon region however, such a right does not exist, as the Walloon region continued to defend the neutrality of its non-confessional subject. The Constitutional Court took the opposite view on 12 March 2015, confirming that the subject, as organized by the relevant regional acts in the Walloon region, is indeed not neutral.

Even if the answer to the prejudicial question did not surprise many in Belgium, the case is nonetheless important on another level. Some argued that this case was a clear indication that public schools should no longer offer a choice between religious and non-confessional classes. They argued that the mere fact that pupils had to make such a choice in a public school (and the subsequent division in the class between religious ideologies during those classes) is a violation of the pupil's right. Interestingly, this case was indeed not tried by someone of the non-official religions in Belgium who felt discriminated against (as was mostly the case in the past), but by a privacy-minded *agnosticus* who refused to publicly declare his ideology. In the Belgian media, the plaintiff made it clear that he wished to replace the current system of offering various confessional and non-confessional classes in public schools, by one neutral non-confessional subject on citizenship. The City of Brussels has uttered a similar wish, and lost no time after the discussed verdict to declare that the creation of such a neutral, objective, critical subject should happen as soon as possible.[3]

This opinion has been voiced internationally as well*: "even if all the conditions [for an effective opt-out scheme] are met, opt-out clauses may still have a negative, stigmatizing impact on the school day reality of those children who are exempted from certain classes. Furthermore, people who wish to avail themselves of opt-out clauses, by virtue of asking for the exemption, will be forced to reveal that they do not share in the predominant faith. Because the state cannot adopt policies that force people to reveal their religious affiliation, or lack thereof, the state must avoid facing people with this particular kind of dilemma. If the latter concerns hold true and cannot be remedied, states and their citizens may have to reconsider the tenability of religious instruction in public schools generally. Potential marginalization and forced disclosure of intimate beliefs provides a firm case against doctrinal religious instruction in public schools per se-something that does not prejudice the possibility of religious instruction in private, religious schools."*[4]

Even if the prejudicial question before the Constitutional Court was formulated in a much smaller and more specific way so that the Constitutional Court did not have to go as far as to assess whether

[2] Act of 21 June 2002 on the Central Council of Philosophical non-denominational Communities of Belgium, delegates and institutions responsible for the management of financial and material interests of recognized non-confessional philosophical communities.

[3] OVERBEEKE, A., (2014), 'De keuze voor levensbeschouwelijk onderricht in officiële scholen in de Franse Gemeenschap beoordeeld door het Grondwettelijk Hof', *TORB*, p. 20 and p. 25-26.

[4] TERMPERMAN, J. (2010), 'State Neutrality in Public School Education: An Analysis of the Interplay Between the Neutrality Principle, the Right to Adequate Education, Children's Right to Freedom of Religion or Belief, Parental Liberties, and the Position of Teachers', *Human rights quarterly*, 32 p. 881.

or not the mere existence of a choice is reconcilable with the freedoms and rights at hand, the case is nonetheless seen as a confirmation that the existence of a choice between religious or non-confessional classes is not unconstitutional. On the contrary, it is perfectly acceptable that the content of both the religious classes and the non-confessional classes are ideology-driven, as long as the possibility to opt out exists for pupils and their parents.

In that, the approach of Belgium's Constitutional Court is highly relevant on a European level, as it highlights that nor the Belgian constitution nor the applicable European law force public schools into the creation of an ideology-free classroom. An effective opt-out scheme by simple unmotivated request suffices to respect the relevant rights and freedoms, i.e. the right to respect for private life, Article 9 ECHR and article 2 of the first protocol ECHR.

Right to wear a headscarf / religious symbols for pupils in public schools

Case Title : Council of State 14th of October 2014, nr. 228.748

- Parties: Sharanjit Singh v. Community Education (Gemeenschapsonderwijs)
- Keywords prohibition on religious clothing for pupils – public school –freedom of religion - neutrality
- Region – country : Belgium - Flanders
- Court : Council of state
- Description:

o Application :

o Facts : A public School in Sint-Truiden (Flanders, Belgium) introduced a general prohibition on wearing religious signs/clothing for pupils, as religious signs were considered irreconcilable with the pedagogical project of the school (notably the principle of neutrality that the public school was obliged to adhere to). The measure was taken pursuant to a similar general prohibition drafted by the organizing body of the schools (the Council of public schools belonging to the Flemish Community, Raad voor gemeenschapsonderwijs) by means of a Circular of 1 February 2013, imposing such a general prohibition for all public schools belonging to the Flemish Community.

o Parties observations: According to the plaintiff, a general prohibition can never be reconciled with the freedom of religion as laid down in art. 9 ECHR. Only individual disciplinary actions or certain measures aiming to restore the order in a specific case can be accepted as restrictions in the meaning of art. 9.2 ECHR.

o Government's Observations : the respondent government submitted that a general prohibition was necessary to protect the equal opportunities and rights of other pupils, as unlawful social pressure would result from allowing religious signs within school walls, and as segregation would occur if religious signs were accepted in some schools but not in others. Moreover, public schools have to offer a neutral education environment, which is guaranteed by preventing pupils from wearing religious signs or clothing.

o Court decision: The prohibition is an interference with the pupils' freedom of religion, more specifically the right to profess a religion in public. Freedom of religion can be restricted (article 9.2 ECHR), as long as this is prescribed by law and necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The Council of State scrutinized the observations brought forward, and held:

Firstly, that the appeal was inadmittable insofar it was directed against the provision in the Circular of the organizing body. As the schools still had to include such a prohibition in their school regulations before the prohibition became effective, only the latter documents could be appealed before the Council. The Circular itself cannot be seen as a final document imposing certain restrictions.

With regards to the specific school regulations of the public school in Sint-Truiden, the Council submitted the following observations:

- School regulations are a "law" in the meaning of art. 9.2 ECHR
- Concerning the legitimate goals in the meaning of art.9.2 ECHR:

- (1) The obligation of neutrality for public schools can be a legitimate reason to restrict the freedom of religion.
    - The council pointed out however that no parent has the right to demand that his child will not be confronted with ideological signs of other pupils. Such a request would only be justified if it is proven that those signs are worn ostentatiously as an act of aggression or to put pressure on other pupils, or as an act of provocation, proselitism, indoctrination, or propaganda, and would thus undermine the convictions of others. Outside of those situations, The Council did not see how wearing religious signs would prevent public schools from offering objective and pluralistic education that enables pupils to develop and sharpen a critical mind, also with regards to religious, ideological or philosophical questions.
    - That art. 9.2 ECHR cannot be assessed in the same way for pupils and for public teachers. The Council thus distinguished this case from previous case law concerning teachers, notably R.v.St. 27 March 2013, no. 223.042, in which the Council of State upheld a similar general prohibition on religious signs for public teachers (other than religious teachers). The Council acknowledged that pupils can have an impact on the obligation of public schools to offer neutral education, but in order for a school to have a justified reason to intervene, there needs to be proof that a certain behavior of certain pupils effectively affects this obligation.
    - The mere existence of an obligation of neutrality as such, is thus not sufficient to justify a general prohibition on religious signs for pupils.
- (2) (Gender) Equality between pupils can be a legitimate goal.
    - However, as a general principle, the Council refers to the European jurisprudence (*S.A.S. v France*, 1 July 2014) that a self-chosen religious practice is an expression of a cultural identity that adds to the pluralism in which democracy finds its source. Only insofar other students would be forced to wear a headscarf can preventive measure from the school serve a legitimate goal.
    - (Gender) equality as such, is thus not sufficient to justify a general prohibition on religious signs for pupils.

- "Necessary in a democratic society":
    - The Council acknowledged that a general prohibition in all public schools might in some cases be reconcilable with art. 9.2 ECHR. A society might come to the point (extreme segregation, ousting other pupils, oppression) were only a general prohibition is an effective measure. The Councils also acknowledged that a school can take preventive measures to prevent future problems (on the condition that such future problems are certain to arise and not solely hypothetical). As a consequence, a general prohibition in all public schools can under certain circumstances be necessary in a democratic society.
    - A general prohibition must however be a measure of last resort, if other measures (e.g. disciplinary actions against specific students, specific measures to restore order in the school) fail. And even if a prohibition on religious clothing or signs is justified, then such justification only applies to the specific schools were the problems have arisen, unless society has reached a turning point by that time, where only a general prohibition can still be effective.
    - The assessment whether or not a prohibition is justified, can as a consequence only be assessed on a case-to-case basis, taking into account all relevant circumstances.
    - The Council begins its assessment in the case at hand by citing the jurisprudence from the European Court of Human Rights, namely that the obligation of neutrality

and impartiality does not give States permission to preemptively avoid religious tensions by taking away all elements of pluralism. Rather, it means that the State must make sure that all different groups learn to tolerate each other (*S.A.S. v France*, 1 July 2014, § 127).

- The Council points out that before a State can interfere with freedom of religion, there must be proof of pressing circumstances that make the State's actions necessary. Those circumstances must be real and imminent, not only hypothetical.
- In the specific circumstances of the case before the Council however, the Council found the prohibition irreconcilable with the criteria of article 9.2 ECHR. The school could not justify that the members of the Sikh community (it was a pupil from that community that started the case) put any kind of peer pressure on fellow pupils, or caused any kind of disorder in the school. Nor was there any kind of proof that their choice of school lead to segregation or had a negative impact on equal opportunities. In addition, such proof was not brought forward for any other religion neither.
- Finally, the Council considers that historically, wearing religious signs and clothing by pupils has always been deemed reconcilable with active pluralism. The Council argues that the decision to move away from this concept of active pluralism was taken too abruptly, and on the basis of only one specific case (headscarves) even though all religious signs are affected by the prohibition. Moreover, the so-called negative effects of wearing a headscarf were not proven. A justified reason for abandoning the concept of active pluralism in all schools (which the Council considers to be a "more-freedom-of-religion-friendly-approach") was thus not given by the school.

o Note

The court affirms in its reasoning the classic European human rights approach with regards to freedom of religion, namely that restrictions are possible, but only to a certain extent, as prescribed by art. 9.2 ECHR. The preservation of the neutral character of public schools is a legitimate state interest as it touches upon the state's obligation to protect "the rights and freedoms of others". However, that does not mean that all ideological acts within school walls necessarily affect the neutral character of public schools. The Council stresses that the restrictions in this case are directed towards pupils, not public teachers, and that pupils do not represent the school in any way. As a result, religious manifestations by pupils do not necessarily have a bearing on the non-confessional character of public schools; and religious manifestations by pupils do not necessarily affect the fundamental rights and freedoms of others. [5] The burden of proof that the restrictions are really necessary lays upon the school introducing the restrictions.

As a general rule, the Council finds that restrictions can only be introduced gradually: first, the school must try to take actions against individual pupils (disciplinary actions, actions to restore the order in school), before the school can consider restrictions targeting certain groups of students or all students. And only if society has gotten to a turning point were schools can no longer reasonably be expected to take actions targeting their own school, a general prohibition in all schools is a possible option.

According to the Council of State, only an *in concreto* approach can suffice to make such an assessment. As Judge Tulkens noted in her dissenting opinion in *Leyla Sahin v. Turkey*, *the application of this ground for limitation can only be deemed necessary in a democratic society if it can be*

[5] TERMPERMAN, J., (2010) 'State Neutrality in Public School Education: An Analysis of the Interplay Between the Neutrality Principle, the Right to Adequate Education, Children's Right to Freedom of Religion or Belief, Parental Liberties, and the Position of Teachers', *Human rights quarterly*, 32 p. 888.

established, in concreto, that a person, by means of wearing a religious symbol or piece of clothing, undermined or was liable to undermine the convictions of others, for instance, if it can be established that a headscarf is worn as a means to exert pressure or to proselytize young children.[6] Although the *in concreto* requirement was not upheld in the verdict of the European Court on Human Rights[7], and although the current jurisprudence from the European Court of Human Rights does not seem to go as far as to force Member States to make an in-dept assessment *in concreto* in every case where a prohibition on religious clothing is introduced[8], the Belgian Council of State nonetheless chose to make such an *in concreto* assessment compulsory, installing a high standard of protection of human rights in Belgium. It is clear that a public school or government body wishing to introduce a prohibition in the future, shall have to overcome this high burden of proof.

In that sense, it can be regretted that the Circular of the Council of public schools of the Flemish community (urging schools to install a general prohibition) fell outside of the scope of competence of the Council of State, so that the annulment in the aforementioned verdict only affected the specific school regulations of the school in Sint-Truiden brought before the Council. Some schools have since (mistakenly, perhaps even deliberately?) interpreted the verdict of the Council of State as sanctioning the general prohibition as prescribed by the Circular, as the Circular itself was not annulled. The Council of public schools of the Flemish community (Raad voor Gemeenschapsonderwijs) has since continued to defend the positive effects of a general prohibition and did not revoke the Circular. Future annulment procedures are to be expected…

[6] Dissenting opinion Judge Tulkens, *Leyla Sahin v. Turkey*, no. 44774/98.
[7] *Leyla Sahin v. Turkey* 29 June 2004, no. 44774/98.
[8] DE HERT, P and DE GEEST, C. (2014), "Raad van State hervindt grondrechtenlijn in arresten GO! Hoofddoekenverbod. Naar een kader voor een school-per-school beleid', *TORB*, vol. 5, p. 71.

Chile

LEADING CASE-LAW ON RELIGIOUS RIGHTS IN EDUCATION: THE CASE OF CHILE

Rodrigo Cespedes[1]

I. SINGLE PARENTS AND RELIGIOUS UNIVERSITIES

1. Case title

A-V.D., María Soledad con Universidad de Los Andes (1992), Rol 20.123-1992 (23/12/1992), *Gaceta Jurídica Nr. 150 (1992)*, pp 38-ss, recurso de protección, Corte Suprema

2. Parties

A-V.D., María Soledad

Versus

Universidad de Los Andes

3. Keywords

Freedom of religion, privacy, private life, free choice of education, autonomy of educational institutions, by-laws, tertiary education, education and disciplinary actions, single parents as students

4. Region/Country

Chile, Region Metropolitana, Santiago

5. Court

Appeal Court of Santiago, confirmed by the Supreme Court of Chile

6. Description

5.1. Facts of the case

A student of a private Catholic University (*Universidad de los Andes,* which is administrated by *Opus Dei*) got pregnant during the academic year. Her pregnancy is product of a long relationship with her boyfriend. She gave notice to the university authorities on her pregnancy and it was implied she will be a single mother. The university authorities punished the student with one year of suspension, denying her entry to university facilities. The decision was based on the fact that "her condition is not a simple pregnancy but the product of sexual intercourse between people who are not married, which is inappropriate and a serious matter according with Christian morality". The university considered that "scandalous behavior is improper and giving good example in an education institution is essential". In sum, that behavior was considered as a severe infraction

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against university regulations which are based in Christian morals and Catholic Faith. University by-laws contain disciplinary rules and it is clear that students who behave against the principles and goals that guide the university can be punished. Some of the disciplinary infractions are "any conduct against decency" and "reprehensible behavior". There is a rainbow of possible punishments which includes expulsion and suspension of students.

The student challenged the decision asking for a judicial review (writ of protection/*recurso de proteccion*).

5.2. Parties observations

5.2.1. Claimant observations

The student claimed she signed a contract with the university and signed promissory notes in order to guarantee the payment of fees. The suspension violates her right to be a student. The suspension also breached her and her unborn baby's right to life and health.

5.2.2. Defendant observations

The headmaster of the university claimed that the student tacitly agreed with university regulations, its principles are well known and she could have chosen a different university. In addition, it was the student who put herself in a position that caused her distress.

6. Application

6.1. Appeal Court of Santiago

The decision of the university was ruled abusive and the punishment of suspension was, consequently, illegal. The Court ordered to allow the student to continue her studies. The fact that the student is single and pregnant cannot be considered as immoral or scandalous. Consequently, the disciplinary punishment imposed to the student does not protect the student community against immoral behavior because that kind of punishment is not suitable for achieving that goal. Students are not compelled to follow Christian morals, just the basic social concepts of decent behavior. The punishment affected the student's constitutional right to ownership; she has the right to intangible propriety (*res incorporales*) to study.

6.2. Supreme Court

The majority Supreme Court upheld the Appeal Courts' ruling, declared illegal the disciplinary punishment and ordered the university to allow the student to continue her studies.

One dissenting opinion considered that the University has autonomy and can enact their own regulations in order to fulfill its goals according to its ideology. Then, students should follow that rules because they have chosen that institution.

7. Note

When I read the facts of this case I imagined that situation happened in Saudi Arabia or during the XIX Century. It is common knowledge that Christianity forbids sexual intercourse outside marriage and it is considered a sin. At the same time, sex activity before marriage is quite common in Western countries. The clash of Catholic values and liberal ones is crystallized in this case.

Lately, in 2000, there was a similar judgment called "*Arraigada Ahumada* con *Instituto Profesional Bautista*".[2] In this case was not a Catholic University but an Evangelical one The Supreme Court ruled in an analogous way but adding discrimination. In both cases, there is a dissenting opinion. In the opinion of the court, not allowing single pregnant students to finish their studies discriminates them in comparison with other students. In fact, it could be considered gender discrimination because pregnancy obviously affects women. In other words, pregnancy is not a legitimate ground for treating people in a different way. The idea of discrimination has two features: the special treatment (privileged/detrimental) towards a person or a group of individuals, and the absence of a valid and reasonable justification for this different treatment. Discrimination "should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms".[3] Discrimination may be associated to prejudice: some people tend to link some collective-individual features with positive or negative characteristics. In other words, assumptions based on stereotypes, a premature, impulsive and baseless libelling of some kind, and not in full knowledge of the reality of facts. In the cases commented related to religious universities, they assume that single parents are immoral.

In both commented cases, the majority of the Courts is quite laconic and focus its arguments on ownership of intangible propriety (*res incorporales*) and discrimination. The dissenting opinions focused on the importance of university autonomy and the by-laws. Dissenting opinions stressed the Chilean constitutional system protects autonomy of private entities in order to guarantee a rainbow of choices. Once the student is part of an educational institution, tacitly agrees and accepts with its religious views or ideology. In those cases the religious beliefs of those universities were obvious. Therefore, freedom of contract prevails. However, freedom of contract and university autonomy are not absolute and there are some limits. Those limits are fundamental rights such as discrimination or privacy.

The set of tools preferred nowadays for adjudicating these kind of cases is the proportionality test, used and developed by the German Federal Constitutional Court and systematised by Alexy.[4] Proportionality is a tool for judging whether any potentially justified interference with a right is the minimum interference necessary to secure the legitimate goal of a state measure. Then, proportionality assesses the level of interference in order to consider it legitimate or unlawful. The proportionality test in the wide sense consists of verifying that the restrictions to rights have a legitimate goal and those limitations are appropriate, necessary and proportionate in order to obtain that aim. The theory of adjudication on fundamental rights, according to Alexy, is in essence a theory of balancing.[5] The adjudication of the case where there are two or more rights in conflict will be a derivative judicial rule that represents an integrated normative solution applicable to the factual context supported by the evidence. That ruling will establish a relation of preference among rights-principles which depends of the facts of the case.[6] The scales of the weight formula and the values assigned to every right-principle in conflict are, in a high degree, almost intuitive and it is even close to a mathematical formula.

In this case we have to ask ourselves which right is more important, the students' rights or the university ones. The Court gave preeminence to the student's rights considering that the

[2] *Gaceta Jurídica Nr. 239 (2000)*, pp 32-40. There is also a dissenting opinion.

[3] UN Human Rights Committee, General Comment 18 (1989): "Non discrimination", UN Doc. HRI/GEN/1/Rev.1 at 26, para.7.

[4] His "Constitutional Rights, Balancing, and Rationality", *Ratio Juris (June/2003) Vol. 16 Nr. 2*, pp 131-140; "On Balancing and Subsumption: A Structural Comparison", *Ratio Juris (December/2003) Vol. 16 Nr. 4*, pp 433-449; "Balancing, constitutional review, and representation", *International·Constitutional Law Vol. 3 Nr. 4 (2005)*, pp 572-581.

[5] ALEXY, Robert, "On Balancing and Subsumption: a Structural Comparison", *Ratio Juris (December/2003) Vol. 16 Nr. 4*, pp 433-449.

[6] ALEXY, Robert, *A theory of Constitutional Rights* (2002), OUP, Oxford, pp 48-52.

punishment was not suitable for the goals the university wanted to achieve. It is quite evident that the punishment is disproportionate and not reasonable.

I believe this is a very interesting case that involves many relevant aspects of constitutional rights adjudication.

II. TEACHERS OF CATHOLIC DOCTRINE, *BONA FIDE* OCCUPATIONAL QUALIFICATION AND SEXUAL ORIENTATION

1. Case title

"*Pavez Pavez y otros* con *Vicario de educación del Obispado de San Bernardo*", Corte de Apelaciones de San Miguel, Rol Nr. 238/2007

2. Parties

Sandra Cecilia Pavez Pavez, Jorge Alberto Pavez Urrutia and MOVILH (Movimiento de Integración y Liberación Homosexual, represented by Rolando Paul Jiménez Pérez)

Versus

Vicario para la Educación del Obispado de San Bernardo

3. Keywords

Teacher of Catholic doctrine, *bona fide* occupational qualifications, separation of church and state, discrimination, sexual orientation, LGBT rights, privacy, conflict of rights

4. Region/Country

Chile, Región Metropolitana, Gran Santiago, Comuna de San Miguel

5. Court

Appeal Court of San Miguel, confirmed by the Supreme Court

6. Description

5.1. Facts of the case

In Chile, in order to teach religion as a school subject, qualified teachers have to be authorized by the respective church in addition. Churches can denied or withdraw that authorization at will. A teacher of Catholic doctrine, who was a lesbian and was in a relationship, was deprived of that authorization. Consequently, she would not be able to work as a teacher of religion in any kind of school.

5.2. Parties observations

5.2.1. Claimant observations

The claimant believed the decision of the Church was abusive and illegal because discriminated her based on her sexual orientation affecting her honor and dignity. Also, that decision restricted her right to work. Those rights are protected in the Constitution, but also in several human rights international agreements: ICCPR, ICESCR and IACHR.

5.2.2. Defendant observations

Chilean legislation gives churches the power to authorize teachers of religion and revokes it if, in the opinion of the Church, the teacher is not suitable. In addition, the state cannot intervene with churches' autonomy.

6. Application

6.1. Appeal Court of San Miguel

The decision of the Church was legal and not abusive because it conforms to the Chilean legal system. Chilean legislation gives churches control over teaching religion. Then, churches approve and revoke authorizations to teach a particular religious doctrine. Churches are autonomous and have discretion in order to control the teaching of their doctrine. The State cannot interfere with that discretion. It is quite clear that this kind of discretion implies that the church can control teachers behave according to the specific beliefs that faith is preaching. There is an unambiguous link between Chilean legislation and Canon Law, which allow the Catholic Church to control the suitability of teacher of Catholic doctrine. In that line of thoughts, the Church did not act illegally or abusively.

6.2. Supreme Court

The Supreme Court upheld the ruling of the Appeal Court of San Miguel.

7. Note

There are many interesting topics related to this judgment: separation of church and state, *bona fide* occupational qualifications, discrimination based sexual orientation, LGBT rights, privacy, conflicts of rights, proportionality, etc.

The separation of church and state has repercussions at school level and is a source of many legal problems. In order to avoid disputes, many modern democratic states are therefore organized under the principle of separation of church and state. Put simply, churches and states should deal with their issues independently and without interference. In practical terms, the state should not have a "preference" for some particular faith and, as such, should set out guarantees for the freedom of religion. At some point in Western history, religious morals and institutions lost their influence in public policy and "spiritual" issues became a personal matter. However, several states have a state church such as Norway or England. Various countries have a "particular relationship" with some creed like Italy or Spain, which give a special recognition to the Catholic faith, in their Constitutions (1947 and 1978 respectively) and in Concordats with the Vatican (1929 and 1979 respectively). Also, some countries, such as Greece, formally recognize that the majority of the population is affiliated with the Greek Orthodox Church. Some countries are strictly secular like France (*laïcité*). Chile is none: the Constitution says nothing about it. Traditionally the Catholic Church has been preponderant and the Constitution only stimulates any institutionalize religion with tax exceptions. However, as we analyzed in the previous case, that autonomy is not absolute.

Bona fide occupational qualifications is a right whose right-holder is the employer and authorise him/her to legitimate "discriminate" when hiring, retaining and firing employees according to some of their "qualities". For example, it is legitimate choosing only Latin-American actors in order to interpret Leonard Bernstein's West Side Story. It is also reasonable to hire female body guards for a single-sex prison. Of course there are grey areas such as political parties or trade unions which will tend to employ people who share their ideology.[7] In some countries, such Italy or Spain, there are *imprese di tendenza* or *empresas de tendencia*. This means that there are entities in which a particular ideology is part of its essence. For example, a religious school, a political party, an NGO such as Green Peace or some trade unions. Because of that essential ideology, those kinds of entities can fired or hired people in a "discriminatory" way. "Ideological or tendency" schools and universities have fired educators based on religious[8] and private behaviour.[9] It is quite common that in those associations, labour contracts include "morals clauses". This kind of terms forbids some kind of behaviour, including private life, of parties of the contract. In that way, parties have to keep some moral behavioural standards in order to not bring disrepute or scandal to the other party and affects it interests.[10] I can be considered that there is an implicit morals clause term in teachers of religion contracts as the Court hinted.

Comparatively, there have been LGBT rights problems and sexual orientation discrimination in religious schools. For example, in *Vriend v Alberta (1998)*[11] the Canadian Supreme Court ruled illegal the dismissal of a gay teacher from a private religious college. In *Fricke v Lynch* (1980),[12] the United States District Court for the District of Rhode Island, upheld the right of a homosexual student to bring a same-sex partner to a high school dance. Similarly, in the Canadian case of *Hall (Litigation guardian of) v Powers (2002)*,[13] a gay student was not allowed to go to the prom with his boyfriend. The school's decision was overturned by the Ontario Superior Court of Justice, which said that the student's rights were violated.

It seems that Chilean Courts are more conservative in their approach to sexual orientation discrimination. In fact, the IACtHR ruled against Chile in the *Atala Riffo case (2012)*.[14] Karen Atala Riffo a lesbian mother of three daughters. She was separated from her husband and originally reached a settlement with her former husband retaining custody of their children. Later, when Atala came out as a lesbian, the ex-husband sued for custody. The Supreme Court of Chile awarded the

[7] *ASLEF v UK (2007)*, App. 11002/05. A trade union with socialist tendencies and with strong anti-discrimination policies expelled a member, Mr. Jay Lee, who run as a candidate for local elections representing the BMP (a fascist party) and had clear anti-Muslim views. It is not necessary to belong to the trade union in order to work. UK Employment Tribunals ordered the re-admission of Lee. ASLEF applied to the ECtHR. The ECtHR ruled that associations are set up by people who share common values, ideals and goals. Then, it would run counter to the effectiveness of the freedom at stake if they had no control over their membership. The ECtHR argued that expulsion did not impinge in any important way on Mr. Lee's freedom of expression or political rights. He would not suffer any detriment because there was no prejudice to him in terms of employment.

[8] In Spain, the main problems about discrimination at the work place are related to religious issues, but especially in the collective aspect of labour law. Spanish teachers have litigated about many subjects (nature of the labour relationship, salaries, participation in the administration of the school, discharge, trade unions, etc.). There are several judgements by Tribunal Supremo (Nrs. 3.557/1997, 4.650/2000, 7.184/2000, 7.196/2000, 1.861/2001, 1.437/2002, 8.372/2003), and by the Spanish Constitutional Court (Nrs. 5/1981, 88/1985, 4/1996). An analysis can be found in BRIONES MARTÍNEZ, Irene María, "Profesores de religión católica según el acuerdo sobre enseñanza y asuntos culturales: el derecho a la intimidad, dos derechos en conflicto", *Aranzadi Social núm. 6 (2004).*

[9] For example in Italy, *Cordero v Università Cattolica del Sacro Cuore* (sent. 195/1972 CCost.) or *P.B. v collegio Don Bosco* (sent 12.530/1991 Ccas) all of them about unfair dismissals and religion. In the *Lombardi v Italy (2009),* App. 39128/05, The ECtHR ruled that a legal scholar who was dismissed from *Universitá Cattolica del Sacro Cuore* because his heterodox views on philosophy of law has freedom of speech, so his dismissal was against Article 9 of the ECHR.

[10] For example, athletes, actors or top-models who advertise products are forbidden to consume alcohol or drugs, Japanese idols sign contracts that include "dating-ban terms". I thank my colleagues Ami Sato and Dr. Shinichiro Goto for explaining me the interesting Japanese case-law on that subject.

[11] 1 SCR 493 [1998], Supreme Court of Canada.

[12] 491 F.Supp. 381 (1980).

[13] 59 OR (3d) 423, 213 DLR (4th) 308 (Sup Ct J). A general view in DENNIS, Donna I. and HARLOW, Ruth E., "Gay youth and the Right to Education", *Yale Law & Policy Review Vol. 4 (1985-1986)*, pp 446-478.

[14] *Atala Riffo and Daughters v Chile (2012),* Inter-Am. Comm. HR, Case 12.502.

husband their custody, saying that Atala's gay relationship put the development of her daughters at risk. The IACtHR ruled that Atala had been discriminated against in the custody case on the grounds of sexual orientation discrimination, which is incompatible with the IACHR.

In sum, this is a very interesting case in which there is a grey area on the separation of state and church. Faith, *bona fide* occupational qualifications and LGBT rights have to be balanced.

Italy

LANDMARK DECISIONS ON "RELIGIOUS, PHILOSOPHICAL AND IDEOLOGICAL RIGHTS IN EDUCATION": ITALIA

Claudio Di Maio[1]

Case Title

Case n. 203/1989

Parties

Moroni Anna Maria and others Vs. President of the Council of Ministers

Keywords

Education, Catholic religion, Secularism, State, Religious beliefs

Country

Italy

Court

Italian Constitutional Court

Description:

Facts

The applicants argue the unconstitutionality of Article 9, paragraph 2 of the Law of 25 March 1985 n. 121 and Section 5, number 2b of its Additional Protocol. It is a judgment on the compliance with the Italian Constitution of some points of the law of ratification and implementation of the new Lateran Concordat, which was signed on 18 February 1984 and which amended the previous agreement between the Holy See and the Italian State, agreement dating back to February 1929.

The text of the Concordat, as amended in 1984, provides for the maintenance of Catholic religious instruction in public schools, at all levels, except university. These rules, however, as well as made operational by the implementing decrees issued by the Ministry of Education, had a different effect than expected.

In fact, with the new rules of the Concordat, as interpreted by the Ministry of Education, the situation was worse for those students who, until then, didn't avail themselves teaching the Catholic religion and who had the power to use the so-called "exemption ". In particular, the provisions forbade only to students, who had availed themselves of the exemption, to be absent from school buildings during the Catholic religion classes.

Application

[1] Research fellow - University of Calabria.

The magistrate of Florence, accepting the defense arguments of the family M. who to him had addressed, argued the illegitimacy of these provisions, at least as it had been interpreted in the ministerial regulations. In particular, the national court, by order of 30 March 1987 (received at the Constitutional Court on 30 September 1988 RO no. 575/1988), it raises the question of the constitutionality of Article. 9, paragraph 2, of the law 25 March 1985 n. 121, (Ratification and execution of the agreement, with additional Protocol signed in Rome on 18 February 1984 that modifies the Lateran Concordat of 11 February 1929 between the Italian Republic and the Holy See) and Article. 5, letter b), number 2 of the Additional Protocol, referring to Articles 2, 3 and 19 of the Italian Constitution.
According to the national court, in fact, the above mentioned rules would cause discrimination against students not availing themselves the teaching of the Catholic religion "when (the rules) could not justify the religious teaching as merely optional."

Government's Observations
The State Legal Service, representing the Presidency of the Council of Ministers, puts in question three objections of inadmissibility: first, noted the ambiguous nature of the order for remission by the court in respect of the constitutional court; the legal representative of the state raises, then, the lack of jurisdiction of the magistrate according to ministerial provisions of organization of the education service and, ultimately, the limited possibility of proposing, in the constitutional review, the appreciation of circumstances that occurred during the first and incomplete application of rules, as in the present case.

Court decision
The Constitutional Court, in a sentence of rejection, said that the rules of the Concordat are compliance with the Constitution, provided that, however, they were be interpreted so as to create a school compulsory attendance and, therefore, stay in school buildings - only for students they decided to avail teaching the Catholic religion. In this regard, the text of the judgment says: "The state is obliged under the Agreement with the Holy See, to ensure the teaching of the Catholic religion. For the students and their families it is optional: only the exercise of the right to rely on it creates an obligation to attend it. For those who choose to refuse it, the alternative is a state of no-obligation. In fact, another compulsory course would cause a violation of conscience, must be kept carefully to one object: the exercise of the constitutional freedom of religion. " Then, in the judgment it is stated that "This Court has ruled, and constantly observed, that the supreme principles of the constitutional system have a higher value compared to other rules or laws of constitutional rank, either when have considered that the provisions of the Concordat (which enjoy special constitutional cover provided by art. 7, second paragraph, of the Constitution) do not escape to their compliance with the supreme principles of the constitutional order (Case no. 30 of 1971, n. 12of 1972, n. 175 of 1973, n. 1of 1977 and no. 18 of 1982), when it is said that the law enforcement of the EEC Treaty may be subject to review by this Court in reference to the fundamental principles of our constitutional order and the inalienable rights of the human person (v. judgments no. 183 of 1973 and no. 170 of 1984) ".

Note
The judgment of 12 April 1989 n. 203 is remembered in many works of jurists and has been the focus of numerous discussions because it refers to an article of the Lateran Concordat of 1984 considered somewhat problematic. Similarly, this judgment stated, finding no precedent in its judgments, secularism as the supreme principle of the legal system. The statement made by the Court is not merely theoretical, but a clarification with respect to the actual legal situation. The Supreme Court states that the Italian legal system comprises, among other things, also of supreme principles, which take precedence over any other rule, also concordat or constitutional.

In addition, states that, among these supreme principles, there is secularism, which is placed in a position of superiority over all other rules.

The Court addresses two issues: in the first place makes it clear that, when we talk about secularism, we refer to a supreme principle of Italian law, namely, a rule that prevails both on the other laws of the legal system, both on constitutional rules or the related laws. The reference becomes explicit because the Court reiterates, in the award any, which this relationship is true both for the provisions of the Concordat, and also for those of international treaties, including the European ones. In the second place, the Court, when making explicit the top position occupied by the supreme principle of secularism, gives him one more feature for warranty with respect to the structure of the form of Italian State.

The Court, in fact, not only affirms the validity of secularism in the Italian system, but qualifies it as a profile that helps to outline the shape of democratic and republican State, as provided by the Constitution. This specific point of view can be seen in a paragraph of the judgment, when it says that: "The values combine with other items (7, 8 and 20 of the Constitution), to structure the supreme principle of the secular State, which is one of profiles of the form of State outlined in the Constitution of the italian Republic." We may be noted that the Court has expressly stated in the judgment a political and general vision of secularism, as the highest principle that becomes one of the profiles of republican form of State, according to italian Constitution. We note, however, that this is the only explicit indication given by the Court, which has not delivered in the other values that the principle of secularism contains in itself, leaving the way open to further discussion and possible interpretations.

The Court, in the light of secularism proclaimed as the highest principle of the legal system, reads the rules of the Concordat until reaching to say that the values of the religious culture, Catholicism in particular, are considered a basic element of the Italian context and to recognize them importance from the historical point of view, as to be inserted within the framework of the purposes of public schools. Reading the words of the judgement, we can get the impression that the Court considers the values and Catholic morality, coherentwith the characteristics of the secularity of the Italian Republic, as the historical experience of country and no elements of ethical and legal conflicts. The innovation of this judgement is an interpretation in which the constitutional judges merely analyze the contents of the concordat using existing words, with a meaning more marked.

Case Title
Case n. 13/1991

Parties
Sommani Letizia and others Vs. President of the Council of Ministers

Keywords
Education, Catholic religion, Secularism, State, Religious beliefs

Country
Italy

Court
Italian Constitutional Court

Description:

Facts
The reasons why are these doubts regarding the constitutionality of the rules applying, in the school context, the question hour of the Catholic religion are due to administrative regulations came into force in May 1989. In fact, just over a month later and under judgment 203/1989, the ministerial circular n. 188/1989 identifies what actually appears to be the "state of non-compulsory", for those who decide not to use the teaching of the Catholic religion. There is provided the opportunity to choose alternatively between:
a) educational activities training;
b) studies and / or individual research;
c) no activity.

The subsequent circular no. 189/1989 "clarifies that study and / or research individual referred to in subparagraph b) [...] are carried out by students with assistance of the teaching staff." While, contrary to what may result from an initial literal interpretation, is deemed that the expression "no activity" corresponds to the performance of "study and / or research without staff assistance". Consequently, the religion, although no longer in the teachings mandatory, is included, however, in the number of compulsory hours for students. Therefore, even those who do not wish to attend are obliged to stay in school choosing the third option.

The applicants, according to two proceedings under Article. 700 of the Code of Civil Procedure, demanded the declaration of illegitimacy of the school hours plan adopted in primary and secondary schools attended by their children, in so far as the teaching of religion was included on the list of compulsory hours, considering the applicants the inexistence an obligation for children to stay in school for such teaching.

Application
Based on these considerations, the magistrate of Florence, by order of 4 May 1990 (RO No. 477 of 1990), referring to Articles 2, 3, 19 and 97 of the Constitution, raises the question of the constitutionality of Article. 9, n. 2, of the law 25 March 1985 n. 121, and paragraph 5, letter b), n. 2, of its Additional Protocol, to the double negative discrimination resulting from the placement of the teaching of the Catholic religion in the ordinary class timetable for those who do not avail themselves of it, either because forced to remain inactive in the school during the teaching of the Catholic religion , both for the reduction of other programs for the temporal space reserved for the aforesaid teaching.

The inclusion of the teaching within the ordinary class timetable would result, for those who do not wish to attend, the obligation to stay in school, and - with particular regard to the elementary school - reduction in the number of hours available for normal activities teaching. The contested legislation - if so interpreted - would be, in the opinion of the court, damaging several areas:
1) Art. 2 for damage resulting in lifelong social-school, the free development of the personality of the child;
2) Art. 3 for discrimination among students;
3) Art. 19 for the violation of religious freedom, understood as freedom not to profess and practice any faith;
4) Art. 97, as well affect the good administration by keeping the students assigned to the school for educational purposes in "total inaction" and reduced - in some cases - even the scope of the teachings provided.

Government's Observations
The President of the Council of Ministers identifies two reasons due to which it would not be possible to admit the propounded illegitimacy question : first the Magistrate remitting not

taking a position regarding the interpretation of the contested provisions, it is not clear what is the relevance of the question in judgment in 'quo'; to this must be added that as the issue raised by the party being on the organization resulting from ministerial circulars, is under the jurisdiction of the administrative courts,so it would be lack of jurisdiction of the Magistrate remitting (who is under a civil jurisdiction).

The State Attorney has concluded for the inadmissibility of the matter that is as unfounded. In the first case it contends, first, the lack of relevance as it would require to the Court to express some kind of opinion about the scope of the legislation denounced (and irrelevant in the main proceedings) and it is argued, secondly, that the Magistrate remitting is, of course , without jurisdiction.

The Religious teaching, in the opinion of the Government, should be considered - according to the judgment no. 203 of 1989 - as an element for the realization of the purposes of the school, not different from other teachings. No obligation may be tolerated as a result of the decision to avail of religious education, so that persons who have decided to use them can not be held an hour more, and religion is considered a compulsory teaching like the others, coming to form that time considered overall need for education. The Attorney General concludes excluding that the ministerial circulars have, which the national court criticizes essentially, an impact on religious freedom.

Court decision

The court, after evaluating the exceptions, considers both surmountable. Regarding the first, declaring that the request is not the same considered and resolved in the judgment of 1989, but an instance that "seeks a broader identification of a concept of" state of non-obligation of the students "who do not avail themselves of 'teaching of the Catholic religion, with consequences on the legitimacy of the regime of non-discrimination introduced by the Administration of Education. in addition, the ministerial circulars are not subjected to the constitutionality proceedings, but the facts that they create, which invests the "state of non-obligation" and therefore an individual right for which "can not be contested the jurisdiction of the ordinary courts".

Stating its reasons, the Court must analyze the scope of the ministerial circular n. 188/1989 in the light of the principle established in the judgement n. 203/1989, whereby "the provision of other material as required for students who do not avail themselves of teaching would lead to a discrimination against them, because the proposal replaces the Catholic religion course. As had already been supported by the third section of the Lazio Regional Administrative Court in its Decision 617/1990, "if the provision of other compulsory teaching would be conditioning the exercise of constitutional freedom of religion [...], an option between a school discipline will be much more determinant (as teaching of the Catholic religion), on the one hand, and activities of educational content entirely absent, on the other hand".

Taking into account these considerations, the court raises the question if the "state of non-obligation "would have, among its contents, the possibility of moving away or be absent from the class." and resurfaces the question of the interpretation of the phrase "no activity". The judges of the Court considers necessary to evaluate the "finalist value of the "state of non-compulsory", to not make equivalents and alternative teaching of Catholic religion with more school activity, to not influence from the outer the individual consciousness and enjoyment of a constitutional right like freedom of religion." So, for Constitutional judges, the less effort or school performance of students who do not attend the course of religion can not influence the decisions of students choosing the Catholic religion. These students and their families take very seriously the decision which can not be affected by the offer of other courses. In fact, with the

proposal made by the State to the community of citizens of teaching the Catholic religion in schools, only tlhey can be answered yes or no, a positive or a negative choice. At this point, the freedom of religion is guaranteed: its exercise results in the affirmative or negative response. Finally, the various forms of school course presented to the free choice of the students no have any relation to freedom of religion. The "state of no-obligation" is used to separate the question of freedom of religion to a free and individual needs facing school organization.

In essence, the Court considers that if the administrative authority anticipates that, even after the decision not to make use of the teaching of the Catholic religion, it still derives a positive engagement (even if this involves only the stay in the school building), then the alternative would no longer be a "choice between a positive and a negative response" but between two positive choices. This approach aims to avoid the possibility of performing a conditioning, which belongs only to the school organization and not the inclination of the person towards the Catholic religion, guaranteed by the Agreement between church and state. The Court emphasizes, therefore, the separation of competences between the Concordat of 1984 and State law. The covenantal source, in fact, can only adjust the condition of those who voluntarily submit to it, but no have power against the students who have opted for the "state of non-obligation". From the result of choice emerges "the subset of those involved in the Concordat as regulation of relations between the state and "their" religion and the subset of those who refuse to recognize it, because they do not profess a confession." Due to the current school organization is undeniable that the "state of non-obligation" may include, among other possibilities, the option to leave or be absent from the school building.

Note
It is widely believed in legal doctrine that the Italian Constitutional Court with judgment n. 13/1991 (as in the case no. 203/1989) has set clear and incontrovertible principles on the question of religion teaching, but not solve all the problems related. Some doubts are not clarified, including those of constitutionality with reference to Article 97 of Italian Constitution.

More precisely, a first problem concerns the same amount of class time ("reduction of other educational activities for the timeframe reserved for the said teaching"). There is no indication from the judge allow to add dded the optional teaching of the Catholic religion, in addition to the normally scheduled hours (exceeding the upper limit) or the school administration need to insert this teaching within the normal school hours.

Another unsolved problem is the "position of the teaching of the Catholic religion in the ordinary class schedule." While it is permissible, according to the ministerial regulations, it can be inserted at any time of day or week, it is undeniable that it would be more coherent if it were placed at the beginning or at the end of the lessons.

Precisely these shortcomings and the fact, not the least, that the judgment is still of rejection, are the cause of the criticism gained in doctrine. Even the statements of judgment no. 203/1989 seemed to be able to effectively solve the problems about the hour of religion, but this ruling established only an interpretation of rejection which is binding only on the parties and its effects are limited. The pronunciation of 1991, that is almost an extension of the previous judgment and is intended to strengthen it, offers the same result: the rejection.

In this regard part of the doctrine has developed a series of theses, which support the binding nature of the judgments of rejection, as judicial precedent not only inter partes. Those lawyers, however, have always a lively awareness of the limited scope of these pronunciations. The reason is that the pronunciation of the Constitutional Court must still be put in concrete terms by the executive power. The adoption of an adverse judgment, therefore, may not indicate a

clear way of interpretation and does not remove the risk that the administration still prospects, with certain modifications, rules at variance with that established by the Court. In conclusion, the merits of the decision n. 13/1991 is making untouchable the principle of secularity of the State; however, leaves the discretion to the executive power, who in the past has not fully accepted the dictates of the Constitutional Judge.

Portugal

Case Title: Acórdão n.º 578/14, 28 of August of 2014

- Parties: the Representative of the Republic (*Representante da República*) for the Madeira Autonomous Region (*Região Autónoma da Madeira*)[1] v. the Legislative Assembly of the Madeira Autonomous Region (*Assembleia Legislativa da Região Autónoma da Madeira*)[2]

- Country: Portugal

- Court: Constitutional Court [*Tribunal Constitucional*]

- Description:

    - Application

This *a priori* (preventive) abstract review proceeding was brought by the Representative of the Republic for the Madeira Autonomous Region.

A norm contained in legislative act of the Legislative Assembly of the Madeira Autonomous Region, sent to the Representative of the Republic to sign as a *Decreto Legislativo Regional*[3] required that a parent or guardian of a student who did not want to receive any moral/religious education had to make an express declaration saying so. The first issue raised by the Representative of the Republic was that the Legislative Assembly of the Madeira Autonomous Region acted *ultra vires*. The legislative act should be considered unconstitutional, for disrespecting the legislative competence of the Parliament, because the regime in question concerned civil rights.

The second issue was that the norm also suffered from material unconstitutionality, because it was inconsistent with the principle of freedom of religion (acknowledged in Article 41.1 of the Constitution) and the guarantee of the separation of church and state – as well as Article 26 (3) of the Universal Declaration of Human Rights.

    - Facts

A norm contained in legislative act of the Legislative Assembly of the Madeira Autonomous Region, sent to the Representative of the Republic to sign as a *Decreto Legislativo Regional* said that in order for students not to attend 'moral and religious education activities' they needed an express declaration to that end from a parent or guardian, whether those activities involved classes in Catholic Moral and Religious Education or some other type of such education..

    - Parties observations

Non-applicable[4].

[1] According to article 278 (2) of the Constitution, the Representatives of the Republic in the Autonomous Regions can ask the Constitutional Court to *a priori* (preventive) review the constitutionality of any norm send to them for them to sign.

[2] In Portugal there are no parties to the procedures of abstract judicial review of the constitutionality of norms. See above, note 1, of case note on Acórdão n.º 423/87.

[3] *Decreto Legislativo Regional* or a Regional Legislative Decree is the form through which the Legislative Assemblies of the Portuguese Autonomous Regions can legislate.

[4] See, above, note 1.

- Government's Observations

No observations were made.

- Court decision

The Constitutional Court considered that the norm in question was enacted *ultra vires*, because it infringed the Assembly of the Republic's legislative competence (to legislation on constitutional civil rights), and that it was also unconstitutional for being in contradiction with the right to freedom of conscience, religion and form of worship, and the principle that public education must not be religious or faith-based.

The Constitutional Court noted that the competence to issue legislation on civil rights, among them the freedom of religion and its institutional corollaries, is reserved to the Assembly of the Republic. Its' competence encompasses all legislative regulation and not just the bases for, or general regime governing, a given domain.

The 2004 Constitutional Revision made some elements of the legislative competence of the Autonomous Regions broader and more flexible, albeit maintaining several limitations, such as the requirement that regional legislation cannot address matters which are legislative competence of the Government or the Parliament. Such matters necessarily include those that fall within either the absolute, or the partially exclusive, legislative competence of the Assembly of the Republic. The Court emphasised that the Constitution expressly prohibits any authorisation of the Autonomous Regions to legislate on matters regarding constitutional rights.

The innovative and restrictive content the Legislative Assembly of the Madeira Autonomous Region sought to introduce in this matter thus configured the existence of *ultra vires* act.

The issue here was not one of merely execution of previous legislation or the regulation of details of the freedom of religion and religious education at publically funded schools – subject that can be seen as being outside the scope of the Assembly of the Republic's legislative competence. The norm the Legislative Assembly of the Madeira Autonomous Region approved conflicted with both the state's symbolic positioning in relation to religion, and the very way in which a negative freedom – *in casu* the freedom not to receive religious education – is exercised.

The question of whether these activities specifically concerned Catholic Moral and Religious Education (EMRC) or any other type of such education was not considered to be at issue.

However, religious education at publically funded schools does primarily entail the academic subject 'EMRC'. The Court recalled that the 2004 Concordat between the Portuguese State and the Vatican subjects attendance at Catholic religious and moral classes at public non-higher education establishments to a positive declaration of will by the interested party.

The Court underlined that the freedom of religion is one of the personal rights, freedoms and guarantees and is expressly enshrined in the Constitution, which attaches a specific importance and degree of sensitivity to it. In addition to its negative dimension, the freedom of religion also requires the state to guarantee the conditions needed for the freedom to be exercised. This duty is particularly sensitive when it comes to the openness of publically funded schools to religious education. This is a manifestation that can trouble the principle of the separation between the state and churches, which is in turn linked to the principle that the state must be non-faith-based or neutral in religious matters. The latter principle applies to public education, which cannot have a

religious orientation, although the state can authorise the different religious faiths to teach their religion at public schools.

The Court emphasised the wide-ranging treatment given to religious freedom in international human rights law, referring specifically to the Universal Declaration of Human Rights, the International Covenant on Civic and Political Rights, the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the Charter of Fundamental Rights of the European Union (CFREU), the European Convention on Human Rights, and the Framework Convention for the Protection of National Minorities.

The Court also recalled that the topic of religious education at public schools can be seen from various perspectives, ranging from radical prohibition ("militant secularism") to compulsory, organised Catholic education funded and taught by the state.

In the present case the Court took the view that an obligation to expressly refuse activities linked to moral and religious education would mean obliging citizens to overtly state a desire which they might prefer to keep quiet and maintain strictly within the domain of their personal privacy. Any freedom not to do something – here, the negative aspect of the freedom of religion – is violated by the imposition of a positive facere as a condition for being able to enjoy that freedom. It may be permissible for the exercise of rights (the right to religion) to depend on taking some form of action (making a request or a declaration, etc.), but this is not true of the exercise of freedoms – a freedom not to do something, which consists of a freedom not to act – in relation to which any material requirement that conditions exercise of the freedom is unacceptable. As a negative freedom, the freedom of religion essentially consists of a freedom "not to do": no one is obliged to possess or profess a religion, and no one is obliged to receive religious education. By modelling non-access to religious education at public schools in the form of a requirement to provide a negative declaration, the regional legislator sought to introduce the right to refuse religious education into the legal system; however, failure to provide such a declaration would mean that that education would have become a compulsory subject.

The Constitutional Court also found that the norm before it was in breach of the constitutional principle of the non-faith-based or religious nature of public education.

The Court said that the entry into force of the 1976 Constitution represented a change in the direction taken in the relations between the state and the different churches. A number of norms in the 1940 Concordat were rendered out of date, including the article under which: 'The education given by the state at public schools shall be guided by the country's traditional moral and Christian principles. Consequently, Catholic religion and morality shall be taught at public elementary, complementary and middle schools to students whose parents or whoever acts in their stead have not requested exemption'.

The academic discipline Moral and Religious Education is currently subject to a range of legislative acts. Of particular importance is the Law governing the Bases of the Education System. In accordance with the provisions of the Constitution, this says the state cannot give itself the right to direct education and culture in accordance with any philosophical, aesthetic, political, ideological or religious directives, and coherently with this, that public education cannot be religious or faith-based.

The Court noted that the bases of the education system fall within the Assembly of the Republic's exclusive legislative competence, and that once those bases had been fixed by the

Assembly, the government had exercised its own legislative competence in the form of Executive Laws that were necessarily subordinated to the Law whose bases they sought to develop.

The Constitutional Court therefore found that the norm was also unconstitutional for these reasons.

The decision was unanimous.

Case Title: Acórdão n.º 174/93, 17 of February of 1993

- Parties: a group of 28 Members of the Parliment [*Deputados à Assembleia da República*][5] v. the government[6]
- Country: Portugal
- Court: Constitutional Court [*Tribunal Constitucional*]
- Description:
    - Application

The Constitutional Court was asked to declare a number of rules set out in two Government administrative regulations (*Portaria* no. 333/86 of 2 July, and *Portaria* no. 831/87 of 16 October) unconstitutional, in *a posteriori* (successive) abstract review proceedings, which can be resumed as:

a. The teaching of Catholic religion and morality as a school subject by primary school teachers themselves;
b. The extension of this subject to state higher education institutions;
c. Training for teachers in the teaching of Catholic religion and moral standards, the inclusion of such training among lecturers' duties and their appointment by the state on the proposal of the Catholic Church.

In the first case, the main problem was the fact that the primary school teachers, a public employee, were teaching the class of Catholic Religion and Morality in state-run schools. There was also the problem of what happened to the student who did not opted for the subject while their teacher was teaching of Catholic religion and morality.

The application sustains the unconstitutionality of these rules on the grounds of an alleged violation of several provisions of the Constitution, particularly the constitutional principle of the separation of church and state. The government was also accused of acting *ultra vires* because these regulations went beyond the administrative scope and infringed the legislative competence of the Parliament.

    - Facts

[5] According to article 281 (2) of the Constitution, a group of at least 23 MP's can ask the Constitutional Court to review the constitutionality of any norm.

[6] In Portugal there are no parties to the procedures of abstract judicial review of the constitutionality of norms. See above, note 1, of case note on Acórdão n.º 423/87.

Portaria no. 333/86 of 2 July, and *Portaria* no. 831/87 of 16 October, were administrative regulations, approved by the government, in implementation of the *Decreto-Lei nº 323/83*, regulating key aspects of the functioning of the subject of Catholic Religion and Morality in state-run schools. The constitutionality of this legislative act was assessed by the Court in the *Acórdão n.º 423/87*. The Court then concluded by the not unconstitutionality of any norm, with a single rule considered unconstitutional with universal binding force: the rule which required pupils (or their legal representatives) to make an express declaration to the effect that they did not wish to receive education in Catholic religion and morality.

These regulations established that the primary school teachers could teach the subject of Catholic Religion and Morality in state-run schools

- Parties observations

Non-applicable[7].

- Government's Observations

The government responded by defending that the administrative regulations did not infringe the constitutional legislative competence of the Parliament because there was no innovation, but a mere reproduction of previous norms of the *Decreto-Lei nº 323/83*. In this sense, as the Constitutional Court already stated in *Acórdão n.º 423/87*, those norms are not unconstitutional.

- Court decision

The Constitutional Court started by analyzing if the government was acting *ultra vires* when it approved the said administrative regulations – in relation to the legislative competence of the Parliament in matters of civil rights, where the freedom of religion is included. The conclusion was that the rules did not innovate in relation to the legal norms that

they were supposed to execute and, in consequence, were not unconstitutional by that reason.

The Court then went on to assess the alleged violation of the principle of the separation of state and church, which is enshrined in the Constitution as part of freedom of religion. According to the way the Court views this principle, the state must remain neutral in religious matters, it must not act in a sectarian manner, nor even give itself the right to organise education and culture along religious lines or to organise and support denominational state education. In other words, a democratic state governed by the rule of law may not impose a particular theory of humanity, the world and life on its citizens.

The principles of the separation of state and church and non-denominational state education must not, however, preclude all co-operation between the state and churches or other religious communities. The state even has a responsibility to engage in such co-operation, in view of the positive dimension of religious freedom and its duty to co-operate with parents in the education of their children, but must do so within the limits imposed by the principles of state religious neutrality and non-denominational character of state education.

Although Catholic religion and moral standards are taught as a school subject by primary school teachers themselves, this is not the state's responsibility, despite a symbolic value that might suggest otherwise. First, the subject is taught only by those teachers who agree and have been nominated by the church; second, such instruction is not wholly prohibited by the principle of

[7] See, above, note 2.

separation; finally, it does not require the teacher in question to impart a particular theory of humanity, the world and life based on the principles of the Christian faith in the teaching of other subjects.

The teaching of Catholic education, moral standards and religion, which is part of the teacher training syllabus, is an optional subject for which the Catholic Church is responsible, and its inclusion in the syllabus does not have to be approved by the relevant organs of each training college.

By 7 votes to 6, the Court decided that the legal rules at issue were not contrary to the Constitution.

Case Title: *Acórdão n.º 423/87*, of 27 October of 1987

- Parties: the President of the Parliament [*Presidente da Assembleia da República*] v. the government[8]
- Country: Portugal
- Court: Constitutional Court [*Tribunal Constitucional*]
- Description:
    - Application

In 1983, the President of the Parliament requested an abstract review of the constitutionality of the *Decreto-Lei*[9] no. 323/83, of 5 July, concerning the teaching of Catholic religion and morality in state schools.

According to the application, these legal rules could be considered inconsistent with several provisions of the Portuguese Constitution, including the principle that no one shall be privileged because of his/her religion (enshrined as part of the principle of equality in Article 13.2 of the Constitution), the principle of freedom of religion (acknowledged in Article 41.1 of the Constitution) and the guarantee of the separation of church and state, as well as the freedom of churches to organise and exercise their own ceremonies and worship as they see fit (set forth in Article 41.4 of the Constitution). This government's legislation could also be considered to be enacted *ultra vires*, because the legislative competence relating to certain fundamental rights (political and civil rights) belongs to the Parliament.

- Facts

The *Decreto-Lei* no. 323/83 regulated the Article XXI of the Concordat concluded between Portugal and the Holy See in 7 May 1940, which establish the teaching of Catholic religion and morality in all levels of state schools. This Article was confirmed after the democratic revolution of

[8] In Portugal the procedure of abstract judicial review of the constitutionality of norms is not adversarial. Hence, there are no parties to the procedures. The abstract review proceedings can be filed both *a priori* (preventive) or *a posteriori* (successive), i.e. before the bill has been ratified by the President of the Republic, or after the legislative procedure has been duly concluded and the budget act has entered into force. The *prior* review proceedings of laws can only be triggered by the President of the Republic. Posterior review proceedings may be filed by a larger number of entities: the President of the Parliament (*Assembleia da República*), the prime minister, the Ombudsman, the General Attorney or one-tenth of the Members of Parliament. If a breach of the rights of the autonomous regions is invoked, the Representatives of the Republic in the Azores and Madeira, the legislative regional assemblies, their presidents or one-tenth of their members, and the presidents of the regional governments can also file a request of *a posteriori* abstract review.

[9] *Decreto-Lei* or a Decree Law is the form through which the Portuguese government can legislate.

1974 by the Article II of the Additional Protocol to the Concordat, of 15 February 1975. Both, therefore, precede the coming into force of the current Portuguese Constitution, at 25 April 1976.

In this law, which executed and regulated the Concordat, a special treatment was given to the Catholic religion, which was justified by the "special significance of the catholic population" in Portugal.

The constitutionality of a similar regime had already been reviewed, in an *a priori* (preventive) proceeding, in 1982[10], in regard to the legislative competence of the Parliament, and was pronounced not unconstitutional. Despite this, the regime approved by the government was different.

- Parties observations

Non-applicable[11].

- Government's Observations

The government responded by defending that the *Decreto-Lei* no. 323/83 does not infringe the constitutional legislative competence of the Parliament because it did not innovate, merely reproducing norms of the Concordat and of previous Laws no 4/71, of 21th August, no 3/73, of 25th July, and of 65/79, of the 4th October. The government also sustained that the *Decreto-Lei* no. 323/83 did not infringe the principle of equality, freedom of religion, the non-denominational character of state schools, and the laicism of the State.

- Court decision

The Constitutional Court analyzed the evolution of the principle of the separation between church and state through the Portuguese Constitutions, as well as the rules regarding the teaching of catholic religion and morality since the entry into force of the Concordat of 1940. The Court also elaborated on the theory of the relations between the church and state, and religious freedom in other jurisdictions (the USA and Italy).

The Court started by stating that when the government enacted *Decreto-Lei* no. 323/83 it was not acting *ultra vires*. Despite the legislative competence of the Parliament in these matters, the Court found that it did not bar the government from legislate, as long as it did not innovate and the legislative act merely repeated a previous, non-unconstitutional, legislative act[12]. The Court found it to be the case, as the *Decreto-Lei* no. 323/83 reproduce rules of the Concordat and of a previous Law, *Lei n.º 4/71*, enacted by the Parliament (before the entry into force of the 1976 Constitution).

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[10] The Portuguese Constitutional Court was created by an amendment to the Portuguese Constitution in 1982, and its work started in 1983. Prior to this amendment, the review of constitutionality of the norms was the competence of the "Revolution Council" (*Conselho da Revolução*), which was composed by the President of the Republic, the chiefs of staff of the armed forces, the Prime Minister (if he is a member of the armed forces) and fourteen armed forces officers, and was entrusted with the guarantee of the "regular functioning of the democratic institutions, the respect for the Constitution and the spirit of the Portuguese Revoluction" (Article 142 of the original version of the Portuguese Constitution of 25 April 1976). While reviewing the constitutionality of laws, the "Revolution Council" was assisted by the Constitutional Commission (*Comissão Constitucional*), composed by four judges, named by the Supreme Court and the self-regulating body of the courts, and four "citizens of acknowledged merit" (named by the President of the Republic, the Parliament and the "Revolution Council"). The "Revolution Council" had already reviewed, in an *a priori* (preventive) proceeding, the *Decreto-Lei* no. 323/83, and determined that it was not unconstitutional by its *Resolução* n.º 96/82, of 17th june – which was preceded by an opinion of the Constitutional Commission (*Parecer* n.º 17/82).

[11] See, above, note 1.

[12] Cfr. Acórdão n.º 423/87, VII, 1 and 2.

The Court concluded that all but one of the rules submitted to it for review either restated previous legislative provisions, and thus did not represent a significant addition to, or modification of, the legal order, or did not belong to the parliament's sphere of legislative competence. The only exception was Article 2 (1) of the *Decreto-Lei* no. 323/83. While the previous Law established that the parents should declare if they wanted their children to attend the Catholic Religion and Morality classes or not, Article 2 (1) of the *Decreto-Lei* no. 323/83 established that if the parents did not expressly ask for their children to be dismissed from those classes, they were mandatory. *Decreto-Lei* no. 323/83, therefore, was considered to restrict the liberty of the parents, outside of the scope previously recognized by Parliamentary Law. That restriction was considered to be an *ultra vires* act of the government, hence unconstitutional.

The Court went on to asking if a difference of treatment of the Catholic Church, in relation to the other religions, resulting from the Concordat, was justifiable. The question is important in concern of the liberty of religion and equality. The Portuguese Constitution recognizes the principle of equality, regardless of the religion one professes (Articles 13(2) and 41(2) of the Constitution). A corollary of that are the principle that the state should be non-denominational and the freedom of the churches and religious groups – and the non-denominational character of public schooling. However, these principles were not considered to be inconsistent with the teaching of religious subjects by the different churches, in state-run schools. According to the Court, the freedom of religion has not only a negative dimension – of no-discrimination and of non-interference by the state – but also a positive dimension, in the sense that the state has a duty to ensure the practice of one's religion. In this sense, the Portuguese state has a duty to facilitate and enable the religious practices of students[13], without discrimination.

Taking into consideration the legal framework, including the Concordat, the Court concluded that this was a case of teaching by the Catholic Church of religion and morality in a state school and not the teaching by the state of a religion. In order to reach that conclusion, it considered that the fact of the subject of Catholic Religion and Morality was part of the school curricula was merely to give it seriousness and severity. The fact that its' teachers were paid by the state, because such sums were considered public support for the Catholic Church. Therefore, the legal regime was not unconstitutional.

The Court bore in mind that the majority of the Portuguese population had traditionally declared itself catholic. Hence, the possibility of the Catholic Church to teach religious classes in state-run schools was considered to be in accordance to its status. However, due to the principle of equality, an equivalent status should be recognized to the other religions and churches. This was considered a problem of unconstitutionality by omission of the general legal regime, and not a specific infringement of the principle of equality by the *Decreto-Lei* no. 323/83.

The only rule considered unconstitutional with universal binding force was, once again, the rule which required pupils (or their legal representatives) to make an express declaration to the effect that they did not wish to receive education in Catholic religion and morality. The freedom of religion is also a negative freedom, in the sense of a right not to act. The demand of state that the student must require not to attend Religion classes is inconsistent with that right.

The Court was divided in this issue. The decision that the legal rule whereby only Catholic religion and moral standards were taught was not unconstitutional was given with the casting vote of

[13] Cfr. Acórdão n.º 423/87, VIII, 2.

the President of the Court; the decision that the legal rules on the express declaration of exemption were unconstitutional was given by 6 votes to 4[14]. The decision was seven dissenting opinions.

[14] The Portuguese Constitutional Court has 13 Justices.

Somalia

Ideology and the development of education in Somalia (historical perspective)

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Introduction

Post-colonial Somalia has been characterized by unstable state save for period between 1969 and 1990. The uneasy relation between clans was responsible for the fragility of the first post-colonial government between 1960 and 1969 when the military seized power. Military rule soon turned into dictatorship guided by socialist ideology. Even though socialism was dropped after the Ogaden war with Ethiopia in 1978, its impact on education was far reaching. The end of Siyad Barre's rule in 1991 and the civil war that followed left Somalia divided into three namely; Secessionist Somaliland with its capital at Hargeisa, semi-autonomous Puntiland with its capital at Garowe, and Somalia with its capital at Mogadishu[1]. Somalia (Mogadishu) has been stateless since 1991 and has been the scene violence both inter-clan and inter-religious. The weakened of clan power in 2005 led to the rise of Islamic extremist ideology[2]. How has been the right to education affected by these two ideologies?

This study looks at how these two ideological developments have shaped the right to education in post-colonial Somalia. Both ideologies were developed in response to disunity caused by clan affiliations but they have had different effects on education[3].

Colonial period

Somalia had a very unstable and divided colonial rule. The north (secessionist Somaliland) was under British colonial while the South was under Italian colonial rule. The two world wars led to several change of hands between colonial masters. Although colonial experiences had many similarities, there were also marked differences. Formal education was introduced by colonial rulers and their priorities determined the content and accessibility. The British in the north and Italian in the south pursued different educational policies. The Italian-run schools provided technical training in agriculture, commerce, maritime studies, and aviation, while the British schools trained young men for administrative and technical positions. (Putman & Noor, 1993) It is surprising that there is no noted legal protest against colonial education in society that already had established **Madrassa**[4] system.

[1] Somalia only covers the central and southern parts of the former pre-war Somalia. This area has suffered the worst of the civil war, clan divisions, total state collapse, and its also where Islamic extremists groups have control.
[2] The failure of clan leaders to provide security, paved way for Islamic courts which eventually split into various extremists groups. These include; al-Shabab, Hisb Islam, Ithad, Istslah, Ahli Suna wa Jama, Takfir, Damjadid, Salaf Qadim, and Salaf Jadid
[3] Somalis are fiercely loyal to their clans and clan divisions have been largely responsible for the collapse of two post-colonial governments
[4] Madrassa is an Arabic word for school but in many East Africa Muslim communities it is used to mean schools offering Islamic instructions in Arabic. It was common in many Muslim societies to oppose colonial education as an alternative to Madrasssa education.

The post-colonial period before the civil war (1960-1991)

Somalia post-colonial period can be divided into two; (a) the first period from 1960 to 1991 when Somalia was still united under one central government. (b) the second period from 1991 to today[5]. The importance of secular education in development and emancipation was voiced in the nationalistic movements after the Second World War. However there was no clear direction on the way forward. The first post-colonial government was dominated by clan rivalry leading to remarkable inefficiency in all sectors.[6] Even though by that time the importance of developing Somali script had been echoed, no tangible steps were made towards that direction[7].

The Socialist revolution and impact on education (1969-1991)

In 1969, a new government through a military coup came into power. The new governing body, the Supreme Revolutionary Council (SRC), named Siad Barre as the president. Closely allied with the Soviet Union, the new regime adopted as its creed "scientific socialism," based on three elements: community development through self reliance, a variant of socialism based on Marxist principles, and Islam. (Putman & Noor, 1993). Education was made free and compulsory at all levels.

Writing Somali Language

In 1972, a Somali script based on the Roman alphabets was adopted. The use of Latin script for writing Somali and its subsequent use as the medium of instruction was a breakthrough and its regarded indisputably a national development landmark. The writing of the Somali language coupled with a mass literacy campaign in the rural areas led to a surge in literacy levels from 5% to 55% in just three years while enrollment of girls jumped from mere 20 % to 40%. The revolution further improved opportunities for women giving them more freedom to become educated, to work, and to travel.

The major purpose of massive literacy campaigns could be summarized as follows:

1. Community development,
2. National unity by promoting equality between gender and also between clans

Even though Siad Barre and his ideology are long gone, the remarkable contributions on the Somali script and girl education are still visible. These developments have been a major target of violent extremists who have attacked schools and the ministry of education building. There has also been revival of madrassa education especially in rural areas and areas under the control of militant groups but they have not managed to totally reverse everything.

Education in Somalia today

The long period of dictatorship before 1991 and statelessness that followed after 1991 did not and has not allowed a functional judiciary or the culture of rule of law to exist. As a result there are no

[5] As already indicated the civil war left Somalia divided into three entities with South-central having no government.

[6] There were two colonial masters, northern Somalia (now Somaliland) got Independence from Britain while Southern Somalia (Puntiland and Mogadishu) got independence from Italy. The two combined to form a single Independent country in 1960. There are four major clans that were competing for power namely; Isaak, Dir, Darood, and Hawiye with many sub-clans.

[7] Even though Arabic writing had been in Somalia for a long time, Somali did not have written language.

landmark or even individual cases to refer to as far as education rights are concerned. Understanding Somalia situation leaves us no option but to consider the ideologies that have shaped the right to education.

Today there is atmosphere of privatization of most aspects of Somali life and education has been equally hit. There is no regulation at all and each stakeholder gives education depending of his ideological and economic interests. Madrassa schools are still important given the value Somalis attach to Islamic religion. Important as they are however, their services are not regulated. The curriculum, duration and all that goes on depend largely on Macalin dugsi [madrasa teacher]. In many areas controlled by militant Islamic groups[8] or where their long arm of terror is feared Madrassa schools are influenced by their interpretations[9]. Subjects like music and sports are not taught even in upper levels because they are western and unIslamic. Though there is no discrimination based on clans, that of gender is encouraged[10]. This privatization continues through to upper levels that is; elementary, intermediate and secondary schools[11]. Accessibility is further affected by fees payment. Most Madrassa schools in rural areas charge five US Dollars per month (5$) while secondary schools charges fifteen US Dollar (15$) which is not affordable to many parents.

Conclusion

In the above discussion, an attempt has been made to show how education rights in absence of court decisions have been shaped by ideologies with different results. Both ideologies came up to diffuse clan influence in the Somali society yet that influence has stubbornly refused to go away. Socialism backed by state power managed to greatly improve literacy levels and equality both across clan and gender. On the other hand Islamism backed by lawlessness has tried to negate some of these rights. At the moment the central government backed by international forces is taking shape, but it will take much long before real state integration and rule of law are realized.

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[8] Although al-Shabab is the most known, in reality there are many militant Islamic groups with an unstable relations

[9] Madrassa schools only teach: Quran recitation and memorization, al-Talbiya (Islamic ethics) and Arabic language which take five to six years. Music and Sports are not taught since they are considered western and unIslamic not even the national anthem. In al-Shabab controlled areas Children are taught Jihad and Anashiida (Arab Children Music about Islam). More on al-Shabab can be found in Roland Marchal (2011) THE RISE OF A JIHADI MOVEMENT IN A COUNTRY AT WAR.

[10] Since girls are considered to develop into mothers/housewives, most don't continue beyond Madrassa. It should be noted that most Somali girls get married between 14 and 16 years of age shortly after completing Madrassa education. This is the norm even areas outside the Islamists control.

[11] For example schools choose their own medium of instruction in elementary and secondary schools which may be Somali or Arabic language. Some urban schools may also add on English as a foreign language. The most enduring subject being al-Talbiya (Islamic ethics) which is taught throughout all levels. There are three different private companies which organize 'National Exams' at intermediate and secondary level and it is up the school administration to choose.

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South Africa

LANDMARK DECISIONS ON "RELIGIOUS, PHILOSOPHICAL AND IDEOLOGICAL RIGHTS IN EDUCATION": SOUTH AFRICA

Georgia du Plessis*

1. Case Title

MEC for Education, Kwazulu-Natal, and Others v Pillay (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007).

2. Parties

MEC for Education: Kwazulu-Natal: First Applicant
Thulani Cele: School Liaison Officer: Second Applicant
Anne Martin: Principal of Durban Girls' High School: Third Applicant
Fiona Knight – Chairperson of the Governing Body of Durban Girls' High School: Fourth Applicant

VERSUS

Navaneethum Pillay: Respondent
Governing Body Foundation: First Amicus Curiae
Natal Tamil Vedic Society Trust: Second Amicus Curiae
Freedom of Expression Institute: Third Amicus Curiae

3. Keywords

Religious Freedom, Culture, Reasonable Accommodation and Education

4. Region – country

Country: South Africa
Province: Kwazulu-Natal

5. Court

Constitutional Court of South Africa

6. Description:

6.1 Facts of the case

The case of *MEC for Education, Kwazulu-Natal, and Others v Pillay* (hereinafter referred to as the *Pillay*-case) directly concerns the place of religious and cultural expression in public schools.[1] Sunali

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Pillay (Sunali) was a learner at Durban Girls High School (DGHS).[2] Upon her admission to the school, her mother signed a declaration in which she agreed to ensure that Sunali complied with the Code of Conduct of the School.[3]

During the school holidays, Sunali's mother (Ms Pillay) gave Sunali permission to pierce her nose and insert a small gold nose stud. Upon her return to school, she was informed that she was not allowed to wear the nose stud as it was a contravention of the Code of Conduct of the School[4].[5] Sunali refused to remove the nose stud.[6] The School then requested Sunali's mother to write a letter motivating why Sunali should be allowed to continue to wear the stud. Ms Pillay explained that Sunali came from a South Indian family that intends to maintain cultural identity by upholding the traditions of the women before them. The nose stud was part of a family tradition (4000 to 5000 years old) that entailed that a young woman's nose was pierced and a stud inserted when she reached physical maturity. This was an indication that she had become eligible for marriage. Today the practice is meant to honour daughters as responsible young adults.[7] As part of the ritual, a prayer is performed and her nose is pierced on the left side for the insertion of the nose stud. The ritual also serves the purpose of endowing daughters with jewellery since a woman's dowry in patriarchal societies went to her husband and all she could claim as her own was her jewellery.[8] Ms Pillay made it clear that the wearing of the nose stud was not for fashion purposes but rather for cultural reasons.[9]

After a meeting with the Governing Body of the School and upon consultation with recognised experts in the field of human rights and Hindu tradition, the School decided not to permit Sunali to wear the nose stud.[10] Although the School has given exemptions to the Code of Conduct based on religion in the past, the School stated that, in the case of Sunali, the nose stud was worn as a personal choice and tradition and not for religious reasons.[11] Dr Vishram Rambilass, called by the School as an expert in Hindu religion, indicated that the practice in question is an expression of Hindu culture. It was not obligatory, nor was it a religious rite. It was also difficult to determine exactly what constitutes Hinduism, since there are various schools of Hinduism that have developed differently.[12]

No disciplinary hearing took place and Ms Pillay took the matter to the Equality Court to obtain an interim order against the school.[13]

6.2 Application

a) Equality Court

The court of first instance was the Equality Court as this case concerns very important questions regarding the nature of discrimination under the provisions of the Promotion of Equality and

[1] *MEC for Education, Kwazulu-Natal, and Others v Pillay*: paragraph 1.
[2] Paragraph 3.
[3] Paragraph 4.
[4] The Code of Conducted stated that only ear-rings were allowed and they had to be plain round studs and only one in each ear at the same level. No other jewellery was allowed, except a wrist watch or Medic-Alert discs.
[5] Paragraph 5.
[6] Paragraph 6.
[7] Paragraph 7.
[8] Paragraph 11.
[9] Paragraph 7.
[10] Paragraph 8.
[11] Paragraph 12.
[12] Paragraph 13.
[13] Paragraph 10.

Prevention of Unfair Discrimination Act 5 of 2000 (the Equality Act).[14] The issue before the Equality Court was whether the School's refusal to permit the wearing of the stud at school was an act of unfair discrimination in terms of the Equality Act.[15] The Equality Court determined that a case of discrimination had been made out but that the discrimination was not unfair since the purpose of the Code of Conduct of the School was to promote uniformity and acceptable convention amongst the learners and to prevent a disorderly school environment.[16]

This decision by the Equality Court was taken on appeal by Ms Pillay to the Pietermaritzburg High Court.

b) High Court

The High Court held that the conduct of the School was discriminatory against Sunali and also unfair in terms of the Equality Act. It was held that South African society prohibits both direct and indirect discrimination and aims to "eliminate entrenched inequalities".[17] Withholding from her the benefit of enjoying her culture or religion, constituted indirect discrimination since both religion and culture were equally protected under the Equality Act and the Constitution.[18] In reaching this conclusion, the High Court noted that Sunali was part of a group that had been historically discriminated against and prohibiting Sunali to wear the stud only served to prolong that discrimination. The desire to maintain discipline in the School was not an acceptable reason for the prohibition as there was no evidence that the wearing of a nose stud by one student had a disruptive effect on the School. The High Court found that there were less restrictive means to achieve school discipline and other school objectives.[19]

The Department contended that the High Court erred in characterising the matter as an equality claim within the contemplation of the Equality Act and the matter was taken to the Constitutional Court of South Africa.[20]

c) Constitutional Court

As already noted, this matter raised vital questions about the extent of protection afforded to cultural and religious rights in the school setting and possibly beyond. It had a significant practical effect on the School and all other schools in the country.[21]

[14] Paragraph 1. The Equality Act gives effect to the right to equality as provided for in section 9 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as "the Constitution"). Section 9(4) of the Constitution explicitly states that special legislation should be created to give effect to the right to equality, hence the Equality Act. Section 9 states: "1. Everyone is equal before the law and has the right to equal protection and benefit of the law. 2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. 3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. 4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. 5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."
[15] Paragraph 11.
[16] Paragraph 14.
[17] Paragraph 15.
[18] Paragraph 15.
[19] Paragraph 17.
[20] Paragraph 25.
[21] Paragraph 35.

The Constitutional Court started with a proper exposition of the concept of discrimination under the Equality Act and the Constitution.[22] Unfair discrimination, by both the State and private parties, including on the grounds of both religion and culture, is specifically prohibited by sections 9(3) and (4) of the Constitution, which read:

> "(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination."

The Equality Act is clearly the legislation contemplated in section 9(4) and gives further content to the prohibition on unfair discrimination.[15] Section 6 of the Equality Act reiterates the Constitution's prohibition of unfair discrimination by both the State and private parties on the same grounds including, religion and culture.[16]

In order to determine whether unfair discrimination existed, the Constitutional Court had to consider several issues.

Culture v Religion

Religion and culture is not only protected by section 9 and equality within the South African Constitution. Sections 15[23] and 30[24] of the Constitution also protect religion and culture respectively.

The Court first mentioned that it is important to keep culture and religion distinct since they are protected by different provisions within the Constitution and the Constitution does not equate them. Without providing a definition, religion is ordinarily concerned with personal faith and belief, while culture relates to traditions and beliefs developed by a community. However, the Court also stated that, often there is a great deal of overlap between the two and that they do not develop in a vacuum. Therefore, it is possible for a belief or practice to be purely religious or purely cultural but it is equally possible for a practice to be both religious and cultural.[25] It can be very tempting to force grounds of discrimination into neatly self-contained categories, but this should be resisted. This is particularly so in cases where the evidence suggests that the borders between culture and religion are malleable such as in the South Indian Tamil Hindu religion and culture. Although they can sometimes be the same and difficult to separate, culture and religion remain very different forms of human association and individual identity, and often inform peoples' lives in very different ways.[26]

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[22] Paragraph 39.

[23] Section 15 of the Constitution of the Republic of South Africa states that: "(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion. (2) Religious observances may be conducted at state or state-aided institutions, provided that— (a) those observances follow rules made by the appropriate public authorities; (b) they are conducted on an equitable basis; and (c) attendance at them is free and voluntary. (3) (a) This section does not prevent legislation recognising— (i) marriages concluded under any tradition, or a system of religious, personal or family law; or (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion. (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution."

[24] "Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights."

[25] Paragraph 47.

[26] Paragraph 60.

> "But in this matter, culture and religion sing with the same voice and it is necessary to understand the nose stud in that light – as an expression of both religion and culture."[27]

Judge O'Regan wrote the minority judgment for this case and, contrary to the majority judgment, emphasised the importance of distinguishing between religion and culture at all times. O'Regan mentioned that, although it is not easy to have a sharp dividing line between the two, it is clear that the South African Constitution recognises that culture is not the same as religion, and should not always be treated as if it is. Religion is dealt with without mention of culture in section 15, which entrenches the right to freedom of belief and conscience. By associating religion with belief and conscience, which involve an individual's state of mind, religion is understood in an individualist sense: a set of beliefs that an individual may hold regardless of the beliefs of others. The exclusion of culture from section 15 suggests that culture is different.[28]

> "The inclusion of culture in section 30 and section 31 makes it clear that by and large culture as conceived in our Constitution, involves associative practices and not individual beliefs. So, section 31 speaks of the right of persons who are members of religious, linguistic or cultural communities "with other members of that community" to enjoy their culture."[29]

However, although such a distinction is important and culture and religion have different consequences attached to them, the Constitutional Court did decide that it is equally possible for a practice to be both religious and cultural and treated this case as such. Irrespective of the fact that Judge O'Regan advocated for a clear separation between culture and religion in the (non-binding) minority judgment, Judge Langa clearly argued (in the majority judgment) what both religion and culture have in common for an individual identity ("…in this matter, culture and religion sing with the same voice…"[30]).

The question was then asked whether Sunali was part of an identifiable religion or culture or both. In this case however, Sunali was clearly part of the South Indian, Tamil and Hindu groups defined by a combination of religion, language, geographical origin, ethnicity and artistic tradition and the Court therefore decided that the practice of the nose stud qualified as both religion and culture.

Centrality of the practice

In order for the practice to be reasonably accommodated, it has to be a central practice for the adherent.

The School argued that the nose stud was not central to Sunali's religion or culture, but that it was only an optional practice.[31] The Court then stated that the centrality of a practice or belief must play a role in determining how far another party, such as a school, must go to accommodate that belief. Reasonable accommodation is an exercise of proportionality. The difficult question is how one is to determine centrality. Should it be the centrality of the practice or belief to the community or to the individual?[32]

[27] Paragraph 60.
[28] Paragraph 143.
[29] Paragraph 144.
[30] Paragraph 60.
[31] Paragraph 86.
[32] Paragraph 86.

Subjective v Objective importance of the practice / voluntary v mandatory religious practices

The Court had to determine whether it was necessary for the practice to be objectively important to the religion in order to be protected, or whether mere subjective importance to the adherent (Sunali) was sufficient. Should a claim that a practice has religious or cultural significance be determined subjectively or objectively?[33] The Court held that centrality must be judged with reference only to how important the belief or practice is to the claimant's religious or cultural identity – hence subjectively. Objective centrality of the practice at large can serve as evidence to the subjective centrality of the practice, but only in so far as it helps to answer the primary inquiry of subjective centrality.[34]

In the minority judgment, Judge O'Regan raised anxiety that an approach to cultural rights which is based on predominantly subjective perceptions of cultural practices may undervalue the need for solidarity between different communities in society. The Preamble of the South African Constitution provides for "Unity in Diversity" and not a society of atomised communities. According to O'Regan there needs to be "pluralistic solidarity" between different racial, cultural, religious and linguistic communities.[35]

Regardless of this minority judgment, the Constitutional Court finally decided that cultural convictions or practices may be as strongly held and as important to those who hold them as religious beliefs. Community is fundamentally important to individual identity. Cultural identity is a fundamental part of a person's identity because it flows from belonging to a community and not from a personal choice or achievement. It is also more than mere association and includes participation and expression of community practices and traditions and hence, human dignity. "Dignity and identity are inseparably linked as one's sense of self-worth is defined by one's identity".[36] Therefore, the identity that one holds from community practices, may be just as important to the human dignity of a person than any other religious practice. Cultural practices therefore have great subjective value for the human dignity of an individual person.

The Constitutional Court also decided that, although cultures are associative, they are not monolithic. The practices and beliefs of an individual's cultural identity will differ from person to person within a culture. Although people find their cultural identity in different places, the importance of that identity to their human dignity and being in the world, remains the same. "There is a danger of falling into an antiquated mode of understanding culture as a single unified entity that can be studied and defined from outside." Cultures are living and contested formations.[37]

The Court also asked the question whether voluntary practices are any less a part of a person's identity or do they affect human dignity any less seriously because they are not mandatory or objectively required by the religion.[38]

Based on these arguments the Court decided that it was the subjective importance of the cultural or religious practice that was important. Evidence showed that the nose stud was not a mandatory tenet of Sunali's religion or culture and it was admitted as such. The nose stud is a voluntary expression of the South Indian Tamil Hindu culture and Hindu religion.[39] It was therefore not objectively obligatory, but rather a subjective voluntary decision to wear it.

[33] Paragraph 51.
[34] Paragraph 88.
[35] Paragraph 155.
[36] Paragraph 53.
[37] Paragraph 54.
[38] Paragraph 62.
[39] Paragraph 60.

It was thus decided that the Equality Act and the Constitution apply to voluntary religious and cultural practices.

Two results thus emanated from this decision:

1. The importance of the practice was determined by the subjective views of the adherent – i.e. how central was the cultural or religious practice to the individual as determined subjectively by the individual himself or herself. The importance or centrality of the practice was not to be determined by the doctrine or rules of the religion or culture itself. The Court stated that it should not involve itself in determining the objective centrality of practices as this will cause the Court to substitute the judgment of the adherent regarding the meaning of a practice with that of its own.[40]
2. If the practice was sufficiently subjectively central or important to the adherent, it is irrelevant whether it is a voluntary or mandatory requirement of the religion. In fact the Court held that a necessary element of freedom and dignity was the entitlement to respect for unique ends the individual pursues. This includes the voluntary religious and cultural practices in which we participate. "That we choose voluntarily rather than through a feeling of obligation only enhances the significance of a practice to our autonomy, our identity and our dignity."[41] The protection of voluntary and obligatory practices also conforms to the Constitution's commitment to affirming diversity. Differentiating between mandatory and voluntary practices does not celebrate or affirm diversity, it simply permits it.[42]
3. The protection of voluntary practices applies equally to culture and religion.[43]

Reasonable Accommodation

The application of the concept of reasonable accommodation to culture and religion was first introduced in the *Pillay*-case.

Reasonable accommodation is a known concept in South African Law and usually used concerning disability in the workplace. The Employment Equity Act, 55 of 1998 defines reasonable accommodation as any modification or adjustment to a job or the working environment that will enable a person from a designated group to have access to or participate or advance in employment. Reasonable accommodation is made an affirmative action measure for designated groups.[44]

At its core, reasonable accommodation means that the State, an employer, a school or the community must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It is to ensure that people are not expelled to the margins of society because they cannot conform to certain social norms.[45] The question is not whether such positive steps should be taken, but rather how far the community must be required to go to accommodate. Reasonable accommodation is, in a sense, an exercise in proportionality that will depend intimately on the facts.[46]

The application of the principle of reasonable accommodation takes into account two important factors: 1. Reasonable accommodation is most appropriate where discrimination arises from a rule or practice that is neutral on its face and 2. The principle is appropriate in specific localised contexts,

[40] Paragraph 87.
[41] Paragraph 64.
[42] Paragraph 65.
[43] Paragraph 66.
[44] Paragraph 72.
[45] Paragraph 73.
[46] Paragraph 76.

such as an individual workplace or school, where a reasonable balance between conflicting interests may more easily be struck.[47]

The *Pillay*-case clearly involved a rule or practice (the wearing of a uniform in the Code of Conduct) that seemed neutral on its face, but had a marginalizing effect and also occurred in a localized context, such as a school.

The School however argued against reasonable accommodation by stating that allowing Sunali to wear the nose stud would place an undue burden on the school since it would negatively impact on the discipline in the school and as a result the quality of the education they provide.[48] The Court then asked whether there are less restrictive means to achieve the purpose of discipline and whether it is a legitimate purpose.[49] The Court mentioned that both discipline and education are legitimate goals but that care must be taken not to state the School's interest too broadly. Sunali's interest in wearing her nose stud could never outweigh the general importance of ensuring discipline in schools but no evidence exists that the wearing of the nose stud will negatively influence education in the school or discipline in the school.[50]

The School further argued that allowing the nose stud will allow for a "parade of horribles" or a slippery slope scenario. The fear was that many more learners will come to school with dreadlocks, body piercings, tattoos and loincloths. The Court stated that such an argument has no merit since the judgment only applies to *bona fide* religious and cultural practices and the possibility of abuse should not affect the rights of those persons who sincerely hold some beliefs.[51] It was also stated that if this case gives those courage who were hitherto afraid to express their religions or their cultures, then that is something to be celebrated.[52]

> As a general rule, the more learners feel free to express their religions and cultures in school, the closer we will come to the society envisaged in the Constitution. The display of religion and culture in public is not a "parade of horribles" but a pageant of diversity which will enrich our schools and in turn our country. Thirdly, acceptance of one practice does not require the School to permit all practices. If accommodating a particular practice would impose an unreasonable burden on the School, it may refuse to permit it.[53]

The Court also explained that using reasonable accommodation to accommodate legitimate cases of religious or cultural expression does not have the effect of abolishing school uniforms, but only requires that, as a general rule, schools make exemptions for sincerely held religious and cultural beliefs and practices and that there should be no blanket distinction between religion and culture.[54]

7. Conclusion

There were a few key decisions in this case causing it to be a remarkable landmark decision regarding religious and ideological rights in education.

[47] Paragraph 78.
[48] Paragraph 96.
[49] Paragraph 97.
[50] Paragraph 98 and 101.
[51] Paragraph 107.
[52] Paragraph 107.
[53] Paragraph 107.
[54] Paragraph 114.

The first decision involved the fact that, although religion and culture should be treated differently and although they have different consequences, they can also sometimes coincide and a clear distinction between the two is not always possible. They both have common roles to play within the determination of the individual's identity.

Secondly, it was decided that the practice has to be a central practice to the adherent but that such a central practice was not to be determined objectively (how important the practice is to the religion or culture) but rather subjectively (how important the practice is to the individual adherent). Objective importance can play an evidentiary role, but only in so far as it supports the case of the individual.

Thirdly, the subjective importance of the practice does not only apply to religious practices but also to cultural practices since the Court decided that cultural practices are just as important to human dignity and identity formation than religious practices.

Fourthly, not only mandatory religious or cultural practices should be accommodated, but also voluntary ones. The obligatory nature of the practice had no effect on whether it is subjectively important to the individual.

Finally, the most important contribution of this case was the use of the principle of reasonable accommodation to allow for religious and cultural practices within education. This principle places an obligation on schools to reasonably accommodate religious and cultural practices to the extent that it does not place an undue burden on the school. Such an undue burden has to be determined on a case-by-case basis.

Uganda

Draft Paper on religious freedom in educational institutional in ; a quest for legal redress

Prepared by: Kasumba Yusuf

Case Title: **Constitutional Appeal No.2 Of 2004**

Parties: The parties included; Dimanche Sharon, Mokera Gilphine Nansereko Luck as the Appellants **AND** Makerere University As Respondent. This case was an Appeal against the verdict of the Constitutional Court on the Constitutional Petition No 1 of 2003.

Region: **The case was heard The Republic Of Uganda**

Court: The case waas handled and ruling made In The Supreme Court Of Uganda at Mengo, in Kampala in August2006 . The case was presided over by Chief Justice of Uganda Benjamin Odoki assisted by Coram Justices, Oder, Tsekooko, Karokora, J.N. Mulenga, George Kanyeihamba and Bart Katureebe.

Keywords: Education, Seventh Day Adventist (SDA) Church, Religious Freedom, Rights Infringement, Contravention of Constitutional Provisions, Petition, Appeal, Constitutionality, Religious Persecution, Religious Marginalisation, Public Utility (University), Damages, Constitutional Rights, Religion, Mandatory Policies

Description:

This was a high profile case that challenged the constitutionaslity of a secular policy framework of the Oldest and biggest Public University and its insensitivity the the respect for religious freedoms beliefs and rights of Ugandans who subscribe to different religious affiliations. It also sought to challenge the applicability of the constitutional provisions of the 1995 Uganda Constitution regarding freedom of worship, religion and equitable guaranteeing of Minority rights. The case case, in addition to invoking contravention of constitutions provisions, sought to reveal how the Seventh Day Adventist students were marginalised and persecuted under the provisions of the rules, regulations and policies of a public University as well as the legal enactments that relate to public Universities in Uganda (in particular University and Other Tertiary Institutions Act (Act 7 of 2001).

Background To The Case and the Application

In 2003, a group of Makerere University students, who subscribe to the beliefs and tenets of the Seventh Day Adventist Church, petitioned the Constitutional Court of the Republic of Uganda, challenging the constitutionality of the Makerere University (the respondent) Policy of organizing scheduled lectures, tests and examinations on Saturdays, a day regarded as Sabbath Day. The application was handled by the Constitutional Court as **Constitutional Cause No. 1 of 2003 (also known as Dimanche Sharon and Others v Makerere University (Constitutional Cause No. 1 of 2003) This** petition was made in respect of declarations under article 137 of the constitution of the republic of Uganda, 1995.

According to the teachings and beliefs of the Seventh Day Adventist church, the Sabbath Day is considered a holy day dedicated to resting and worshiping, free of any gainful or material work. In the beliefs and conviction of the appellants attending lectures, doing course work assignments, sitting tests and examinations, is included in the fold of work, which is an abomination.

The petition was supported by affidavits of the three petitioners namely Dimanche Sharon, , Luck Nansereko Moreika Gilphine and supplemented by affidavit by Dr. John B. Kakembo, Fred Lulinaki and Deborah Nassanga and others.

The application entailed that Makerere University policies and regulations made under the authority of the University and Other Tertiary Institutions Act (Act 7 of 2001), which inter alia stipulate that students, irrespective of their religious affiliations are mandated to attend lectures, sit tests, examinations and attend other functions on any day of the week , is inconsistent with and in contravenes Articles: 20, 29 (1) (c), 30 and 37 of the Constitution of Uganda, and therefore infringes on their constitutional right enshrined in the constitution of Uganda and well as the UDHR. The principle of the petition was that freedoms must be enjoyed and guaranteed with absence of coercion and constraint.

The petitioners prayed for a court order awarding them damages for infringement of their constitutional rights and costs of the petition since they had missed university programmes conducted on Sabbath day Saturdays including attending lectures and sitting tests and examinations, This had in turn resulted in their inability to complete their courses on time and or and even in some cases abandoning the courses altogether

However, on 24th September 2003, the petition was dismissed by the constitutional Court presided over by the Deputy Chief Justice, Leticia Mukasa Kikonyogo ,Justice A.E.N. Mpagi-Bahigeine, JA , Hon. Justice J.P. Berko JA, Hon. Justice A. Twinomujuni JA and Justice C. N. B. Kitumba JA. The Appellants and Respondent were order bear their own costs.

Dissatisfied with the ruling of the Constitutional Court, the appellants, appealed to the Supreme Court, challenging the verdict of the constitutional Court and seeking redress. The appeal was handled as Constitutional Appeal No.2 Of 2004

Facts

Makerere University was established in 1922 as a public technical school whose major purpose was to train and create cheap skilled and semi-skilled labour to support the colonial administration and Christian Missionary institutions. Initially, Makerere was to train African artisans. Its programmes were later expanded to include with courses to train teachers, medical personnel, engineering technicians, surveyors and agricultural assistants. However, according to Sicherman (2008:13) Makerere was to serve an implicit purpose of controlling education to forestall the dangers of independent thought. Then, in 1950, Makerere was transformed into a University college affiliated to the University of London. In1963, Makerere was fused into the University of East Africa as one the University colleges in addition to one in Dar es Salaam and another in Nairobi. It was later granted an autonomous University staff in 1970 following the enactment of the Makerere University Act of 1970. Following liberalization programmes embarked on by the NRM Government, The University saw rapid expand in volume of expansion was not matched with the expansion of physical facilities or even academic staff. It was for this reason that academic programmes were redesigned into, Day, Evening, Distance and, recently even virtual. This also meant that weekends became normal working days at Makerere. As a public University, Makerere admits students on merit irrespective of their religious inclination and all students are expected to abide by its policies, rules and regulations. Being a public University does not mean automatic placement for students. Candidates willing to pursue

education at Makerere University apply for entry. Therefore, no one is compelled to join the University.

The facts use in arguing for the merit of the petition indicated that on Saturday, 25th January 2003, Makerere University scheduled mandatory examinations for papers ***"Introducing Law"*** and ***"Legal Aspects of Planning"*** and another exam on ***"Civil Procedure"*** in was scheduled on a Sabbath Day in 2002.

Parties observations

The Appellants made the following observations to support their application, petition and subsequent appeal;

- That since 1997, Makerere University instituted a policy aimed at increasing access to University education.
- This policy led to a sharp increase in students' enrolment and courses of study.
- That the University made rules and regulations which among others, required students to respond to academic work even if schedules collided with their respective days of worship.
- The appellants found attending lectures, sitting tests and examinations on Sabbath day inconveniencing and contradictory to their religious belief
- As a consequence, Seventh Day Adventists Students missed some of the programmes conducted on Saturdays.
- That the above resulted in many students (SDA) inability to complete their courses of study and even in some cases abandoning the courses.
- The University policies and regulations interfered with their freedom of religion.
- They attempt to negotiate with the University authorities seeking adjustment of the regulations to accommodate the interests of Seventh Day Adventist students.
- Among the requests made to the University was the rescheduling of tests and examinations on days other than the Sabbath day or organizing special examinations for those who miss exams held on Sabbath Days.
- In the interim they had also requested the University to confine SDA students on Sabbath Days whenever exams are scheduled so that a late sitting of the exams could be done after 6.30 p.m.
- That Makerere University, as a public institution, is obliged to respect and uphold their inherent and fundamental rights and freedoms as established under Article 20 of the Constitution of Uganda
- That the policies of the university infringed on their fundamental rights and freedoms to practise their religion as guaranteed under Article 29(1) (c) of the Constitution.
- In the appeal to the Supreme Court, the appellants argued that the Constitutional Court erred in holding that the respondent's actions did not contravene the Constitution.

Observations of Makerere University (the Respondent)

- In Response, the University indicated that ;
- The University rules and regulations were contained in the Fresher's Joining Instructions and circulated to all students at the time of joining the university,
- That all students were informed that University programmes might run for seven days a week.
- That the University was not obliged to meet interests of particular groups in respect of examinations since the University embraces staff and students from a multitude of religious

backgrounds

- That the University received but did not honour the request of SDA students because it was secular institution and with limited physical facilities and budgetary provisions.
- That the SDA students were, in any case allowed to retake the exams they missed, which was a gesture of accommodation.

Government's Observations

In this case government observation is reflected in the Observations of the Supreme Court.
The supreme court obseved that the crucial issue of the case revolved around the question of Whether the University regulations contravened Articles 20, 29(1) (c), 30 and 37 of the Constitution of Uganda and whether the University was entitled by law to claim a lawful derogation under Article 43 of the Constitution of Uganda, which related to general limitation to fundamental freedoms and rights in public interest.
The Supreme Court observed that the Constitutional Court ruled against both issues.

Court decision

The Supreme Court of the Republic of Uganda upheld the verdict of the Constitutional Court that the Makerere University policies and regulations are neither inconsistent with and nor in contravention of Articles 20, 29(1) (c), 30 and 37 of the Constitution of Uganda in respect of the Seventh Day Adventist Students. Therefore, the Appeal was dismissed no order as to costs.

United Kingdom

Martin Browne
UK

R (Shabina Begum) v Headteachers and Governors of Denbigh High School

Case Title
R (Begum) v Headteachers and Governors of Denbigh High School [2006] UKHL 15

Parties
Shabina Begum (with her Litigation friend Rahman)
Denbigh High School
Secretary of State for Education (Intervening)

Keywords
Education, Religious Dress, Neutral Uniform Policy, Proportionality

Region – country
England and Wales, United Kingdom

Court
House of Lords

Description
Application :
Applicant sought judicial review of the decision of her school not to admit her wearing jilbab, as a violation of Article 9 of the European Convention of Human Rights (ECHR).

Facts :
The school was a mixed community (state) school and around 79% defined as Muslin. The uniform policy was inclusive following consultation with parent groups, and religious leaders from local mosques. As a result, the school continued to permit the wearing of the shalwar kameeze.

For two years the individual wore the shalwar kameeze without complaint. When she changed to a jilbab and attended on the first day of the next academic year, the school sent her home for failing to comply with the uniform policy.[1]

The Court of Appeal found that the applicant had been unlawfully excluded because the school, as part of the process of excluding her, did not correctly consider her freedom to manifest her religion and properly justify the restriction of her right.

Parties Observations :
Shabina Begum, along with other members of her family, held the firm view that Islamic law required her to wear a jilbab and was thus necessary part of the manifestation of her religion, which was engaged and should be accommodated.

1 *R (Begum) v The Headteacher and Governor of Denbigh High School* [2005] EWCA Civ 199.

Government's Observations :
The school accepted the general duties to secure religious education *in loco parentis*. The school already permitted clothing that would identify students as Muslim, including the shalwar kameeze which was sufficient to fulfil the Islamic duty of modesty. In all circumstances, the school applied the uniform policy strictly and considered it fulfilled the Applicant's right as it offered a choice of clothing compatible with the Muslim faith generally.

The Government (intervening) supported the school's approach.

Court Decision :
1. The House of Lords dismissed the fundamental Article 9 claim. There had been no interference in the right to manifest one's religion.

2. The Court of Appeal's approach was mistaken: the focus under the Convention was whether rights had been violated, not whether a decision/act was made by a defective decision making process.

3. Even if there had been an interference with the applicant's right, there had been no violation of Article 9, as any interference was justified.

Note:
This case was considered by the court at a time of increased public discussion concerning the limits of multiculturalism and the different forms of Islamic dress,[2] and apprehension about full face veils.[3] Furthermore, this case came after the first wave of cases under the Human Rights Act 1998 (HRA).[4] As jurisprudence on the direct application of rights settled, litigation arose seeking clarification of the boundaries of rights, particularly regarding the exact duties of public bodies and the balancing of competing rights in 'hard cases' such as in relation to individual religious freedom.

The HRA contained the first express statutory provision in the UK requiring public bodies to be tolerant towards manifestations of religious beliefs. Though common law freedoms existed,[5] the HRA brought in additional considerations, and schools such as Denbigh High School, sought to ensure their school uniform policy was in accordance with the core belief of Islam, and communicated to all prospective parents. They believed that a balance was achieved that accommodated Muslim girls wishing to manifest their belief in maintaining modesty, and maintained a relatively neutral uniform code that was important for equality and discipline of all students.

Begum was also aware of the human rights aspect of her case from the very first challenge at the school gates.[6] She initiated a judicial review on the refusal to admit he to the school whilst wearing the jilbab. This 'hard case' required the court to assess and balance, not only the Applicant's rights against those of non-Muslims in each of these domains, but to determine the extent to which a minority religious belief was to be balanced against the protection already offered to the collective group of Islamic believers. On this point the school was concerned that permitting the jilbab would lead to undesirable differentiation between Muslim groups on the basis of their strictness of practice.[7]

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2 Especially following the well-publicised French law banning '*le port de signes ou de tenues manifestant une appartenance religieuse*

3 E.g.; see comments of Home Secretary Jack Straw in asking a woman to remove her veil when entering his office http://news.bbc.co.uk/1/hi/uk_politics/5410472.stm BBC News Website 5 October 2006 (accessed 5 November 2015).

4 In force from 2 October 2000.

5 The Bill of Rights 1969 contained a prohibition on the persecution of religions.

6 R (Begum) v Headteachers and Governors of Denbigh High School [2006] UKHL 15 per Lord Bingham, para 10.

7 *Ibid.* para 18.

Understandably, the court was keen to avoid pronouncing on matters of religious doctrine, deferring to the additional and subsequent consultations the school took with the London Central Mosque and Iman Dr Abushadyan. The majority of the Lords set out a structured response encapsulating the difficult issue of balancing rights in a liberal society, in essence taking a standard two-step approach. First determining whether the Applicant's rights had been limited, before assessing whether that interference is justified and necessary in a democratic society. However, there was also a strong theme of understanding and respect towards the different forms of clothing and the importance that was attached to these by different believers within Islam. Baroness Hale epitomised this approach by stressing the importance of moral judgments and the choice religious clothing for a Muslim woman and the collective community.[8]

Two concerns arise from the general approach of the court; first it affords a great degree of deference to a public body that adopts an inclusive approach. This acceptance of the consultation process undertaken by the school, ignores the often difficult question of identifying the right community with which to consult. In this case, the school were adjudged to have not limited the right by consulting, and by offering alternatives. There is no encouragement for the school to consult specifically on Begum's asserted right. In this way, the court endorsed a d*e minimis* approach, that alleviates responsibility of the public body to interrogate it's own assertion that it not interfered with Article 9 rights and doesn't require the body to assess all manifestations on an equal pragmatic basis.

Second, the public body's inclusive approach may be legal, even if that discriminates against a minority within a faith. This doesn't uphold the idea of 'faith pluralism', that two or more beliefs within one faith may be equally valid.[9] Failing to protect the rights of one minority within a religious group may be detrimental to the overall fulfilment of protecting religious rights in schools, particularly if a limitation of the type of religious clothing is made institutional precisely because of it represents a widespread of acceptable religiosity.[10]

It is anomalous that the three majority judges did not even accept the first step of their systematic assessment, that the school's policy limited religious freedom at all.[11] Even when considering the justification aspect (on the basis of protecting the interest of other students) the judges largely ignored the question of whether that particular limitation was 'necessary in a democratic society', or assess whether a less restrictive means was appropriate. Judicial concern was directed generally towards the role of schools in promoting community cohesion, the ability of Muslim girls ability to exercise autonomy and choice, and considering a wider political context, that religious extremism should be guarded against. The school had a laudable objective in setting out a relatively neutral uniform policy in fulfilment of these aim. Asking the school to go further, would place a huge burden on a public body that should be focused on the education of the collective student body, not spending time tailoring their policy for every individually asserted right to act in a different and distinct way. The schools' approach was considered already a thoughtful and proportionate response to reconciling the complexities of the situation.[12] Yet, in respecting multiculturalism it fails to afford full protect to distinct individuals.[13]

Analysing the individual determination of rights shows how complex equality can be. The limitations

8 *Ibid.* paras 93-96

9 See further, Tombs, D. (2010) Rights and Righteousness: Perspectives on Religious Pluralism and Human Rights, Northern Ireland Human Rights Commission, Belfast.

10 Mikhail, J (2008) 'Dilemmas of Cultural Legality' International Journal of Law in Context 4(4) 385-393, 388

11 The two judges in the minority found that the right had been limited but the action was justified as it was taken in order to not affect the rights of others.

12 *Op. cit.* 6 per Baroness Hale para 98.

13 *Op. cit.* 10 at 392

available under Article 9(2) qualify the individual right to manifest a belief. However, whilst not all manifestations have to be accommodated, it is hard to undermine the conclusion of one commentator that the that the House of Lords emanated a conceptualisation of the Judaeo-Christian majority in assessing the boundaries of the right to manifest the Islamic faith especially by deferring to a school that had consulted with local mosques that might not have represented the Applicant's own beliefs.[14]

The government at the time clearly recognised the importance of this case and accordingly intervened. They continued to monitor similar cases reviewing the policy of Islamic dress in schools, such as the review of one school's decisions on banning the niqab,[15] finally issuing guidance in 2007.[16] The guidance followed the House of Lords reasoning (above), confirming that schools should consult with the wider community, making every effort to accommodate religious needs of individuals, but that the 'best interests of the school community as a whole' takes precedence.[17]

R (Williamson) v Secretary of State for Education and Employment

Case Title
R (Williamson) v Secretary of State for Education and Employment

Parties
Philip Williamson, Michael Bates, Pauline Bolton, Grahame Davies, David Greenwood, Marianne Hosey, Paul Hubbard, Philip Moon, Roy Sammons, Anthony Seaton, Matthew Walker, Colin Wilcock (Applicants)
The Secretary of State for Education (Respondent)

Keywords
Education; Discrimination; Religious Schools; Corporal Punishment

Region – country
England and Wales, United Kingdom

Court
House of Lords

Description
Application :
Whether the legislative ban on corporal punishment in educational establishments was compatible with Article 2 Protocol 1 of the Convention given a category of headteacher, teacher, and parent who profess a belief that schools should use moderate corporate punishment as an ultimate measure of discipline.

Facts :
A coalition of applicants, headteachers, teachers, and parents representing 5 different Christian schools from across the UK brought a judicial review on the comp ability of section 548(1) of the Education Act 1996 with Article 9(1) of the Convention and Article 2 of Protocol 1.

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14 Jivraj, S (2013) 'Interrogating religious: Christian/secular values, citizenship and racial upliftment in governmental education policy' 9(3) Interntional Journal of Law in Context 318-342, 337

1. 15 *R. (on the application of X) v. Y School* [2006] EWHC 298 (Admin), *Azmi v Kirkless MBC* (2007) IRLR 484

16 http://news.bbc.co.uk/1/hi/education/6466221.stm BBC News Website 7 November 2007 accessed 2015

17 https://www.gov.uk/government/collections/departmental-advice-schools accessed 5 November 2015

The Court of Appeal held that Article 2 Protocol 1 is concerned solely with the rights of parents, section 548 of the 1996 Act did not interfere with their Article 9 rights as they retained the ability to inflict punishment themselves. Furthermore, if parents retained this ability, they cannot delegate their right to the headteachers or teachers of the school. The law was not neutral on the imposition of punishment and a belief that one measure is more effective than another was not sufficiently cogent to amount to a philosophical conviction.

Parties' Observations :
That the statutory ban was incompatible with the fundamental beliefs of a large Christian community, that teachers should, in place of parents, administer physical punishment shortly after the unacceptable behaviour as required by scripture.

Government's Observations :
The Secretary of State asserted that the claimant's beliefs were not 'sufficiently cogent, serious, cohesive, or important' to attract the protection of the Convention. Even if they were only the parents, can claim to be manifesting a religious belief by physically harming a child. If there has been interference, it is justified on the grounds of public safety.

Court Decision :
The appeal was dismissed. The express purpose of section 548 of the 1996 Act was to exclude corporal punishment from all educational establishments, no issue of 'delegation' can be sustained contrary to the will of Parliament.

A distinction has to be drawn between the right to hold a belief and the manifestation which is itself qualified. The parents' Article 9 rights were engaged through Article 2 Protocol 1 but that, as corporal punishment is so invasive to the child, the strict statutory protection was justified as being necessary in a democratic society.

The restriction of physical violence in a school setting was not disproportionate and was not in the best interests of the child.

Note :
The *Williamson* case is one of the fullest examinations of the right to manifest religious beliefs by a UK court following the HRA. Underpinning the judgment is a consistent approach aimed at marrying tolerance, with the new positive rights which were asserted by the group of Applicants in seeking to overturn inconsistent legislation.

The approach taken is consistent with the seminal case of *Campbell and Cosans v United Kingdom*,[18] which held that, inherently, 'philosophical convictions' means those that are worthy of respect in a democratic society and are not incompatible with human dignity.[19] It further set out that beliefs and convictions must attain 'a certain level of cogency, seriousness, cohesion and importance'[20] In *Williamson*, the House of Lords confirmed that the same threshold requirements apply to 'manifestation of belief', including that they must be compatible with human dignity.[21]

In dismissing the Applicants' claims, the Lords found first that that Court of Appeal confused the two concepts of religious beliefs and philosophical convictions, using the term 'religious convictions' and

18 (1982) Seris A No48 4 EHRR 293
19 1982 para 36
20 Ibid at 37
21 Per Lord Walker para 64

that there was no need to fuse the two, the test for engaging Article 9 was the same. Second, the Court of Appeal found that the Applicants' convictions had not attained a sufficient level of cogency and coherency[22]and even went so far as to doubt the theological foundation for the core belief, labelling it 'merely good practice'.[23]

In contrast, each member of the House of Lords found took great care in delineating the scope of Article 9 and accorded great weight to the sincerely held beliefs in varying terms,[24] that on an objective basis were sufficiently cogent and coherent and did not require further interrogation. The Court did accept the Applicants' beliefs engaged the Convention under Article 9 and Article 2 Protocol 1, although the teachers did not engage the latter, lacking a separate right to administer corporal punishment from that of the parents'.[25] Although ultimately the appeal was dismissed, this was on the basis of an overriding necessary limitation to protect children, to avoid an absurdity of statutory drafting.[26]

Notably, the Lords deciding this case seemed to to be aware of the difficulty of restricting the manifestation of religious beliefs in public places, and correctly focused attention on the means for interfering with the manifestation purported to be part of their 'foundational beliefs'. This was the opposite approach to the Court of Appeal where there was a distinct lack of discussion about the justification of the limitation, they instead preferred identifying ways in which the parents could still discipline their children at home and in an attempt to tailor the parents' right to manifest a belief. Baronness Hale set out the required focus on what was 'necessary in a democratic society' expressing this further as 'corresponding to a pressing social need' requiring in particular that it is 'proportionate to the legitimate aim pursued'.[27] As Parliament set out the ban on corporal punishment as a means of protecting the rights and freedoms of all children (and was widely supported in doing so), then allowing some schools to be exempted from this would defeat the express intention of Parliament..

Baroness Hale's judgment is a standalone tour-de-force in focusing a judgment on the rights of children as she elucidated their rights in the strongest of terms. It is easy to agree with the simple logic she set out, as although the parents have the primary responsibility and the primary right to do discipline a child, the state steps in when it seeks to regulate the exercise of that responsibility in the interests of potentially vulnerable children and society as a whole.[28]

Critically, the ban on corporal punishment does not leave the schools without disciplinary methods, and it doesn't deny the parents' rights, the statute simply doesn't allow for the extension of that right specified on the grounds of individual religious beliefs.[29] Nevertheless a change in prosecution policy to commence proceedings against some parents who have used physical force to punish their children may worry parents such as the Applicants.[30] At least there is an indication that the courts will into account the cultural context of the incident which could include the standards of this religious

22 E.g.; Per Buxton L.J. para 19 Williamson and Others v Secretary of State for Education and Employment EWCA (2002) 1926

23 Per Buxton L.J. para 76; Per Rix L.J. para 188.

24 E.g.; Per Lord Nicholls paras 16-35 a large section detailing the appropriate protection for sincerely held beliefs

25 Per Lord Nicholls paras 35-37.

26 For a Case Comment on this theme see R. English 1 Crown Office Row blog http://www.1cor.com/1315/?form_1155.replyids=419 accessed 5 November 2015.

27 Per Baronness Hale para 79

28 Per Baroness Hale paras 71-72

29 See further discussion in N. Harris 'Getting a grip? The role of the law in response to behavioural concerns relating to pupils in school. [2014] Education Law Journal 99

30 http://www.theguardian.com/society/2014/jan/10/mother-smacking-child-assault-sentence

community,[31] but facing a charge and custodial sentences is itself an interference. Clarity on the aspect of public policy would be welcome.

Taking the Williamson and Begum decision together, one conclusion to draw is that a material interference with Article 9 rights may not be identified if there are alternative arrangements available to the applicants. This isn't the case for all situations concerning the protection of religious rights, for example in employment discrimination.[32] It may depend on the level of difficulty in alternative means of manifestation. According to Lord Hoffman, the standard of 'rendered impossible', is too high, rather the courts should query where the limitation is material interference.[33] The range of minority groups asserting Article 9 rights becomes ever more diverse, with many claims on the boundary between religious and philosophical convictions. One additional effect of *Williamson* is an encouragement for the courts to be sensitive to the wide range of beliefs across and within religious groups flowing from the respect due, once a minimum standard has been surpassed. This is true, even if the belief is not foundational, or common to the core group of believers, it is the importance for the individual that is to be assessed.[34]

Even if beliefs are found to engage Article 9, and even given a greater focus on 'group disparity' and 'faith pluralism', the courts are not willing to overturn the express wishes of Parliament, when that body states that it is acting for the benefit of the wider society. Nevertheless, human rights law should be applied in a sensitive fashion, accepting of these differing schools of thought, and seeking out and limiting the material interference with the enjoyment of the right. [35]

G v St Gregory's Catholic science College Governors

Case Title
G v St Gregory's Catholic Science College Governors [2011] EWHC 1452 (Admin)

Parties
G (by his litigation friend)
The Headteacher and Governors of St Gregory's Catholic Science College Governors

Keywords
Education, Indirect Discrimination, Justification, Uniform, Race Discrimination

Region – country
United Kingdom

Court
United Kingdom High Court, Administrative Court

Description
Application :

31 PK v RK [2015] EWHC 2316 (Fam), see further a report here http://www.independent.co.uk/news/uk/home-news/judge-says-cultural-context-should-be-considered-when-investigating-allegations-of-parental-child-10308692.html

32 Eweida Ref

33 T. Linden, 'School and Human Rights: The Denbigh High School Case' (2005) 6 Education Law Journal 229 at 233.

34 Mba v London Borough of Merton [2014] 1 WLR 1501, is one a range of cases that considers 'group disparity' post Williamson

35 On this theme see D. McGoldrick, 'Multiculturalism and its Discontents' (2005) 5 Human Rights Law Review 27 at 33-36.

The Claimant claimed that prohibition of cornrows by the school under the auspices of its pre-existing uniform policy was discrimination in a breach of Article 14 on the grounds of and race and sex.

Facts :
The school's policy detailed the exclusion of a number of hairstyles but not specifically cornrows. G wore cornrows following the family tradition of not cutting hair from birth. G was turned away from the school on his first day. Girls were permitted to wear cornrows, as these were conventional for girls certain ehtnicities. G eventually moved to a different school that allowed him to keep his cornrows.

Parties' Observations :
1. The Claimant claimed that the School's failure to permit him to wear cornrows when they were of cultural and ethnic significance and equated to indirect racial discrimination.
2. Had the school assessed his rights appropriately, it would have been able to ascertain whether it could grant exceptions to the policy.
3. The School should that cornrows were conventional for boys acceptable by general usage.

Government's Observations :
1. The school submitted that it was necessary to show a practice had 'exceptional importance' to the person alleging disadvantage.
2. Notwithstanding, it was entitled to limit distinctive hair cuts that symbolise gang culture, symbolise divisions and which affect disunity.
3. The school maintained a ban on skinheads, for similar reasons but permitted religious exceptions in special circumstances for Sikhs and Rastafarians.

Court's Decision :
1. There had been indirect discrimination on the grounds of race. More than choice was required, but the need to show exceptional importance as stated in *Aberdare,*[36] put the threshold too high. A particular disadvantage was created by by this ban. G met the required threshold of being in a category that suffered disadvantage.

2. Where there was a genuine cultural and family practice of not cutting boy's hair and wearing cornrows, an exception to the policy could and should be made. There was no difference in principle between religious reasons justifying non-compliance and G's reasons.

3. No unlawful sex-discrimination. Permitting girls to wear cornrows did not equate to treating boys less favourably if the overall policy was taking into consideration.

Note:
Gregory is an example of a popular approach where an Applicant brings a claims under dual headings of statutory discrimination and breach of human rights. G did so as the standard for establishing racial discrimination is seen to be lower than the threshold for establishing an interference with rights such as Article 9. This disunity may on its face disadvantage individuals claiming pure breaches of Article 9 rights, where the matter relates solely to religious or philosophical convictions but it also indicates a more inclusive threshold that could apply to a broader range of beliefs.[37] Persuasively, in this case the Applicant highlighted the different protection afforded by those exceptions granted as a matter of faith to established groups such as Sikhs and Rastafarians, requesting equal protection and submitting that his family's customs and traditions held as much subjective importance as those faiths.

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36 R (Watkins-Singh) v Governing Body of Aberdare Girls' High School [2008] EWHC 1865 (admin)
37 Including to individuals in the circumstances of Shabina Begum, above.

This decision by the High Court is important for three reasons. First, it expands the category of people who may be able to assert the protection of discrimination law, to those who's practice is culturally part of the protected characteristic. Second, the school was not successful in pleading a seemingly objective justification, the court granting no deference to the legitimate aim proffered by the school. Finally, the court refuted a floodgates-style argument and refused to acknowledge this policy limitation on the duty of schools to accommodate minority beliefs and practices on the basis that some exceptions were already afforded on religious grounds.

The headline determination that social customs can form 'part of ethnicity' and are protected by race discrimination law, was qualified by the judge as 'not making new law'.[38] However, the courts have previously protected practices that were 'required' or 'exceptionally important'**.39 T**hose standards are undermined by this decision that a particular cultural importance is sufficient.[40] In essence this expands the reasoning that first established that groups such as Sikhs can be an ethnicity through the shared, long history, family and social customs often associated with religious observance.[41] Following *Gregory*, there is clear precedent for extending this protection beyond the realms of collective religious observance, to smaller groups and individuals. The standard, for evidencing the customary practice of particular importance is relatively low, predicated upon the *Mandla* criteria plus the individual making 'more than a simple choice' to participate in the practice. This suggests, the protection of discrimination law may now be widely extended. Just as the law now protects cultural and social norms that are part of an ethnicity, it may also as a matter of logic protect philosophical and ideological convictions that form part of an ethnicity.

The second question to consider is how this approach differs to the 'cogent and coherent' test applied above regarding the engagement of Article 9 rights. Cogency and coherency tends to refer to the firmness of a belief, following *Williamson*, its importance is presumed and so once fulfilled no further inquiry is made into the belief. On the other hand, in order to establish the cultural practice, an analysis of the subjective importance, historical, and societal context is required. It is unclear whether the disparity in threshold actually disadvantages those seeking protection of Article 9 rights. Consequently the novel construction to take from Gregory is the extension of protection to practices that simply form a 'part'. If this is cross-applied to religious and philosophical convictions the appropriate comparison question would be to ask whether the manifestation is a sufficiently cogent and coherent 'part' of a belief.**42**

Cases such as *Begum, Mandla, Williamson* and this case, show that the boundaries between religious, philosophical, ideological and customary rights are a continuum. There is no justification to limit the protection of one category to the exclusion of others, particularly in relation to educational institutions. To be consistent therefore, the courts should afford respect to any of those convictions that have been asserted once sufficiently cogent, coherent, and part of a belief or protected characteristic.[43]

This approach may be criticised as being highly individualistic, but this is in the unifying theme of the human rights framework in the UK, which supplanted the previous system of simply tolerating recognised minority groups. The duty of a public body to regard even more particularised special interests does need to be carefully calibrated. The school's concerns about increased external

38 Per X para 41

39 *R (Watkins-Singh) v Governing Body of Aberdare Girls' High School* **[2008] EWHC 1895 (Admin), [2008] ELR 561 (***Watkins-Singh***) ; Mandla v Dowell Leee REF**

40 Para 37

41 Mandla v Dowell Lee [1983] 2 A.C. 548, para 582

42 **E. Prochaska 'Discrimination: School Uniform Policy – a Case Comment' (2011) Ed. Law 12(4), 255**

43 Otherwise the courts should justify the differing levels of proof that are required to establish a belief or conviction.

influence and division, exemplify precisely the perceived need for neutral rules. The difference would also affect resource provision, through enormous pastoral, pedagogical, and budgetary pressures.[44] It will take time for the courts to explore whether the two approaches outlined above are consistent and finding a suitable balance with other policy interest, the first step however would be to identify and recognise the importance of these rights equally to all individuals.

Returning to *Gregory,* the court utilised a highly individualistic approach and the school's seemingly objective justification was dismissed. The school was required to have regard to all issues concerning ethnicity that were entailed by any objective policy. The lack of prior complaints, and that some boys removed their cornrows, was not sufficient evidence of a proportionate approach. The school's consultative approach with decisions concerning Sikh boys' hairstyles on a case-by-case basis, already encapsulated the approach to be afforded to the Applicant.

The equating of the Applicant's social custom to religious adherence by Sikhs is informative. This is despite the fact that no religion demands that adherents wear cornrows and G did not initially proffer a religious reason for wearing them. To the extent that there is any identifiable social ideology present, cornrows are no different to Rastafarian hairstyle, or a certain approaches to parenting and discipline. There is therefore more support for the unified approach set out above, this is not a results-based argument, even if the school took the pragmatic case-by-case approach advocated, they may still have come to the conclusion that the interference was justified on certain occasions just as they did in relation to skinheads.

Finally, the court refuted the school's floodgates argument on a fact-sensitive analysis. M**aking an exception for G would not open the floodgates as only provided protection for 'genuine, cultural and family practice' that has been continuing for generations, with consistency, and with some degree of vigour, precisely because of its central importance to family life.** In identifying the example of Sikhs, and Sixth-Formers in respect of whom the rules on hair were not always strictly applied, the court showed the weakness of the school's defence. Nonetheless, the High Court only gave salutary consideration to the potential of the expansive approach in escalating the risk of other students claiming more tenuous social customs as 'particularly important' to a part of a claimed ethnicity. An additional burden is thus placed on courts to delineate guidance in future to determine *bona fide* claims.

In concluding analysis of all three cases, one takeaway lesson is offered for all schools; governing bodies and headteachers should examine their neutral policies for potentially unlawful restrictions on the right of both child and parents to manifest religious belief, philosophical, and ideological convictions. In each case consider exceptions for pupils whose family or cultural practices make them unable to conform to the policy.45 The justificatory basis for the policy is important, as it determines how the court will assess the claim. Exceptions should be context based, bearing in mind the seriousness of the sanction for the individual pupil for breaching the policy given the importance of the right to education.[46]

44 On the anticipation of a burden see further http://www.elaweb.org.uk/resources/ela-briefing/g-v-st-gregorys-catholic-college

45 **E. Prochaska 'Discrimination: School Uniform Policy – a Case Comment' (2011) Ed. Law 12(4), 257**

46 T. Cross, Religious rights in education: has Eweida changed the law? http://www.11kbw.com/uploads/files/TCPaper.pdf

ECHR Cases

Kathryn O'KEEFE against the United Kingdom

Application no. 10610/05

THE FACTS

The applicant, Ms Kathryn O'Keefe, is a British national who was born in 1962 and lives in Dorset. She was represented before the Court by Tyndallwoods, a firm of solicitors based in Birmingham. The United Kingdom Government ("the Government") were represented by their Agent, Ms E. Willmott, of the Foreign and Commonwealth Office, London.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

1. Background facts

The applicant was, at the material time, a W/Corporal in the Women's Royal Army Corps. She was dismissed from the armed forces on 3 August 1989, pursuant to the policy of the Ministry of Defence against homosexuals in the armed forces.

2. Domestic proceedings

On 8 November 2000 the applicant submitted a claim to the Employment Tribunal arguing that her dismissal, and the treatment to which she was subjected, breached the Sex Discrimination Act 1975 ("the 1975 Act"). As a result of the House of Lords' judgment in *MacDonald (AP) (Appellant) v. Advocate General for Scotland (Respondent) (Scotland)* dated 19 June 2003, the applicant withdrew her domestic proceedings.

B. Relevant domestic and European law and practice

The law and practice in force at the relevant time concerning the dismissal of homosexuals from the armed forces are described in the decision of the Court in the case of *MacDonald v. the United Kingdom* (no. 301/04, 6 February 2007).

COMPLAINTS

1. The applicant complained under Articles 3, 8 and 10 alone and in conjunction with Article 14 of the Convention, about the investigation into her sexual orientation and about her subsequent dismissal from the armed forces pursuant to the absolute policy against homosexuals in those forces.

2. She also complained under Article 13 that she did not have an effective domestic remedy in this regard.

THE LAW

A. Complaints under Articles 8 and 13 of the Convention

The applicant complained about the interference with her right to respect for her private life by the investigation into her sexual orientation and her dismissal from the armed forces. She invoked Article 8 of the Convention, which provides, in so far as relevant, that:

> "1. Everyone has the right to respect for his private (...) life (...).
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

She further complained under Article 13, about the lack of an effective remedy for these alleged violations of her rights, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

On 20 December 2005 the respondent Government were given notice of the application and were requested to submit their written observations, on the admissibility and merits of the case, in respect of the applicant's complaints under Articles 8 and 13 of the Convention.

In their submissions dated 28 April 2006 the Government accepted that the tribunal proceedings lodged by the applicant were effective within the meaning of Article 35 § 1 of the Convention so that her claim had therefore been introduced with the Court within the six-month time-limit set down by the same provision. They further accepted that the applicant's dismissal from the armed forces, as well as the investigation into her sexual orientation, violated Article 8 alone and in conjunction with Article 13 of the Convention.

The applicant submitted her response on 22 August 2006 together with the relevant supporting documentation.

The Government filed a unilateral declaration on 8 June 2007 as an alternative to the acceptance by the applicant of their friendly-settlement proposal. It provided as follows:

> "The Government of the United Kingdom regrets the investigation into the sexual orientation of the applicant Kate O'Keefe and her subsequent discharge from the Army on the grounds of her sexual orientation. The Government acknowledges that the investigation and discharge breached the applicant's rights under Article 8 of the Convention and of Article 13 in conjunction with Article 8.
>
> In regard to this issue, the government recalls that on 12 January 2000, and in response to the Court's judgments on the merits in the Lustig-Prean and Beckett and the Smith and Grady cases, it introduced The Armed Forces Code of Social Conduct Policy Statement lifting the ban on homosexuals serving in the military. The Code is intended to explain the Armed Forces' revised policy on personal relationships involving Service personnel and applies to all members of the Armed Forces, regardless of their gender, sexual orientation, rank or status, and provides a clear framework within which people in the services can live and work. Furthermore, it complements existing policies, such as zero tolerance towards harassment, discrimination and bullying. Under paragraph 5 of the Policy Statement, when considering possible cases of social misconduct, and in determining whether the Service has a duty to intervene in the personal lives of its personnel, Commanding Officers at every level must consider each case against a Service Test based on whether the actions or behaviour of an individual has adversely impacted or is likely to impact on the efficiency or operational effectiveness of the Service and not on the sexual orientation of the personnel. Furthermore, Guidance Notes for Commanding officers have been issued in order to explain the Code of Conduct and to give officers detailed guidance on how it should be implemented.
>
> In these circumstances, and having had regard to the particular facts of Ms O'Keefe's case and the amount of financial loss she suffered, the Government declares that it hereby offers to pay ex gratia to the applicant the amount of £51,645 [pounds sterling]. This sum, which also covers

legal expenses connected with the case, shall be paid in pounds sterling to a bank account named by the applicant within three months from the date of the striking-out decision of the Court pursuant to Article 37 of the European Convention on Human Rights. This payment will constitute the final settlement of the case."

On 10 July 2007 the applicant rejected the Government's offer of a friendly settlement.

The Court observes at the outset that the parties were unable to agree on the terms of a friendly settlement of the case. It recalls that, according to Article 38 § 2 of the Convention, friendly-settlement negotiations are confidential and that Rule 62 § 2 of the Rules of Court further stipulates that no written or oral communication and no offer or concession made in the framework of the attempt to secure a friendly settlement may be referred to or relied on in contentious proceedings. However, the declaration was made by the Government, outside the framework of the friendly-settlement negotiations.

The Court also recalls that Article 37 of the Convention provides that it may at any stage of the proceedings decide to strike an application out of its list of cases even if an applicant wishes the examination of the case to be continued, where the circumstances lead to one of the conclusions specified under (a), (b) or (c) of paragraph 1 of that Article. Article 37 § 1 (c) enables the Court to strike a case out of its list if:

"for any other reason established by the Court, it is no longer justified to continue the examination of the application".

Article 37 § 1 *in fine* includes the proviso that:

"However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires."

The Court notes that it has specified in a number of cases the precise nature and extent of the obligations which arise for the respondent State under Articles 8 and 13 of the Convention as regards the investigation and dismissal of homosexuals from the British armed forces. It has further made awards for just satisfaction in those cases (*Lustig-Prean and Beckett v. the United Kingdom* (just satisfaction), nos. 31417/96 and 32377/96, 25 July 2000 and *Smith and Grady v. the United Kingdom* (just satisfaction), nos. 33985/96 and 33986/96, ECHR 2000-IX; *Perkins and R. v. the United Kingdom*, nos. 43208/98 and 44875/98, 22 October 2002; and *Beck, Copp and Bazeley v. the United Kingdom*, nos. 48535/99, 48536/99 and 48537/99, 22 October 2002).

The Court has carefully examined the terms of the Government's declaration. Having regard to the nature of the admissions contained in their declaration, the speed and nature of the State's reaction to the afore-mentioned lead judgments in *Lustig-Prean and Beckett v. the United Kingdom* and *Smith and Grady v. the United Kingdom* (notably through the introduction of *The Armed Forces Code of Social Conduct Policy Statement*), as well as the amount of compensation proposed, the Court considers that it is no longer justified to continue the examination of the application (Article 37 § 1 (c)) (see, *MacDonald v. the United Kingdom*, no. 301/04 (dec.) February 2007; and, for the relevant principles, *Tahsin Acar v. Turkey*, [GC], no. 26307/95, §§ 75-77, ECHR 2003-VI).

In light of all the above considerations, the Court is satisfied that respect for human rights as defined in the Convention and the Protocols thereto does not require it to continue the examination of the application in so far as it concerns the applicant's complaints under Articles 8 and 13 of the Convention (Article 37 § 1 *in fine*).

Accordingly, this part of the application should be struck out of the list.

B. Remaining Complaints

The applicant also invoked Articles 3, 10 and 14 of the Convention. To the extent that these complaints have not already been covered by the terms of the Government's unilateral declaration, the Court considers that they are, in any event, manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Takes note of the terms of the respondent Government's declaration;

Decides to strike the application out of its list of cases in accordance with Article 37 § 1 (c) of the Convention in so far as it concerns the applicant's complaints under Articles 8 and 13 of the Convention;

Declares the remainder of the application inadmissible.

P.F. and E.F. v. the United Kingdom (dec.) - 28326/09

Decision 23.11.2010 [Section IV]

Article 3

Positive obligations

Alleged failure by police to take all reasonably available measures to protect schoolchildren and their parents from sectarian violence: *inadmissible*

Facts – The first applicant was the mother of the second applicant, who was a pupil at a Catholic primary school situated in Belfast (Northern Ireland). During the autumn of 2001 loyalists staged protests along the route the second applicant (and other pupils) used to get to school. Owing to sectarian tensions in the area, the police believed that there was a risk that violence could erupt in other parts of the city if they were forcibly to end the protest. They therefore decided to exercise restraint. Instead of breaking up the protest, they placed themselves between the protesters and the parents and children walking to school and used their shields to protect them against missiles. The protest lasted more than two months. During this period none of the children were physically injured, but they were subjected to sectarian abuse and intimidation as they walked to school every day. The first applicant brought judicial-review proceedings on behalf of herself and her daughter for a declaration that the authorities had failed to secure the effective implementation of the criminal law and to ensure safe passage for her, her daughter and the other pupils to the school. Her application was dismissed in a decision that was upheld on appeal.

Law – Article 3: The behaviour of the loyalist protesters – which was premeditated, had continued for two months and was designed to cause fear and distress to young children and their parents making their way to school – had reached the minimum level of severity required to fall within the scope of Article 3. The police had possessed more than sufficient foreknowledge of that treatment to trigger their obligation to take preventive action. Accordingly, the primary question for the Court was whether the police could be said to have taken all reasonable steps to prevent ill-treatment.

In answering that question, the Court had to bear in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which had to be made in terms of priorities and resources. The obligation to take "all reasonable steps" had to be interpreted in a way which did not impose an impossible or disproportionate burden on the authorities. It followed that the police had to be afforded a degree of discretion in taking operational decisions. Such decisions were almost always complicated and the police, who had access to information and intelligence not available to the general public, were usually in the best position to make them. This was especially the case in a situation as volatile and unpredictable as the one pertaining in north Belfast during the summer and early autumn of 2001, where riots, sectarian murders and violent disorder had erupted.

In view of that context, the Court accepted that the police had taken all reasonable steps to protect the applicants. First, they had followed a course of action they reasonably believed would end the protest with minimal risk to the children, their parents and the community at large. They had intelligence which suggested that a more direct approach could increase the risk to the parents and children walking to the school, lead to further attacks on Catholic schools and also result in increased violence in north Belfast. It could not, therefore, be said that they had either disregarded the risk to the applicants, or given greater priority to the "unspecified risk of disturbances elsewhere". Secondly, they had not stood by and done nothing: rather, they had placed themselves as a shield between the protesters and the parents and children at considerable cost to themselves, with forty-one officers

being injured during the operation. By contrast, no child had sustained any physical injury during the whole period. Thirdly, requiring the police in Northern Ireland to forcibly end every violent protest would likely place a disproportionate burden on them, especially where such an approach could result in the escalation of violence across the province. In a highly charged community dispute, most courses of action would have inherent dangers and difficulties and it had to be permissible for the police to take all of those dangers and difficulties into consideration before choosing the most appropriate response. Consequently, the applicants had not demonstrated that the authorities had failed do all that could be reasonably expected of them to protect them from ill-treatment.

Conclusion: inadmissible (manifestly ill-founded).

The Court also declared inadmissible as being manifestly ill-founded the applicants' complaints under Articles 8, 13 and 14 of the Convention.

Savez crkava "Riječ života" and Others v. Croatia - 7798/08

Judgment 9.12.2010 [Section I]

Article 14

Discrimination

Inability of Reformist churches to provide religious education in schools and to conclude officially recognised religious marriages: *violation*

Article 1 of Protocol No. 12

Inability of Reformist churches to provide religious education in schools and to conclude officially recognised religious marriages: *Article 1 of Protocol No. 12 applicable*

Facts – The applicants were churches of a Reformist denomination registered as religious communities under Croatian law. They sought to conclude an agreement with the Government regulating their relations with the State, claiming that without such an agreement they were unable, *inter alia*, to provide religious education in public schools and nurseries, to have religious marriages celebrated by them recognised by the State, or to provide pastoral care in health and social-welfare institutions and prisons. The authorities informed the applicants that they did not fulfil the cumulatively prescribed criteria for the conclusion of such an agreement as set out in a Government instruction, in particular that they had not been present on Croatian territory since 1941 and did not have the required 6,000 adherents.

Law – Article 14 in conjunction with Article 9: Even though the Convention did not impose on States an obligation to have the effects of religious marriages recognised as equal to those of civil marriages, or to allow religious education in public schools and nurseries, Croatia allowed certain religious communities to provide religious education in public schools and recognised religious marriages performed by such communities. Once the State had gone beyond its obligations and created additional rights falling within the wider ambit of any Convention right, it could not, in the application of such rights, take discriminatory measures within the meaning of Article 14. In the applicants' case, the authorities had refused to conclude an agreement because the applicant churches failed to satisfy the cumulative historical and numerical criteria set forth in the Government's instruction. However, the Government had entered into such an agreement with other religious communities which did not fulfil the numerical criterion either. This was because the competent commission had established that those churches satisfied the alternative criterion of being "historical religious communities of the European cultural circle". The Government had provided no explanation as to why the applicant churches did not qualify under that criterion. Consequently, the Court concluded that the criteria set forth in the Government's instruction had not been applied on an equal basis for all religious communities.

Conclusion: violation (unanimously).

Article 1 of Protocol No. 12: Under domestic law the State enjoyed discretion in deciding whether or not to conclude an agreement with a religious community enabling it to provide religious education and to have religious marriages celebrated before it officially recognised. The applicant churches' complaint in this respect therefore did not concern "rights specifically granted to them under national law". Nevertheless, the Court considered that this complaint fell within the third category specified by the Explanatory Report on Protocol No. 12 as they concerned alleged discrimination "by a public authority in the exercise of discretionary power". Given the finding of a violation of Article 14

taken in conjunction with Article 9, it found it unnecessary to examine separately the complaint under Protocol No. 12.

Conclusion: Protocol No. 12 applicable, but no separate examination necessary (unanimously).

Article 41: EUR 9,000 to each applicant in respect of non-pecuniary damage.

Lautsi and Others v. Italy [GC] - 30814/06

Judgment 18.3.2011 [GC]

Article 2 of Protocol No. 1

Respect for parents' philosophical convictions

Respect for parents' religious convictions

Display of crucifixes in State-school classrooms: *no violation*

Facts – At a meeting of the governors of the state school attended by her children the applicant pointed out that the presence of crucifixes in the classrooms infringed the principle of secularism according to which she sought to educate her children. Following a decision by the school's governors to keep crucifixes in classrooms, she instituted proceedings in the Administrative Court. In the meantime the Minister of Education adopted a directive instructing school heads to ensure that crucifixes were displayed in classrooms. The applicant's claim was dismissed by a decision upheld at final instance by the *Consiglio di Stato*. The applicant and her two sons (the second and third applicants) lodged an application with the European Court, which gave a judgment on 3 November 2009 finding unanimously that there had been a violation of Article 2 of Protocol No. 1 taken together with Article 9 of the Convention (see Information Note no. 124).

Law – Article 2 of Protocol No. 1: The decision whether crucifixes should be present in State-school classrooms formed part of the functions assumed by the respondent State in relation to education and teaching and, accordingly, fell within the scope of the second sentence of Article 2 of Protocol No. 1. That made it an area in which the State's obligation to respect the right of parents to ensure the education and teaching of their children in conformity with their own religious and philosophical convictions came into play. The crucifix was above all a religious symbol. Whilst it was understandable that the first applicant might see in the display of crucifixes in the classrooms of the State school formerly attended by her children a lack of respect on the State's part for her right to ensure their education and teaching in conformity with her own philosophical convictions, her subjective perception was not in itself sufficient to establish a breach of Article 2 of Protocol No. 1.

The decision whether crucifixes should be present in State-school classrooms was, in principle, a matter falling within the margin of appreciation of the respondent State. Moreover, the fact that there was no European consensus on the question of the presence of religious symbols in State schools spoke in favour of that approach. That margin of appreciation, however, went hand in hand with European supervision. It was true that by prescribing the presence of crucifixes in State-school classrooms – a sign which undoubtedly referred to Christianity – the regulations conferred on the country's majority religion preponderant visibility in the school environment. That was not in itself sufficient, however, to denote a process of indoctrination on the respondent State's part. Furthermore, a crucifix on a wall was an essentially passive symbol that could not be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities. The Grand Chamber did not agree with the approach of the Chamber, which had found that the display of crucifixes in classrooms would have a significant impact on the second and third applicants, aged eleven and thirteen at the time. The effects of the greater visibility which the presence of the crucifix gave to Christianity in schools needed to be placed in perspective. Firstly, the presence of crucifixes was not associated with compulsory teaching about Christianity. Secondly, Italy opened up the school environment to other religions in parallel. In addition, the applicants had not asserted that the presence of the crucifix in classrooms had encouraged the development of teaching practices with a proselytising tendency; neither had they claimed that the second and third applicants had

experienced a tendentious reference to that presence by a teacher in the exercise of his or her functions. Lastly, the first applicant had retained in full her right as a parent to enlighten and advise her children, to exercise in their regard her natural functions as educator and to guide them on a path in line with her own philosophical convictions. Accordingly, in deciding to keep crucifixes in the classrooms of the State school attended by the first applicant's children, the authorities had acted within the limits of the margin of appreciation left to the respondent State in the context of its obligation to respect, in the exercise of the functions it assumed in relation to education and teaching, the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Conclusion: no violation (fifteen votes to two).

Dojan and Others v. Germany (dec.) - 319/08, 2455/08, 7908/10 et al.

Decision 13.9.2011 [Section V]

Article 2 of Protocol No. 1

Respect for parents' philosophical convictions

Respect for parents' religious convictions

Refusal to exempt children from sex-education classes and other school events which parents considered contrary to their religious convictions: *inadmissible*

Facts – The applicants, members of the Christian Evangelical Baptist Church with strong moral beliefs, had children who attended a local public primary school. Mandatory sex-education classes formed part of the school curriculum in the fourth year of primary school. In 2006 the school decided to hold two-day theatre workshops at regular intervals for third- and fourth-grade children, in order to raise awareness of the problem of sexual abuse of children. Finally, it was a school tradition to organise an annual carnival celebration. Students were offered swimming classes or exercise in the gym as an alternative activity if they did not wish to attend the carnival. The applicants prevented their children participating in some or all of the above activities and, as a result, were fined for an administrative offence, which, in the case of two parents who failed to pay, was later converted to a prison sentence.

Law – Article 2 of Protocol No. 1: The second sentence of Article 2 of Protocol No. 1 aimed at safeguarding the possibility of pluralism in education, a possibility which was essential for the preservation of democratic society. It imposed a broad duty on the States to respect parents' religious and philosophical convictions throughout the State-education system. However, the setting and planning of the curriculum in public schools in principle fell within the competence of the States and the solutions adopted might legitimately vary according to the country and the era. In fact, many subjects taught in school could, to a greater or a lesser extent, have some philosophical complexion or implications and the same was true of religious affinities. The second sentence of Article 2 of Protocol No. 1 required the States, in fulfilling the functions assumed by them with regard to education, to ensure that the information or knowledge included in the curriculum was conveyed in an objective, critical and pluralistic manner and to avoid indoctrination that might be considered as not respecting parents' religious and philosophical convictions. Such an interpretation was consistent with Articles 8 and 10 of the Convention as well as with the general spirit of the Convention.

The sex-education classes at issue aimed at neutral transmission of knowledge regarding procreation, contraception, pregnancy and child birth in accordance with the underlying legal provisions and the ensuing guidelines and curriculum, based on current scientific and educational standards. The goal of the theatre workshop was to raise awareness of sexual violence and abuse of children and was consonant with the principles of pluralism and objectivity embodied in Article 2 of Protocol No. 1. As regards the carnival celebration, the Court observed that it had not been accompanied by any religious activities and that alternative events had been offered for those who did not wish to attend. There was no indication that the information or knowledge imparted at any of the events complained of was not conveyed in an objective, critical and pluralistic manner. In refusing exemption from the compulsory sex-education classes, theatre workshop and carnival celebration, the national authorities had not overstepped their margin of appreciation. Moreover, the applicants had remained free to educate their children after school in conformity with their religious beliefs. Finally, the means employed with a view to compelling the applicants to ensure their children's attendance at the events at issue had not been disproportionate. Even though two parents had been

given a prison sentence in default, the Court considered it solely a means of enforcing their payment obligation that had been imposed in accordance with the relevant provisions of domestic law.

Conclusion: inadmissible (manifestly ill-founded).

Hüseyin SÜRMELİ et Cemal SEVİN contre la Turquie

des requêtes n^{os} 29061/06 et 34582/06

EN FAIT

Le requérant, M. Hüseyin Sürmeli (requête n^{o} 29061/06), est un ressortissant turc, né en 1942 et résidant à Izmir.

Le requérant Cemal Sevin (requête n^{o} 34582/06), est un ressortissant turc, né en 1950, résidant à Izmir et exerçant la fonction de « dedelik » (chef spirituel) dans un *cemevi* (lieu de culte chez les alevis, mouvement religieux non reconnu par l'Etat).

Les requérants sont représentés devant la Cour par M^{e} K. Kırlangıç, avocat à Izmir.

A. Les circonstances de l'espèce

Les faits de la cause, tels qu'ils ont été exposés par les requérants, peuvent se résumer comme suit.

M. Sürmeli exerce la fonction de « rehberlik » dans le *cemevi* de Limontepe à Izmir. Dans la confession des alévis, le « *rehber* » figure parmi les dignitaires religieux et exerce une fonction similaire à celle de « *dede* », c'est-à-dire chef spirituel.

Quant à M. Sevin, celui-ci exerce la fonction de « *dede* » dans le *cemevi* de Limontepe à Izmir.

Le 8 octobre 2001, les requérants présentèrent deux requêtes à la direction des affaires religieuses dans lesquelles ils demandèrent : la reconnaissance de l'existence et des droits des alévis et la réorganisation de ladite direction conformément à cette situation ; la reconnaissance des *cemevis* comme lieu de culte propre aux alévis ; et la reconnaissance des fonctions de « *dede* » et de « *rehber* » avec l'octroi d'un statut et d'un salaire.

Le 7 novembre 2001, la direction répondit qu'il était impossible de donner une suite favorable aux demandes en question au motif que les fonctions désignées par les mots « dedelik », « zakirlik », ou « rehberlik » (fonctions religieuses dans la confession alévie) n'entraient pas dans le cadre imparti à la direction. Elle souligna également que les requérants ne remplissaient pas les conditions requises pour une nomination à un poste de la fonction publique. En effet, pour une telle nomination, il fallait au préalable passer un concours d'entrée, en vertu de la loi n^{o} 657 sur la fonction publique.

Le 14 février 2002, M. Sürmeli introduisit un recours en annulation devant le tribunal administratif d'Ankara. Quant à M. Sevin, il présenta également une action identique à une date non précisée.

Dans leurs recours, les requérants soutinrent, à titre préliminaire, que les dispositions pertinentes de la loi n^{o} 633 sur la création et les attributions de la Direction des affaires religieuses (ci-après « la Direction ») n'étaient pas en conformité avec les articles 2, 12, 24 et 136 de la Constitution et les textes internationaux relatifs à la liberté de religion auxquels la Turquie adhère. Ils demandèrent que lesdites dispositions soient soumises à l'examen de la Cour constitutionnelle (par voie d'exception). A titre secondaire, ils affirmèrent que le fait que la Direction soit organisée afin de fournir un service public exclusivement aux musulmans adhérant aux écoles de théologie sunnites n'était pas compatible avec les principes constitutionnels de laïcité et de neutralité du service public.

Par un jugement du 23 octobre 2002, le tribunal administratif débouta M. Sevin de sa demande.

Par ailleurs, le 28 février 2003, le tribunal administratif rejeta également la demande de M. Sürmeli au motif que le refus de l'administration défenderesse était conforme à la législation pertinente. Il écarta tout d'abord l'exception d'inconstitutionnalité soulevée par le requérant, ne la jugeant pas sérieuse, au sens de l'article 152 de la Constitution. Quant au fond de la demande, il observa que, selon la législation pertinente, la Direction était chargée de traiter des affaires relevant du domaine des croyances, du culte et de la morale de l'islam et de gérer les lieux de culte et accomplissait sa fonction par l'intermédiaire de fonctionnaires portant les noms de mufti, *vaiz, imam-hatip* et muezzin. Il ressortait ainsi qu'il n'existait aucune fonction correspondant à celle

invoquée par le requérant, sachant par ailleurs que, quoi qu'il en soit, le requérant ne pouvait être nommé fonctionnaire que par voie de concours.

Le 1er avril 2003, M. Sevin et le 20 octobre 2003, M. Sürmeli formèrent un pourvoi contre les jugements de première instance. Ils invoquèrent les articles 2, 10 et 24 de la Constitution, ainsi que les textes internationaux pertinents.

Le 20 mars 2006, le Conseil d'Etat infirma le jugement de première instance rendu quant à l'affaire de M. Sürmeli pour vice de procédure et renvoya l'affaire au tribunal administratif d'Ankara. Il considéra notamment que la juridiction de première instance avait rejeté la demande du requérant en se référant essentiellement à sa demande d'intégration à la fonction publique, alors qu'elle aurait dû se prononcer séparément sur toutes les demandes du requérant. Il observa également que le requérant aurait dû introduire des recours séparés pour chaque demande. Selon les éléments du dossier, le requérant, estimant que les voies de recours internes étaient devenues inefficaces, ne donna pas suite à l'arrêt du Conseil d'Etat et ne poursuivit pas l'affaire devant le tribunal administratif.

Le 27 mars 2006, le Conseil d'Etat infirma également le jugement de première instance rendu quant à l'affaire de M. Sevin pour les mêmes motifs.

Par un jugement du 6 février 2007, à la suite du renvoi de l'affaire au tribunal administratif d'Ankara, ce dernier ne se plia pas à l'arrêt du Conseil d'Etat quant à la nécessité d'engager des recours distincts pour chaque demande. Il se prononça à nouveau sur le fond des demandes de M. Sevin et les rejeta.

Selon les éléments du dossier, M. Sevin, estimant que les voies de recours internes étaient devenues inefficaces, ne donna pas suite à l'arrêt du Conseil d'Etat et ne forma pas un pourvoi contre le jugement de première instance.

B. Le droit interne pertinent

1. La Constitution

L'article 10 se lit comme suit :

> « Tous les individus sont égaux devant la loi sans distinction de langue, de race, de couleur, de sexe, d'opinion politique, de croyance philosophique, de religion ou de secte, ou distinction fondée sur des considérations similaires.
>
> (...)
>
> Les organes de l'État et les autorités administratives sont tenus d'agir conformément au principe de l'égalité devant la loi en toute circonstance. »

Les parties pertinentes de l'article 24 sont libellées comme suit :

> « Chacun a droit à la liberté de conscience, de croyance et de conviction religieuse.
>
> (...)
>
> Nul ne peut être contraint de participer à des prières ou à des cérémonies et rites religieux ni de divulguer ses croyances et ses convictions religieuses ; nul ne peut être blâmé ni inculpé à cause de ses croyances ou convictions religieuses (...) »

L'article 136 dispose :

> « La direction des affaires religieuses, qui fait partie de l'administration générale, remplit les fonctions qui lui sont confiées en vertu de la loi spécifique qui la régit, conformément au principe de laïcité, en se tenant à l'écart de toutes opinions et idées politiques, et en se fixant pour but de réaliser la solidarité et l'union nationales. »

2. La Direction des affaires religieuses

La Direction des affaires religieuses fut créée par la loi n° 633 du 22 juin 1965 – publiée au Journal officiel le 2 juillet 1965 – sur la création et les fonctions de la présidence des affaires religieuses. En

vertu de l'article premier de ladite loi, la présidence des affaires religieuses, rattachée au premier ministre, est chargée de traiter des affaires dans le domaine des croyances, du culte et de la morale de l'islam et de gérer les lieux de culte. Au sein de la Direction, le Conseil supérieur des affaires religieuses constitue la plus haute autorité de décision et de consultation. Il est composé de seize membres, désignés par le président de la Direction. Il est compétent pour répondre à toutes questions concernant la religion (article 5 de la loi n° 633).

GRIEFS

Les requérants se plaignent de la durée des procédures qui se sont déroulées devant les juridictions administratives. Ils se plaignent également de n'avoir reçu, à aucun moment de la procédure, communication des avis du procureur et du juge rapporteur du Conseil d'État. Ils invoquent l'article 6 de la Convention.

Les requérants invoquent une violation de l'article 9 de la Convention, lu isolement ou combiné avec son article 14. Ils soutiennent qu'en tant que dignitaires de la confession alévie, ils sont privés de statut juridique en droit turc, contrairement aux dignitaires de l'islam sunnite, qui sont considérés comme « fonctionnaires d'Etat ». Ils expliquent que la Direction des affaires religieuses, rattachée au premier ministre et dont les ressources proviennent du budget général, est chargée de traiter des affaires dans le domaine des croyances, du culte et de la morale de l'islam, alors que les autres communautés religieuses – dont les alévis – ne peuvent bénéficier d'aucune aide financière.

Les requérants se plaignent de ne pas avoir bénéficié d'un recours interne effectif au travers duquel ils auraient pu formuler leurs griefs de méconnaissance des articles 9 et 14 de la Convention. Ils soutiennent que, vu les durées de procédure et l'approche très formaliste des tribunaux administratifs, il n'est plus possible de soutenir qu'un recours en annulation devant les tribunaux administratifs constitue une voie de recours interne efficace.

Les requérants allèguent également une violation de leur droit à l'instruction consacré à l'article 2 du Protocole n° 1.

EN DROIT

Compte tenu de la similitude des requêtes quant aux faits et aux griefs, la Cour estime nécessaire de les joindre et décide de les examiner dans une seule décision.

A. Sur la durée de la procédure

Les requérants se plaignent de la durée des procédures qui se sont déroulées devant les juridictions administratives. Ils invoquent l'article 6 de la Convention.

En l'état actuel du dossier, la Cour ne s'estime pas en mesure de se prononcer sur la recevabilité de ces griefs et juge nécessaire de communiquer cette partie des requêtes au gouvernement défendeur conformément à l'article 54 § 2 b) de son règlement.

B. Sur les autres griefs

Les requérants invoquent une violation de l'article 9 de la Convention, tant pris isolément que combiné avec l'article 14. Ils se plaignent également de ne pas avoir bénéficié d'un recours interne effectif au travers duquel ils auraient pu formuler leurs griefs de méconnaissance des articles 9 et 14 de la Convention.

Les requérants allèguent en outre une violation de leur droit à l'instruction consacré par l'article 2 du Protocole n° 1. Enfin, ils se plaignent de n'avoir reçu, à aucun moment de la procédure,

communication des avis du procureur et du juge rapporteur du Conseil d'État. Ils invoquent à cet égard l'article 6 de la Convention.

La Cour rappelle qu'aux termes de l'article 35 § 1 de la Convention, elle ne peut être saisie qu'après l'épuisement des voies de recours internes. A cet égard, elle souligne que tout requérant doit avoir donné aux juridictions internes l'occasion que l'article 35 § 1 a pour finalité de ménager en principe aux Etats contractants : éviter ou redresser les violations alléguées contre lui (voir, parmi beaucoup d'autres, *Cardot c. France*, 19 mars 1991, § 36, série A n° 200, *Civet c. France* [GC], n° 29340/95, § 41, CEDH 1999-VI, et *Selmouni c. France* [GC], n° 25803/94, § 74, CEDH 1999-V).

Certes, un requérant n'est pas tenu d'exercer des recours qui, bien que théoriquement de nature à constituer des recours efficaces, n'offrent en réalité aucune chance de redressement des violations alléguées. L'un des éléments d'appréciation peut être la passivité totale des autorités nationales face à des allégations sérieuses selon lesquelles des agents de l'Etat ont commis des fautes ou causé un préjudice ou lorsque la durée exigée pour l'exercice d'un recours conduit au constat qu'il n'est pas efficace (voir *Ernst et autres c. Belgique* (déc.), n° 33400/96, 25 juin 2002).

La Cour constate que les requérants soutiennent que les voies de recours internes étaient devenues inopérantes, compte tenu des durées de procédure et de l'approche très formaliste des tribunaux administratifs.

Toutefois, la Cour observe que, dans le cadre de griefs tels que ceux présentés par les requérants, un recours contentieux devant les tribunaux administratifs constitue en principe une voie de recours efficace à épuiser (voir, *mutatis mutandis*, *Uysal Erdem c. Turquie* (déc.), n° 26328/95, 11 septembre 2001). Par ailleurs, s'agissant de la procédure devant les tribunaux internes, une passivité totale, de nature à rendre les voies de recours internes inefficaces, ne peut être observée, dans la mesure où les juridictions internes ont adopté au moins deux décisions sur une période de quatre ans et cinq mois pour M. Sürmeli et de cinq ans et quatre mois pour M. Sevin. La situation des requérants se distingue donc de celles où la Cour avait conclu à l'inefficacité d'une voie de recours existante en raison du fait qu'aucune décision n'était intervenue pendant longtemps et ne pouvait être attendue à brève échéance (comparer avec *Ernst et autres* précité, *Selmouni c. France* [GC], n° 25803/94, § 81, CEDH 1999-V, *Özgür Kılıç c. Turquie* (déc.), n° 42591/98, 24 septembre 2002).

Partant, les requérants, n'ayant pas poursuivi leurs affaires devant les tribunaux internes, n'ont pas donné aux juridictions turques l'occasion que l'article 35 a pour finalité de ménager en principe aux Etats contractants : éviter ou redresser les violations alléguées contre eux. Il s'ensuit que cette partie de la requête doit être rejetée en application de l'article 35 § 1 et 4 de la Convention.

Par ces motifs, la Cour, à l'unanimité,

Décide de joindre les requêtes ;

Ajourne l'examen du grief des requérants tiré de la durée des procédures;

Déclare la requête irrecevable pour le surplus.

Laduna v. Slovakia - 31827/02

Judgment 13.12.2011 [Section III]

Article 14

Discrimination

Unjustified difference in treatment of remand prisoners compared to convicted prisoners as regards visiting rights and access to television: *violation*

Facts – The applicant was detained pending trial from 1 September 2001 to 9 February 2006, when he began a nine-year prison sentence. In his application to the European Court, he complained that at the material time remand prisoners did not have the same visiting rights as convicted prisoners and that, unlike convicted prisoners, they had no access to television.

Law – Article 14 in conjunction with Article 8: Prison restrictions on family visits and on watching television came within the ambit of private and family life under Article 8. Article 14 was therefore applicable. Detention on remand fell within the notion of "other status" within the meaning of that provision as, even though it could be imposed involuntarily and generally for a temporary period, it constituted a distinct legal situation that was inextricably bound up with the individual's personal circumstances and existence. Further, as a remand prisoner the applicant was in a relevantly similar situation to the comparator group of convicted prisoners since his complaints concerned visiting rights and access to television in prison which were issues of relevance to all prisoners.

At the material time, remand prisoners were allowed to receive visits for a minimum of thirty minutes a month compared to the two hours allowed convicted prisoners. Moreover, for much of the relevant period the frequency of visits and the type of contact which convicted prisoners were allowed depended on the security level of the prison in which they were being held, whereas remand prisoners were all subject to the same regime, regardless of the reasons for their detention and the security considerations.

The Court was not satisfied that there had been any objective and reasonable justification for these differences in treatment. The provisions of the Detention Act 1993 requiring any restrictions on detainees' rights to be justified by the purpose of the detention and the need to ensure order, the safety of others and the protection of property did not justify restricting remand prisoners' rights to a greater extent than those of convicted prisoners and the arrangements had been criticised by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT) in its reports on visits to Slovakia in 1995, 2000 and 2005. Furthermore, while particular restrictions on a prisoner's visiting rights might in some instances be justified for security reasons or to protect the legitimate interests of an investigation, those aims could be attained by other means which did not affect all detained persons regardless of whether they were actually required. For example, different categories of detention could be used, or particular restrictions imposed if necessary in an individual case. International instruments such as the International Covenant on Civil and Political Rights and the European Prison Rules of 1987* stressed the need to respect the remand prisoner's status as a person who is to be presumed innocent, while the European Prison Rules 2006, which were adopted shortly before the applicant's detention on remand ended, provided that unless there was a specific reason to the contrary untried prisoners should receive visits and be allowed to communicate with family and other persons in the same way as convicted prisoners. In the light of these considerations, the visiting restrictions imposed on the applicant had been disproportionate.

As regards the lack of access to television, the Government had failed to put forward any objective justification for treating remand prisoners differently to convicted prisoners, for whom television was considered part of their cultural and educational activities.

Conclusion: violation (unanimously).

Article 1 of Protocol No. 1: Making the applicant's right to buy additional food and other products in the prison shop conditional on his applying at least the same amount of money to the reimbursement of his registered debts constituted interference with his right to the peaceful enjoyment of his possessions. That interference had a legal basis and securing the reimbursement of debt was undoubtedly in the general interest. As to proportionality, the interference had limited but not deprived the applicant of the ability to use the money in his prison account to buy food and other products in the prison shop. Furthermore, the requirement to reimburse his debts did not apply to medicine, indispensable sanitary items, materials for correspondence, or taxes and fees. Accordingly, regard being had to the wide margin of appreciation afforded to the Contracting States in the debt-recovery sphere, the interference was not disproportionate to the aim pursued.

Conclusion: no violation (unanimously).

Article 13: The Court notes that it declared admissible and examined the applicant's complaints under the substantive provisions of the Convention only to the extent that the alleged breach stemmed from the alleged deficiencies in the relevant law. Article 13 could not be interpreted as requiring a remedy against the state of domestic law.

Conclusion: no violation (unanimously).

Article 41: EUR 9,000 in respect of non-pecuniary damage.

* Recommendation No. R (87) 3 of the Committee of Ministers of the Council of Europe on the European Prison Rules adopted on 12 February 1987, replaced with Recommendation Rec(2006)2 of the Committee of Ministers of the Council of Europe on the European Prison Rules adopted on 11 January 2006.

Fernández Martínez v. Spain - 56030/07

Judgment 15.5.2012 [Section III]

Article 8

Article 8-1

Respect for private life

Refusal to renew teacher of Catholic religion and morals' contract after he publicly revealed his position as a "married priest": *no violation*

[This case was referred to the Grand Chamber on 24 September 2012]

Facts – The applicant is a secularised Catholic priest. In 1984 he applied to the Vatican for dispensation from the requirement of celibacy. He married the following year and he and his wife had five children. From 1991 he worked as a teacher of religion and morals at a State high school, his contract of employment being renewed annually on the basis of the opinion of the local bishop, which was binding on the Ministry of Education. In 1996 the applicant attended a meeting of the "Movement for Optional Celibacy". The participants expressed their disagreement with the Church's position on various matters, including abortion, divorce, sexuality and birth control. An article was published in a regional newspaper, together with a photograph of the applicant and his family. It mentioned the applicant's name and reported a number of comments he had made. In 1997 the applicant was granted a dispensation from celibacy. His teaching contract was not renewed, on the ground that he had breached his duty to teach "without creating a risk of scandal" by publicising his status as a "married priest". The applicant challenged that decision in the domestic courts, but to no avail. The Constitutional Court observed, in particular, that the diocese had been aware of his status as a "married priest" but had only stopped renewing his contract after the article was published – at the applicant's own instigation – in the press.

Law – Article 8: The decision not to renew the applicant's contract had affected his prospects of pursuing a professional activity and had had a consequential impact on his enjoyment of the right to respect for his private life. Article 8 was therefore applicable. The main question was accordingly whether, in discharging its positive obligations, the State was required to give precedence to the applicant's right to respect for his private life over the right of the Catholic Church to refuse to renew his contract. Religious communities traditionally and universally existed in the form of organised structures, and where their organisation was at issue, Article 9 of the Convention was to be interpreted in the light of Article 11, which protected participation in associations from unjustified State interference. Under Spanish law, the concept of autonomy of religious communities was accompanied by the principle of State religious neutrality, which prevented the State from expressing a position on matters such as scandal or celibacy for priests. However, this obligation of neutrality was limited in that the bishop's decision was subject to judicial review. The bishop could not put forward candidates who did not possess the professional qualifications required for the post and was also required to respect fundamental rights and freedoms. Furthermore, although the definition of the religious or moral criteria serving as a basis for not renewing a candidate's contract was the exclusive prerogative of the religious authorities, the domestic courts could nevertheless weigh up the competing fundamental rights and also had jurisdiction to examine whether the decision not to appoint the candidate concerned had been based on any grounds other than strictly religious ones, those being the sole aspects protected by religious freedom. The applicant had had the opportunity to bring his case before the appropriate courts. Since the grounds on which he had not had his contract of employment renewed were of a strictly religious nature, the Court confined itself to

ensuring that neither the fundamental principles of the domestic system nor the applicant's dignity had been impaired.

In the present case, the publication of the article in question had led the bishop to consider that the requisite bond of trust had been breached. This bond necessarily entailed certain characteristics which set teachers of Catholic religion and morals apart from other teachers. In not renewing the applicant's contract, the ecclesiastical authorities had simply been discharging their obligations in accordance with canon law and the principle of religious autonomy. On signing his contract, the applicant had been, or should have been, aware of the particular features of the employment relationship for a post of that nature. As a result, the Court considered that the applicant had been bound by duties of loyalty and observed in that connection that he had not left the meeting in question, even after noticing the presence of media representatives, and that he had been among those who had openly expressed their disagreement with Church policy on various matters. The appropriate courts had, moreover, shown on the basis of sufficiently detailed reasoning that such duties of loyalty were acceptable in that their purpose was to protect the sensitivities of the public and of the parents of pupils at the school. Furthermore, the duty of discretion and circumspection was all the more important because the direct beneficiaries of the applicant's teaching were minor children, who were vulnerable and impressionable by nature. Regard being had to the State's margin of appreciation, the appropriate courts had struck a fair balance between various private interests.

Conclusion: no violation (six votes to one).

(See *Lombardi Vallauri v. Italy*, 39128/05, 20 October 2009, Information Note 123; *Obst v. Germany*, 425/03, et *Schüth v. Germany*, 1620/03, 23 September 2010, Information Note 133; and *Siedenhaar v. Germany*, 18136/02, 3 February 2011)

Vojnity v. Hungary - 29617/07

Judgment 12.2.2013 [Section II]

Article 14

Discrimination

Total removal of applicant's access rights on account of his attempts to transmit his religious beliefs to his child: *violation*

Facts – The applicant belonged to the religious denomination *Hit Gyülekezete* (Congregation of the Faith). In 2000 he divorced and his son, who was born in 1994, was placed with the mother. The applicant was granted access. He twice applied without success for custody or an order varying his rights of access. In 2006 the domestic courts withdrew custody from the mother and placed the boy with his older brother. It refused to give custody to the applicant after noting a comment in an expert psychologist's report that the applicant held unrealistic educational ideas hallmarked by religious fanaticism which rendered him unfit to provide the boy with a normal upbringing. Ultimately, in 2008, the courts removed the applicant's access rights altogether, on the grounds that he had abused them by imposing his religious convictions on his son.

Law – Article 14 in conjunction with Article 8: The decision to deprive the applicant of access rights in respect of his son had constituted an interference with his right to respect for family life. When deciding on the applicant's suitability to contribute to his son's development, the domestic authorities had added to their consideration the factor – that had evidently been decisive – of the applicant's religious convictions and its possible effects on the child. The applicant's religious convictions had thus had a direct bearing on the outcome of the matter in issue and there had been a difference of treatment between the applicant and other parents in an analogous situation. The aim pursued, namely the protection of the child's health and rights, was legitimate. However, the rights to respect for family life and religious freedom as enshrined in Articles 8 and 9 of the Convention, together with the right to respect for parents' philosophical and religious convictions in education, as provided in Article 2 of Protocol No. 1, conveyed on parents the right to communicate and promote their religious convictions in their children's upbringing. That would be an uncontested right in the case of two married parents sharing the same religious ideas or worldview and promoting them to their child, even in an insistent or overbearing manner, unless it exposed them to dangerous practices or physical or psychological harm. The Court saw no reason why the position of a separated or divorced parent who did not have custody of his or her child should be different *per se*. In the instant case there was no evidence that the applicant's religious convictions involved dangerous practices or exposed his son to physical or psychological harm. No convincing evidence had been presented to substantiate a risk of actual harm, as opposed to the mere unease, discomfort or embarrassment which the child might have experienced on account of his father's attempts to transmit his religious beliefs. The expert had not examined the applicant, nor had his suggestion that the applicant should be examined by a psychiatrist been followed up. The Government had not demonstrated the presence of exceptional circumstances which could justify a measure as radical as the total severance of contact between the applicant and his son. The domestic courts had decided to apply an absolute ban on the applicant's access rights without giving any consideration to the question whether the mere suspension of access for a certain period of time or any other less severe measure that existed under Hungarian law (such as the exercise of access rights in controlled circumstances) would have sufficed to allow the child to regain his emotional balance. For the Court, the approach adopted by the authorities had amounted to a complete disregard of the principle of proportionality that was requisite in this field and inherent in the spirit of the Convention.

Consequently, the applicant had been discriminated against on the basis of his religious convictions in the exercise of his right to respect for family life.

Conclusion: violation (unanimously).
Article 41: EUR 12,500 in respect of non-pecuniary damage.

Case of Kasymakhunov and Saybatalov v. Russia

(Applications nos. 26261/05 and 26377/06)

PROCEDURE

1. The case originated in two applications (nos. 26261/05 and 26377/06) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Uzbek national, Mr Yusup Salimakhunovich Kasymakhunov ("the first applicant"), and a Russian national, Mr Marat Temerbulatovich Saybatalov ("the second applicant"), on 11 July 2005 and 10 June 2006 respectively.

2. The first applicant was represented by Mr K. Koroteyev, Ms D. Vedernikova, Ms N. Kravchuk, Mr P. Leach and Mr W. Bowring, lawyers with the Human Rights Centre "Memorial", based in Moscow. The second applicant was represented by Mr R. Mukhametov, a lawyer practising in Tyumen. The Russian Government ("the Government") were represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicants alleged, in particular, that they had been convicted on the basis of legal provisions that were neither accessible nor foreseeable in their application. They also complained of a violation of their freedoms of religion, expression and association and of discrimination on account of their religious beliefs.

4. On 11 June 2009 and 17 June 2010 the applications were communicated to the Government. It was also decided to rule on the admissibility and merits of the applications at the same time (Article 29 § 1).

THE COURT UNANIMOUSLY

1. Decides to join the applications;
2. Declares the complaint concerning the conviction on the basis of legal provisions that were allegedly neither accessible nor foreseeable in their application admissible and the remainder of the applications inadmissible;
3. Holds that there has been no violation of Article 7 of the Convention in respect of the first applicant;
4. Holds that there has been a violation of Article 7 of the Convention in respect of the second applicant.

Done in English, and notified in writing on 14 March 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sindicatul “Păstorul cel Bun” v. Romania [GC] - 2330/09

Judgment 9.7.2013 [GC]

Article 11

Article 11-1

Freedom of association

Refusal to register a trade union for priests on account of the autonomy of religious communities: *no violation*

Facts – In April 2008 thirty-five clergy members and lay employees of the Romanian Orthodox Church decided to form a trade union. The elected president applied to the court of first instance for the union to be granted legal personality and entered in the register of trade unions. However, the representative of the archdiocese lodged an objection. The union’s representative maintained the application, which was supported by the public prosecutor’s office. In May 2008 the court allowed the union’s application and ordered its entry in the register, thereby granting it legal personality. The archdiocese appealed against that judgment. In a final judgment of July 2008 the county court allowed the appeal, quashed the first-instance judgment and, on the merits, refused the application for the union to be granted legal personality and entered in the register of trade unions.

In a judgment of 31 January 2012 (see Information Note 148) a Chamber of the Court held by five votes to two that there had been a violation of Article 11, finding that in the absence of a “pressing social need” and of sufficient reasons, a measure as drastic as the refusal to register the applicant union had been disproportionate to the aim pursued and therefore unnecessary in a democratic society.

Law – Article 11
(a) *Applicability* – The duties performed by the members of the trade union and the manner of their remuneration entailed many of the typical features of an employment relationship. However, the work of members of the clergy had certain special characteristics, such as its spiritual purpose, the fact that it was carried out within a church enjoying a certain degree of autonomy, and the heightened duty of loyalty towards the Church. It could therefore be a delicate task to make a precise distinction between strictly religious activities and activities of a more financial nature. However, notwithstanding their special circumstances, members of the clergy fulfilled their mission in the context of an employment relationship falling within the scope of Article 11, which was therefore applicable to the facts of the case.

(b) *Merits* – The refusal to register the applicant union amounted to interference, which had been based on the provisions of the Statute of the Romanian Orthodox Church. The domestic courts had inferred from the Statute that the establishment of Church associations and foundations was the prerogative of the Holy Synod and the archbishop’s permission was required for members of the clergy to take part in any form of association whatsoever. The interference had pursued the legitimate aim of protecting the rights of others, and specifically those of the Romanian Orthodox Church.

Bearing in mind the arguments put forward by the archdiocese before the domestic courts in support of its objection to recognising the trade union, it had been reasonable for the county court to take the view that a decision to allow the union’s registration would create a real risk to the autonomy of the religious community in question. In Romania, all religious denominations were entitled to adopt

their own internal regulations and were thus free to make their own decisions concerning their operations, recruitment of staff and relations with their clergy. The principle of the autonomy of religious communities was the cornerstone of relations between the Romanian State and the religious communities recognised within its territory. The Romanian Orthodox Church had chosen not to incorporate into its Statute the labour law provisions which were relevant in this regard, a choice that had been approved by a Government ordinance in accordance with the principle of the autonomy of religious communities. Having regard to the aims set forth by the applicant union in its constitution – in particular those of promoting initiative, competition and freedom of expression among its members, ensuring that one of its members took part in the Holy Synod, requesting an annual financial report from the archbishop and using strikes as a means of defending its members' interests – the judicial decision refusing to register the union with a view to respecting the autonomy of religious denominations did not appear unreasonable, particularly given the State's role in preserving such autonomy. In refusing to register the applicant union, the State had simply declined to become involved in the organisation and operation of the Romanian Orthodox Church, thereby observing its duty of neutrality under Article 9 of the Convention.

The county court had refused to register the applicant union after noting that its application did not satisfy the requirements of the Church's Statute because its members had not complied with the special procedure in place for setting up an association. The court had thus simply applied the principle of the autonomy of religious communities. It had concluded, endorsing the reasons put forward by the archdiocese, that if it were to authorise the establishment of the trade union, the consultative and deliberative bodies provided for by the Church's Statute would be replaced by or obliged to work together with a new body – the trade union – not bound by the traditions of the Church and the rules of canon law governing consultation and decision-making. The review undertaken by the court had thus confirmed that the risk alleged by the Church authorities was plausible and substantial, that the reasons they had put forward did not serve any other purpose unrelated to the exercise of the autonomy of the religious community in question, and that the refusal to register the applicant union did not go beyond what was necessary to eliminate that risk.
More generally, the Statute of the Romanian Orthodox Church did not provide for an absolute ban on members of its clergy forming trade unions to protect their legitimate rights and interests. Accordingly, there was nothing to stop the applicant union's members from availing themselves of their right under Article 11 of the Convention by forming such an association that pursued aims compatible with the Church's Statute and did not call into question the Church's traditional hierarchical structure and decision-making procedures. Moreover, the applicant union's members were free to join any of the associations currently existing within the Romanian Orthodox Church which had been authorised by the national courts and operated in accordance with the requirements of the Church's Statute.

Lastly, there was a wide variety of constitutional models governing relations between States and religious denominations in Europe. In view of the lack of a European consensus on this matter, the State enjoyed a wider margin of appreciation in this sphere, encompassing the right to decide whether or not to recognise trade unions that operated within religious communities and pursued aims that might hinder the exercise of such communities' autonomy. In conclusion, the county court's refusal to register the applicant union had not overstepped the margin of appreciation afforded to the national authorities in this sphere, and accordingly was not disproportionate.
Conclusion: no violation (eleven votes to six).

Ljiljana HUHLE and Günter HUHLE against Germany

Application no. 61145/09

THE FACTS

1. The applicants, Ms Ljiljana Huhle and Mr Günter Huhle, are German nationals, who were born in 1963 and 1950 respectively and live in Seevetal, Lower Saxony.

2. The facts of the case, as submitted by the applicants, may be summarised as follows.

A. The circumstances of the case

3. The applicants are the parents of two children, a son who was born in 1992, and a daughter who was born in 1993. The applicants decided that their children should attend a public school which taught classical philology and which was situated in the neighbouring federal state of Hamburg. The applicants' son attended the school in 2003/2004 and 2004/2005 and the daughter in 2004/2005.

4. In 2004 the Lower Saxony school administration provided the applicants with free tickets for public transport to and from the school. The applicants requested reimbursement of travel expenses incurred by use of their private car.

5. On 2 September 2004 the administration dismissed the applicants' request. It found that the school was accessible by public transport. It stated that it would reimburse the costs of transport by private car only on those days when the applicants' son was scheduled to tidy up classrooms after school.

6. On 5 September 2004 the first applicant lodged an administrative appeal. She mainly argued that travelling to school by public transport was unreasonably long and unsafe. She added that her daughter now also needed to travel to school by private car. On 14 October 2004 the administration dismissed the administrative appeal.

7. On 12 November 2004 the applicants lodged an action before the administrative courts.

8. On 21 November 2005 the Lüneburg Administrative Court held that the state of Lower-Saxony was obliged to ensure that pupils could reach the school they attended within a reasonable time. It stated that pursuant to the court's case-law a one-way trip to or from school was not allowed to exceed 90 minutes while 60 minutes was still reasonable. It referred in this context to an expert opinion of the Lower Saxony Transport Commission of 1979. It found that in the present case the journey to school was unreasonably long. It stated that a school day, including attendance, travel and homework, should not exceed 8 hours per day. In addition, it pointed out that the children had to change bus twice per trip.

9. On 4 June 2008 the Lower Saxony Administrative Court of Appeal quashed the Administrative Court's judgment and dismissed the remaining claim. It reiterated that the state of Lower Saxony was obliged to ensure that pupils could reach a school within a reasonable time. It confirmed that 90 minutes for secondary schoolchildren for one way was unreasonably long, while 60 minutes was still reasonable. In the concrete case between 63 and 79 minutes were needed not including the necessary transfer and waiting times. However, the court underlined that the children attended not the closest secondary school which led to a comparable qualification (*Abitur)*, but a distant secondary school with a special and rare curriculum. In these circumstances slightly longer travel times had to be tolerated. The court lastly rejected the applicants' argument that public transport was unsafe.

10. On 15 January 2009 the Federal Administrative Court dismissed the applicants' appeal on points of law. It stated that the case concerned primarily the law of the state of Lower Saxony, not Federal law, and the judgment showed no disrespect for the principles of Federal law.

11. On 16 June 2009 a three judge panel of the Federal Constitutional Court dismissed the applicant's constitutional complaint without further reasoning.

12. By letter of 18 March 2013 the applicants informed the Court that their children had stopped attending the secondary school in question because transport arrangements were unreasonable.

B. Relevant domestic law

13. Section 114 in connection with section 63 of the Education Act of Lower Saxony stipulate that the local authorities have to bear the reasonable school travel expenses for students residing in their area or alternatively have to reimburse the parents for expenses necessarily incurred.

COMPLAINTS

14. The applicants complained under Articles 5, 8, 9 and 14 of the Convention and under Article 26 of the Universal Declaration of Human Rights (right to education) about the administration's refusal to reimburse their costs for school transport of their children by private car. They mainly argued that the trip to school by public transport was unreasonably long and exhausting for the children and not sufficiently safe, such that they were compelled to use a private car.

Invoking Article 6 they complained that the length of the proceedings was unreasonably long.

THE LAW

A. Complaint concerning the reimbursement of transport expenses

15. The applicants relied on Article 26 of the Universal Declaration of Human Rights – right to education – while complaining about the administration's refusal to reimburse their costs for school transport of their children by private car. The Court will examine the complaint under the first sentence of Article 2 of Protocol No. 1, which provides:

> "No person shall be denied the right to education."

16. The Court is aware that Germany has made the following reservation to Article 2 of Protocol No. 1, but considers it not necessary to consider its application to the present case as the application is in any event inadmissible for the reasons set out below. The reservation reads as follows:

> "The Federal Republic of Germany adopts the opinion according to which the second sentence of Article 2 of the (First) Protocol entails no obligation on the part of the State to finance schools of a religious or philosophical nature, or to assist in financing such schools..."

17. The Contracting Parties are not obliged under Article 2 of Protocol No. 1 to establish or to subsidise education of any particular type. This provision essentially establishes access to primary and secondary education, although higher education is not necessarily excluded. The right to education might also contain positive obligations (see *Leyla Şahin v Turkey* [GC], no. 44774/98, §§ 135, 136, ECHR 2005-XI). It cannot be used to derive a right to free transport to the school of one's choice where an alternative is available which would involve free transport and which has not been shown to conflict with the parents' convictions (see *Cohen v. the United Kingdom,* no. 25959/94, Commission decision of 28 February 1996).

18. In the present case, the applicants have not contended that the secondary schooling which was available to them locally was inadequate. They did however wish to send their children to a specific school, outside the catchment area of their local school and, indeed, outside the state of Lower-Saxony where the applicants lived. Their reason for this was that no local schools offered a curriculum which included classical philology.

19. The Court first notes that the education system in Lower Saxony, far from requiring the applicants' children to attend the local school which was maintained by it, permitted them to attend the school of their parents' choice. The education system also provided free public transport to that

school under certain conditions. Even if in certain circumstances effective access to education may require the provision of transport – which the Court is not required to decide in the present case– the respondent Government, in providing free public transport to the school of the applicants' choice, has met its obligation under the first sentence of Article 2 of Protocol no. 1. The fact that the children had over one hour's travel time in each direction is a consequence of the applicants' decision to send their children to that particular school, and does not affect the respondent Government's obligation, which is to ensure access to education.

20. As regards the applicants' argument that public transport was not sufficiently safe, the Court notes that the domestic courts rejected this argument as unsubstantiated. The applicants have not submitted facts that would compromise the domestic courts' assessment of facts.

21. Consequently, the applicants' complaint in this regard is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. Complaint under Article 6 § 1 (length of proceedings)

22. The applicants complained about the length of the proceedings under Article 6 § 1 of the Convention. This provision provides as follows:

> "In the determination of his civil rights and obligations, everyone is entitled to a ... hearing within a reasonable time ..."

23. The Court observes that even assuming that the duration of the court proceedings had been protracted in the pertinent case, the complaint in this regard has to be considered as inadmissible for non-exhaustion of domestic remedies, as Germany has introduced a domestic remedy which entered into force on 3 December 2011 to compensate for excessive duration of court proceedings.

24. The Court found in *Taron v. Germany* (dec.) no. 53126/07, 29 May 2012, that it was appropriate and justified to require even those applicants who had lodged their application with this Court before the entering into force of the Act to avail themselves of the new domestic remedy. Furthermore, the applicant cannot claim that he was not properly aware of the new domestic remedy, see *Bandelin v. Germany* (dec.), no. 41394/11, 22 January 2013. The Court noted in that case it was the primary task of the applicants to observe national developments relevant to their applications and to react accordingly.

25. In the present case the applicants have not submitted that they lodged a remedy pursuant to the new Act against Excessive Court Proceedings and Criminal Investigations. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

C. Further complaints

26. Given that the applicants' complaint under Article 2 Protocol No. 1 has been rejected for being manifestly ill-founded, the Court is of the opinion that also the related further complaints, in particular under Articles 5, 8, 9 and 14 of the Convention, are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Stefano ASQUINI and others against Italy - 10009/06

Judgement 05.11.2013

THE FACTS

The applicants, Mr Stefano Asquini, Mrs Federica Bisconti and Ms G.A., are Italian nationals who were born in 1963, 1966 and 2002 respectively and live in Rome. The first and second applicants are the parents of the third applicant. They are represented before the Court by Mr Nicolò Paoletti, Ms Alessandra Mari and Ms Annapaola Specchio, lawyers practising in Rome.

A. The circumstances of the case

The facts of the case, as submitted by the applicants, may be summarised as follows.

In September 2005 the third applicant was enrolled in a public nursery school.

With the aim of providing their child with a pluralistic and secular education, in conformity with their philosophy of life, the first and second applicants requested that their child be exempted from Catholic religious education, as they were entitled to do under Italian law (see, in particular, Presidential Decree no. 751 of 16 December 1985 and Legislative Decree no. 297 of 16 April 1994).

On 15 April 2013, the Court asked the applicants to provide it with a copy of their request for exemption or to give an indication of the date on which the request was submitted. However, the applicants failed to do so, solely providing the Court with a declaration of the nursery school concerning the enrolment of the third applicant and the choice to be exempted from Catholic religious education.

COMPLAINTS

Citing Articles 9 of the Convention and 2 of Protocol No. 1 thereto, the first and second applicants complain that the compulsory inclusion of Catholic religious education in the public nursery school curriculum interferes with their freedom of thought, conscience and religion and with their right as parents to ensure that their daughter receives an education which is in line with their philosophical convictions.

They also complain that the only means of obtaining exemption from compulsory Catholic religious education being by written request constitutes a further violation of the Convention under its Articles 9 and 10, as the applicants were obliged to take a formal stand with regard to their personal beliefs.

Finally, the first and second applicants allege that as she was separated from her classmates during Catholic religious education lessons, the third applicant has been discriminated against, in violation of Article 14 of the Convention taken in conjunction with the above-mentioned provisions. In such a situation the child has been the victim of exclusion and isolation entailing psychological distress.

THE LAW

The Court notes that the applicants did not raise their complaints before the school governing body (*Consiglio di intersezione*), which could have submit proposals for education and teaching to the teachers' council (*Collegio dei docenti*). Any negative response to their request could have been brought before the administrative courts (see, *mutatis mutandis*, *Lautsi and Others v. Italy* [GC], no. 30814/06, §§ 11 to 16, ECHR 2011 (extracts)).

Therefore the present application is inadmissible for non-exhaustion of domestic remedies following article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court unanimously
Declares the application inadmissible.

Krupko and Others v. Russia - 26587/07

Judgment 26.6.2014 [Section I]

Article 9

Article 9-1

Manifest religion or belief

Disruption of a Jehovah's Witnesses religious meeting by armed riot police: *violation*

Article 5

Article 5-1

Deprivation of liberty

Lawful arrest or detention

Detention of participants at religious ceremony of Jehovah's Witnesses: *violation*
Facts – The applicants were Jehovah's Witnesses belonging to various congregations in Moscow. On 12 April 2006 some 400 people, including the four applicants, were about to celebrate the most solemn and significant religious meeting of the year for Jehovah's Witnesses when the police arrived in large numbers and cordoned off the university building that had been rented for the occasion. Fourteen members of the congregation, including the applicants, were segregated from the rest of the group and taken to minibuses under police escort before being driven to a local police station where they remained for about three hours, until after midnight.

The four applicants brought proceedings before the national courts to complain in particular about the disruption of the service and their detention. In a final judgment of March 2007, the courts held that the police had lawfully stopped the service as it had been held on unsuitable premises under domestic law and that the three hours spent by the applicants at the police station could not be considered as detention.

Law – Article 5: It was established that there was an element of coercion which, notwithstanding the short duration of the detention, was indicative of a deprivation of liberty within the meaning of Article 5 § 1. The applicants had produced their identity documents at the request of the police officers, answered the officers' questions and obeyed their orders. They were not formally suspected of, or charged with, any offence and no criminal or administrative proceedings were instituted against them. The station officer had acknowledged in the domestic proceedings that no elements of an administrative offence had been established. It followed that the applicants' arrest could not have been effected "for the purpose of bringing [them] before the competent legal authority on reasonable suspicion of having committed an offence" within the meaning of Article 5 § 1 (c). Hence, the deprivation of liberty to which the applicants were subjected did not have any legitimate purpose under Article 5 § 1 and was arbitrary.

Conclusion: violation (unanimously).
Article 9: The early termination of the service ordered by the police had constituted an interference with the applicants' right to freedom of religion. It was unnecessary to rule on the question whether that interference was "prescribed by law" because, in any event, it was not "necessary in a democratic society"*. The Court had consistently held that, even in cases where the authorities had

not been properly notified of a public event but where the participants did not represent a danger to public order, dispersal of a peaceful assembly by the police could not be regarded as having been "necessary in a democratic society". This finding applied *a fortiori* in the circumstances of the present case where the assembly in question was not a tumultuous outdoors event but a solemn religious ceremony in an assembly hall which had not been shown to create any disturbance or danger to public order. The intervention of armed riot police in substantial numbers with the aim of disrupting the ceremony, even if the authorities genuinely believed that lack of advance notice rendered it illegal, followed by the applicants' arrest and three-hour detention, was disproportionate to the aim of protecting public order.

Conclusion: violation (unanimously).

Article 41: EUR 30,000 jointly in respect of non-pecuniary damage.

* See, for example, *Kasparov and Others v. Russia*, 21613/07, 3 October 2013, Information Note 167.

S.A.S. v. France [GC] - 43835/11

Judgment 1.7.2014 [GC]

Article 8

Article 8-1

Respect for private life

Ban on wearing religious face covering in public: *no violation*

Article 9

Article 9-1

Manifest religion or belief

Ban on wearing religious face covering in public: *no violation*

Article 14

Discrimination

Ban on wearing religious face covering in public: *no violation*

Facts – The applicant is a practising Muslim and said that she wore the burqa and niqab, which covered her whole body except for her eyes, to live in accordance with her religious faith, culture and personal convictions. She added that she wore this clothing of her own accord in public and in private, but not systematically. She was thus content not to wear it in certain circumstances but wished to be able to wear it when she chose to do so. Lastly, her aim was not to annoy others but to feel at inner peace with herself. Since 11 April 2011, the date of the entry into force of Law no. 2010-1192 of 11 October 2010 throughout France, it had been against the law to conceal one's face in a public place.

Law – Article 8 and Article 9: The ban on wearing, in public places, clothing designed to conceal one's face raised issues with regard to the right to respect for the private life (Article 8 of the Convention) of women who wished to wear the full-face veil for reasons relating to their beliefs; and to the extent that the ban was complained of by individuals such as the applicant who were thus prevented from wearing in public places clothing that they were required to wear by their religion, it particularly raised an issue with regard to the freedom to manifest one's religion or beliefs (Article 9).

The Law of 11 October 2010 confronted the applicant with a dilemma: either she complied with the ban and thus refrained from dressing in accordance with her approach to religion, or she refused to comply and would face criminal sanctions.* There had thus been an "interference" or a "limitation" prescribed by law as regards the exercise of rights protected by Articles 8 and 9 of the Convention.

The Government had argued that the interference pursued two legitimate aims: "public safety" and "respect for the minimum set of values of an open democratic society". However, the second paragraph of Articles 8 and 9 did not expressly refer to the second of those aims or to the three values invoked by the Government in that connection.

The Court accepted that the legislature had sought, by adopting the ban in question, to address concerns of "public safety" within the meaning of the second paragraph of Articles 8 and 9.

As regards the second aim, "respect for the minimum set of values of an open democratic society"**, the Court was not convinced by the Government's submission in so far as it concerned respect for gender equality. A State Party could not invoke gender equality in order to ban a practice that was defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those Articles, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms. Moreover, in so far as the Government thus sought to show that the wearing of the full-face veil by certain women shocked the majority of the French population because it infringed the principle of gender equality as generally accepted in France, the Court referred to its reasoning (below) as to the other two values that they had invoked.
Secondly, respect for human dignity could not legitimately justify a blanket ban on the wearing of the full-face veil in public places. The clothing in question might be perceived as strange by many of those who observed it, but it was the expression of a cultural identity which contributed to the pluralism inherent in democracy.

Thirdly, in certain conditions, what the Government had described as "respect for the minimum requirements of life in society" – or of "living together", as stated in the explanatory memorandum accompanying the Bill – could be linked to the legitimate aim of the "protection of the rights and freedoms of others". The respondent State took the view that the face played an important role in social interaction. The Court was therefore able to accept that the barrier raised against others by a veil concealing the face was perceived by the respondent State as breaching the right of others to live in a space of socialisation which made living together easier. That being said, in view of the flexibility of the notion of "living together" and the resulting risk of abuse, the Court had to engage in a careful examination of the necessity of the impugned limitation.

First, it could be seen clearly from the explanatory memorandum accompanying the Bill that it was not the principal aim of the ban to protect women against a practice which was imposed on them or would be detrimental to them.

As regards the question of necessity in relation to public safety, within the meaning of Articles 8 and 9, the Court understood that a State might find it essential to be able to identify individuals in order to prevent danger for the safety of persons and property and to combat identity fraud. However, in view of its impact on the rights of women who wished to wear the full-face veil for religious reasons, a blanket ban on the wearing in public places of clothing designed to conceal the face could be regarded as proportionate only in a context where there was a general threat to public safety. The Government had not shown that the ban introduced by the Law of 11 October 2010 fell into such a context. As to the women concerned, they were thus obliged to give up completely an element of their identity that they considered important, together with their chosen manner of manifesting their religion or beliefs, whereas the objective alluded to by the Government could be attained by a mere obligation to show their face and to identify themselves where a risk for the safety of persons and property had been established, or where particular circumstances entailed a suspicion of identity fraud. It could not therefore be found that the blanket ban imposed by the Law of 11 October 2010 was necessary, in a democratic society, for public safety, within the meaning of Articles 8 and 9 of the Convention.

The Court then examined the questions raised by the need to meet the minimum requirements of life in society as part of the "protection of the rights and freedoms of others". It took the view that the ban in question could be regarded as justified in its principle solely in so far as it sought to guarantee the conditions of "living together".

In the light of the number of women concerned, about 1,900 women in relation to the French population of about sixty-five million and to the number of Muslims living in France, it might seem excessive to respond to such a situation by imposing a blanket ban. In addition, there was no doubt that the ban had a significant negative impact on the situation of women who, like the applicant, had chosen to wear the full-face veil for reasons related to their beliefs. A large number of actors, both international and national, in the field of fundamental rights protection had found a blanket ban to be disproportionate. The Law of 11 October 2010, together with certain debates surrounding its drafting, might have upset part of the Muslim community, including some members who were not in favour of the full-face veil being worn. In this connection, the Court was very concerned by the fact that the debate which preceded the adoption of the Law of 11 October 2010 was marked by certain Islamophobic remarks. It was admittedly not for the Court to rule on whether legislation was desirable in such matters. It nevertheless emphasised that a State which entered into a legislative process of this kind took the risk of contributing to the consolidation of the stereotypes which affected certain categories of the population and of encouraging the expression of intolerance, when it had a duty, on the contrary, to promote tolerance. Remarks which constituted a general, vehement attack on a religious or ethnic group were incompatible with the values of tolerance, social peace and non-discrimination underlying the Convention and did not fall within the right to freedom of expression that it protected.

However, the Law of 11 October 2010 did not affect the freedom to wear in public any garment or item of clothing – with or without a religious connotation – which did not have the effect of concealing the face. The impugned ban mainly affected Muslim women who wished to wear the full-face veil. Nevertheless, the ban was not expressly based on the religious connotation of the clothing in question but solely on the fact that it concealed the face.***

As to the fact that criminal sanctions were attached to the ban, the sanctions provided for by the legislature were among the lightest that could be envisaged, consisting of a fine at the rate applying to second-class petty offences (currently EUR 150 maximum), with the possibility for the court to impose, in addition to or instead of the fine, an obligation to follow a citizenship course.

By prohibiting everyone from wearing clothing designed to conceal the face in public places, the respondent State had to a certain extent restricted the reach of pluralism, since the ban prevented certain women from expressing their personality and their beliefs by wearing the full-face veil in public. However, the Government had indicated that it was a question of responding to a practice that the State deemed incompatible, in French society, with the ground rules of social communication and more broadly the requirements of “living together”. From that perspective, the respondent State was seeking to protect a principle of interaction between individuals, which in its view was essential for the expression not only of pluralism, but also of tolerance and broadmindedness, without which there was no democratic society. It could thus be said that the question whether or not it should be permitted to wear the full-face veil in public places constituted a choice of society.

In such circumstances, the Court had a duty to exercise a degree of restraint in its review of Convention compliance, since such review would lead it to assess a balance that had been struck by means of a democratic process within the society in question. In matters of general policy, on which opinions within a democratic society might reasonably differ widely, the role of the domestic policy-maker had to be given special weight. In the present case France thus had a wide margin of appreciation.

This was particularly true as there was no European consensus as to the question of the wearing of the full-face veil in public. While, from a strictly normative standpoint, France was very much in a

minority position in Europe, it had to be observed that the question of the wearing of the full-face veil in public was or had been a subject of debate in a number of European States. In addition, this question was probably not an issue at all in a certain number of member States, where this practice was uncommon.

Consequently, having regard in particular to the breadth of the margin of appreciation afforded to the respondent State in the present case, the Court found that the ban imposed by the Law of 11 October 2010 could be regarded as proportionate to the aim pursued, namely the preservation of the conditions of "living together" as an element of the "protection of the rights and freedoms of others". The impugned limitation was therefore "necessary in a democratic society". This conclusion held true with respect both to Article 8 of the Convention and to Article 9.

Conclusion: no violation (fifteen votes to two).

Article 14 of the Convention taken together with Article 8 or Article 9: The applicant had complained of indirect discrimination. As a Muslim woman who for religious reasons wished to wear the full-face veil in public, she belonged to a category of individuals who were particularly exposed to the ban in question and to the sanctions for which it provided.

A general policy or measure that had disproportionately prejudicial effects on a particular group might be considered discriminatory even where it was not specifically aimed at that group and there was no discriminatory intent. This was only the case, however, if such policy or measure had no "objective and reasonable" justification, that is, if it did not pursue a "legitimate aim" or if there was not a "reasonable relationship of proportionality" between the means employed and the aim sought to be realised. In the present case, while it might be considered that the ban imposed by the Law of 11 October 2010 had specific negative effects on the situation of Muslim women who, for religious reasons, wished to wear the full-face veil in public, this measure had an objective and reasonable justification.

Conclusion: no violation (unanimously).

* See *Dudgeon v. the United Kingdom*, 7525/76, 22 October 1981.
** See *Leyla Şahin v. Turkey* [GC], 44774/98, 10 November 2005, Information Note 80; and *Ahmet Arslan and Others v. Turkey,* 41135/98, 23 February 2010, Information Note 127.
*** Contrast *Ahmet Arslan and Others v. Turkey*, op. cit.

Mansur Yalçın and Others v. Turkey - 21163/11

Judgment 16.9.2014 [Section II]

Article 2 of Protocol No. 1

Respect for parents' religious convictions

Lack of objectivity and pluralism in the teaching of religious instruction and limited possibilities for exemption from compulsory classes: *violation*

Facts – The applicants are the parents of children of compulsory school age. They are members of the Alevi religious community.

They complained to the Court that the provision of compulsory religion and ethics classes in primary and secondary schools infringed their right to respect for their religious beliefs. In the 2011/12 school year, following the publication of the judgment of the Court *Hasan and Eylem Zengin v. Turkey*, significant changes had been made to the curriculum and textbooks for the religion and ethics classes.

Law – Article 2 of Protocol No. 1: Following publication of the *Hasan and Eylem Zengin* judgment, changes had been made to the curriculum of the compulsory religion and ethics classes. The changes had been chiefly intended to ensure the provision of information about the various beliefs existing in Turkey, including the Alevi faith, but the main aspects of the curriculum had not really been overhauled since it focused predominantly on knowledge of Islam as practised and interpreted by the majority of the Turkish population. In so far as the case concerned a debate relating to Islamic theory, it was not for the Court to take a stance on such matters, which would be manifestly outside its jurisdiction. Nevertheless, it was clear from the case file and the Government's observations that the curriculum of the religion and ethics classes was structured around the fundamental concepts of Islam, such as the Koran and the sunna. Admittedly, the fact that the curriculum gave greater prominence to Islam as practised and interpreted by the majority of the Turkish population than to the various minority interpretations of Islam and other religions and philosophies could not in itself be viewed as contravening the principles of pluralism and objectivity and potentially amounting to indoctrination. However, bearing in mind the particular features of the Alevi faith as compared with the Sunni understanding of Islam, the applicants could legitimately have considered that the way in which this subject was taught was likely to cause their children to face a conflict of allegiance between the school and their own values, thus giving rise to a possible issue under Article 2 of Protocol No. 1.

The Court failed to see how, given that the religion and ethics classes were compulsory and there was no appropriate exemption system in place, the prospect of pupils facing a conflict between the religious instruction provided by the school and their parents' religious or philosophical convictions could be avoided. The discrepancies between the approach adopted in the curriculum and the particular features of the applicants' faith as compared with the Sunni understanding of Islam were so great that they could scarcely be alleviated to a sufficient degree by the few references to Alevi beliefs and practice that had been included in the textbooks. In addition, the possibility that pupils might be given more detailed information in optional religious education classes did not exempt the State from its obligation to ensure that the teaching of compulsory subjects met the criteria of objectivity and pluralism while also respecting religious or philosophical convictions.

Accordingly, notwithstanding the significant changes made in 2011/12 to the curriculum and textbooks for the compulsory religion and ethics classes, the respondent State's education system

still did not appear adequately equipped to ensure respect for parents' convictions. In particular, no possibility for an appropriate choice had been envisaged for the children of parents who had a religious or philosophical conviction other than that of Sunni Islam, and the very limited exemption procedure was likely to subject those parents to a heavy burden and to the need to disclose their religious or philosophical convictions in order to have their children exempted from the religion lessons.

Conclusion: violation (unanimously).

Article 41: no claim made in respect of damage.

Article 46: One of the main reasons for the Court's finding of a violation of the Convention was that in the field of religious instruction, the Turkish education system was still not adequately equipped to ensure respect for parents' convictions. This conclusion in itself implied that the violation of the applicants' right, as guaranteed by the second sentence of Article 2 of Protocol No. 1, had originated in a structural problem, as in the case of *Hasan and Eylem Zengin*. The Court therefore stressed the need to ensure appropriate means of affording these possibilities without further delay, in accordance with the principles set out in this judgment and without requiring pupils' parents to disclose their own religious or philosophical convictions.

(See *Hasan and Eylem Zengin v. Turkey*, 1448/04, 9 October 2007, Information Note 101)

SOME FURTHER ISSUES TO DISCUSS

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Conceptual perspective issues of comparative assessment of education. *Meditations & questions from the work towards an international framework for comparison of education law & policy that fosters balance in education*

Marco Matthijsen

Reactions are most welcome via marco@matthijsen.nl

I. Introduction, occasion for this article

The following considerations spring from an endeavour I'm involved with since summer 2012, to try to develop an integrated assessment of education law and policy.

When finishing editing the third edition of *Balancing Freedom, Autonomy and Accountability in Education* from Charles Glenn and Jan de Groof (eds.), Jan de Groof asked me the challenging question: 'Could you develop an updated and revised comparative assessment for these 66 countries? It might not need many work because in 2003 we already made one!' Later on I asked Jan if he would be okay when I was going to revise the former assessment framework, because with 66 now instead of 28 countries then, this framework must be more neutral towards different situations and of higher level of aggregation of values for parts of an indicator. That was okay for Jan, you can assume, but it put me on an conceptual and data adventure in an relatively unknown field.

To that end I have compared and analyses the education system of 66 countries, as presented in this edition, with additional material via internet and interviews. A former draft sketch of this is published in the *Proceedings of the Second World Congress on the Right to and Rights in Education*, Brussels November 2012, and now available in a revised working paper with Trends and changes along 15 indicators for 66 countries in education law and policy, including some SPSS correlation analyses.

As you can imagine such an endeavour contains many different questions, to many to share in a short article. The main way to deal with it is based on the methodology of iterative induction, to explore different laws (inductive), from a standpoint of view of education rights (deductive), while on the road changing the framework of assessment until it covers up (point of saturation) all relevant differences. In this context I like to share three interesting topics with accompanying questions that are related with the perspective of developing a framework of assessment that could strengthen the value of comparative education law and policy even more. On the sideway I would also like to express/confirm that practicing social science is not a neutral act (if ever that can be said of practicing science, even nature). Every publication in a journal is an action that expresses/confirms/challenges certain values/phrases, rituals/conventions and routines of practice. Therefore, we will be able to change politics better if we are able to understand which attitude issues research could lead us through, three of those – related to global comparative education law assessment – I would share and support us to think about are:

1) The perspective of the interest group. Isn't it time that we should include both public and independent schools in our considerations more integrated.
2) The perspective of cultural neutrality. What wider perspectives on education law and policy do we need to develop in ourselves to be able to understand patterns in education law and policy really across the world, and be able to learn from them.

3) The perspective of the moral manual of human dignity. Which dimensions of education law and policy should be discriminated that can help us to see light through all aspects of education law among different nations. And how can these dimensions framed in such a way that is will also strength our perception of human dignity as well as quality of education rights in education law.

This article therefore is not to make a conclusion, but putting some interesting questions in a framework for greater enhancement of the contribution of comparative education to the world.

II. Perspectives of interest groups: traveling beyond private vs. public

Developments in new choices & design principles regarding education law and policy, especially regarding by innovation on the one hand, and governance on the other hand, illustrate that public and private/independent schools join the same interest of being able to make their curriculum their own. Ownership of stakeholders is in this regard a relatively new perspective: Like in South Africa where since 1996 were public schools are allowed to come under control of School Governing Bodies, existing of parents and other stakeholders, or in Singapore where public schools are even stimulated to become independent.

A very basic perspective in this regard is that of the teacher. If you are coming from another country or culture where public vs. independent schools don't exist, but just teachers with a couple of learners, the division between public vs. independent schools would be superficial. Just a practice of labeling and division of power. Because true teachers, whether in a public or independent school, share the same interests. Taken to the level of comparative education law and policy, this requires us to develop an perspective that integrates both perspectives. Because many teachers, especially in countries with evolving accountability systems, share – whether they are from public or independent schools – the same worries about the overload they experience in time as a consequence of reporting tasks they have, but also mentally regarding their assumed duties to monitor progress and make intervention reports etc. This development annoys many teachers, and is a wide used topic among teachers. Given this fact, it is interesting why many national and international stakeholder representatives doesn't include the independent and public perspective at the same time, like teacher unions.

Questions:

- Why should we continue to distinguish regulation for public and independent/private schools. In which way are we able to present their shared interest. The interest of every school for every involved student, parent and other stakeholders to be an owner of their curriculum.
- What are factors we mostly locate when it comes to difference in regulation between private and public schools. Like religion and values etc. In which way this will change if we see them as troubled by the same governments who year after year tell they want to reduce regulations, and year after year they increase regulations, or if not in number in our mental interpretation!
- What are typical assumptions when it comes to the typical ideas about the contrasting nature of freedom vs. equal chances? Because the first value is identified with independent schools, and the second with public schools. What sort of examples of policy can help us overcome this narrow thinking, and to develop policies in line with human rights that favor freedom as well as equal chances!
- If we identify ourselves 7 days with seven stakeholders: the parent, the teacher, the school leader, the school board, the student, the municipality, the government, and another week about their representative organs (which aren't the same as a consequence of the game of public

policy making), what sort of holistic texture of thinking about education law and policy would that bring to use, especially also in our attitude. Which typical assumptions could we bury.

III. Learning from comparative education helps to overcome nationalistic focus

Elaboration of education law in different countries leads to interesting perspectives on how nations deal with design issues of education law and policy (p.26-64). This leads to refreshing examples unknown to many practitioners, researchers and policymakers. From qualification of teachers to space for homeschooling, which in many countries is allowed but also combined with opportunities to follow certain group dependence issues like gym or theatre in the school. In small countries quite spectacular developments can also be seen, like in Qatar were all schools have becoming independent/private. Such refreshing and or dareful policies can free us from conventional thoughts about how things should be done in policy, showing the relevance of comparative research.

A very interesting question this forces us to comprehend is, what perspectives and concepts comparative education law and policy should we develop to understand all these differences, but also to value and be able to argument positive developments as well as to understand global patterns in education law and policy.

The lessons comparative education can give us to overcome to ethnocentric thinking is not easy to take, since it is the nation state and welfare state that have adopted education as one of its core targets of existence. Another issue that comes up with that is that access to education, the way education is organised, in most ways is perceived as the duty for the state to provision public schools. Which is also the reason why the right to education is for 6-16 year olds almost completely the same as an obligation to learn!! But if we really understand that on the one side many stakeholders among public vs independent schools share the same interests, and on the other side that in practice in many countries independent schools contribute in a great sense to the basic availability of schools (See BRAC), in some cases the only available schools are private or independent, then why focus on availability in connection with duty to provision. Doesn't it earlier require us to think about access to education in a sense that that right includes availability, instead of seeing accessibility and availability as independent variables!?

The preliminary results contain a very strong positive relation between policies in favour of equal chances as well as freedom in education. That seems to contradict strongly with convictions about the possibility to integrate both values in policy equally. Although the framework being developed and applied in this first exercise towards a comparative assessment of education law and policy in 66 countries (with many preservations), was not designed to show that education law principles regarding freedom vs. equal chances are contrasting principles, and the final data could be different from these, some correlations[1] are to interesting not to mention now:

- The dimension that predicts the highest value on all four dimensions together is freedom (0.89). The lowest is accountability (0,65, N 62).
- The relation between Freedom and Equal Chances is the in between correlation of 4 dimensions with the highest correlation (0,716, N63). This relation remains high when it is also controlled for

[1] The quantifying analyse method of correlation (in this case Pearson via SPSS), is a method to discover in how many cases two values are appearing in a high or low relation to each other. If there is a high correlation, this doesn't means that such high correlation is necessary, conditional, but that in reality both values appear in most cases together across different circumstances. For correlations a sample of N of around 35 to 66 is being used (not in all cases 66 because not in all cases enough data were present).

Accountability (0,64), as well as Autonomy (0,586), and Accountability and Autonomy together 0,533!

- An intriguing relation is also between Equal Chances and Autonomy, 0,519. Because when correlated for Accountability this remains high, 0,434, but not when controlled for Freedom, then it almost diminishes but not totally to 0,127, and Accountability and Freedom together to 0,118.
- The lowest correlation of one dimension with others is around Accountability (with Autonomy 0,385 N62; with Equal Chances 0,423 and with Freedom 0,443). A preliminary reading could be that around accountability practices differ very munch between countries, as well as cohesion of accountability measures within countries.
- Although in general the combination of Autonomy and Accountability is favored by many think-tank's and research (like McKinsey and OECD), their actual correlation in law in many countries isn't very high at present, 0,385. When controlled for Equal chances this decreases with 54% to 0,211. Meaning that the view and measures a country take on Equal chances, means a lot for how they operationalize an optimal relation between Autonomy and Accountability, and when controlled for Freedom it almost disappears to 0,151. This last distinction supports a discrimination between Autonomy and Freedom, and to increase our effort in understanding choices regarding freedom.

(a) Questions:

- Why does the data reveal that the quality of law regarding all 4 dimensions is highest correlated with freedom. What does this say?
- Why is the correlation between equal chances and freedom higher, than most convictions regarding policy towards both issues reveal.
- If we identify ourselves 7 days with seven different nations regarding education, what sort of flexibility in thinking about education law and policy would that bring to us?
- If we identify 7 days about seven practices of learning outside of school? What sort of flexibility around the organization of compulsory education/learning would that bring to us?

IV. A moral manual in an age of plurality: choosing dimensions of education law in line with human rights

The traditional preservative is that in policy we have to choose between competing values, especially freedom vs. equal chances, whereas the combination of another pair of values is strongly advised by many like the OECD and implemented. While the 'obligation' to confess to either freedom or equal chances is strongly spread, regarding the wealth of countries this contradiction in practice shows the fussiness about it too: on the one side the phrase that developing countries don't have the luxury for support of independent schools because of lack of means. 'There are private schools for'. And on the other hand the reality in many countries now and in history of private initiatives that foster to education, from missionary schools to culturally inspired to pedagogically inspired teachers around the world. Among them BRAC, the Bangladesh Rural Advancement Committee, which is the biggest ngo in the world provisioning education which employs around 100.000 people and serving education for millions of students across different countries. The opposition of freedom and equal chances, as well as the phrase that allowing freedom is something for developed countries is not confirmed by the diversity of results in the 66 countries assessed. In rich ànd poor countries laws exist that oblige schools to use certain learning materials (a lack of freedom in education). Some could argue that in many countries this is also a luxury, because it is cheaper for a poor country to build up its capacity in learning material to work with mandated learning materials (or rebuilding their culture after a breakdown/war). But even then the *golden standard* for the possibility of an equal alternative could and should be applied, because that doesn't cost such much that it could be worthwhile not to facilitate. That shows that it is not a practical decision, but a value loaded decision for not allowing an alternative. The golden alternative is only applied in a few countries, given more

or less burden of evidence to the school that applies for an alternative curriculum or learning material.

While defining and selecting education rights that are possible and worthwhile to assess comparatively, education law knows quite a wide range. While on the one side assessing it all would not be possible, on the other side what will be assessed needs to have a certain value, as in positive law. Such a value can best be find in international adopted articles regarding education rights. Although the articles in the Rights of the Child regarding education cannot rest on the same reputation then by example the Covenant on Social, Cultural and Economic Rights, it comprehends the most divers and specific rights regarding education. Which together with rights in other international covenants, can be reduced to the following eight categories of education rights. Please don't read them to conclude if this a final categorization, but to help us to develop a coherent understanding of basic education rights. With another vision another categorization is of course possible.

1) Freedom rights (to establish and choose)
2) Respect for identity (respect for the child's parents, their identity, culture and language)
3) Right to enjoy and access education and to be respected in their interests in decisions
4) Right on protection regarding education
5) Right on protective measures to access and enjoy education in a manner that is be respected within on and respect for diversity/plurality
6) Right on equal development via education, unequal circumstances legitimate unequal facilities.
7) Right on development of the child's personality, talents and mental and physical abilities to their fullest potential.
8) Governance of choice and participation of stakeholders.
9) Accountability of governance of quality of education

Whereas for scholars such a framing in eight could function, for the public, as well as for policymakers, to remember 8 categories is way too difficult, that is a very practical first reason to choose for less dimensions. The second reason for the need to cluster to 3 or 4 dimensions in concepts that can be easily remembered because they are close to our core values, is the need to have a moral manual, to look which indicators are important for different meanings of education law. It helps to understand differences in education law, as well as to develop education law in meanings that provide a meaningful relation of human dignity with education rights. In such a way that it could inspire everyone involved in education to contribute to the realization of these meanings of human dignity in the practice of education policy. The third reason is closely related, to be able to group indicators (in the research framework now 15 indicators are targeted, not 8) that are related to different perceptions regarding specific values, that will make it easier to explain and do research regarding correlations between different variables. Like a more communitarist approach could colour that many education rights are designed, implemented and related to other regulations in such a way that it doesn't give many space to entrepreneurial civil responsibility in education.

Some possible choices for dimensions:

- The four dimensions of the Balancing editions, added with equal chances: Freedom; Equal right to education; Autonomy and Accountability. Which has a quality that covers values (freedom and equal chances) as well as more instrumental policies (managerial autonomy vs. public accountability & governance);
- The four A's by Katarina Tomasevski, the 4 appeals of human rights around education: available, accessible, acceptable and adaptable. Which are useful to assess the effectivity of an education system in totality, but not to divide different policies. Accessibility by example understand from a more abstract level includes availability.

- The four/five A's by Jan de Groof: Awareness/Advocacy, Adequacy, Accountability and Autonomy (incl. adaptability). An alteration which embeds better principles of education policy and administration, but includes also refreshingly that everybody in every role in education has a responsibility for advocacy of education rights.
- Law generic values: Freedom (incl. autonomy), Equity (incl. right to education and equal access) and Responsibility (incl. responsibility for targets, public funding etc). Therefore an alteration of Freedom, Equality and Brotherhood of the French Revolution for this context.
- Categories of education rights: The right to education; Freedom in education incl. autonomy; Equal chances and Accountability. This lies most closely to different international perceptions. But it doesn't leave open a conception on the right to education in which not the state is responsible to provide education, but to govern that everyone gets his right to education fulfilled, in whatever way.

You have to forgive me that I stipulate this issue and possible choices in such a short hand. But please do understand that it not here to make a decision yet, nor to make a competent introduction, but to support the idea that we have to understand, that developing an assessment framework, requires also to develop a moral manual, and to work together in that direction regarding a choice that makes sense for more than our lifetime and our context now, not meaning that others in the future could make other decisions or improve ours.

Questions:

- Why should we choose for this or that categorization? What are your requirements for such an important decision and why. Should other people define the same?
- What difference should it make if one or more of these values are education specific or not. Like equal right on development is a principle open for different sectors, like healthcare, but right to education or equal right to education is not! Especially also seen in the light that there is still a great future for further implementation of human dignity in healthcare and education, recognizing especially also the problems around funding of it, and managerial cut offs.
- Which values would have a bigger chance on cultural neutral adaptation? And gives space for different interpretations?
- What do we think about further categorization of the 8 categories of education rights as part of the International Treaty on the Rights of the Child.
- Although more hands are still needed to plea for enough/more freedom for pedagogical inspiration, teacher ownership as well as innovation in education. Should not the advocates for such quality also include the value of equal chances in their advocacy. And if not, are they not to blame to put themselves beyond the table of discussion (and vice versa of course for all the people desired to improve equal chances via and in education)!?
- Why should we prefer provision, protection or participation rights vs. freedom, equal chances, autonomy and accountability.

V. A personal note, regarding commitment to the duties of comparative education law

I have this article will stimulate you to think about one or more of its questions regarding the perspective of interest group/stakeholder; the question of diversity and cultural neutrality and the question of a moral manual that can stimulate moral mapping in an age of plurality.

My personal motivation to contribute with this research is that I believe in further development of education law and policy with the help of comparative law. An assessment that gives examples of a

smart balance between different values behind and targets of education rights, but also does justice to differences in education law, could contribute to that development.

The *Human rights* and the adoption of *human dignity* as central values since WWII, are still very young, while those wo work with law or try to change it, work with a texture of law that is much older than these new principles. Therefore, the law we make on top of the present law, whatever beautiful values are written in the Explanatory Memorandum (paper is more patient than man, as the saying goes), in many cases does not express and contribute to the freedom, brotherhood and equality that could be fostered with law that is based on human dignity. 'Okay, yes of course but very abstract. And maybe, even more unrealistic' some could say.

I like to see myself educated as an anthropologist, although I haven't completed cultural anthropology. In a really true sense, I would like to see the real seeker of knowledge as interested in what it is to be human in general, and at the same time interested in what it is human in a specific context. Developing such an perspective requires to be a macro perspective, as if you were coming from another planet, which would lead to amazing question's by example of how we deal with our elderly people, and at the same time a dwarf that can see all details of the human in focus, as in game theory, how do elements interact with each other.

One of the problems regarding change is that humans have the ability to reframe their own actions in beautiful (idealistic) or legitimate (neutralizing) reasoning, contrasted with its accompanying mechanism to explain the behaviour of others in terms of neutral (he/she is doing this bright thing because it gives image/pays his/her religion obliges) or natural reasons (he/she is doing that way because he/she is from that ethnicity/religion/social background/profession etc. In psychology known by external and internal attribution. The sharp reader will feel that these mechanisms not only reveal egocentricity in different forms, but also that these mechanisms all together reveal our deep internalization of the value of freedom (which brings us back to the riddle of why freedom has the highest correlation with total quality of education law). So we can reason beautiful, while in fact our actions can express values that are completely different than the one we identify with, like the contribution to the development of a system in which schools teach to the test. Because since Freud and likewise we know that what tricks you says also/especially something about you. But people have evolved this capacity of hiding their own feelings with neutralizing, naturalizing and idealizing themselves and others, it is even more difficult to reach people to understand their behaviour and change it. The best way in this perspective is to find ways to light up the torch of development of people, and that lies in our capacity of learning from others, or because we have mirror neurons as some like to frame it in. In a simple saying: the grass on the other side looks always greener. People can argue for ever, but once somebody sees something else in practice he/she is open to sense (instead of arguing in words with others), people can change their policy concepts much faster. That works best if you see something in another context, as from the other (greener) side. That showed for me a very important duty of people involved in comparative education.

EXTRA READING MATERIAL

Please take note that the attached articles have been published elsewhere and that they are made available here with the permission of the authors.

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Religious Freedom in Education: A Fundamental Human Right

CHARLES J. RUSSO

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Religious Freedom in Education: A Fundamental Human Right

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From the earliest times, whether in cave paintings in prehistoric France, the ancient polytheistic religions of Egypt, Greece, and Rome, or the animistic belief systems in much of the rest of the pre-Judeo-Christian Western world, humans all over the globe recognized the need to call on a higher being as they engaged in what today is described as freedom of religion.[1] Yet, at the outset of the second decade of the 21st century, a palpable tension exists between two fundamental human rights, freedoms to education and religion, especially as they interact in public or state-funded elementary and secondary schools. In other words, most nations subscribe to an array of international documents proclaiming both education[2] and religious freedom as fundamental human rights. Still, significant limitations exist in much of the world as to whether people can exercise the rights to religious freedom in and around state-funded or, in some instances, private schools,[3] even as formal schooling is increasingly available.

Two comprehensive studies by the Pew Forum on Religion and Public Life reveal astounding results.[4] The first reported that the residents of 64 nations, accounting for 70% of the world's population, live under circumstances under which religious freedom is severely restricted.[5] These limits apply even though the constitutions of 76% of nations provide for ''freedom of religion.''[6] The follow-up study indicated that ''[r]estrictions on religious beliefs and practices rose between mid-2006 and mid-2009 in 23 of the world's 198 countries (12%), decreased in 12 countries (6%) and remained essentially unchanged in 163 countries (82%).''[7] The report added that ''[t]he share of countries with high or very high restrictions on religious

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beliefs and practices rose from 31% in the year ending in mid-2009 to 37% in the year ending in mid-2010 . . . [such that] three quarters of the world's approximately 7 billion people live in countries with high government restrictions on religion . . . up from 70% a year earlier.''[8]

As a bellwether in human rights, Brown v. Board of Education[9] is recognized as significant throughout the world.[10] In mandating equal educational opportunities for all regardless of race, the United States Supreme Court declared that ''education is perhaps the most important function of state and local governments.''[11] This same Court, though, sets American public education apart from much of the Western world insofar since it created ''a wall [of separation] between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.''[12]

A second group of nations represent the antithesis of the judicially imposed American separatism because there is little or no distinction between and among religion, state, and education in their educational systems.[13] In a third set of countries, including Canada,[14] Australia,[15] and much of Western Europe,[16] state funding is provided to support what are referred to as denominational or confessional schools. In these schools religion is integral to curricula even in the face of growing conflicts over religious plurality, hostility,[17] secularism, or neutrality that is analogous to the American perspective but with twists on aid to faith-based schools.

Education, whether provided in state or private, also known as nonpublic schools in the United States, typically religiously affiliated or faith-based, is of paramount importance because it holds the key to the future not only for personal growth and fulfillment but also by providing countries with a steady flow of well-informed citizens. However, under the euphemism of ''control follows the dollar,'' educational officials in confessional schools in Europe and elsewhere tend to have less freedom to direct their curricular content than religiously affiliated nonpublic schools in the United States because they depend on the state, rather than tuition, for operating revenues. For this reason, leaders in many religious schools in the United States refuse to accept public funding so that they can preserve curricular control and doctrinal purity.

The right to an education is crucial regardless of whether it is a shared state and local concern as in the United States or is directed at the national level as in most other nations. An overlapping concern is religious freedom and the role of faith-based instruction in state schools, not to mention what is taught in private religious schools where the values may be inimical to those of host nations. Again, the United States is different from much of the world because, as indicated, the judiciary and educational leaders have more often than not adopted the Jeffersonian metaphor calling for a ''wall of separation'' between Church and State that does not exist in other nations where there is freedom of religion.[18]

American courts have applied the judicially created metaphor of ''the wall of separation,'' particularly with regard to religious instruction and activities in

public schools. At the same time, the Supreme Court specified that educators in public schools can teach about religion in such contexts as history and literature as long they do not seek to teach religion or to inculcate religious values.[19] Even so, since most American educational leaders fear conflicts over religion, they typically prohibit virtually all official references to it in school-sponsored activities, even though in practice this is directed particularly at Christianity,[20] sending out a not so subliminal message that religion is a topic to be avoided. As a form of compromise, in response to concerns of parents who wish to have their children educated in religious settings, the Supreme Court emphatically upheld the right of religiously affiliated (and nonsectarian) nonpublic schools to operate in the seminal case of Pierce v. Society of Sisters of the Holy Names of Jesus and Mary.[21] The Court has since handed down a series of rulings placing some restrictions on public funding[22] under the judicial construct known as the Child Benefit Test, under which aid goes to children and not their religiously affiliated nonpublic schools, first enunciated in its 1947 judgment in Everson v. Board of Education.[23]

Using the ''wall of separation'' metaphor has helped the United States, as a relatively new and religiously pluralistic society, to avoid the religious strife that has plagued many other parts of the world for centuries. Yet, imposing the wall of separation in the United States often results in inequities for families who must make the draconian choice between enrolling their children in tax-supported public schools or essentially paying twice by having to also bear the cost of tuition when sending their children to religiously affiliated nonpublic schools, particularly in localities where public schools are ineffective.[24] The wall of separation also has the effect of largely removing instruction and discussions about religion from the market place of ideas in public elementary and secondary schools, an outcome that is something of a mixed blessing.

The trick, of course, not just in the United States, is to maintain a healthy separation between government and religion. This balance should allow individuals to practice their faiths freely wherever they live.[25] As reflected in the Pew Reports, this is an increasingly complex challenge as religious freedom becomes constricted in a pluralistic world.

Against the background, the remaining four substantive parts of this article reflect on the relationship between the rights to education and religion as what should be complementary fundamental human rights. The first two parts of the article highlight relevant passages in international agreements on the status of education and religion, respectively, as fundamental human rights. The third section discusses selected issues, drawn from examples of litigation in the United States on why the rights to education and religious freedom, whether with state funding in denominational or sectarian schools, as demonstrated in student dress, student-initiated religious activities, curricular issues, and celebrations of religious holidays are important issue when focusing on religious freedom. The fourth part offers recommendations for practice before rounding out with a brief conclusion.

EDUCATION AS A FUNDAMENTAL RIGHT

The compulsory education laws of virtually all nations nominally operate in conjunction with a variety of international covenants, the effectiveness of which is beyond the scope of this article. Athough not all nations automatically enter international agreements into domestic legislation,[26] their principles reflect the long-standing view present in many democratic nations that the right to education for children, indeed, for all, is of utmost importance.[27] To develop an understanding of these widely accepted documents, this section briefly reviews the key features of the leading instruments on education as a fundamental human right.

The Universal Declaration on Human Rights (UDHR), promulgated in 1948, was the first internationally accepted document to enunciate the value of education as a basic human right. According to this Declaration,

- Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compul-sory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
- Education shall be directed to the full development of the human person-ality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
- Parents have a prior right to choose the kind of education that shall be given to their children.[28]

In 1959, Principle 7 of the Declaration on the Rights of the Child reiterated the right to an education in asserting that:

> The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgment, and his sense of moral and social responsibility, and to become a useful member of society. The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents.[29]

Further, Principle 5 of the Declaration maintains that ''[t]he child who is physically, mentally, or socially handicapped shall be given the special treatment, education and care required by his particular condition.''[30]

The 1989 Convention on the Rights of the Child (the Convention) has had a significant impact on the legal duties of educators. Although the Convention

is perhaps the most expansive instrument to achieve international recognition on the rights of children, many signatories have not acted in keeping with its spirit, let alone its letter, in safeguarding the educational rights of all children. 160 Among the more than 30 of the Convention's 54 articles impacting on education, Article 3 states that in ''all actions concerning children . . . the best interests of the child shall be a primary consideration.''[31] It is unlikely that these interests can be met without affording children some right to speak for themselves on a range of social and educational issues, including religion. 165 In this regard, Article 12 claims just such a right in stating that a ''child who is capable of forming his or her own views'' has a right ''to express these views freely in all matters affecting them.''[32] Article 13 extends this concept further in maintaining that children ''shall have the right to freedom of expression including freedom to seek, receive and impart information and ideas of all kinds.''[33] Article 13 raises interesting and important issues about speech that could have implications for religion, some of which have played themselves out in the United States over such controversial topics as sexuality education, especially as instruction in this area conflicts with parental values.[34] More specifically, questions of this type lead to disputes over student dress and initiated religious activities in public schools along with curricular issues and the celebration of religious holidays.[35]

RELIGIOUS FREEDOM AS A FUNDAMENTAL RIGHT

The same international instruments that discussed education are just as cognizant of the need to maintain religious freedom. Article 2 of UDHR declares that ''Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.''[36]

Article 18 of the UDHR adds what may be the most basic freedom of all, namely that that ''Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.''[37]

The 1959 Declaration on the Rights of the Child highlights the place of nondiscrimination based on religion in the following articles:.

> Article 1
>
> The child shall enjoy all the rights set forth in this Declaration. Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family.

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Article 10

The child shall be protected from practices which may foster racial, religious and any other form of discrimination.[38]

The most recent instrument on children, the 1989 Convention on the Rights of the Child, expresses similar concerns in its provisions.

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 29 General comment on its implementation

1. States Parties agree that the education of the child shall be directed to: (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin . . .

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.[39]

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, enacted in December 1992, shares many of these same concerns:

Article 1

States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.

Article 2

1. Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities)

> have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.
>
> 2. Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.[40]

More recently, Article 2.1 of the 1994 International Covenant on Civil and Political Rights stipulates that,

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Further, its Article 18 declares that

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
>
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.[41]

DISCUSSION

A major challenge for educators and their lawyers in a world where there is growth among individuals who identify as atheists[42] is accommodating the religious needs, or lack thereof, of students, particularly those who attend public schools. Of course, the way in which educators and lawyers act varies from one nation to the next, even from one region of a country to another, especially a large nation. As school officials seek to educate children in environments where they can practice their faiths freely, the range of issues, as evidenced in illustrative litigation from the plethora of case law in the United States, includes such key questions as student dress, student-initiated religious activities in schools, curricular concerns, and celebrations of religious holidays, matters that go to the heart of religious freedom.

In attempting to provide balance, the United States Supreme Court explained in School District of Abington Township v. Schempp and Murray v. Curlett, that its judgment forbidding prayer and Bible reading in public schools ''[p]lainly does not foreclose teaching about the Holy Scriptures or about the differences between religious sects in classes in literature or history.''[43] Still, the American judiciary especially has struggled to devise an appropriate middle ground between teaching about religion and the teaching of religion in public schools.

As a necessary corollary, in light of Pierce v. Society of Sisters, educators in religiously affiliated nonpublic schools in the United States are free to teach as they see fit while requiring students to comply with their rules.[44] Even in acknowledging the power of the state ''reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils,''[45] the Court focused on the owners' property rights under the Fourteenth Amendment. The Court grounded its analysis in the realization that educational officials sought protection from unreasonable interference with their students and the destruction of their businesses. The Court decided that while state officials may oversee such important features as health, safety, and teacher qualifications in nonpublic schools, they could not do so to an extent greater than they did for public schools.

If students are to learn to appreciate and experience freedom of religion in public education, then four closely related exemplary issues must be taken into consideration. The first is how students can engage in outward manifestations of their faiths as demonstrated in their attire,[46] whereas the second concerns student-led religious activities in public schools. The third topic briefly reviews curricular concerns before the fourth examines the celebration of religious holidays in schools. These four areas were selected because each is essential to how religious diversity and individuality are present in public schools.

Dress Codes

At a time when school safety is in the forefront, the following cases illustrate how the courts agree that educators must develop the least restrictive means possible when seeking to prevent students from wearing religious garb to school. The Ninth Circuit affirmed that educational officials in California violated the rights of Sikh students by trying to prevent them from wearing ceremonial daggers under their clothes.[47] The court decided that officials overstepped their authority absent a showing that a total ban on these largely ceremonial religious weapons was the least restrictive alternative way to promote campus safety.[48]

In a case from Texas overlapping with issues of dress, the Fifth Circuit invalidated a local school board policy that forbade male students from having their hair touch their ears. The policy would have required a Native

American student to wear his long hair in a bun on top of his head or in a braid tucked into his shirt. The court affirmed that given the student's sincere religious belief in wearing his hair visibly long, the policy would have imposed an impermissible substantial burden on his right to the free exercise of religion.[49] In an earlier case involving dress, when students wore rosaries to school as necklaces, a federal trial court in Texas observed that educators violated their First Amendment right to speech because rosaries are a form of religious expression.[50]

Student-Initiated Religious Activity

Spurred on in large part by a case from higher education—Widmar v. Vincent,[51] in which the Supreme Court ruled that when officials at a state university in Missouri made campus facilities generally available for activities of registered student groups, they could not close them to other organizations based on the religious content of their speech—in 1984 Congress enacted the Equal Access Act (EAA).[52] According to the EAA, officials in public secondary schools receiving federal financial aid, and that permit noncurriculum-related student groups to meet during noninstructional time, cannot deny access to groups due to the religious, political, philosophical, or other content of their speech. Among other limitations, the EAA does allow officials to exclude groups if their meetings run the risk of materially and substantially interfering with the orderly conduct of school activities.

The Supreme Court upheld the EAA in Board of Education of Westside Community Schools v. Mergens.[53] The Court agreed with Congress that insofar as most high school students could recognize that allowing peer-initiated religious clubs to function in schools did not imply state endorsement of religion, the EAA was constitutional. The Court added that the religious club was entitled to meet since doing so is a form of free speech.[54] Circuit courts extended the scope of the EAA to allow students to select leaders who comply with club religious standards;[55] to meet during lunch time[56] and during activity periods at which attendance was taken;[57] and to have access to funding and fundraising activities, a school yearbook, public address system, bulletin board, school supplies, school vehicles, and audio-visual equipment.[58]

The status of the EAA may be in some doubt following the Supreme Court's holding in Christian Legal Society v. Martinez.[59] The Court affirmed that officials at a public law school in California had the authority to implement a policy requiring an on-campus religious group to admit all-comers from the student body, including those who disagree with its beliefs, as a condition of becoming a recognized student organization. On remand, the Ninth Circuit rejected the group's remaining claim on the basis that organizational leaders failed to preserve their argument that law school officials selectively applied the policy for appeal.[60]

Curricular Elements

The American judiciary continues to struggle over the place of religion in public school curricula, especially in distinguishing between teaching about religion and the teaching of religion. A fairly recent case from California highlights the tension present about having different faith-based worldviews in public schools, especially amid growing religious plurality. The Ninth Circuit affirmed the dismissal of challenge from parents who questioned the use of curricular content on Islam.[61] The materials included a simulation unit on Islamic culture in a social studies course that, among other things, required students to wear identification tags displaying their new Islamic names, dress as Muslims, memorize and recite an Islamic prayer that has the status of the Lord's Prayer in Christianity as well as other verses from the Qur'an, recite the Five Pillars of Faith, and engage in fasting and acts of self-denial. Without addressing the merits of the claims, the court determined that the activities ''were not . . . 'overt religious exercises' that raise[d] Establishment Clause concerns.''[62]

In Delaware the mother of a Muslim child raised a variety of claims. The federal trial court rejected the school board's motion for summary judgment since genuine issue of fact remained as to whether a fourth-grade teacher's use of Christmas readings violated the student's rights under the State Constitution's Preference Clause, which combined elements of the Federal Free Exercise and Equal Protection Clause and whether school officials were entitled to qualified immunity for the alleged violations.[63] The court granted the board's motion for summary judgment as to the claim that the teacher's reading from a textbook that brought up religion in discussing events of 9=11 on the ground that this did not violate child's rights under the State Constitution's Preference Clause.

An ongoing contentious issue concerns teaching about the origins of humankind. Starting with Epperson v. Arkansas,[64] the Supreme Court[65] and lower federal courts[66] agree that parental wishes to the contrary notwithstanding, teaching the Biblical accounts of creation in public school science classes violates the constitution as a form of seeking to establish a Christian perspective.

Religious Celebrations

Considering the vast amount of litigation that has transpired on religion in American public schools, it is surprising that the United States Supreme Court has yet to address a case directly on the place of religious celebrations in schools. Needless to say, this leaves educators uncertain how to proceed on this recurring matter.

In an early case, the Eighth Circuit upheld guidelines developed by a school board in South Dakota for use in connection with religious observances, most notably Christmas and other holidays.[67] The court held that explanations

of historical and contemporary values relating to both secular and religious holidays, the short-term use of religious symbols as examples of religious heritages, and integration of music, art, literature, and drama with religious themes could be included in curricula as long as they were presented objectively as a traditional part of the cultural and religious heritages of holidays.

A federal trial court in Pennsylvania reviewed a case wherein school officials permitted a ''Winter Holiday'' display including information on Chanukah and Kwanzaa, but nothing on Christmas other than a parody of a traditional Christmas hymn that the plaintiff, a youth minister, found offensive.[68] The court rejected the challenge on the ground that the display did not favor one religion over another. Subsequently, the Second Circuit upheld a policy of the New York City Board of Education that permitted seasonal displays of a menorah along with a star and crescent but not a manger scene.[69] The court declared that insofar as the policy had the perceived secular purpose of promoting pluralism and respect for diversity, lacked the principle or primary effect of advancing or inhibiting religion, and did not excessively entangle church and state, it was constitutionally permissible.

Courts reached mixed results with regard to commemorating Good Friday, the day on which Christ died. The Seventh Circuit first affirmed that a law from Illinois making Good Friday a paid holiday for teachers and closing schools was unconstitutional.[70] However, the same court later upheld Indiana's recognition of Good Friday as legal holiday for state employees because doing so was based on secular justifications including the provision of a spring holiday supported by evidence that this was not a sham.[71] Similarly, the Fourth[72] and Sixth[73] Circuits agreed that treating Good Friday as a legal holiday was constitutionally permissible.

RECOMMENDATIONS

As reflected by the review of selected American cases relating to religion in public schools, it is a challenge finding the proper balance so as to avoid appearing to be hostile to issues of faith or preferring one set of values to another. Accordingly, by including balanced instruction about religion in school curricula, educators can promote tolerance while accommodating diversity. Moreover, a balanced approach can assist in the development of more cohesive societies while helping to eradicate stereotypes that might lead to violence while advancing good relations in society. To this end, educators, their lawyers, and other interested parties may wish to consider the following recommendations.

- Consistent with the internationally accepted norms reviewed earlier, leaders must take steps to have religious education explicitly recognized and safeguarded as a fundamental human right for all children. In other

words, national leaders should develop laws and policies designed to protect and enhance the religious rights of all students regardless of their faiths. Since adopting such an approach can present a challenge in parts of the world that have been slow to extend full rights to historically

underrepresented religious groups or where religious freedom and 450 plurality have not been at a premium, political and educational leaders

in particular must show their mettle if they are to help their citizens to reach their full potential.

- Ø National leaders must provide adequate funding to create schools to provide children of all faiths with a world-class education. This is an 455 especially important concern during a time when there is a growing cyni-cism about the need for education as a tool to help promote diversity and understanding of others such that it must move beyond concerns over resources or capacity to focus on how systems can not only be funded

  but also be made accessible to all. Such funding must cover not only 460 construction of facilities and purchasing instructional materials but also paying salaries designed to enhance ‘‘the best and brightest’’ to enter

  the field of education.
- Ø Treat education, religious and secular, as an integrative factor, one that can

  help prepare all children to become productive members of their societies 465

  rather than set them apart from one another based on religion and other

  personal characteristics. If acceptance of diversity of religious beliefs is

  not encouraged in schools and not imbued throughout curricula, via such

  courses as world and= or comparative religions, then one cannot expect

  to find them present throughout the rest of society. Consistent with 470

  Justice Scalia’s dissent in Lee v. Weisman,[74] wherein the Supreme Court

  invalidated prayer at public school graduation ceremonies, one can only

  wonder how individuals who disagree can ever learn to do so respectfully

  if they cannot do so within the confines of academic settings wherein all

  should be open to the free exchange of ideas. 475
- Ø Reconceptualized school systems must be open to all children wherein educators teach respect for religiously pluralistic, cross-cultural princi-ples that respect internationally accepted norms, as well as national laws,

  as explicated in the various covenants discussed herein. In other words,

  systems must be inclusive, not exclusive. 480
- Ø Laws and policies must be enacted to meet the educational needs of religious minorities while respecting the laws of host nations and inter-nationally accepted norms about treatment of individuals outside of their own communities.
- Ø Institutions of higher learning must enhance teacher and administrator 485 preparation programs by including instruction about dealing with religious issues so that they can better educate children.
- Ø Leaders should adopt proactive roles helping to create shared values among all groups in developing educational curricular=standards for

the treatment of religions by ensuring that schools offer courses such as comparative religions while avoiding the sectarian teaching of or about singular religious perspectives in public schools. It is essential for officials in central governmental ministries at the state or national levels maintain leadership role in developing curricular content about religion to ensure uniformity in all schools.

8. Educators should develop curricular content, and accompanying materi-als, about religion drafted by professionals who can call on outside experts for assistance. Individuals from respective governmental and edu-cational ministries as well as from the university sector should provide leadership on this important project. At the same time, even as edu- cational leaders work to develop curricula with an eye toward primarily satisfying religious freedom, they must simultaneously challenge students to develop critical thinking skills that may challenge established beliefs.
9. Leaders should implement religious-based curricular content that can be widely accepted. Still, educational leaders should provide some consideration for permitting groups to preserve their independent religious heritages in the schools within the boundaries of domestic law and internationally accepted covenants.
10. Members of committees who are assigned the task of developing curricular materials about religion should be selected from among a broad representation of stakeholders, including, but not limited to, parents, students, teachers, civil leaders, interested in helping to ensure equal educational opportunities for all children.
11. Leaders, particularly in developing nations, should schedule conferences=meetings on the right to schooling in an attempt to obtain input from all parties, again including, but not limited to parents, students, teachers, and civil leaders, who are interested in helping to ensure equal educational opportunities for all children. In developed nations, educational leaders in particular should encourage parents to become more involved in the education of their children and citizens to vote to ensure that their school boards or governing bodies truly represent community interests while holing to appropriate educational standards.
12. In light of the rapid pace at which change occurs, leaders should regularly re-evaluate and update educational goals to keep them current.

CONCLUSION

As the world continues to shrink amid growing interdependence, a major challenge facing the global community is ensuring the educational and religious rights of all children. As daunting and expansive as this crucial task may appear to be, protecting these dual rights should be a priority for educational leaders, lawyers, and policymakers because doing so can help to ensure a better tomorrow for all.

NOTES

1. See, e.g., Marija Gimbutas, ''Megalithic Religion: Prehistoric Evidence,'' in Encyclopedia of Religi-on, 2nd ed., vol. 9, ed. Lindsay Jones (2005), 5822–5826; Mary Edwardsen and James Waller, ''Prehistoric Religions: An Overview,'' in Encyclopedia of Religion, 2nd ed., vol. 11, ed. Lindsay Jones (2005), 535 7374–7376.

2. For a discussion of education as a fundamental right, see Charles J. Russo, ''Reflections on Education as a Fundamental Human Right,'' Education and Law Journal, 18 (2010): 87–105.

3. The story of the 15-year-old Pakistani female, Malala Yousufzai, whom members of the Taliban attempted to kill for promoting education for girls comes to mind in this regard. For one story among the many documenting this incident, see Sylvia Hui, ''Girl Shot by Taliban Won't Back Down: Teen Renews Plea for Education for Pakistani Girls,'' Boston Globe A, Feb. 5, 2013.

4. See also 2013 World-Watch-List, a website maintained by the California-based group Open Doors, identifying the 50 nations where wide-spread persecution of Christians is Prevalent: http://www.worldwatchlist.us/?gclid=CIvxoMKa67QCFUbf4AodHgkAMg

5. ''Global Restrictions on Religion,'' The Pew Research Center's Forum on Religion and Public Life, December 17, 2009, 1, http://pewforum.org/Government/Global-Restrictions-on-Religion.aspx

6. Ibid., 64.

7. ''Rising Restrictions on Religion: One-Third of the World's Population Experiences an Increase,'' The Pew Research Center's Forum on Religion and Public Life, August 2011, 9, http://www.pewforum.org/uploadedFiles/Topics/Issues/Government/RisingRestrictions-web.pdf

8. Ibid.

9. 347 U.S. 483 (1954).

10. For an example of how Brown is viewed in a comparative context, see Charles J. Russo, Johan Beckmann, and Jonathan Jansen (ed.), Equal Educational Opportunities: Comparative Perspectives in Education Law: Brown v Board of Education at 50 and Democratic South Africa at 10 (2005).

11. Brown, supra Note 9 at 493.

12. Everson v. Board of Education, 330 U.S. 1, 18 (1947), reh'g denied, 330 U.S. 855 (1947).

13. In Muslim Countries, for instance, it is typically illegal to practice any religion other than Islam. See, for example, Organization of the Islamic Conference=OIC's Cairo Declaration of 1990, available at http://www1.umn.edu/humanrts/instree/cairodeclaration.html, at articles 24 and 25. Article 24: All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah. Article 25: The Islamic Shari'ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration.

14. See Note 46 infra and accompanying text for a brief discussion of this issue.

15. See Douglas J. Stewart and Charles J. Russo (2001), A Comparative Analysis of Funding Non-Government Schools in Australia and the United States. Education and the Law 13 (2001): 29–41.

16. For a thorough review on this issue with a primary focus on Europe, see Dympna Glendenning, Religion Education and the Law (2008).

17. In Lautsi and Others v. Italy, application 30814=06; (2012) 54 E.H.R.R. 3; 30 B.H.R.C. 429; (2011) Eq. L.R. 633; (2011) E.L.R. 176, available at 2011 WL 2747582, on March 18, 2011 the European Court of Human Rights rejected, by a margin of fifteen-to-two, the claim of a Finnish-born mother, who argued that the presence of a crucifix in a public school classroom in Italy violated both their right to education and her right to educate her children in accordance with her atheist beliefs under the European Convention on Human Rights 1950 Protocol 1 art.2.

18. See, e.g., East Mathias Hariyadi, ''East Java: Six Catholic Schools Could Be Shut Down for not Teaching Islam,'' AsiaNews.it (January 16, 2013) (reporting that officials in ''East Java province, are threatening to shut down six Catholic schools ''by 19 January'' if the latter do not provide Islamic courses and readings of the Qur'an to their Muslim students, in accordance with regional bylaw n. 8 of 2012, which requires all Muslim students to receive Islamic courses in school''), available at http://www.asianews.it/news-en/East-Java:-six-Catholic-schools-could-be-shut-down-for-not-teaching-Islam-26877.html

19. School District of Abington Township v. Schempp and Murray v. Curlett, 374 U.S. 203 (1963).

20. See, e.g., Charles J. Russo and Ralph D. Mawdsley (2001), ''The Supreme Court and the Establishment Clause at the Dawn of the New Millennium: 'Bristl[ing] with Hostility to All Things Religious' or Necessary Separation of Church and State?'' Brigham Young Universit Edcucation and Law Journal 2 (2001): 231.

21. 268 U.S. 510 (1925).

22. See, for example, Lemon v. Kurtzman, 403 U.S. 602 (1971) (denying salary supplements for teachers who worked in religiously affiliated nonpublic schools); Aguilar v. Felton, 473 U.S. 402 (1985) (forbidding the on-site delivery of remedial services for children who attended religiously affiliated nonpublic schools).

23. 330 U.S. 1 (1947), reh'g denied, 330 U.S. 855 (1947) (upholding a statute from New Jersey permitting reimbursement to parents for costs associated with sending their children to their religiously affiliated nonpublic schools).

24. See, for example, Zelman v. Simmons–Harris, 536 U.S. 639 (2002) (upholding the use of state-funded vouchers to pay tuition for children who had attending the failing schools in Cleveland, Ohio).

25. See Note 13.

26. See the Constitution of the Republic of South Africa (http://www.info.gov.za/documents/constitution/1996/index.htm). 231.3 International agreements: Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. 233 Application of international law: When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

27. For a report on 12 countries (Australia, Belgium, Canada, Denmark, Germany, Iceland, Ireland, New Zealand, Norway, South Africa, Spain, and Sweden) that have worked to imbed the rights of children into domestic law, see Laura Lundy, Ursula Kilkelly, Bronagh Byrne, and Jason Kang, The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries available from http://www.unicef.org.uk/Documents/Publications/UNICEFUK_2012CRCimplementationreport%20FINAL%20PDF%20version.pdf

28. Available from http://www.un.org/en/documents/udhr/index.shtml

29. Available from http://www.un.org/cyberschoolbus/humanrights/resources/child.asp

30. Ibid.

31. Available from http://www2.ohchr.org/english/law/crc.htm

32. Ibid.

33. Ibid.

34. In a partial dissent in Wisconsin v. Yoder, 406 U.S. 205, 245–46 Justice Douglas questioned whether children had rights apart from their parents based on his fear that students could have been ''harnessed'' to the lifestyles of their parents without opportunities to express their own wishes in writing:

> ''It is the student's judgment, not his parents,' that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed. The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today.'' See Charles J. Russo and William E. Thro, ''Reflections on the Law and Curricular Values in American Schools,'' Peabody Journal of Education 87 (2012): 402.

35. Moreover, Article 28 of the Convention directs signatories to (a) Make primary education compulsory and available free to all; (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
(d) Make educational and vocational information and guidance available and accessible to all children;
(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

36. Available from http://www.un.org/en/documents/udhr/index.shtml

37. Ibid.

38. Available from http://www.un.org/cyberschoolbus/humanrights/resources/child.asp

39. Available from http://www2.ohchr.org/english/law/crc.htm

40. Available from http://www.un.org/documents/ga/res/47/a47r135.htm

41. Available from http://www.hrweb.org/legal/cpr.html

42. See, for example, Bill Sherman, ''Report: Atheism Rate Growing Worldwide,'' Tulsa World (August 25, 2012), available at 2012 WLNR 18136286 (''The Global Index of Religiosity and Atheism poll found, on average, that 13 percent of the world population identified themselves as convinced atheists in 2012. A 2005 poll of 39 nations found 4 percent of the people were atheists. Those same 39 nations had a 7 percent atheism rate in the 2012 poll.'')

43. Supra note 19 at 300 (1963).

44. See Gorman v. St. Raphael Academy, 853 A.2d 28 (R.I. 2004) (upholding a rule in a Roman Catholic secondary school restricting hair length for male students).

45. Pierce, supra Note 21 at 534.

46. The related question of teacher dress, as a potential impact on students is beyond the scope of this article.

47. Cheema v. Thompson, 67 F.3d 883 (9th Cir. 1995).

48. See also Isaacs v. Board of Educ. of Howard County, Md., 40 F.Supp.2d 335 (D. Md. 1999) (granting a school board's motion for summary judgment when a student unsuccessfully relied on the First Amendment right to free speech in seeking to wear a head wrap to school to celebrate her cultural heritage).

49. A.A. ex rel. Betenbaugh v. Needville Indep. Scheme Dist., 611 F.3d 248 (5th Cir. 2010). For an earlier case reaching the same result, see Alabama and Coushatta Tribes of Texas v. Trustees of the Big Sandy Indep. School Dist., 817 F. Supp. 1319 (E.D. Tex. 1993), remanded by 20 F.3d 469 (5th Cir. 1994).

50. Chalifoux v. New Caney Indep. School Dist., 976 F. Supp. 659 (S.D. Tex. 1997).

51. 454 U.S. 263 (1981).

52. 20 U.S.C.A. xx 4071 et seq..

53. 496 U.S. 226 (1990).

54. See, for example, Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) (ruling that the newspaper of a student-led religious organization could not be denied funding due to its beliefs).

55. Hsu v. Roslyn Union Free School Dist., 85 F.3d 839 (2d Cir. 1996), cert. denied, 519 U.S. 1040 (1996).

56. Ceniceros v. Board of Trustees of the San Diego Unified School Dist., 106 F.3d 878 (9th Cir. 1997).

57. Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd., 336 F.3d 211 (3d Cir. 2003).

58. Prince v. Jacoby, 303 F.3d 1074 (9th Cir. 2002), cert. denied, 540 U.S. 813 (2003).

59. -Christian Legal Society v. Martinez, 130 S. Ct. 2971 (2010).

60. Christian Legal Society v. Wu, 626 F.3d 483 (9th Cir. 2010).

61. Eklund v. Byron Union Sch. Dist., 154 Fed.Appx. 648 (9th Cir. 2005), cert. denied, 549 U.S. 942 670 (2006).

62. Ibid.

63. Doe v. Cape Henlopen Sch. Dist., 759 F. Supp.2d 522 (D. Del. 2011).

64. 393 U.S. 97 (1968).

65. Edwards v. Aguillard, 482 U.S. 578 (1987).

66. McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982) (striking down a law from Arkansas that would have required providing balanced treatment for instruction on Biblical notions of creation if evolution was included in curricula); Kitzmiller v. Dover Area Sch. Dist., 400 F.Supp.2d 707 (M.D. Pa. 2005) (invalidating a curriculum designed to teach ''intelligent design'').

67. Florey v. Sioux Falls Sch. Dist. 49–5, 619 F.2d 1311 (8th Cir. 1980), cert. denied, 449 U.S. 987 (1980).

68. Sechler v. State College Area Sch. Dist., 121 F.Supp.2d 439 (M.D. Pa. 2000).

69. Skoros v. City of New York, 437 F.3d 1 (2d Cir. 2006), cert. denied, 549 U.S. 1205 (2007). For a commentary on this case, see Charles J. Russo, ''Of Baby Jesus and the Easter Bunny: Does Christianity Still Have a Place in the Educational Marketplace of Ideas in the United States?'' Education and Law Journal 16 (2006): 61.

70. Metzl v. Leininger, 57 F.3d 618 (7th Cir. 1995).

71. Bridenbaugh v. O'Bannon, 185 F.3d 796 (7th Cir. 1999), cert. denied, 529 U.S. 1003 (2000).

72. Koenick v. Felton, 190 F.3d 259 (4th Cir. 1999), cert. denied, 528 U.S. 1118 (2000) (rejecting the claim that a Maryland statute providing for public school holidays on the Friday before Easter through the Monday violated the Establishment Clause).

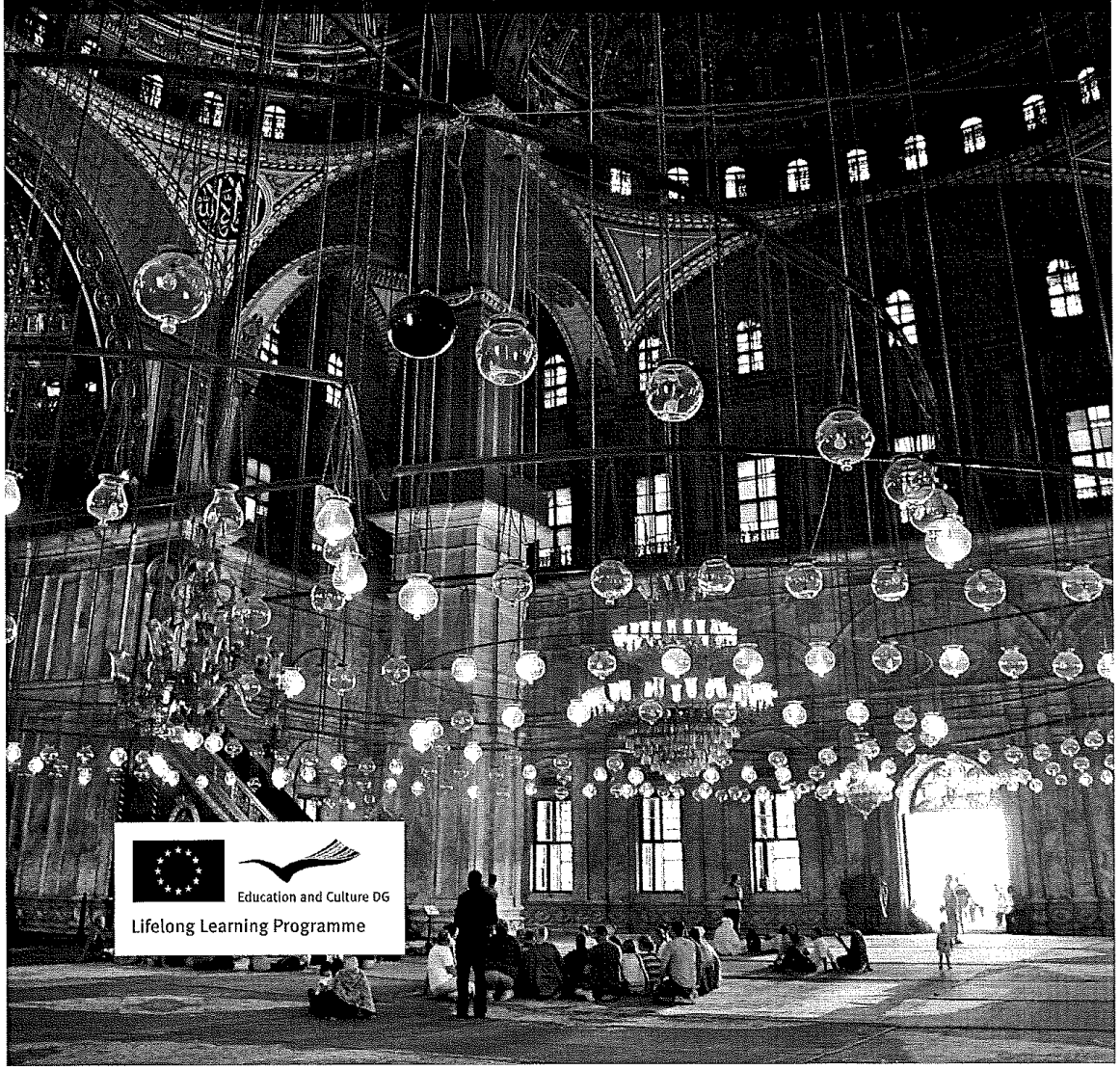
73. Granzeier v. Middleton, 173 F.3d 568 (6th Cir. 1999) (affirming that closing courts and offices in a county courthouse and administration building on Good Friday plus posting a sign on the courthouse door containing a picture of a four-inch high crucifix with the image of Christ did not violate the Establishment Clause).

74. 505 U.S. 577, 631, 637-638 (Justice Scalia, dissenting). Justice Scalia wrote that ''The Court's notion that a student who simply sits in ''respectful silence'' during the invocation and benediction (when all others are standing) has somehow joined—or would somehow be perceived as having joined—in the prayers is nothing short of ludicrous. We indeed live in a vulgar age. But surely 'our social conventions,' have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence.'' Internal citations omitted.

De Groof J., Van der Donk W., Lauwers G. and Verhappen T., Reflections on Religion and Education in the Netherlands and Flanders

Reflections on Religion & Education in The Netherlands and Flanders

Jan De Groof, Wim van de Donk, Gracienne Lauwers, Peter de Goede, Tim Verhappen[1]



Index

Reflections on Religion & Education

We urge consideration of different ways of dealing with religious and philosophical differences in educational systems. In the first section we present some general and fundamental considerations related to the nature and development of religion in modern society and the relationship between religion and the public domain. In the second section, we present considerations which more directly affect the structure and functioning of the Dutch and Flemish educational systems. In the third section, we give an outline of the contours of an alternative, appropriate to the future, to the way in which religious and philosophical differences have traditionally been dealt with in The Netherlands and Flanders.

§ 1 General considerations Religion & Public Domain

Our call for reconsideration of dealing with religion in the education system is driven by considerations of:
the ambivalent nature of religion;
the changing nature of religion;
the individualization of religion;
the changed context of religion;
the de-territorialization of religion;
the dialogical nature of religious identity;
the importance of equal and mutual recognition of religious identity;
and the post-secular character of the public domain.

The ambivalent nature of religion
Religion is a source of mischief, but also a source of values

Negative images of the intolerant and discordant nature of religion are widespread. Often - at least from a historical perspective – people refer to the religious wars in early modern Europe, particularly the Thirty Years War (1618-1648). The secularization of the state would be, from this perspective, the successful response to the horrific experience of the religious conflicts and would also be a sufficient or necessary condition for processes of democratization. Casanova (2009), however, shows that the religious wars cannot be considered to be the foundations of the secular state. This is a historical myth, they rather introduced the principle of *cuius region eius religio*. This principle stands for the confessionalisation of the state and a territorialization of religion. The secularization of European states came much later and did not necessarily contribute to a democratization of these states (cf. the secular Soviet regime).

Unarguably, religion has often been a source of injustice in the past, although the recent history of the twentieth century gives little empirical evidence for this. The 'Short Century of Europe' (1914-1989) was certainly one of the most violent in the history of mankind, but Holocaust and Gulag were not the product of religious fanaticism. They were brought about by modern, secular ideologies. In contrast, the fall of the Berlin Wall and the end of the Cold War were to a considerable extent attributable to a Catholic Pope and his fellow-countrymen. The revolution in South Africa and the abolition of the apartheid regime would not have taken place without the active role of the churches. The terrorist attacks of September 11, 2001 gave a new impetus to the focus on the 'problematic' nature of religion and enhanced the fear of religion in secular democratic states. Militant atheists like Dawkins, Harris, and Hitchens point to "9/11" as evidence of the anachronistic and pathological nature of religion, and maintain that religion and democracy are incompatible.

Certainly, not only secular ideologies, but also the highest spiritual ideals can be extremely destructive. In human history they have been 'poisoned chalices' (Taylor), the cause of untold misery and cruelty. Yet, besides all obscurantism and oppression religion is also a powerful source of high moral standards. The widespread negativity about religion - and by extension its banishment to a protected private sphere beyond the secular public domain - ignores religion as a source of private and public morality and therefore pays a high price. Religious beliefs have a specific power of articulation of moral intuitions, with an - at least potentially – enriching significance for the public domain (Habermas, 2009).

It is noteworthy that many critics of religion fire their arrows against intolerant and violent forms of religion and treat them as if they are equivalent to other forms of religion. To the extent that contemporary religions are enthralled with 'logos' - certainly the case for the fundamentalist versions of the great monotheistic religions which hold their holy books (Bible, Tanach, Koran) to be literally true - they are an easy prey for the scientific arguments of the anti-religious camp. But today religion - as in pre-modern times - for many believers is more 'mythos' with an opaque core, 'ein Bewusstsein von dem, was fehlt' (Habermas, 2008), a deeply felt sense of a transcendental Being which cannot be put into words. The understandable attention for religious sectarianism and the

intertwining of religion with politics as a means of power in various regions of the world should not make us forget that in all great religions, compassion for fellow man (the Golden Rule of Confucius and of the Bible) is central (Armstrong, 2009).

We should not unilaterally put emphasis on the shadow side of religion. It does not make sense either to only have an eye for the good things of the naturalistic enlightenment thinking and to ignore the 'malaise' of modernity (the extreme individualism in a disenchanted world without sense, the 'iron cage' of instrumental rationality and the demise of substantive goals, the alienation of political life and the erosion of citizenship and political freedom, Taylor, 1994). In short, we must avoid one-sided and caricatured images of religion and modernity (Van de Donk, 2007).

The changing nature of religion

Changing religion transforms social imagination

Religions are dynamic phenomena. They are entangled in a permanent process of adaptation or reply to new challenges (both from 'inside' and 'outside'), they combine with various socio-cultural contexts and undergo their influence (it is just the variety which is a result of this which makes it almost impossible to draw a substantial definition of religion, one that tries to capture the 'essence' of religion).

A very rough sketch of cultural and religious transformations may suffice here to sketch the changeable nature of religion. Taylor goes much deeper into this in *A secular age*.

When we go far back in human history and turn our attention to 'early' or 'archaic' religion we become aware of great religious transformations and - in their wake - the revolution which has taken place in our 'social imagination', the way in which people in the western world conceive their social life. In ancient societies, religion was 'everywhere', intertwined with everything else, and it was in no sense a separate, private area. The religious life was inextricably linked to social life. In these societies, the social group was the primary authority at religious acts. Individuals could not imagine themselves outside of given social contexts (besides this 'embedding' in society, ancient religion, according to Taylor, is characterized by its embedding in the cosmos and an embedding in the form of a focus on 'normal' human prosperity, people ask for good health, fertility and the like when they invoke religious powers or try to placate them).

If we go back to the period during the last millennium BC we see in the "axial time" various "higher" forms of religion occurring in different societies. These post-axial religions introduce what Taylor refers to as the great uprooting ('disembedding'). It is in many respects a break with the old religion, although ancient practices would still determine the religious life for centuries. Non-embedded religion sets free the individual from the social sacred (as well as the cosmic sacred and the 'normal' notion of human prosperity: it creates a 'higher' concept of human welfare). The principles of axial spirituality give rise to a social imagination that produces the modern individual, a conception of the social world as composed of individuals. In pre-modern times the individual was given meaning by the whole to which he belonged, but the perspective gradually shifted from the collective to the subjective. Religious beliefs - the medieval man was expected to obtain a godly inner self - played a key role (Augustine was the first to speak of a religious 'self;' 'in the inner man lives the truth'). .

The great uprooting from wider social and cosmic orders, introduced and yet more or less implicit in the axial revolution, achieves its logical conclusion with progressive disenchantment, the reform movement which culminated in the Protestant Reformation (which also changed the Catholic Church), and religious individualism. Modern people have developed a sense of self-consciousness which is not comparable to the self-understanding of medieval or ancient man. Since the late Middle Ages, in a period of half a millennium, in Western Christianity a power line evolved towards a more personal religion. More than ever, individuals are now responsible for their own religious projects.

However, within the Western world there is not a single pattern of modernization (cf. Berger, Davie & Fokas, 2008). Modernization is a multiple phenomenon with more than one specific line of development (e.g. the relationship between modernity and religion is not necessarily a zero sum game). As far as we can speak about a Western pattern of modernization, it is by no means the traditional pattern on which other modernizing cultures have to focus. Eisenstadt (2002) aptly refers in this context to 'multiple modernities' (2002).

The individualization of religion
Religion individualizes, but does not disappear

One of the major social transformations in Western culture is individualization (other keywords with which this change is expressed are 'reflexive modernization' or 'post-traditional society'). The modern 'focus on the self' - whose origins are located in religious thought, to the extent that modernity has religious roots (Hellemans, 2007) - makes individuals responsible for their own fulfillment. For this reason, the traditional values and norms or assigned identities and roles come to have less importance as sources of identity.

This de-traditionalization makes individuals more than ever before responsible for their own religious projects. Thus individuals are less guided by handed-down revelations and explanations as they self-consciously and autonomously seek their own religious identities. As Wade Clark Roof (1994) puts it: "religious identity becomes less ascribed, and more of a voluntary, subjective, and achieved phenomenon."

Taylor characterizes the contemporary religious conditions in the North-Atlantic civilization as 'the era of authenticity'. Characteristics are a focus on individual self-expression and a rejection of authority imposed from outside. Davie (1994) speaks in this context of 'nominal' Christianity. She refers to the rise of 'believing without belonging', or at most in a distant way in the form of 'vicarious religion', an alternate religion with which people move away from institutionalized religion, but nevertheless do not want to break the bond completely. It is a seeking form of religion, often referred to with the term 'spirituality,' which consists of an eclectic patchwork ('bricolage' or 'Mischreligiosität).

In the transformed but persistent presence of religion in modernity, the modern (religious) culture is permeated by rational enlightenment naturalism that tends to regard man as an atomized, context-free, detached and 'punctuated' subject, that objectifies and controls itself and its surrounding world. The subject is in this 'Cartesian' thinking master of his world, decides itself on what is valuable or not, and does not need God anymore. Yet this modernity is also steeped with a romantic expressivism, with its consciousness that the 'self' is situated and has linguistic, social and moral sources. Romanticism assumes that the self is part of a greater whole and is committed to a reunification of the spheres separated by the Enlightenment (individual – community; body – spirit; reason – feeling; human - nature). In other words, the Enlightenment is not the only source of modernity, Romanticism is also indispensable. In a similar way to Taylor, Habermas also notes that in our culture the naturalistic *Weltanschauung* – which studies reality in a scientific way and manipulates it in an instrumental way - conflicts, but is also closely linked with (revived) religion.

Enlightenment and Romanticism are therefore both - in a contradictory way - united in the identity of modern man. The price of exile in an enlightened, god-forsaken world calls for opposition to the enlightenment ideal and a longing for a reunion with the transcendental. In modernity, the distinction between these mental attitudes started to run more or less parallel with the distinction between public and private. The public areas of the state, politics, law and science became gradually more secularized by Enlightenment thinking, while the romantic ideal of authentic self-realization is designated as a private matter. Thus we encounter the term 'secularism'. Let us consider what the rise of secularity in the modern Western world means.

The changing context of religion
Modalities of secularity

In 1500 it was virtually impossible to have an attitude of disbelief - because the faith was so entwined with the social life that one without the other was barely conceivable. Today the situation has radically changed and it has become normal to state that 'we live in a secular age'. But what is this secularism?

Secularism can be interpreted in terms of public spaces. The obvious conclusion is that religion has disappeared from many isolated public domains (state, politics, economy, culture). These areas are nowadays largely devoid of references to God or a transcendent reality, as seen in the 'separation of church and state', although there is a wide range of 'models' in which the relations between these areas are shaped quite differently, with sometimes even very 'unsecular' connections between these two (the first meaning of secularism thus refers to secular public domains).

The removal of religion out of public domains does not mean that in such a society the majority of the population doesn't have a religious belief or practice. The second meaning of secularism refers to whether people are estranged from religious belief and practice. In this sense, many Western European countries are substantially secularized (in contrast with much of the United States).

In a third sense, closely connected with the second and slightly with the first, according to Taylor, secularism points towards new religious circumstances. The term refers to the fundamental change of circumstances in which religion manifests itself. Modernity does not lead to a world where religion has been marginalized or has disappeared. Religion in modernity remains an important source of motivation. Yet, secularism involves a social transition: from a society where religion is not in question towards a society in which religion is regarded as one option among others. The available option of an independent, exclusive humanism which doesn't accept transcendental goals, is the crucial change which is the core of modern secularism. This was a precondition for the rise of disbelief and the actual beginning of what Taylor calls the 'nova effect', the steady expanding of forms of belief and disbelief. The former naïve framework in which belief for most people was the automatic option has given way to a reflective framework. Belief is one option among many others, it is moreover a controversial option because for many people a certain naïve atheism is the most plausible option at first sight. This dramatic shift in the overall context, the disruption of the old natural background and the emergence of a situation where everyone realizes that there are several options (on which people disagree, and often even disagree within themselves), is a central characteristic of modern Western society.

Therefore we must *learn* to navigate between the different perspectives: our 'own' point of view and a 'detached' perspective, because our own point of view is only one of the possible points of view and we have to coexist with all the other points of view. So, we are doomed to live our belief (or disbelief) in a permanent state of doubt or uncertainty, because if we just look backwards or sideways we meet people with a different perspective. Indeed, a virtuous use of doubt allows us to deal with the inevitable tensions between the many 'gods' who battle for attention from and support of people in modernity (Berger & Zijderveld, 2009).

The de-territorialization of religion
Media and virtual polytheism

Global media reinforce the experience of living in a polytheistic universe. Ulrich Beck notes in 'Der eigene Gott' the importance of the media for the de-territorialization of religion. What is new in the religious 'conditio humana' at the beginning of the 21st century is the connection of everyone with everyone: the 'cosmopolitan constellation'. Therefore, all religions and 'kulturell-spiritueller Symbolwelten' are set free from their historical and spatial context and are simultaneously present and available. The territorially fixed isolation of religions comes to an end. Through migration processes, but mainly by old and new media, the world has turned into a global village where the religious or non-religious 'other' is more than ever present in the consciousness of

everyone. Thanks to modern communication media, worldwide encounters or clashes between religions are not only considerably easier but also inevitable.

New media act as a catalyst for de-institutionalization and individualization of religion. User-generated media such as YouTube undermine traditional religious authority, which can no longer monopolize the access to the media. Everyone can spread religious messages or claim religious authority by means of these new media. Self-aware, reflective individuals find in an extensive media landscape the symbolic inventory with which they give meaning to their religious self. Less than before do they rely on family, school or church for their spiritual experiences. Individualization, though, does not exclude collective, 'metatopic', non place-bounded forms of 'gathering' where many people simultaneously 'take part' in events and experience powerful emotions which can be considered as new forms of religion.

This state of universal neighborhood recalls the play *Huis clos* by Jean-Paul Sartre. A number of people are together behind closed doors and cannot avoid the gaze of the others (Brandsma, 2006). More than ever, the words of Yeats are relevant in the 21st century: 'What do we know but that we face, one another in this place'. Religion in cyberspace has already been described as the virtual version of polytheism in ancient Greece, on grounds of the volatile and fragmentary nature of the Internet, which with its tremendous variety of religious places greatly stimulates the nova effect of Taylor (De Mul, 2002).

Societies have become increasingly porous. Mass media globalization makes us all neighbors in the global village. This can reinforce the eclecticism which is characteristic of seeking spirituality. Virtual polytheism may therefore contribute to a tolerant multi-religious society, but it may also inspire to religion as a hyper-identity, 'sacred fire' and fear of the (dis)believing other (Sloterdijk, 2008). Virtual polytheism can be a blessing or a curse; religion retains its ambivalent character.

The dialogical nature of religious identity
The illusion of a single identity as destiny

Many modern people define themselves apart from traditional, common frameworks. According to Taylor, this might turn into a perversion of the romantic ideal to be true to themselves. People than become blind for the 'sources' of their self and regard themselves as the measure of all things. The corresponding (existential) portrayal of man is that of a subject who, thanks to his cogito, in a sense creates itself, and is only accountable to that cogito. The detached ratio of a narcissistic ego rejects all external patronizing demands and assumes to be independent of any linguistic, social or moral horizons. Sen (2006) calls this 'identity 'disregard.' It is a sense of reductionism which ignores the fact that our identity largely derives from frames of reference which we didn't constitute ourselves.

Taylor has a different vision of human identity. He starts from the idea that man is 'situated' in a linguistic and social sense. Man interprets himself - man is a self-interpreting animal - against the backdrop of an already existing and transcendent horizon of value judgments. To that extent he is not master of his own values. He is born and socialized into a social world, a space of intersubjective meanings which precedes his own subjectivity. We cannot suppress or deny the horizons through which things gain significance for us. We orient ourselves on this moral map. We always define our identity in dialogue with, sometimes in conflict with, other identities. We need dialogic relationships to define ourselves. We do this by means of 'strong' values, motivated by moral evaluations. To define yourself as being religious means, in other words, to figure out on what grounds you significantly differ from other (un)religious persons. The formation of a religious identity is a dialogical process.

It is a popular form of reductionism to present human identity as a unitary phenomenon (Sen, 2006). The assumption is that a person is pre-eminently connected with one collective and that his personal identity is completely determined by that collective. Human identity however is complex in nature,

composed of a large number of identifications. The relative weight of those reference points within our overall sense of identity can vary due to context and time. In particular, sectarian movements elevate the religious identity of their supporters into a dominant identity and incite them to ignore all the other identities people have and appreciate (class, gender, occupation, language, science, politics, lifestyle). For the vast majority of believers, their religious identity, however, is one among many others.

We do not create our identity out of nothing (ex nihilo), we are set in contexts which transcend us, but that is not to say that our identity is a fate (Sen calls this 'the illusion of destiny'). It is not true that our identity is already there and is only waiting for us to discover it. The creation of an identity, also a religious one, involves reflection and choice. A highly self-conscious person reflects on his religious identity, wondering what other identities are relevant and weighs the relative importance of different identities. The creation of a religious identity is therefore a dialogical process with room for personal creativity (Appiah, 2005).

The importance of equal and mutual recognition of religious identity

Beyond social autism

Our identity essentially depends on dialogic relationships with others. Still, the nature of our dependence on other people changed significantly in the course of time. In earlier, hierarchical societies, identity was assigned and largely determined by a stable social division of roles. Today - in the era of authenticity - we define our identity, our image of ourselves, our essential characteristics, much more from the inside, in an overt or internal dialogue with what George Herbert Mead described as 'significant others' (Taylor, 1995).

This change intensifies the need for *recognition* of our identity. This is an essential human need that goes beyond a kind of courtesy we owe our fellow human beings. In the case of socially derived identities recognition is a priori given by a social 'script' and therefore hardly problematic. In contrast inner-derived identities have to gain recognition in a process of exchange.

Recognition (Kant's principle of '*die Anerkennung*') adds an intimate dimension to the personal relationships we maintain with our significant others who provide or withhold recognition. Recognition also has a social dimension in the public domain. Also in the public domain, our - more and more individualized - identity may or may not be recognized.

In a decent society, the government recognizes the unique religious identity of every individual and every religious group in the same way. This policy of equal recognition is blind to the differences between secular and religious 'truth claims.' Both can count on an equal package of rights and obligations. When, under the guise of neutrality of the public domain, secular beliefs are prioritized, this can be regarded as a more or less oppressive or humiliating denial of the equal status of religious beliefs.

However, sometimes a policy of equal recognition requires taking into account the differences between people. Precisely because of the equal recognition one is not blind to those differences and they form the basis of a differential approach. In laws and regulations, in a careless and almost unnoticed way, the sensitivities of religious minorities are often not taken into account. Nussbaum describes this subtle violence as 'soul rape.' A truly equal recognition of the religious other is not asking for a blind equal treatment, but for a generous dispensation for believers with moral conflicts. Only then the government is 'fully respectful' and 'fully fair' to the religious out-group and its policy is no longer the hallmark of the in-group (Nussbaum, 2008).

The 'subjective turn' in Western culture puts into perspective the importance of strictly organized collective identities, which is not to say that the need for recognition of specific cultural and religious groups is always illegitimate. Compared to the past, however, for many people their personal identity derived from many dimensions has become much more important than a collective identity derived from a group (Schuyt, 2009). But there is no "I" without a "we,"

no personal identity without membership in a group. Communities with a collective identity are entitled to equal recognition, as long as we look out for hyper-collective identities which offer no exit-possibility to their members.

A decent society requires *equal* recognition of secular and religious beliefs and forms of *mutual* recognition that go beyond passive tolerance. Precisely because the importance of recognition in our culture has intensified - and denied recognition may or may not evoke suppressed feelings of wounded pride, shame and anger - recognition must be mutual and go beyond living alongside each other like autistics (as in a sense was the case during 'pillarization'). More is needed than dimming the headlights or lowering the eyes in a meeting with the (un)believing other (cf. Pels, 2008). Nobody needs to give up his own truth, but a mutual willingness to listen and learn is a prerequisite for peaceful coexistence and social cohesion.

The post-secular character of the public domain
Inclusive and equal neutrality towards secular and religious beliefs

In many democratic political systems, the public domains of the state, science, and economics have been separated from religion. However, the range of 'models' for relations between secular and religious spheres is extremely varied. Within the framework of religious freedom and mutual autonomy of religious and political institutions (twin tolerations - Stepan, 2000) the spectrum varies from French *laïcité* to the Anglican church in the United Kingdom. The Dutch government has maintained 'unsecular' relationships with religion in the form of denominational pillars that were 'masters in their own houses' in fields such as education, media and health care, while the house was financed with public funds. In Belgium as well, similar arrangements testify to a prudent, pragmatic approach to the 'separation' of church and state (De Groof, 1988).

The separation or mutual independence of church and state - in the literal sense of mutual recognition of institutional autonomy - does not mean that in another sense there is no legitimate space for religion in the public domain of the state. Or that this institutional differentiation requires a complete watershed between religion and other public domains. The institutional separation of church and state does not imply, for example, that religious arguments should be excluded from the common space of the public debate (or need translation into a secular language, see Rawls, 1993).

The persistent presence and indeed resurgence of religion allows us to characterize our society as a *post-secular* society in which secular and religious beliefs are entitled to equal access to the public domain. The public domain is indeed secular in the sense of an institutional separation between church and state, but should, we believe, be post-secular in the sense of a neutral attitude towards secular and religious truth claims. It should keep an equal distance to both religious and secular beliefs. It is not acceptable, under the guise of 'neutrality', to take seriously only secularized Reason.

The principle of institutional separation of church and state - we do not want to open the debate on this topic – may not act as a 'conversation stopper' which enforces a form of exclusive neutrality whereby the government keeps a far distance from religion. The institutional separation of church and state combines very well with an inclusive neutrality which gives generous place to religion in the public domain (Van Bijsterveld, 2009, Van der Burg, 2009).

This inclusive conception of neutrality was also the supporting idea of the Dutch and Belgian tradition of religious segregation which in many public domains offered room to faith-based organizations. Especially now that we retract from our understanding of modernization as a process which reduces religion to a pre-modern, anachronistic phenomenon that at best has marginal significance as a kind of psychological immune system in the private sphere – and 'public' religions do not wish to 'deprivatise' either (Casanova, 1994) - there is no reason not to give a legitimate place to religion in the public domain at the beginning of the 21st century.

In comparison to the heyday of pillarization, the pattern of cultural-religious pluralism is drastically 'depillarised'. Consider the rise of Islam in more and less conservative variants; the emergence of diffuse 'seeking' spirituality, expressed in both superficial and serious forms; the increase of the number of people who consider themselves to be atheist or agnostic, with a number of high-profile spokespersons who radically but unilaterally emphasize modernization and secularization as liberating forces and put aside religion as an irrational and anachronistic phenomenon which should be entirely banned from the public domain; the reduced importance of traditional centers of religious authority, although smaller, religiously-conservative centers of disciplined submission to an external religious authority persist; and finally the growth of ecumenical awareness within *mainstream* Catholicism and Protestantism, so the old fault line between Rome and Reformation is still hardly active. All of this means that little remains of the former steadiness and clarity. From a stable and institutionalized pluralism (*semper idem*) we move towards a more individually based and more fluid pluralism (*panta rhei*). Religion became an elusive, 'liquid' (Roof, 1994, Bauman, 2005) phenomenon, so in many areas the traditional pillarized arrangement with publicly supported confessional organizations stands under great pressure, also in the educational field.

This public domain needs a new arrangement, a new prudent and pragmatic compromise (Margalit, 2009) that - if possible in a way that will stand up in the future - do justice to the outlined transformations of religion, and guarantees the fundamental right of religious freedom in the context of an institutional separation of church and state, and also contributes to a peaceful and respectful treatment of religious pluralism. Now that we have outlined our considerations in this section in a more general and fundamental way, we will have a closer look at considerations that directly affect structure and functioning of the Dutch educational system.

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§ 2 Considerations religion and education

§ 2.1 The Dutch history of denominationalism and depillarisation

The typical Dutch tradition of the so-called 'particularism' begins with the - Dutch - Revolt (1568 - 1648) and the birth of the Republic of the Seven United Netherlands (1588-1795). The historical term 'particularism' refers to the resistance of the bourgeoisie in the Dutch provinces against the authority of the German Emperors Maximilian I (1459 - 1519) and Charles V (1500 - 1558) or the Spanish King Philip II (1527 - 1598): an opposition that stemmed from the desire of the bourgeoisie to largely independently defend its interests, through its own organization.[2] The Dutch provinces were the legacy that Charles V in 1506 as the sovereign had received from his grandmother, Mary of Burgundy (1457-1482). Charles V was besides the ruler of the Dutch provinces since 1516 also King of Spain and from 1519 on the emperor of the Holy Roman Empire (962-1806). He inherited the Spanish kingdom from his mother Joanna of Castile (1479 - 1555) and the authority over the Holy Roman Empire was transferred to him by his grandfather Maximilian I. From the moment Maximilian I, through his marriage to Mary of Burgundy, acquired custody of the Dutch territories and the Spanish throne of Philip II, the only son of Charles V, the Dutch provinces put their special or private interests above the public interest of the Holy Roman Empire or the Spanish kingdom. Therefore since then we speak of the particularism of the Dutch provinces. This particularism finally degenerated in 1568 in the so-called 'Dutch Revolt'; a term used in modern history to refer to the 'Eighty Years War'.[3] In 1648 the Peace of Westphalia ended the uprising. Spain recognized the sovereignty of the confederation of Dutch provinces and their formal relationship with the Holy Roman Empire got broken: the Republic of the Seven United Netherlands, by the States-General since 1588 became a fact.[4] In 1795 the Republic of Seven United Provinces came to an end, one year after a invasion of the republic of France, installed in 1792. The Republic of the Seven United Netherlands was a vassal of the French First Republic (1792 - 1804), and as such renamed Batavian Republic (1795-1801). Since 1801, the Dutch provinces were called 'Batavian Commonwealth' (1801-1806) after a constitutional amendment by the First Consul of the First French Republic, Napoleon Bonaparte. But when Napoleon Bonaparte lost his confidence in the compliance of the Netherlands, he renamed it the Kingdom of Holland (1806 - 1810), crowning his brother Louis Napoleon Bonaparte king. In 1810 the Kingdom of Holland was annexed by the First French Empire (1804-1815), liberated in 1813 by the Prussians and the Russians. The French occupation was a serious breach of the particularistic nature of Dutch society and strengthened the forces of some upper middle class who favored the creation of a modern, centralized state.[5] Next Willem Frederik of Orange-Nassau as Willem I (1813 to 1815) was the sovereign Prince of the Principality of the Netherlands from 1815 to 1840 and king of the United Kingdom of the Netherlands. Finally, his son Willem Frederik George Lodewijk as Willem II 1840-1849 was the king of the Kingdom of the Netherlands (1839 - present). Under the authority of Willem I and Willem II the Netherlands developed into a modern unitary state.

In society, particularism remained, albeit in modernized form, however, very lively.[6] Particularism managed to revive by expressing itself in the so-called 'denominationalism' of Dutch society: the organization of society in vertical structures based on religious or philosophical principles. The Dutch

2 Erven Fortuyn, W.S.P. [cop. 2002], De verweende samenleving. Een religieus-sociologisch traktaat. Uithoorn, Karakter Uitgevers B.V./Rotterdam, Speakers Academy Uitgeverij B.V. [cop. 2002], p. 93.

3 Van Ondheusden, J.L.C. [cop. 2005], De wereldgeschiedenis in een notendop. Amsterdam, Uitgeverij Bert Bakker [cop. 2005], p. 62.

4 See endnote 2, p. 64.

5 See endnote 1, p. 94.

6 See endnote 4.

society, as such, was during the first half of the twentieth century divided into a Protestant-Christian pillar, a Roman Catholic pillar, a social-democratic pillar and a liberal-neutral column: vertical structures, each with its own broadcasting, newspaper, trade unions, political parties, housing associations, youth organizations, educational institutions, healthcare facilities, sports clubs, etc. The (regionally rooted) interests of the various pillars were institutionally reconciled at state level.[7] *Morally* speaken, the different pillars were united by their common petty-bourgeois understanding of the bourgeois lifestyle.[8] The dominance of this interpretation of the bourgeois values was broken by the cultural revolution which took place from the beginning of the second half of the twentieth century. Fortuyn calls this change even a revolution, as it totally changed the Dutch society, opened discussion upon the collective system of values, and damaged not to say completely destroyed the transfer, training and enforcement mechanisms of this system.[9]

Most of the aforementioned institutions within the pillars which were responsible for the transfer, training and enforcement mechanisms for collective norms and values their cultural and moral influence, but not their objective existence despite the 'depillarization'. Some organizations, however, had cease to exist. The decoupling of the institutions on the one hand and their traditional supporters on the other had two consequences. The institutions were able to focus on their professionalism independent of any worldview motivation or aspiration to cultural and moral formation of their 'supporters'. The traditional 'supporters' were disintegrated and individualized, which allowed individuals to define their own norms and value patterns.[10] Both developments as a result of the process of depillarization started in the sixties of the twentieth century maintained in all spheres of society, so as well in the Dutch educational system. The emancipation of the education stakeholders - especially the authorities, the teaching staff, pupils and students, and parents - drastically changed the way in which freedom of education currently is achieved. The freedom of education during the pillarization was achieved by a strict distinction between public (accessible to everyone) and private (secular - primary and secondary) education, this freedom since the depillarization is realized through a small number of homogeneous 'remnants' of the aforementioned pillarized distinctions on the one hand and a large number of educational institutions with a very heterogeneous composition on the other hand. In this section we will discuss this transformation in the Dutch educational system. In subsection 2.2 we show how the abovementioned prescription of fundamental rights and law and legislation and case law allow an expression of the blurring distinction between public and private schools.

§ 2.2 Article 23 of the Dutch Constitution: freedom of education

The act

Article 23 of the Constitution articulates the fundamental right to freedom of education. The text of the Constitution reads as follows:[11]

1. Education shall be the constant concern of the Government.
2. Providing education is free, subject to state control and to regulate by law, for the forms of education designated by law, the research of the ability and morality of those who teach.
3. Public education is designated by law with respect to everyone's religion or belief.
4. In each municipality government sufficiently general public primary education is provided in a sufficient number of public schools. Under rules set by law notwithstanding this provision may be admitted provided to receive such

7 See endnote 4.
8 See endnote 1, p. 99.
9 See endnote 1, p. 100.
10 Barth, M.A.M. [cop. 2001], 'Opvoeden tot burgerschap: vrijheid, geen vrijblijvendheid.', in: Vuijsje, H. (red.), Moreel leren. De overdracht van normen en waarden in het onderwijs. Assen, Koninklijke Van Gorcum [cop. 2001], p. 68.

11 See: http://wetten.overheid.nl/BWBR0001840/geldigheidsdatum_21-01-2010 ; visited on Thursday January 21, 2010.

private schools".[14] Vermeulen[15] and Zoontjens[16] talk about the "freedom to express an own religious or philosophical view on man and society in education". Nevertheless it is clear that we can distinguish three levels in the freedom of education, namely the freedom of establishment or foundation, freedom of organization and the freedom of conviction.

The freedom of establishment or foundation

The freedom to found an education institution is contained in Article 23 paragraph 2 of the Constitution. The word 'teaching' in the saying "the teaching is free [...]." indicates that the fundamental right does not accord to those who purchase education (students and their parents), but only to those who - on their own initiative – provide education. Those who - on their own initiative - offer education are those who establish and maintain a private school. The right to freedom of education is thus a right at the 'offer' side and not the 'demand' side. It is a right of producers, not consumers.[17] The organization and decision making process of private schools is governed by private law. Educational institutions which provide private education are maintained by a 'a legal body with full legal capacity who according to the statutes or regulations provide education without a profit-making motive".[18] Educational institutions of public education, by contrast, are established by the government under a general provision under Article 23 paragraph 4 of the Constitution, first sentence. The authority of the public school lies with the board of the municipality (mayor and aldermen) where it is established[19] , with a by the council established governance committee[20], a public entity and a private legal body[21], namely the Foundation.[22] We will refer to this later when discussing the amendment of Article 23 paragraph 4 of the Constitution in 2006.

The freedom to organize

The freedom of establishment means the freedom to determine according to own's one view an educational institution of private education, the related organization, the management and governance.[23] Some parts of the freedom to organize are mentioned in a non-restrictive phrase in the Constitution in Article 23 paragraph 6, second sentence. The words 'in particular' indicate that the freedom of establishment in principle is more than just the choice of learning materials and the recruitment of teaching staff.[24] Experience shows that educational institutions of private education perceive the selection of students as part of their freedom of establishment.[25] This practice has its legal basis in Article 7 paragraph 2 Equal Treatment Act:

"The first paragraph, section c, does not affect the freedom of an institution of special education, when regarding the admission and participation in education requirements, which considering the aims of the institutions necessary to achieve its basis, where

14 Mentink, D. [cop. 1996], Artikel 23 van de Grondwet: de vrijheid van richting en de dragers van de vrijheid van onderwijs, in: Proefvlieger bij het advies 'Richtingvrij en richtinggebonden', 's-Gravenhage, Onderwijsraad [cop. 1996], , p. 12.

15 Vermeulen, B.P. [cop. 1999], Constitutioneel onderwijsrecht, 's-Gravenhage, Elsevier [cop. 1999], p. 51.

16 Zoontjens, P.J.J. [cop. 2003], Bijzonder en openbaar onderwijs, in: Ton Bertens e.a. (red.), Recht en religie, bijzonder nummer Ars Aequi, Nijmegen [cop. 2003], pp. 59-88.

17 Mentink, D. & Vermeulen, B.P. [cop. 2007], Artikel 23 Grondwet, Toelichting op het grondwetsartikel over onderwijs zoals aan de hand van ontwikkelingen in wetgeving, international recht en jurisprudentie, 's-Gravenhage, Reed Business [cop. 2007], p. 73.

18 See: Article 55 Law on Primary Education. See also: Article 49 paragraph 1 Law on Secondary Education, Article 9.1.1 Education Act and Article 9.51 paragraph 1 Law on Higher Education and Research.

19 See: Article 23 paragraph 4 of the Constitution, first sentence: "[...] government [...]".

20 See: Article 83 Municipalities.

21 See: Article 47 Law on Primary Education. And further: Article 42a Secondary Education Act.

22 See: Article 17 and Article 48 Act on primary education. And more: Article Article 42b and 53c to the Secondary Education.

23 See endnote 16, p.69. And further: Article 5 paragraph 2c Equal Treatment Act: "The first paragraph shall affect the freedom of an institution of special education to make demands on the performance of a function that, given the purpose of the institution, are necessary for the achievement of their principles, such requirements may not lead to discrimination on the mere fact of political opinion, race, sex, nationality, heterosexual or homosexual orientation or marital status.

24 See endnote 16, pp. 61 & 69.

25 See endnote 16, p. 71.

such requirements may not lead to discrimination on the mere fact of political opinion, race, sex, nationality, heterosexual or homosexual orientation or marital status. Discrimination on grounds of sex is only permitted if the nature of the institution and demands for students of both sexes have equivalent facilities".

With regard to the first sentence of the said subsection it is important to say that it expressly states that the requirements that private schools maintain for the selection of teachers and pupils are not allowed if they lead to discrimination on grounds of the *mere fact* of political opinion, race, sex, nationality, heterosexual or homosexual orientation or marital status, that is based on any of the above facts alone. It may also be clear that freedom of establishment is closely linked to the freedom of conviction to be discussed below.

In contrast with private schools, educational institutions of public education are accessible to all under Article 23 paragraph 3 Constitution, and teachers and students may therefore not be refused because of their religion or belief.

The freedom of conviction

As mentioned in the literature, there is no agreement on the definition of freedom of conviction. The Administrative Court of the State Council in 1997 determined a set of generally accepted criteria to determine the freedom of conviction. Required for such an autonomous conviction to be recognized: (I) an objective contained in statutes which is clearly distinguishable from that of other schools, (II) this objective is supported by a 'discernible movement' in Dutch society, and (III) the 'measured significance' of this objective meets the legal norm for foundations.[26] Pedagogical convictions are explicitly not convictions within the meaning of the abovementioned legal criteria, although the so-called general-private schools - schools with a particular pedagogical basis – are state funded. The concept of conviction has in this sense a religious and philosophical nature. There are both public and private schools based on a particular pedagogical convictions. Based on freedom of conviction, private schools are allowed to select the learning materials and maintain a selective policy for the recruitment of teaching staff and admission of students.

The extention of this freedom is demonstrated by the famous so-called Maimonides judgement of the Supreme Court in 1988.[27] In this case, the question arose whether the board of the Maimonides Lyceum, an Orthodox Jewish school, had the right to refuse a child, Aram Brucker, from a liberal Jewish family who didn't have a Jewish mother while the educational institution only allowed and allows children with a Jewish mother. The father of the child, was allowed to attend the school in his youth as a pupil. Nevertheless, the Supreme Court judged the management of the school to be within its rights by refusing the child as a pupil.

The "freedom of conviction" protected by Article 23 of the Constitution has so much weight, taking into account Article 6 of the Constitution and Article 9 EVRM, that those who (as in this case the Foundation) maintain a private education institution, in principle – setting aside special circumstances of which there is no question here – in relation to parents of a child who, according to admission policies with a religious basis, is not eligible for admission, are free to deny the request of these parents for admission, even though the parents (as in the case of the Bruckers) have a strong and reasonably-founded preference for the education provided at the said institution, and even though the said institution is the only one that provides education of this religious character.

In this judgment the Supreme Court indicates, though restrainedly, that rights based on convictions are not unlimited. When there are "special circumstances" - circumstances referred to in Article 7 paragraph 2

26 Afdeling Bestuursrechtspraak Raad van State 11 februari 1997, Administratiefrechtelijke Beslissingen 1998, 28, met noot van Vermeulen, B.P. en Koolmann, C.A.J.M.; Ars Aequi 1998, pp. 607-612.

27 Hoge Raad 22 januari 1988, Administratiefrechtelijke Beslissingen 1988, 96, Nederlandse Jurisprudentie 1988, 981 (Maimunides).

General Equal Treatment Act, the first sentence - then a private school can not rely on Article 23 paragraph 5 of the Constitution. Furthermore, according to the opinion of the Supreme Court in this case there need to be a refusal of a student or students "based on a consistent policy resting on religious grounds". The Supreme Court thus requires that the admission policy of private schools comply with a requirement of consistency. It is not permitted to use any criteria for admission at random. The Equal Treatment Commission maintains the same requirement for private schools in terms of their policies for the recruitment of teaching staff.[28] The number of private schools in accordance with the criteria of the Maimonides judgment and the Equal Treatment Act who have a selective policy for the recruitment of teaching staff and admission of pupils are only 5 percent of the total, according to Zoontjens.[29] The remaining 95 percent of the total number of private schools maintain an open admission policy. They require teachers and students to respect the religion or conviction of the school rather than to endorse it.

As mentioned above, public schools have to offer education in a ideologically neutral manner. Nevertheless, the legislator has stated the neutrality requirement in a formal sense regarding educational institutions of public education, which means that everyone's religion or belief has to be respected. So in Article 46 paragraph 1 Law on Primary Education the aforementioned educational institutions are mandated to give attention to the worldview and social values of Dutch society:

"Public education contributes to the development of pupils with attention to the religious, philosophical and social values of Dutch society with acknowledgement of the significance of the diversity of these values".

The legislator has formally stipulated in article 50 of the Law on Primary Education that public schools can provide religious education and / or worldview training:

"The responsible authority allows students to obtain religious education or worldview training at school. The time spend on this education can go up to maximum 120 hours according Article 8, the seventh paragraph, heading b. For students who do not attend this teaching, the authority provides other educational activities at school".

The distinction between public educational institutions on the one hand and private educational institutions on the other hand, so specifically emphasized in the Constitution, has been weakened by legislation in a formal sense, particularly in response to changes in views on the role of religion and belief current within Dutch society. The passive or negative educational neutrality of public educational institutions has as such given way to the active pluralism or positive neutrality of these educational institutions.[30]

Moreover, legislation has formally established that the responsible authority of a public school may be exercised by a foundation.[31] The municipality where the public school is located may, pursuant to Article 48 of the Law on Primary Education, entrust the management of the school to a foundation. This foundation performs all duties and responsibilities of the authority with the exception of decisions on the abolition of public schools.[32] Under Article 17 of the Law on Primary Education public schools may merge *administratively* with private schools by uniting their responsible authority - that of local government - with the responsible authority of private schools.[33] The Board resulting from an administrative merger of public and private schools is called a 'joint management'. In exceptional cases, the public and private schools are also allowed to *physically* merge by establishing so-called 'mixed schools'. The constitutional basis for the physical merger of

28 Commissie gelijke behandeling 4 december 2001 (oordeel 2001-116) en Commissie gelijke behandeling 26 juni 2006 (oordeel 2006-128).
29 See endnote 15.
30 See endnote 16, p. 90.
31 See endnote 21.
32 See Article 48 paragraph 5 of the Act on primary education.
33 See Article 17 paragraph 1 Law on primary education.

public and private schools is a amendment to Article 23 paragraph 4 of the Constitution in 2006. The following italicized elements were then added to the said subsection:

"In every municipality sufficient public general primary education is provided by the government in a sufficient number of *public* schools. Exceptions to this law may be allowed under rules established by law, provided there is opportunity to receive such education, whether or not in a public school. ".

By adding these elements to the subsection, the constitutional legislator expressed in principle that primary education should be available from public schools. The constitutional legislator however allowed the legislator in a formal sense to make an exception to that principle. To date, the legislature has not drawn up legislation to establish the mixed schools in a formal sense. It is expected that, when the fundamental provision on the freedom of education is submitted to a review, the conditions under which mixed schools may be established will be under discussion, partly because the Dutch parliamentary history has shown that there are both supporters and opponents of mixed schools, partly because foundation and organization of these schools is a legally complex and highly technical matter. It is complex because it is not clear in advance whether a mixed school should be considered to be a public or private school and how the government can fulfill its role as authority over the - merged - public school. As long as Article 23 of the Constitution stipulates a strict distinction between public and private schools, the mixed school has to be one or the other. Another category is simply not possible at this moment. And as long as the legislature in a formal sense doesn't provide rules regarding the role of government - which undoubtedly will be a party in the physical merger of a mixed school and take part in the governing of this mixed school – the risk remains that the municipal authority will end up in a juridical and administrative mine field in case of a merger. Moreover, it seems probable that the legislator in a formal sense - when legislation will be created which affects the foundation of mixed schools - will make sure that this educational institution can only be the result of a merger between a public school or more public schools on the one hand and a private school or several private schools on the other hand, and not be a foundation ex nihilo.[34]

Freedom of education and the right to education in international law and European law

Finally, we note that freedom of education is not only guaranteed by Article 23 of the Constitution, but also by a number of human rights provisions. We call the most important:

1. Article 2 Protocol 1 European Convention for the Protection of Human Rights and fundamental freedom;

"No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical Convictions. ".

Concerning this article it should be noted that this provision presumably does not enforce a claim on public funding of private schools, as far as the Dutch court denied the horizontal application - between citizens and between citizens and *private legal* persons - to this provision.[35] But as far as private schools are fully financed by public funds and - taking into account all the aspects related to freedom of conviction and organization – it might be possible that the Dutch court will draw the conclusion that every Dutch fully funded educational institution, and thus also the publicly funded private schools, has to be called a 'public' institution. The State would have the positive obligation by virtue of Article 2 in conjunction with Article 14 (prohibition of discrimination) Protocol 1 European Convention for

34 See note following Report, Parliamentary Papers II 2001/02, 28 081, No. 5, p. 3. And further, endnote 15.

35 Vermeulen, B.P. [cop. 2007], Vrijheid, gelijkheid, burgerschap. Over verschuivende fundamenten van het Nederlandse minderhedenrecht en -beleid: immigratie, integratie, onderwijs en religie. Den Haag, Sdu Uitgevers [cop. 2007], p. 28: voetnoten 45 en 46.

the Protection of Human Rights and Fundamental Freedoms) to guarantee equal access for individual citizens.[36]

Furthermore, it is not unimportant to point out the fact that Article 2 Protocol 1 European Convention for the Protection of Human Rights and Fundamental Freedoms expressly states that *parents* have the right to secure education which corresponds to their religious beliefs. The article is in contrast with Article 23 of the Constitution which primarily focusses on the rights of suppliers of education, in principle the right of consumers of education. This fact immediately raises the question if and how the right to education and the right of parents to exercise this right by founding schools is guaranteed by Article 23 of the Constitution. The answer to this question needs to be an affirmative one; Article 23 of the Constitution guarantees the right to education, whether by the right of parents to exploit this right by founding a school and make a school choice, to discount the freedom of establishment or foundation, a freedom which over time was used more by schools operating independently from parents than by parents themselves. As a result, suppliers of education are usually schoolboards, which does not necessarily mean that parents basically cannot provide education. Indeed it is obvious that parents are free to independently organize and provide education, either in the form of home education under Article 5a and / or Article 5b of the Compulsory Education Law, either in the form of a government recognized educational institution.

And further:

2. Article 14 Charter of Fundamental Rights of the European Union;
3. Article 13 International Covenant on Economic, Social and Cultural Rights;
4. Articles 149 and 150 Treaty establishing the European Community;
5. Articles 1, 2 and 5 International Convention on the Elimination of All Forms of Racial Discrimination;
6. Articles 1 to 5 Convention on the Fight against Discrimination in Education;
7. Article 23 paragraph 3, 28 and 29 Convention on the Rights of the Child, Articles 1 to 8 of Directive 2000/43/EC on the basis of Article 13 Treaty establishing the European Community.[37]

The blurring of the distinction between public and private schools

In this subsection we attempted to broadly indicate the extent to which Article 23 of the Constitution and adjacent regulatory and case law offered room for and are the expression of the blurring of the distinction between public and private schools. In short, in particular the legislation on the ability of public schools to offer religious education and worldview training, the possibility for municipalities to privatize the governance of public schools, and the cautious steps toward the legislation of mixed schools are a clear indication of the *legal* blurring of the distinction between public and private education. This is certainly not the whole story. The distinction between the two forms of education also blurs *in fact*, public education gets increasingly a special character and private education is becoming more public and general by nature. The identity of public schools is increasingly the result of a compromise between different religious and philosophical views about life in and outside the schools, while many private schools, whether consciously or not, allow their identity to be watered down. Earlier we noted that only a small share of the private schools select teachers and students by employing religion or belief as a selection requirement: a requirement which was previously seen by private schools as an

36 Onderwijsraad (rop. 2002), Vaste grond onder de voeten. Een verkenning inzake artikel 23 Grondwet. Den Haag, Onderwijsraad (rop. 2002), p. 37.

37 Zie eindnoot 35, bijlage 3.

important tool for the maintenance of their identity. For a considerable number of schools in primary education, the abandonment of the pupil admission requirement is opportunistic, if these schools cannot otherwise maintain their enrollment about the level for school closing, as prescribed by Article 154 of the Law on Primary Education.[38]

38 "For each municipality, based on student density in that municipality, a waiver standard established by the formula: Lifting Standard = 0.6 x (student density (0.15 + 0.0027 x pupil density)). The result of the calculation is completed, the decimals are ignored if the first decimal place is less than 5 and the decimal place are neglected and the number increased by 1 if the first decimal place is equal to or greater than 5. The waiver standard is at least 33 and 200. The student density is the result of the population of 4 to 11 years in the municipality divided by km2 land area of that municipality. If the number of km2 of the municipality is less than 10 km2, is to calculate the density based on 10 student km2. The pupil density shall not exceed 500. ".

§ 3 The modified relation between denominationalism and depillarisation in Flanders

§ 3.1 The Belgian and later the Flemish 'school issue' as a reflection on the changed relation between denominationalism and depillarisation (summary)

It is well known that the educational policy of Willem I during the 'Dutch Regime' caused and also triggered the 'Belgian Revolution'. Article 226 of the fundamental law of August 24, 1815 required that public education is 'an ongoing subject of concern' of the government. The politics of Willem was interpreted as a commitment to a monopoly of the State. In the Empire there needed to be a unit concerning education and upbringing, according to the principles of state building, and the church ought to be useful to the state. Gradually the freedom of education was hindered and the authorization requirement of the government for any private initiative was a thorn in the side of the church. "Freedom of education was, for the Catholic Church, the price of the support which it gave to the revolutionary movement which resulted, in 1830, in the separation of Belgium from Holland."

One of the first acts of the 'Provisional Government' was the creation of a committee which had to design the principle of freedom of education. The decrees of October 12 and October 16, 1830 ordered the freedom of association, expression and education, par excellence : ' dans un but religieux ou philosophique quel qu'il soit, de professer leurs opinions comme il l'entendent, et de les répandre par tous les moyens possibles de persuasion et de conviction.'

On December 17, 1830 the letter of Archbishop de Mean was read in the National Congress. More than the brochure '*Considérations sur la liberté religieuse*' - which was published at the same time as the committee's draft constitution and was entitled to be the manifesto of the so-called school of Mechelen -, this letter speaks about the freedom of education.[39] The letter stated that religion and education are intertwined in such way that religion is no longer free, when education is not. The Archbishop asked the National Congress to guarantee a full and complete constitutional freedom of education and to make to this end any measures preventing the exercise of this freedom impossible.

The original Article 17 of the Constitution stipulated: *'Education is free; any preventive measure is prohibited, the punishment of crimes is only set through the law. Public, state funded education, is also governed by law.'*

Compulsory education, a fortiori nursery and primary education, had long been steeped in the Catholic religion, under the authority of the church hierarchy. The Belgian system of 'recognition of worship' also insured to the Catholic religion a privileged status.' The autonomy of public education, especially the schools organized by the municipalities and the provinces on the one hand, and the individual freedom of choice to worldview education on the other hand, were committed to school and therefore political conflicts.

The course of education policy 1830-1958, however, turned out to be a long effort to bring *peace* to other controversial subjects: recognition and funding of Catholic education, the role of government and the development of state education, the scope of pedagogical freedom and the impact of inspection and surveillance, the choice of denominational and non-denominational education, ...[40] Finally, the balance was achieved through the school pact and the unfolding law, as subsequently revised many times.[41]

The *free choice of school* is the core of the school pact and the entire legislation derives from it, - e.g. the

39 Simon A., Le Cardinal STERCKX et son temps (1792-1867), dl. 1, L'église et L'état, Weteren, 1950, blz. 142; Huyens E., Discussion du Congrès National de Belgique, 1830-1831, Brussel, 1844, dl. IV, blz. 42.

40 Witte E., De Groof J. en Tyssens J., Het schoolpact van 1958: ontstaan, grondlijnen en toepassing van een Belgisch compromis, Leuven, 1999, p. 895.

41 De Groof J. m.m.v. Fiers J., De Schoolpactwetgeving: coördinatie en annotatie, Antwerpen, 1996, p. 192.

rational planning of education, school transport, health surveillance and counseling, social benefits, and – not for its quantitative but for its fundamental implications - the rules in favor of parents to choose schools according to their conviction within a certain distance.[42]

After thirty years this school pact became outdated.[43] The constitutionalization of the common fundamental rights, due to the 'federalization' of education, then led to the present Article 24 of the Constitution which reads as follows:

§ 1. Education is free; any preventive measure is forbidden; the punishment of offenses is only governed by law or decree.
The community offers parents a free choice.
The community organizes neutral education. Neutrality implies notably the respect of the philosophical, worldview or religious beliefs of parents and pupils.
Schools run by the public authorities offer, until the end of compulsory education, the choice between the teaching of one of the recognized religions and non-denominational ethics.
§ 2. If a community as a organizing body wishes to delegate powers to one or several autonomous bodies, it can only be done by decree adopted by a majority of two thirds of the votes cast.
§ 3. Everyone has the right to education with respect for fundamental rights and freedoms. Access to education is free of charge until the end of compulsory education.
All pupils of school age have the right to moral or religious upbringing at the expense of the state.
§ 4. All pupils or students, parents, staff and educational institutions are equal according to the law or decree. The law and decree take into account objective differences, notably the characteristics of each organizing authority, which justifies appropriate treatment.
§ 5. The establishment, recognition, and subsidizing of education by the community is governed by law or decree."

Worldview character was considered to be the crucial standard for the organization of the Belgian education system[44] and the Flemish legislation was derived from it. However, there are some differences in emphasis. Two examples: the choice between denominational and non-denominational schools has changed into the choice between government and free education; municipal and provincial (officially subsidized) education can only be considered as a free school choice if its neutral character is formalized. The denominational or secular character of quite a number of schools in this pillar would just be less pronounced or even fade away.

The status of philosophical teaching, including the inspection and supervision, the legal status of staff in denominational education, the organization of non-denominational ethics, and the regime of private institutions challenged the concept of the philosophical nature of the private and public schools and thus the concept of a free choice.

The unequivocal worldview character of education belongs to the past. Several times, Catholic education was asked – with mixed results – to make room for an explicit recognition of non-catholic dispositions through the organization of non-catholic philosophical education or through exemptions, through the recruitment of Muslim teachers, or by dismantling the responsibility of the school authorities by a far-reaching right to participation.

The tendency to regulate and the extensive involvement of the state in almost all aspects of policy, governance and management put a mortgage on the remaining 'free space' within the freedom of education. It can be expected that a public debate will go into the heart of this freedom. Maybe a new

42 De Groof J., De overheid en het gesubsidieerd onderwijs, Brussel, 1985, 280 p.
43 De Groof J., De Grondwetherziening van 1988 en het onderwijs: de schoolvrede en zijn toepassing, Brussel, 1989, 233 p.
44 De Groof J., Het levensbeschouwelijk karakter van de onderwijsinstellingen, Administratief lexicon, Brugge, 1985, p. 135.

'school pact' can be expected.[45] The place of religion in education is under pressure.[46] The first theme is the creation of a new general course on ideology and philosophy.[47]

§ 3.2 Case study: religion and the secularization process in education in Flanders and in a European context

Introduction

The 'Religionsfriede' mentioned in the Treaty of Augsburg of 1555 introduced the principle 'cuius regio, eius religio'. Europe was Christian, but divided into a Protestant north and a Catholic south. The fracture line went right through the Low Countries.

Under the motto 'Give to Caesar, what belongs to Caesar, give to God what belongs to God'[48] the States, when they introduced compulsory education in the 19th century, allowed parents to ensure the fulfillment through schools or home education. Although education in the 19th century was mainly provided by Catholic institutions, though without adequate funding, the Belgian State gradually claimed a more prominent place in education and the freedom to choose non-denominational education was put on the agenda. Several conflicts due to the imbalance in funding at the expense of private education and the role of governments in general, have repeatedly led to dramatic political crises. Mostly - as already stated - a "school war" ended with a compromise. Thus, the Belgian history experienced several pacts - in principle on the subsidized status of private schools and staff, the development of state education, the choice between religious and secular education,... The school Pact of November 20, 1958 and the School Pact Law of May 29 1959 anchored the former worldview compromise – a characteristic pacification model of that period. The constitutional amendment of July 15, 1988 constitutionalized the leading school pact principles.

Throughout Belgian history and even after the federalisation of education the French model with a strict separation between church and state in education was consciously not chosen. Religion in Flemish education is regarded as a prominent criterion for the organization of courses; the freedom for parents to choose a school set up according to their own religious (and secular) belief has a constitutional character (Article 24). It is no coincidence that the Documents of Vatican Council II, *Gravissimum Educationis* (October 28, 1965)[49] and *Dignitatis Humanae* (7 December 1965), had an unmistakable Belgian mark.[50]

The Belgian 'model' reflects a partnership between church and state, par excellence in education, including public schools in which a place was reserved for religion. Recognized religions traditionally had the right to provide religious education within public education and this worldview right was also

45. Zie bijzonder nummer '50 jaar schoolpactwet', Tijdschrift voor Onderwijsrecht en Onderwijsbeleid, 2009-2010, nr. 1-2.
46. Zie o.m. Overbeeke A., Geloven in Straatsburg. Levensbeschouwelijk onderricht en onderricht over levensbeschouwingen in het officieel onderwijs in het licht van recente EVRM-jurisprudentie, Tijdschrift voor onderwijsrecht en onderwijsbeleid, 2008-2009, p. 145-171; Overbeeke A., Maakt het Arbitragehof school met een eigen religie-concept? Grasduinen in de jurisprudentie over levensbeschouwelijke kwesties, Tijdschrift voor onderwijsrecht en onderwijsbeleid, 2006-2007, p. 168-187; Overbeeke A., Segregatie, desegregatie, integratie? Het recht op schoolkeuze en -stichting, schoolkeuzegedrag en de gevolgen ervan voor de schoolsamenstelling, Tijdschrift voor onderwijsrecht en onderwijsbeleid, 2003-2004, p. 303-317; Overbeeke A., Levensbeschouwelijk onderricht: keuzevak en keuzevrijheid in Vlaanderen anno 2002, Tijdschrift voor onderwijsrecht en onderwijsbeleid, 2002-2003, p. 115-157.
47. Inghelbrecht P. en Franken L., Het schoolpactcompromis in vraag gesteld: pleidooi voor een nieuw vak over levensbeschouwingen en filosofie in het Vlaams onderwijs, Tijdschrift voor Onderwijsrecht en Onderwijsbeleid, 2009-2010, nr. 1, p. 44-64.
48. Matthew 22:21. So for example, has, unlike Christianity, Judaism no such distinction. Therefore it is difficult to separation of church and state by pulling in Israel in a way that this has happened in the West (cfr. Aharon Barak - President Supreme Court Israel 1995 - 2006).
49. http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651028_gravissimum-educationis_en.html
50. De Groof J., De katholieke leer inzake onderwijs en opvoeding, in Witte E., De Groof J. en Tyssens J., Het schoolpact van 1958: ontstaan, grondlijnen en toepassing van een Belgisch compromis, Leuven, 1999, p. 361-431.

sanctioned in the Constitution.[51]

The heightened regulation and related government intervention, through the imposition of recognition and funding conditions, monitoring mechanisms and quality standards – later mentioned as development objectives and attainment targets – didn't ignore the subsidized private education. Modern educational policy raised questions as to the core substance of freedom of establishment, conviction and organization. The – albeit not absolute – right of everyone to gain access to a school of subsidized private education regardless of religious belief gets a greater weight than the 'active' freedom of education.

Does the 'neutralization' of the entire education system and the partial overshadowing of the denominational label of Catholic schools get in the way of religious-based education? The recent evolution in the school system does at least not mean that most Europeans would call themselves strictly secular. The report by Romano Prodi in October 2004[52] further stated that Europe sees itself as Christian, and that religion is a political matter. Overall in Europe there is no strict separation of church and state. Even in France, *'l'état le plus laïque au monde'*, there is mutual cooperation and financial support. Most European regimes subsidize, although not in a uniform scale, schools based on a particular religious concept – as in other public domains active state support of churches and religious communities is recognized. In Belgium and Flanders the non-denominational pillar also acquired a prominent place in the organization of schooling and the confessional but not Christian religious groups also asked for recognition of their right to education informed by their convictions. But the majority view is still reflected in percentages of educational institutions and of parents who send their children to Catholic schools. Although hardly the majority of Europeans can be called 'active Christians', a large population seems to generally be 'passive' Christians.[53]

It is highly debatable how relevant this is for the identity of the denominational school. The secularization goes on more in public education. The choice of education in any of the recognized religions and ethics, was expanded with a choice of an opt-out from both religion and ethics. In an emphatic manner, the replacement of this option by a general philosophical course is advocated.[54]

Since time immemorial active religious minorities have lived in Flanders – now in large numbers with a Muslim identity. Although the number of Muslim students overall remains limited, they are unevenly distributed. Their number in some urban schools goes up to more than 80% of the enrollment. In Belgium, 16.4% of the residents are of foreign origin (of which 7.8% non-European).[55] In the Brussels Region, 56.5% of the residents are of foreign origin (33.1% non-European), in the Walloon Region 16.6% of the inhabitants (5.2% non-European) and in Flanders, 9.7% of the population (5.1% non-European). A significant number of these residents live in cities: 29.7% in Antwerp (22.2% non-European), 20.2% in Mechelen (17.4% non-European), 65.3% in Brussels (42.6% non-European), 80.8% St. Gilles (42.2% non European), 98.3% Saint-Josse-ten-North (81.8% non European), 74.5% Schaerbeek (54.8% non European), Ghent 20.3% (16.3% non European)). The largest group of people of non-European descent are Muslim.

With regard to integration the political discourse in the European countries seems to have moved from multicultural supporting integration of Muslims into a rather assimilationistic rhetoric. But is a common national identity which does not allow or promote ethnic loyalty and the development of subgroups, but regards ethnic origin as irrelevant for full membership

51 Artikel 24 §1 GW

52 'The Spiritual and Cultural Dimension of Europe' (2004) http://cordis.europa.eu/documents/documentlibrary/10421445!EN6.pdf

53 Eurobarometer Survey, Gallup International Millennium Survey.

54 For discussions between politicians and academics see also: H. Wamink, Godsdienst en Levensbeschouwing in Het Onderwijs, Uitgeverij Peeters (Leuven), 2003.

55 http://www.mpdata.be/Data/Vreemdelingen/NIS/2005/NIS-Nat-2005-vreemdeling-afkomst.htm

of society realistic? Anti-discriminatory measures are to a limited extent helpful for educated Muslims on the labor market. Numerous socio-economic problems persist, such as the dramatic problem of the equality of women in the Muslim community. The creation of minority institutions does not seem to facilitate integration.

Most Muslims consider Islam as a guide for daily life. One distinguishes liberal Muslims where the individual is central, and another group of Muslims who consider the group identity to be central. In addition, there are militant Muslims. The distinction between these different groups of Muslims is not clear-cut, and certainly not in the headscarf debate (see Begun case below). Especially the development of a militant Islamism conflicts with the process of linear of secularization of society.

Denominational education subsidized by the State

The subsidizing of private denominational education raises a number of philosophical questions, other than the questions which arose in the homogeneous Belgium and Flanders before and just after the School Pact. What importance will the community still give to subsidized private education if the majority of these educational institutions in reality would call themselves more 'pluralistic' if the school board doesn't seem to manage and offer a credible, distinguished ('own') educational project? Will those responsible be able to reflect about the relevance of ideology and the particular educational concepts in curriculum, courses and timetable, in the methodology, the governing of staff, school rules and work plans and the overall educational project? Do parents assign a high importance to a free choice of school based on religious principles? How often is relied upon specific inconsistencies in making decisions about teachers or directors? Which restrictions can the State impose on the foundation and establishment of private education who have to fulfill the the relevance and proportionality requirement? Must subsidized private education be accessible to everyone regardless of the religions belief of the parents?

The school occupies the central place in the classification of the relationship between churches and the government. Europeans are generally reluctant to a strict separation of church and state (Wall of Separation) and thus subsidize schools founded by religious congregations and social agencies or organizations with a religious, worldview or philosophical basis. On the other hand, secularists put questions about the "recommunitarisation" and disintegration of the secular society - due to the religions affirmation of Muslims. Unlike Christianity, Muslims and Orthodox Jews hold much more onto prescribed rituals.[56] Because Islam is to a greater extent exposed in ritual acts and regulations, the risk for evangelism and conversion as a result of the outward manifestation by educational staff is higher.

There is no uniformity in Europe regarding the place of religion in society.

Under the Belgian Constitution of 1830, the state is neutral with regard to ideology, but explicitly recognizes the moral and social utility of worship. Outside 'the temporary character of worship', and the recognition of cults we record multiple domains of mutual understanding, cooperation and support. The government finances the salaries of more or less 100 imams. In January 2002 the Flemish Government paid grants for the construction of mosques.

On January 1, 2000 Sweden ended the status of the Swedish Lutheran church as state church. The church retains the responsibility for the management of cemeteries. The law on religious communities came into force on 1 January 2000 and gives public subsidies to religions. The state remains responsible for the maintenance of church property as part of the Swedish national heritage. In addition, four mosques were recently built with state funding.

56 Western Islamic scholars believe that there is a possibility for ijtihad, the ability of the individual believer to the scriptures to read and interpret the purpose of introducing the basic concepts to redefine a balance between religious rules and individual spiritualism. It follows that the ahistorical Sharia is rejected, and that the focus is on textual reinterpretatie of the Qur'an, eg. the slaughter of animals on Eid-al-Kabir clears space for symbolic offerings of such funds to foundations (No. 56 p. 159).

Norway and Denmark, approved the Evangelical Lutheran church as their state church. The state collects a church tax which is only granted to the Lutheran church. There is an exceptional procedure if a certificate is submitted.

The Constitution of 1949 states that Germany is neutral in religious matters without excluding cooperation between church and state. The taxpayer chooses between one of the recognized religions or identified him/herself as a non-believer. The Protestant church, the Catholic Church and Judaism receive federal taxes and the state subsidizes social services provided by religious congregations. Organizations founded by approved churches founded get state subsidies for providing those services. This does not apply to Islam.

The Anglican Church in England is a state religion but doesn't obtain direct subsidies, with the exception of 70% for maintenance of the churches.

In France, the Law of 1905 enacted the separation between church and state and ended the privileges of the Catholic Church. The Law on Associations of 1901 guarantees freedom of association and allows religious groups to conduct activities not related to worship and to be exempted from taxation. Muslim associations receive grants for the creation of cultural centers and cultural activities. While the law prohibits public funding for each religion, the state in practice is the owner of the places of worship, and in consequence is responsible for the maintenance and free use by the clergy. Since 1959, the State pays the salaries of teachers in private religious schools. Approximately 20% of French students go to schools that are founded on the basis of a particular religious belief, mainly Catholic schools. The schools with a 'contract d'association' get a percentage of the cost of the student in a public school. The state currently does not finance a Muslim school. There is an independent Muslim school in Lyon on the premises of the mosque, for girls who were suspended from public schools for wearing a headscarf. Specific rules exist in the Alsace-Moselle region which falls outside the scope of the Act of 1905. The Catholic, Lutheran and Calvinist Church and the Jewish community receive grants from the state there and the clergy are paid by the state. The ban on wearing the headscarf is also to be respected in the Alsace-Moselle region.[57]

Freedom of subsidized private schools

The traditional school conflict in Belgium / Flanders had much to do with how much autonomy 'free' schools possessed and/or the extent of government subsidization of schools based on a religious ethos, as well as the worldview nature of public education. In the absence of equal government funding, parents who send their children to schools with a religious character would have to have sufficient resources. When neutrality outweighs the parents' freedom of choice, this choice is only possible choice for those who are financially well-off.

After the new generation of educational legislation and as the constitutionalization of the School Pact became enforceable, we can ask different and more profound questions. It is no longer sufficient to refer to the continued substantial involvement of religious communities in providing education or to the international legal standards with whom the choice of school by the parents may be inspired by the (religious) ethos of the school.[58]

The discourse of the 'secularists', who consider government subsidies as the use of public funds for purely private purposes, seems too narrow. It denies the historical reality and the dynamic activity of responsible groups and citizens, the right to participation, the need for pluralism. A completely secular education system would be in basic conflict with the principles of democracy and of freedom, even if it were practical to achieve.

In addition to the 'credibility' of denominational

57 Klausen, J., The Islamic Challenge: Politics and Religion in Western Europe, Oxford, 2005, p. 142-148.

58 Art. 13 (3) UNCESCR of 1966, Art. 5 (a) (b) of the Convention against Discrimination in Education, Art. 24 (2) Children's Convention, Art. 2 of Protocol 1 ECHR recognized the freedom to establish private education. This is based on minimum standards for registration, inspection, certain knowledge and skills to be taught.

education and the scope of government action, the question is raised what attitude the State and the community must adopt with respect to religious communities which should in principle be treated strictly equal. Do parents need to be able to opt for a subsidized private school which offers education according to their own religious beliefs and prepares students for a life in their own community (but will be educationally disadvantaged) or to opt for a school which provides education informed by the secular conception of good citizenship, or for example the prohibition of corporal punishment? Is there a conflict between the rights of parents and the child to equal opportunities to develop?

The Equal Educational Opportunities Act of 2002

The dividing line between preference and racism is sometimes difficult to define. When a public school has primarily pupils from a predominantly Muslim country, and the language on the playground is no longer Dutch, the Flemings refuse to send their children. This can be the result of a different philosophical preference, or of doubts about the quality of education in the school, or - in extreme cases - of racial considerations. The result is a *de facto* religious segregation in public schools because parents are exercising their free choice of school.

Also to meet this requirement, the Decree on equal educational opportunities, better known as the GOK[59], was issued. Subsidized private schools receive their funding from the state, and are independent of the state in terms of educational content and management but can no longer exercise an admission policy that selects pupils in order to guarantee the specific religious character of the school by refusing children with different religious backgrounds.

This creates a shortage of schools or a risk of exclusion of those parents who for religious reasons want to raise or put their children together in a school with children of like-minded parents. Is a difference in access to subsidized private schools still allowed and what can provide objective and reasonable grounds for this?

The equal treatment decree of 2008

The EU treaty includes the *prohibition of discrimination* in Article 13 (8) and gives the European Commission the power to take action and to issue directives (cf. Article 14 ECHR). I.e. anti-discrimination rules are – in contrast with international law – directly applicable community law. Community law must be transposed into national law and policy. In terms of anti-discrimination directives, this was the case with the 'Equal Treatment Decree' of 2008[60], which applies to subsidized private schools. The decree introduces a ban on discrimination that has a pass-through to the choice of school of parents based on their own preferences.

The (equal treatment) Decree of 2008 applies to Flemish education and prohibits discrimination based on religion. But is the blind application of non-discrimination provisions in education not a mean to seek for cultural and secular homogeneity rather than diversity? If Muslims demand equal rights in education on the grounds that all citizens are equal regardless of religion or other cultural, demographic or social characteristics, does this mean that they also have to recognize equality for homosexuals? Equality is not a relative concept with a different meaning for social, cultural, religious or sexual groups. Equality necessarily implies that changes must be made in the ideas of conservative Christians, Jews and Muslims and their traditional views on society. For Orthodox Jews and Muslims this means a radical project in which religious practices and theological considerations will be adapted to the changed social and legal conditions in which they live in Europe.[61]

59 Concerning equal educational I, June 28, 2002, BS 14 September 2002.

60 Under a decree for the Flemish equal opportunities and equal treatment policy, July 10, 2008, BS 23 September 2008.

61 Raad van State, Afdeling Administratie, nr. 147.579 van 12 juli 2005 in de zaak A. 160.192/XII-4396, inzake VZW Vrije Rachel tegen de Vlaamse Gemeenschap.

Perception and manifestation of religion by students and teachers

Does neutrality mean a ban for pupils and teachers to express their beliefs in education? Secularists oppose the introduction of religious expressions into the public sphere which they consider as exclusively belonging to the private sphere. The neutrality of public space must be secured.

If this is not the implicit message that religion is a controversial phenomenon which in Flanders can only be tolerated outside the school? Indeed, if religion can have a positive value in the education of children, why is it then excluded from Flemish schools? As a result religious pupils and staff are 'undressing' themselves outside the school gates before entering the school. Instead of developing their identity, they are asked to ignore their personality and belief in the public educational system. However, in the name of tolerance everyone should give high importance to personal freedom of opinion and therefore enable the expression of religious belief in the public sphere.[62]

Do people who get offended by expressions of religion have the right to prohibit such statements in the name of tolerance and good citizenship?[63] Is it not a requirement of a secular democracy to be tolerant towards the religious tendencies with which one disagrees? Is the manifestation of religion not a means to train students in good citizenship and tolerance? Which are the less restrictive alternatives for this ban? Which social interests are relevant and justify a restriction on the right to manifest a religion? Does a student voluntarily waive the right to manifest his religion when he voluntarily enrolls in a public school?

Where equality in the name of tolerance is elevated as an absolute value within public education, as a result genuinely believing children lose the opportunity to express themselves in a religious way. As a consequence, there is a demand for the establishment of private schools. However, unlike in the Netherlands, access to subsidized private education is no longer solely based on the faith of the parents. This increases the demand for purely private schools. Because these schools are not subsidized by the state, these schools set up on religious grounds are only accessible to those who have the financial resources to pay the enrollment in such schools.

The wearing of religious symbols: the scarf

The *hijab* or head scarf has led to controversial legal decisions over all Europe. The basis for this is Article 9 of the ECHR that only applies a religious rule if it is formulated in a non-ambiguous way. Wearing the headscarf on the basis of the Koran is optional and therefore in many countries it is seen more as a political statement than a religious requirement.[64] In Europe, there is no unanimity on the right to wear the headscarf. Governments and courts have in several cases used a reasonable control and prescribed the extent to which restrictive dress codes may be imposed.

The judgment of the ECHR shows that the national government has a very broad discretionary competence in the application of Article 9 (2). Restrictions on religion can be imposed because the public order is threatened, provided that the restrictions are contained in a decree or law, not by administrative regulations, and that the restrictions are necessary and proportionate to the intended objective. The national courts in Europe have judged that a ban on headscarves is legally acceptable. Article 9 (1) of the Convention only allows restrictions on freedom of religion to the extent that this is required for the protection of social and legal order. Article 9 (2) allows states to limit by law expressions of religion or belief to the extent that they are necessary in a democratic society in the interests of public safety,

62 According to Johannes Rau to ban the headscarf the first step towards the creation of a secular state which Bands religious signs and symbols from public life.

63 Grant tegen Canada, 1995 – 125 DLR (4th) 556

64 There are in the public debate also questioned the argument that it cover to preserve the purity and virginity is a restriction of sexual freedom. Covering the female body because it distracts the man would have the connotation of female inferiority.

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

In Ludin, the German Constitutional Court judged upon the restrictions of the wearing of headscarfs by teachers which can be directed to religious freedom under the German Constitution.[65] In Germany, the ban on wearing the veil is a matter for the Länder. In Berlin, the law prohibits, crosses, yarmulkes, and head scarves. In other Länder, only the headscarf is banned. In Bavaria the headscarf is banned and the hanging of crucifixes in schools is compulsory. The argument is that women who wear headscarves openly express proselyrism in the classroom. In July 1998 a school in Stuttgart refused to recruit a German-Afghan female teacher because she wore the headscarf. In September 2003 the German Constitutional Court made a judgment. Women's rights were violated because there was no legal ban on the wearing of the headscarf, but local authorities have the power to legally ban the wearing of the headscarf.[66] The Länder have the power to regulate 'neutrality', but the federal government does not. In 1995 the Constitutional Court declared the law which obliged schools in Bavaria to hang crucifixes in every classroom unconstitutional.[67] Then a new law was enacted in Bavaria on the crucifix as a cultural heritage[68], the constitucional problem was circumvented by providing a complaints procedure. Students and parents may request that the crucifix be removed from the classroom if they have clear reasons for this. The director shall consider the complaint, taking into account the interests of the religious majority. On April 1, 2004 Baden-Württemberg issued the law which forbids teachers to wear a headscarf as a threat to Western values. The crucifix however was not banned under the argument that universal human rights and democracy stem from Christian values. State neutrality does not mean that the State has to be neutral with regard to fundamental values. The Länder are responsible for cultural policy. Freedom of religion, however, is a federal matter. The question may be raised whether such widespread standardization does not go far beyond the interpretation of the *margin of appreciation*.

In Sahin v. Turkey[69] Sahin claimed that she was forced to choose between education and religion and that this was a discrimination between believers and unbelievers. She argued that the headscarf is no danger to public order and therefore a ban is illegal under Article 2. The Turkish government argued that the headscarf is a symbol that goes against the principles of the republic and is contrary to the principle of secular education.

In Dahlab v. Switzerland[70] the ban on the headscarf ban was considered valid because the obligation not to promote conversion in a public school.

In October 1989 the first suspension of a pupil because the wearing of a headscarf occurred in France. According to the State Council the wearing of the headscarf did not infringe on the principle of laicité. Lionel Jospin, former prime minister, then issued a series of regulations that gave principals the power to take decisions on whether or not to permit the headscarf. According to the French Council of State in 1999, the directors have the authority to promulgate rules for clothing on behalf of functioning of the school or classroom. In 2003, President Jacques Chirac declared that the wearing of headscarves in schools was a violation of the separation of church and state. The committee headed by Bernard Stasi, made a report which was presented on December 11, 2003. It advised the Commission to introduce a ban on the wearing of conspicuous religious symbols.[71]

65 Article 3.2 states that all persons are equal before the law, the Article 3.3 provides that no person will be an advantage or disadvantage on religious grounds, the Article 4.1 guarantees the right to religion and belief and argues that freedom of religion and belief is inviolable.

66 BverfG, BvR 1436/02, 24 september 2003 http://www.bverfg.de/entscheidungen/rs20030924_2bvr143602.html?SuchbegriffFF=1436%2F02

67 BverfGe 93,1, 16 mei1995

68 The claim that the value would be free crucifix and the headscarf a symbol of the crucifix as a zeal inherited from Western nations and the headscarf is not, however, seems difficult to defend.

69 Sahin v. Turkije Nr. 44774/98 (19/11/2002)

70 Dahlab v. Zwitserland Nr. 42393/98 (15/02/2001)

71 Assemblée Nationale, Rapport fait sur la question du port des signes religieux a l'école. Tome II, 1ère partie. Audition (juin 11, 2003), 26; Jean-Pierre Raffarin, Projet de loi relatif a l'application du principe de laicité dans les écoles, colleges et lycees publics, Assemblée Nationale, (février

Such a ban would be necessary to protect public order and to protect freedom of conscience of others.'[72]

In Great Britain, the right to religiously dress by the student in a school was recognized by the case Shabina Begun.[73] In September 2002 the director suspended Begun for wearing the Jilbab. Since 2002, Begun attended the same school without ever challenging the dress code. Begun stated that the Koran gave her the insight that a Muslim woman should cover the entire body except the face and hands. The director stated 'that some girls in the school expect the school to help resist the pressure of more extreme tendencies. They would feel abandoned by those to whom they should rely on for the support of their freedom and their own interpretation of Islam. The school did allow Muslim women to wear the shalwar kameez. Moreover, local Muslim leaders and imams and the parents approved the school dress code. 80% of pupils in the school was a Muslim. The court of first instance agreed with the director and stipulated that the school can impose a dress code taking into account the presence of religious students. On March 2, 2005, the Court of Appeal approved with the pupil Sabina Begun and broke the ruling of the court of first instance. In court Begun was assisted by her brother, who spoke on her behalf with the school and the court. Afterwards the brother appeared to be a member of the extreme Islamic group.'[74]

Concerning Belgium and Flanders proceedings in courts have been initiated with non-uniform results until now. For public education we have to wait for the ruling of the Constitutional Court in response to the request for advice by the Council of State.'[75] One of the remaining questions is the tension between the school's autonomous discretion versus the need to resolve the headscarf issue by decree. It cannot be excluded that a general ban on wearing headscarves in education will lead to the establishment of Muslim schools, although in time, while Flanders precisely wants the integration of Muslims in the existing educational system.

Prayer Rooms

Groups of religious students cannot demand for a place to worship liturgy within the public education. In Flanders there is no legal obligation to provide such a space or to release time this release in the curriculum.

Halal and kosher food

Can / should schools with many Islamic students (exclusively) offer halal food? If a public school exclusively offers halal or kosher meals, can other parent consider this as a form of indoctrination because through school life, namely the meal inside the school, one aspect of a particular religion or culture is imposed on all children?'[76]

Teaching Religion

Classic is the question of the purpose of religious education. Is it purely educational or is it also meant to develop the experience of Christian faith? Is there a distinction between teaching a particular religion on the one hand and 'indoctrination' on the other hand?

If religious instruction is completed as a course about different religions, can parents then oppose their children being exposed to a variety of religious beliefs? Believing that mutual tolerance must be taught, the secularist position would not provide an opt-out from a course on the characteristics of different religions.

3, 2004), http://www.diplomatie.gouv.fr/actu/print_bol.asp?liste=20040204.html; http://www.assemblee-nationale.fr/12/cra/2003-2004/153.asp;

72 Patrick Weil, Lifting the veil of ignorance, Progressive Politics, 1/3/04, p.16-24, http://www.policy-network.net/uploadedFiles/Publications/Publications/ProgressivePolitics3_1FINAL.pdf. Jean-Paul Costa, a vice-president of the ECHR would advise the Stasi Commission, given in a closed session.

73 The Queen v. Headteacher and Governors of Denbigh High School 2006, EWHC 1389 (Admin)

74 Klausen, J., The Islamic Challenge. Politics and Religion in Western Europe, Oxford, 2005, p. 172-179.

75 Raad van State bij arrest nr. 202.039 van 18 maart 2010

76 Cfr. the incident following the Halal Christmas dinner at a Catholic school in Weert (Netherlands) in December 2009, and the incident in 2007 for outdoor classes in schools where only halal Antwerp would be served. A day later the ship after strong protests teaching everything back.

There is no doubt that religious teaching in schools is limited to an objective factual knowledge of religions, it contributes to citizenship, at least in the sense that religion historically played an important role in the development of contemporary culture. Education on religion can be justified because it familiarizes students with the existence of different social groups and their historical and cultural interest in the multicultural society. Is knowledge on other religions required to live as good citizens? Can fundamentalist tendencies of parents oppose teaching about another religion, that is the religion of the majority, and prevent their children from gaining knowledge on the diversity of worldviews as well as the non-denominational tradition?

When religious education however is filled in as the experience of a particular religion, the secularist interpretation will bump against an occasional incompatibility between the religious education perspective and the predominant secular character of society. According to secularists, the transmission of faith is a violation of the neutrality of education. Religious education in Flanders is taught according to a curriculum approved by the competent religious authority and taught by qualified teachers appointed by the competent religious authority, that is in most cases the Catholic Church.

There is another possibility: a general theoretical course, introducing the world religions and secularism, can be coupled with the option to obtain education on one of the options with a religious or secular nature. One argument against such an option is motivated by the argument that the budgetary cost of preserving the right to choose is too high.

Compulsory courses without exemption

Creationism vs. evolutionism in science classes

In Flanders parents and children who perceive such education as an infringement on their religious freedoms have no legal opt-out from such science lessons. What is the extent to which the State must accommodate the religious concerns of parents on these competing worldviews? What will happen with the teaching material and the worldview they portray? What is the impact of the (the lack of) instruction of one of these worldviews on the religious freedom of students, parents and teachers?
There seems to be no reason to doubt the option to permanently maintain an objective scientific approach of the final attainment levels.

Sexual education and homosexuality

In Flanders sexual education is a compulsory course and parents have no right to opt out. In this course both biological and non-biological topics are taught such as contraception, HIV and AIDS, sexually transmittable diseases, equality based on sexual orientation. Such sexual education is too far-reaching to religious parents who look upon sexual acts in conjunction with the moral restrictions around sexual activity. However, in Flanders it is a compulsory teaching matter on which the school can lose funding if it is not taught, unless alternative final attainment levels have been approved.[77]

In Kjeldsen, Busk Madsen and Pedersen v Denmark[78] and subsequent case law, the European Court of Human Rights (ECHR) judged that information must be provided in an objective, critical and pluralistic manner. According to the ECHR the objective informing of children about sexually transmitted diseases was no breach of treaty provisions. But what about the teaching of homosexuality as family relationships?[79] If heterosexuality is presented as the norm, there may be a discriminatory treatment of the gay lifestyle. If the school simply ignores the issue, this can be seen as implicit criticism of homosexual way of living or as a refusal to end sexual prejudice?

When information on heterosexuality and homosexuality is provided in the same way, this is

77 Raad van State, Afdeling Administratie, nr. 142.539 van 12 juli 2005 in de zaak A. 160.192/XII-4396, inzake VZW Huis Rachel tegen de Vlaamse Gemeenschap. By contrast, the method of Steiner schools or derogare from the attainment and development of sex education received.

78 Kjeldsen, Busk, Madsen en Pedersen tegen Denemarken, 1979

79 Chamberlain v. Surrey School District No 36, 2002, SCC 86

hardly neutral for religious parents given the implicit message that both ways of living are acceptable. According to their religious beliefs however, homosexuality is an immoral behavior, and they consider sexual education as a breach of their right to an education according to their own ideas for their children.

It is expected that such questions will arise in schools.

Opt out of swimming lessons?[80]

Is swimming a compulsory course, or can girls request for an opt-out for swimming lessons because of cultural and / or religious principles? Can swimming in Burqini be admitted?[81] Throughout Europe there are different answers to these questions as well.

Towards a further secularization or alternative forms of education in Flanders?

In Flanders public educational institutions with their own religious ethos do not exist (anymore). Public education in Flanders, is considered to be neutral and there are no public schools with a religious basis. However, recently it became possible to start a method school like the Freinet school. Whether educational concepts with an worldview basis, such as Steiner schools, are acceptable can give rise to dispute. In this way can the public schools meet the demand of predominantly Muslim parents, for a wider choice based on their religious beliefs? This question needs to be answered as well as the question of the formal refusal to wear religious symbols.

It cannot be denied that private education based on religious foundations (whether or not as a school of free choice thanks to the School Pace Law) enjoys a privileged position in Flemish education. However, subsidized private education has clearly lost a significant part of the freedom of its governing bodies and has had to make numerous concessions in terms of autonomy and educational freedom.[82] A recent initiative against the far-reaching secularization in the subsidized private education comes from religious congregations. Brother René Stockman, superior general of the Brothers of Charity, developed in 2009 at the request of a group of parents the idea to establish profiled Catholic schools. Catholic schools continue to develop educational activities from a Christian inspiration, but at the same time adapt to the target audience: young people growing up in a secular world where religion has become rather marginal. The more distinctive Catholic school would have a more religious atmosphere with room for prayer and liturgy. These schools would develop the spiritual potential of children from a young age the same way as the schools who develop the musical and sporting potential of children.

A less controlled form of parental choice is that for home schooling, whether or not in a group of like-minded. This development is not uncomplicated in all countries, as shown by the ban on home schooling in Germany. In the Netherlands there was a strong debate on the legality of home schooling.

According to the European Court of Human Rights the ban on homeschooling may be justified: 'Schools represented society, and it was in the children's interest to become part of that society. The parents' right to education did not go as far as to deprive their children of that experience. (...) Not only the acquisition of knowledge, but also integration into and first experience with society are important goals in primary school education. The German courts found that those objectives cannot be equally met by home education even if it allowed children to acquire the same standard of knowledge as provided for by primary school education. The [European] Court

80 http://www.deutschlandwoche.de/2009/05/21/oberverwaltungsgericht-munster-muslimische-madchen-mussen-am-schwimmunterricht-teilnehmen/

81 refer the question to the Flemish Minister of Education and Training, the participation of ethnic minority pupils in physical education classes and swimming lessons from the Commission for Education, Training and Science Policy Meeting 10/01/2002 http://isp.vlaamsparlement.be/website/hrm-vrg/311951.html

82 However, there remain fundamental differences legally. Thus legally subsidized private education, with the exception of exam dispute is not considered a public authority. The provisions of the open government decree of March 26, 2004 shall not apply to subsidized private education.

[of Human Rights] considers this presumption as not being erroneous [...] The [German] Federal Constitutional Court stressed the general interest of society to avoid the emergence of parallel societies based on separate philosophical convictions and the importance of integrating minorities into society. The Court regards this as being in accordance with its own case-law on the importance of pluralism for democracy.[83] In Germany, 40 families are involved in a legal dispute about homeschooling[84] because they want to raise their children in a parallel Christian society without exposing them to secular values, especially sex education. One of these German families asked for and received asylum in the United States, on the basis of the ban on home education in Germany (District Court on December 16, 2009).[85]

Reflections

Both the unilateral 'secularist' and 'fundamentalist' reading of the freedom and right to education have limits.

Officially, the goal of a secular education is to fully develop the maximum potential of a child and to form a good citizen. But what does this potential include? Is this only intellectual potential or also spiritual? Does the child in school need to be mainly taught personal autonomy and critical rationality, should cultural and religious values only be taught in the family, outside the school? Should children mainly be prepared for autonomous rational action? Is there a need for religious education which raises a child in a particular religious belief?

These questions will have a new relevance when the balance between law and freedom does not acquire adequate interpretation.

When the child's development occurs within a public educational system, the state should ensure that the family values of the child are respected rather than only questioned critically. Yet for some parents the compulsory reading on different religious beliefs (without an expressed preference of the State) will already be perceived as an infringement on their religious freedom[86], while another view suggests that it is in the interest of the community to teach children tolerance and to familiarize children with a wide range of lifestyles.[87]

The State benefits by training citizens in good citizenship by ensuring that everyone reaches a minimum level of education and gets familiarized with the principles of a constitutional State with constitutional rights and freedoms which are essential for a democracy.[88] As a result there is no room for fundamentalist views, such as expressed by anti-Semitic statements of teachers.

What is the relationship between an occasional 'homogenization' in the public law school and the desire of religious groups to maintain diversity within the public educational system?

Or, to take yet another example of confrontation which is by no means 'new': is the development of the rational autonomy of the child more important than the spiritual worldview of the parents in the educational context? Such 'conflict' also refers to the public interest being handled by private education and the complementary achieved by private schools which are supervised by civilian authorities and authorities with a same point of view.

Does a democracy approach a doctrine which in the name of citizens' equality marginalized religion in the 20th century among all peoples of the world?

83 Fritz Konrad en anderen tegen Duitsland, 35504/03, 2006

84 Zie Home School Legal Defense Association

85 http://www.hslda.org/hs/international/Germany/RomeikeBrief.pdf

86 USA, Mozert v. Hawkins County Board of Education, 827 F 2d 1058 (6th Cir 1987), 484, VS 1066, 1988.

87 According to Stolzenberg is a feature of religious fundamentalism not to be exposed to a different ideology than the fundamentalist faith. When the curriculum encourages rational analysis and a recognition of dissent and diversity as positive values, this (according to Stolzenberg) already in conflict with the view of the same fundamentalist believers. Stolzenberg, Harvard Law Review 581, 1993, 106, 612-613.

88 Board of Education, Island Trees Union Free School District, No 26 v. Pico, 457 VS 853, 876 (1982).

A democracy based on the level of homogenization which doesn't provide space for religious groups in the public sphere to express their religious identity in the name of social inclusion and by which a Flemish public educational system free of religion is deemed to be necessary to obtain a tolerant society and good citizenry?

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§ 4 Towards another relationship between religion & education

Every era has its concerns, as do current times as well. The financial crisis is leading to a decrease in our material wealth but pales in comparison to the increase in wealth over the past decades to the detriment of both ecological and social values. We therefore see the crisis more as a moral and cultural crisis: the deeper explanations for what is happening to us these days can be found in *these dimensions*. Whoever considers profits and markets as an end in themselves substantially overlooks that an economy must serve people, instead of vice versa. Anyone who thinks that rich people are only rich because they have a lot of money and happiness only derives from money ignores that one's happiness occurs only in relationship with others (for some people there is a decisive presence of God; *Ubi Caritas et Amor, Deus ibi est*).

Some observers have already explicitly pointed out that the deep roots of the crisis lie in an increasingly absent moral and social education. Curricula which do not explicitly provide space for ethical and social education are breeding grounds of citizens, workers and entrepreneurs who can hardly be blamed for only thinking in terms of individual bonuses rather than in terms of the *bonum commune*. They do not know better. They didn't learn otherwise.

Now we are on the eve of a development of our economy in a direction in which mutual trust and ability to adequately communicate with people (who in many more aspects are becoming more different) are increasingly important, it is essential in our view and more important than ever to lay the foundations in our educational system for a society that provides sufficient confidence and capability.

In our view such confidence and ability starts with an adequate knowledge of and a systematic confrontation with those differences. The knowledge of these differences includes the knowledge of different religious and philosophical traditions.

In Flanders and the Netherlands, we keep these traditions alive in such a setup of the educational system that they are mostly developed separately because they develop in quite separate domains, apart from the others. The differences are tolerated.

Especially when it comes to the design of the system of primary and secondary education, we can ask important questions about the extent to which traditional conflict-averse systems are still sufficient. Does it still meet the initial goal to enable different religious and worldview groups to organize their own education? And, even more important, is this goal still relevant in the society we now live in?

Abraham Kuyper, among others, preferred the pillarized structure rather than a monopoly system of public schools that take the portrayal of mankind by liberal enlightenment as their basis under the guise of neutrality. He was a fiery critic of this kind of structure.

Of course the attention for religion in public schools is a possible option and in Catholic circles, there were opponents of private schools as well, on the grounds that they would only limit the chances to integrate into Dutch society.

Kuyper didn't agree, mainly because he suspected that would soon lead to anti-religious or anti-clerical state education according the laicist French model that he was contesting alert and antithetical. Warned by the French legislation of 1905 which banned any form of religion to the private domain, he didn't want a school that was organized along the lines of a 'central station where all directions meet'. We quote: "The so-called sampling of all the systems nourishes only superficiality, devastates thought, spoils character, and makes brains ill-equipped for hard work. (...) Believe me, it is not through going up and down the steps of many buildings to peer at their front halls but through coming to know thoroughly a single well-build house all the way to the attic that your knowledge of how to build becomes solid." From the same range of ideas another idea to clearly distinguish

private and public education arose.

The Belgian approach is not so fundamentally different. In our country the fight on principles long raged about the 'primacy' of private education above the 'supplemental character' of public education. Government initiative was only justified, some claimed, when the free initiative was lacking or insufficiently responded to the convictions of families. Although there were ardent supporters of the public schools, it was only with the School Pact Law and finally the constitutional revision in 1988 that the rights of public schooling were firmly established.

Does the sharp distinction between private and public education still persist? The architecture recommended by Kuyper probably was adequate for a society that consisted of only a few, clearly distinguishable, almost industrial-organized religious groups. That society was divided into worldview compartments, according to the overall design of pillarization. This gave the society an organized structure, and formed the basis of a stability which featured the social relations in the Netherlands and Flanders for many years.

There are considerable changes: society is no longer clearly segmented into religious groups. What remained of those pillars can be criticized. Nowadays, these pillars soar as a mainly administrative reality at high altitude above the floor of individual schools. Pillars are shriveled to governing bodies which melted into large conglomerates, provoked by the government. These administrative conglomerates often control schools, sometimes hundreds at a time, in which the common and clearly articulated religious identity carried out by pupils and staff is hardly recognizable. The private Flemish education is different in this regard. The governing bodies / school boards each have a large autonomy - albeit that the role of the V.S.K.O. can't be underestimated. Some of these 'governing bodies' are big players. The analysis however is identical: not depillarization is the main problem, but the devitalization.

In most schools the religious identity seems to be so diluted that everything can dissolve in it. The vast majority of private schools employ all candidates without further and certainly not too difficult questions about their religious background, as public education is supposed to do.

If parents ask about it, they are often reassured that they will not be affected by the school's identity. Sometimes there is an explicit reference to the importance the school attaches to respect for all beliefs. But in most cases this respect indicates an indifferent attitude and a silent attention.

Furthermore, it is not difficult to notice that, in spite of the continued mutual differentiation between identity and quality, the differences *between* the schools in recent decades have become rapidly smaller than the differences *within* schools. We should further investigate the number of schools to which it applies, and there will certainly be exceptions. But it is an undeniable fact that secularization deeply marked the Dutch and Flemish educational system.

But this does not do justice to the many existing initiatives to (re)unite religion and education in schools. This is so in the more religiously conservative part of the private education and in schools who only appeal to a small group of teachers and pupils. We also need to express appreciation for the various initiatives taken by for instance the leadership of Catholic education in Flanders to articulate the specificity of the Christian school.

But the common picture is different: parents and students no longer primarily choose a school on the basis of confession, but on the basis of criteria such as quality or closeness. Sometimes still referred to as 'culture'. Especially in the Flemish education this was already so since the seventies, but the social trends reinforced this trend drastically. The once tight connection between school, church and family is only for a limited number of schools a living reality. We suspect that in addition to secularization the great increase in school size in recent years also has its part. Many boards by which parents could be involved in the school of their children through a locally organized faith community were cut out of the educational system. Led by professional directors, many schools these days have the profile of business

enterprises: thus it no surprise that parents start to behave as consumers.

It is not surprising: the school is in many ways a mirror of our society. Our public domain has changed, especially because the people in our society have changed, not only by increases in communities of reference but also due to an increasing differentiation and pluralization of lifestyles.

A person's identity, including religion, is today less formed by coherent tradition than was the case in the past. Our society has become multi-religious and multicultural, quite apart from the rise of Islam in Europe. The former clearly segmented pluralism has given way to a society that increasingly looks like a mosaic. The dynamics are sometimes staggering: leading sociologists and philosophers speak of foam (Sloterdijk) and a fluid society (Bauman).

It is not possible here to give a complete diagnosis. But in the context of our discussion we dwell a little longer on the work of Charles Taylor. Taylor analyzes all these developments with an interesting discussion of the concept of secularization. We now point out the already mentioned three meanings of that term (see paragraph 1) in connection with the debate on religion and education.[89]

According to Taylor, that term refers *primarily* to the phenomenon of the privatization of religion and a strict separation of church and state: religion was, whether or not encouraged by the laws, banished from the public domain. In the wake of the separation of church and state a distinction between religion and public domain has been advocated, both as a normative understanding and as an empirically observable phenomenon. In the Netherlands, this conception of secularization has been the basis for a plea for the separation between public and private education, with a challenge (which has always existed in liberal circles) to the financing of the latter from public funds. This formed the basis of the first phase of the debate on Article 23 of the Constitution.

Secondly, secularization refers to the phenomenon of abandonment of religious practice, and the so-called secularization thesis was long regarded as uncontroversial by sociologists. According to this thesis, modernization leads to a diminished role of religion, perhaps even to its disappearance. Here as well wishful thinking and empirical observations were confused, and recently it has been penetratingly pointed out that the thesis is less convincing than previously thought (see, for example, the work of such sociologists as Berger, Martin, Casanova, and Putnam). This has been discussed in detail in the WRR-Exploring 'Believing in the public domain' (2006). Also from this perspective on secularization there was a regular attack on Article 23 of the Constitution, asking why private schools with a religious character should be subsidized any longer, especially since in so many cases they are not so distinctive anymore?

In *A Secular Age* Taylor adds a third conception of secularization. He suggests that the term now mainly refers to the fact that believing is more and more an option and not an automatism. In later lectures, he stressed that secularization must be understood as an indication of an increasing pluralism, of the condition of increasing differences, in which the option to believe or not can be filled in completely different ways. In the new context of religious conditions we can hardly speak of a binary opposition between faith and disbelief, but rather of a 'profusion' of many (non-) religious positions and possibilities among which people are reflexively (ie on a non-obvious or naive way) moving, searching, doubting (partly inspired by the ethics of authenticity). In the secular age people continue to seek a form of transcendence. They do this in the continued presence of other religious and nonreligious others. Doubt and uncertainty thus belong to belief. In the WRR-Exploring this was described as the transformation of religion: the phenomenon religion is changing shape, becomes less institutional and traditional, and obtains a more individual and dynamic character. Identities, also religious ones, are in this view increasingly less clear and stable, we can speak of '*liquid religion*'.

We might have to refer yet again to the earlier

89 Taylor, Charles (2007). A Secular Age. Cambridge: Belknap Press of Harvard University Press, p. 19-20.

statement that secularization left deep traces in the Dutch and Flemish primary and secondary schools. What that means depends thus also on the perspective of secularization one adopts. It's like measuring the political engagement of citizens. If that is measured in terms of numbers of people who are active members of a political party, the involvement is not substantial. When other indicators are taken into account, the engagement is not too bad (cf. Rosanvallon, 2008).

It is more or less the same with religion. If one would measure in a way that also portrays other non-institutional forms of religious identity and commitment, there is a significantly different picture than on the basis of measuring attendance. There is, indeed, a different attitude towards traditional religions: Grace Davie (1994) speaks of *'vicarious religion'* and *'believing without belonging'*: it is good that religion exists, but I do not take part myself. Others emphasize the individualization and de-traditionalization of religion: 'something-ism' to orthodoxy, one seeks the meaning increasingly on their own, often aided by new media. In this sense, the WRR spoke of a remarkable return of religion, but in the context of that transformation.

Our point is that the assumption that secularization necessarily gives rise to a further retreat of religion from the public domain and a reduction in numbers of believers gives a limited perspective on what's going on. We note that the debate on the usefulness and necessity of private/denominational education by both supporters and opponents until now has mainly been conducted from the first two mentioned views of secularization. The diagnosis directed towards the solution. Modernization leads to secularization in the first two mentioned meanings, and must be translated into a reduction or even elimination of publicly funded denominational education and sometimes even of all private schools. Education about religion might be part of history education, preferably by lecturing on pre-modernity.

Taylor's third definition of secularization and also the empirical situation of our educational system (Section 2) actually call for shaping the debate in a more intelligent and productive way. Taylor urges us for the next phase of the debate. He did the same as Government Commissioner for the Canadian government, by drawing a report on the public role and significance of religion in a multicultural and secular society (a pioneer in our point of view).[90] It led to an interesting debate on the relationship between religion and education. Such a debate is also necessary in the Netherlands and Flanders.

The (in our point of view) fundamental freedom of religion and belief and the consequent right of parents to start a school for their children, in close association with their affiliated denomination, should not be affected. That would be contrary to the passive tolerance of pluralism that traditionally characterizes our society. Particularly in religiously conservative environments, but not only in that community, there also exists today a need to shape the connection between religion and education in this classic way. Although there is discussion here as well, both Christians and Muslims discuss the dilemmas connected to the functioning in a society as a relatively closed group.

But no freedom without responsibility, no freedom is absolute. In our point of view, such schools – often in relatively homogeneous communities – may be required to pay attention to other forms of religion and belief than those that form the basis of their own school. This is in the interest of their own students, who after leaving the school or through new media get in contact with other religious identities. We prefer that this classic form of denominational education will be durable protected, but that doesn't end our story. Such a situation is only valid nowadays for a small number of schools and only a small part of the parents.

Therefore, we would like to plead, in the context of Article 23 of the Dutch Constitution, to develop multiple variations in order to shape the connection between religion and education. This article should

90 G. Bouchard en Ch. Taylor (2008) Fonder l'avenir. Le temps de reconciliation. Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles.

not to be abolished, but further developed to make it suitable for the other options for the relationship between religion and education. The Belgian Constitution contains the already partially explored provision: "All pupils of school age have the right to moral or religious education provided by the state". This provision is in addition to the option of parents to education of the recognized religions and non-denominational ethics (art. 24 § 1, § 4 GW) in the public schools.

This means that in addition to a mono-religious model (learning in religion) there must also be room for a multi-religious (learning about religion) or even an inter-religious model (learning from religion) (Roebben, 2009).

Especially now as it is no longer so for many parents that people are guided by a tradition in his religious preferences, and that the children get educated in schools where there exists several religious traditions, there must be given a careful thought to the possibility that pluralism mainly leads to lukewarm and negligence of the attention paid to religion. And as theological and educational thought on the formation of religious identities in a multi-religious society offers new insight (Miedema & Vroom, 2004; Miedema, 2006), the application of those insights should not be hindered by the current governance structure of the educational system. Taylor states that one's (religious) identity depends on and develops in dialogic relationships with others. 'To define yourself means to find out what is the significant difference with others. Identity, in other words only emerges in a social space or horizon. Only among other 'selves' is man a 'self' (intersubjectivity precedes subjectivity). Man is not a detached, atomistic or point-like entity (the buffered self), but is situated in a social, linguistic, historical, etc. horizon. Only at such an horizon can you decide case by case what is good or valuable (see also the work of Buber and Levinas). It also calls to do justice for this horizon, and to bring it inside education.

Precisely because education is a mirror of society, we have to think on how we can give room to the use of and shape mono-, multi-and inter-religious learning. First of all, we are convinced that the differences between public and private education are no longer adequate to with the demands of our time: in administrative terms, each school should be a private one, preferably with its own governing board, which might also be multi-religiously composed if suitable to the situation. In our point of view, in spite of the 'Enlightenment fundamentalists,' who sometimes want to prohibit any form of religious education in publicly funded education, at least in every school and for every pupil a thorough program on *education about religion* should be presented in a more mandatory form than at present.

The public interest requires that any student, especially with growing religious diversity in society, can develop an adequate and comprehensive picture of religious and philosophical traditions. This may be expected of education in *all* schools, including public schools and more religiously-conservative ones.

It may also be expected that these schools offer education which transcends the strictly cognitive aspects of teaching on religion, and for instance also provides room for *education into religion*, whether or not provided by a religious body or any other so-called sponsoring agency.

In the light of the development of European legislation, the possibility to make a choice to withdraw or to take part at an alternative form of active involvement must be respected for parents and pupils. In England there are experiments with these different forms, and the religiously diverse parent committees that are contributing appear to be a successful way to allow the school to become an entryway to the multi-religious society in which children will live together. Respect is not a dead letter or a cover for tepid indifference, but an active task that comes with genuine mutual acquaintance. A recent European study on the challenges religion faces in primary and secondary education (Luce Pépin, *Teaching about Religions in European School Systems*), shows that there are three central tasks. First: improving the quality of teaching about religions (the status of that education in schools, the quality of the supply and quality of teachers). Secondly, it is necessary to embed teaching

about religion in a more general framework with a focus on intercultural education, human rights and civic education. Thirdly our type of society requires a specific focus on how to deal in a civilized way with important differences that have their basis in religious and philosophical beliefs.

The philosophical situation in the Netherlands and Flanders at the beginning of the 21st century requires an active management of religious diversity that goes beyond the 'leave in peace' of the (un) believing other (Stevaert, 2005; Sacks, 2005, Brandsma & Kalsky, 2009). Although passive tolerance and mutual ignorance may have been a step forward after the brutal religious wars, they do not reflect the social and religious developments of recent decades any longer. Now that we can leave this period behind, in which the debate on private education was mostly conducted on the basis of misplaced notions of secularization, there are chances to focus that debate on an active pluralistic (Vanheeswijck, 2008), 'non- conservative strategy' (Taylor, 2007) which is not afraid of the confrontation with the religious stranger, but approaches people with a different belief with respect and genuine interest. In our time, the (dis)believing other has become routine, the 'Normalfall' (Sundermeier, 1996). Let us therefore not feel threatened, but make over the education for our children!

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Jan De Groof

On the Implementation and Justiciability of the Right to Education

A. *Ratio* behind the implementation and the justiciability of the right to education

International human rights treaties grant everyone the right to education. States, upon ratification of these treaties, have the primary responsibility to guarantee that individuals subject to their jurisdiction enjoy this right and to ensure that their national educational systems meet the requirements assigned to human rights as proscribed by international human rights conventions.[1] To fulfil their obligation and to fully realise the right to education, it is not sufficient that the right to education merely exists in their national legal order but it is of the utmost importance that national states undertake additional steps.[2]

Contracting parties must effectively implement the right to education into their national legal system in order to create the necessary setting for ensuring the enjoyment of the right to education. Upon ratification concrete and effective measures, such as the adoption of constitutional provisions, legislation and policies or the abolishment of existing inconsistent laws or policies, must be taken by contracting parties.[3] Most of the states have created such settings and abided by their legal obligations to implement international treaties into their national legal order. Still this is not suffi-

[1] De Groof, No Person shall be denied the Right to Education, 2004, 725.
[2] De Groof et al, The Right to Education and Rights in Education, 2006, 426; Singh, Report of the Special Rapporteur on the right to education, justiciability on the right to education, 2013. A/HRC/23/35, para 17.
[3] Justiciability, Right to Education Project, promoting mobilisation and accountability. [www.right-to-education.org/issue-page/justiciability] last visited on 12 December 2014.

cient for guaranteeing the effective and full protection of the right to education.

I. "Justiciability"

Having a legal right and its mere incorporation into a domestic legal order is not enough; enforcement mechanisms must also be available. Indeed, 'for rights to have meaning, effective remedies must be available to redress violations'.[4] It is not conceivable to have a right without a remedy.[5] One of the options to enforce a right is to render it justiciable. Justiciability refers to 'the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur'.[6] The right to education is justiciable in all its dimensions since it is internationally recognised as demonstrated by the enshrinement of this right in various international and regional treaties as well as it implementation in the national constitutions.[7]

However, this latter statement is contested as the justiciability of economic, social and cultural rights have encountered some opposition based on two main arguments namely: the 'specific nature' of these rights and the doctrine of the separation of powers. The former argument stipulates that since social and economic rights are vague, show a lack of precision and demand the adoption of positive measures for its implementation, the justiciability of such rights is not possible, contrary to civil and political rights which are clearer and impose a negative obligation. The second argument,

[4] General comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5, para 24.
[5] Coomans, The Justiciability of economic social and cultural rights, in: Hey et al, The justiciability of economic, social and cultural rights, 2009, 427.
[6] International Commission of Jurists, Courts and the Legal Enforcement of Economic, Social and Cultural Rights – Comparative Experiences of Justiciability, 2008.
[7] Singh, Report of the Special Rapporteur on the right to education, justiciability on the right to education, A/HRC/23/35, 2013, para 27.

believes that the doctrine of separation of powers is undermined since by adjudicating on matters related to the right to education the judges step into the executive's sphere of competence. As was said in the case *R v Cambridge Health Authority ex parte B* 'Difficult judgments on how a limited budget is best allocated to the maximum advantage of the maximum number... is not a judgement a court can make.'[8]

However these arguments can be counter argued.[9] With regards to the first argument, '[t]he nature of the rights themselves is not a legitimate basis for rejecting their justiciability'.[10] The unwillingness to recognise economic, social and cultural rights often stems from political and ideological ideas as well as the cultural and political history of the state.[11] Indeed, political and ideological ideas rather than scientific ones are often behind the non-recognition of economic, social and cultural rights[12] and non-justiciability of these rights are simply 'a perception'.[13] As to the second argument, the separation of powers does not exclude the possibility that the judges may play a role in the enforcement of the right to education, especially since the separation of powers is currently described as the 'dynamic and ongoing interaction between the different branches of government' where the courts engage not only 'in an

[8] R v Cambridge Health Authority ex parte, B [1995] 2 All ER 129 (CA).
[9] James, The forgotten Rights: the case for the legal enforcement of Socio-economic rights in UK national Law. 1826 (2), p.1.
[10] Christiansen, Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court, Colum. Hum. Rts. L. Rev., 38, 2006-2007, 347.
[11] James, The forgotten Rights: the case for the legal enforcement of Socio-economic rights in UK national Law, 1826 (2), 1.
[12] Plovesan, The Implementation of Economic, Social and Cultural Rights: Practices and Experiences, in: Goldewijk et al (eds), Dignity and Human Rights: the Implementation of Economic, Social and Cultural Rights, 2002, 113.
[13] Marcus, The Normative Development of Socioeconomic Rights through Supranational Adjudication, Stan. J. Int'l L., 42, 53, 2006, 101.

exacting examination of state policies with respect to socio-economic rights', but also in the 'normative development of the content ... [thereof], drawing where appropriate on international and comparative standards'.[14] Besides, the principal of equality and fair hearing, including access to court, would be undermined if some executive decisions would not be entitled to be subject to review.

This entails that individuals can have recourse to courts to challenge states' compliance with their obligations to protect the right at stake. And it means that international, regional and national judicial and quasi-judicial bodies can review state parties' actions, omissions, provisions and policies, related to education. [15]

II. Why is justiciability important?

The role of the court in the enforcement of the human right is crucial. It guarantees that the right is respected, protected and fulfilled. Judicial and quasi-judicial bodies not only protect but also promote the right to education in guaranteeing and enforcing this right. The justiciability of a right renders the state accountable for action or inaction according to international, regional and national legal norms. Judicial enforcement has a role in granting remedies in cases of violation of the right to education. A finding of violation of the right to education in an individual case may have a large impact and lead to systematic institutional change consequently benefit to other victims of the state behaviour which was challenged and it may simultaneously prevent future violations of the

[14] O'Connell, Vindicating Socio-Economic Rights: International Standards and Comparative Experience, Routledge, 2012, 201; International Commission of Jurists; Courts and the legal Enforcement of Economic, Social and Cultural rights- comparative experiences of justiciability, 2008, 75.

[15] Coomans, In search of the Core Content of the Right to Education', in: Chapman/Russel (eds), Core Obligations: Building a Framework for Economic, Social and Cultural Rights, 2002, 220.

right at stake. Besides, judicial bodies play an important role in the clarification of the scope and the content of the right to education and in the specification of the different rights available to individuals.[16] The court's role is also important as it gives a voice to the marginalised group in a democratic society which often neglects their interests. Indeed, the distinctive nature of the Court's approach is that it is respectful of democratic prerogatives and of the limited nature of public resources, while also requiring special deliberative attention to those whose minimal needs are not being met.[17]

Moreover, a judgment of an adjudicating body may bring a state's violation of a right in the public eye and potentially attract the media's attention. In turn, this will enhance a state's accountability and the possibility of change. With regards to the quasi-judicial mechanisms, such as an ombudsman and domestic human rights establishments, the political and legal pressure put on states subsequent to the decision of quasi-judicial mechanisms illustrates their importance despite the non-binding nature of their decision. Moreover such mechanisms may, on the basis of their findings, lodge a complaint in domestic courts. [18]

Justiciability of the right to education is also necessary for socio-economic reasons. Besides the fact that education alleviates pov-

[16] International Commission of Jurists (ICJ), Courts and the Legal Enforcement of Economic, Social and Cultural Rights, Comparative Experiences of Justiciability, 2008, Human Rights and Rule of Law Series No. 2, 75; Key concepts on ESCRs – Can economic, social and cultural rights be litigated at courts? [http://www.ohchr.org/EN/Issues/ESCR/Pages/CanESCRbelitigatedatcourts.aspx] last visit on 10 December 2014.

[17] Sunstein, Social and economic rights? Lessons from South Africa, Public Law and Legal Theory Working Paper No. 12, University of Chicago; see also in Design Democracy, What constitutions Do, 221-237.

[18] Kishore/Singh, Report on the justiciability of the right to education in national legal systems.

erty, persons immigrate in order to obtain better education for their children and better opportunities in other countries. If countries universally implement and realize the right to education, immigration might not be necessary since there will be education everywhere.[19]

B. Examples of justiciability of the right to education via judicial and quasi-judicial mechanisms at national and international level

The right to education is and has been justiciable in many jurisdictions.[20] This section will provide some of the many examples illustrating the justiciability facets of the right to education. It will illustrate how the right to education is widely recognised as enforceable in international and national courts. The chosen national case law relates to countries that have ratified the relevant human rights treaties.[21] These countries, although several human rights violations still exist in them and the right to education has not necessarily been fully realized, present models of justiciability. These countries have ratified human rights treaties containing the right to education and incorporated it in the domestic law in attempts towards justiciability.

The Supreme Court of the United States stresses the state's responsibility by stating that 'providing public schools ranks at the very apex of the function of a state'.[22] Another case in this regard, is the *Campaign For Fiscal Equity v. State of New York* case where the Supreme Court of New York held that the State funding of pub-

[19] For a discussion of this issue see Dustmann/Glitz, Migration and Education, NORFACE MIGRATION, Discussion Paper No. 2011-11, Handbook of the Economics of Education, Vol. 4. Edited by Hanushek ed al.

[20] Coomans, The Justiciability of economic social and cultural rights, in: Hey et al, The justiciability of economic, social and cultural rights, 2009, 427.

[21] Coomans, The Justiciability of economic social and cultural rights, in: Hey et al, The justiciability of economic, social and cultural rights, 2009, 428.

[22] Wisconsin v. Yoder (1972), 406 U.S 205, 213, 92 S.Ct. 1526, 32 L.Ed.2d 15.

lic education did not meet the minimum constitutional requirements in order to comply with the duty to provide a "sound basic education". On appeal, the decision was upheld.[23] In *Brown v. Board of Education*, the US Supreme Court adjudicated on discrimination and ruled that distinct educational infrastructure for black and white children are "inherently unequal" and it recognised education as an element of the foundations of a democratic society.[24]

The South African Constitution, 1996 is famous for its extensive provisions on economic and social rights, which was drafted with the ICESCR in mind.[25] Section 38 of the South African Constitution, dealing with the enforcement right of the Constitution, states that 'anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.' The court has given a broad interpretation to this provision requiring that the claimant seeking for a remedy demonstrates sufficient interest in receiving the sought relief.[26] Besides, through *amicus curiae* (friends of the court) action has been made possible for individuals and organisations to take part in human rights court's litigation by proving that their

[23] State Supreme Court of New York, Campaign For Fiscal Equity v. State of New York et al., 710 N.Y.S. 2d 475, January 9, 2001; see also New York Court of Appeals, Campaign For Fiscal Equity v. State of New York et al., 100 N. Y. 2d 893, June 26, 2003; New York Appellate Division, First Department, Campaign for Fiscal Equity, Inc. v. State of New York, 2006 NY Slip Op 02284, March 23, 2006.

[24] US Supreme Court of Justice, Brown v. Board of Education of Topeka, 347 US 483 (1954).

[25] Coomans, The Justiciability of economic social and cultural rights, in: Hey et al, The justiciability of economic, social and cultural rights, 2009, 429.

[26] Liebenberg, South Africa adjudicating Social Rights Under a Transformative Constitution, in: Langford, Social Rights Jurisprudence, Emerging Trends in International and Comparative Law, 2009, 80.

contribution will be useful for the court and distinct from those of the disputing parties. In practice, South African jurisprudence demonstrates how the courts are developing a model for judicial review of socio-economic rights which supports the constitution's provisions.[27]

In Columbia, the court has developed a pile of case law concerning the right to education.[28] Its jurisprudence, based on article 27 of the constitution, clarifies that the constitution recognises the right to education as a fundamental right directly enforceable by courts via writ of protection, even in the case where the education provided has been privatised.[29] The writ of protection is enshrined in article 86 which provides that every person has the right to fill a write of protection before a judge, at any time or place, through a preferential and summary proceeding, for himself/herself or by whomever acts in his/her name for the immediate protection of his/her fundamental constitutional rights when that person fears the latter may send it to the Constitutional Court for possible revision. The Court found a violation of the right to education when a private school stopped to carry on providing education to a child with attention deficit disorder and it ordered all schools to provide education for such children even if they are not specialised to educate them.[30]

In *O'Donoghue v. Minister for Health*, the Irish High court adjudicated on the subject of the right to education for children having disabilities and held contrary to the defendant (the state) that a

[27] Liebenberg, South Africa adjudicating Social Rights Under a Transformative Constitution, in: Langford, Social Rights Jurisprudence, Emerging Trends in International and Comparative Law, 2009, 75, 80.
[28] Sepulveda, Colombia: The Constitutional Court's Role in Addressing Social Injustice, in: Langford, Social Rights Jurisprudence, Emerging Trends in International and Comparative Law, 2009, 155.
[29] Sentencia T-534/97.
[30] T-255/01.

severely mentally disabled child is not uneducable.[31] It based its decision on the definition of education clarified by the Supreme Court in the case of *Ryan v. AG* which defines it as 'the teaching and training of a child to make the best possible use of inherent and potential capacities, physical, mental and moral'.[32] It also considered the advance made internationally in the field of education for children with disabilities. Thus, the court made it clear that the constitution obliges the state to provide for free primary education to all children, including disabled ones, and that special measures must be undertaken for those children whose handicap prevented them from enjoying the conventional education.

In Israel, the Supreme Court decided that the right to education for children with disabilities includes the right to free education not only in respect of special education, but also in integrated educative settings. In this case the government was ordered to arrange its budgetary previsions to cover these services.[33]

The right to education has also been recognised as justiciable by international court.[34] In *the Belgian Linguistics Case No. 2*, the European Court of Human Rights held that despite the negative formation of the first sentence of article 2 protocol No.1 stating 'no person shall be denied the right to education', this article secures this right.[35]

The right of people with disabilities was also protected by the European Committee on Social Rights who held in a collective complaint by Autism-Europe that the European Social Charter was in-

[31] O'Donoghue v. Minister for Health& Ors [1993] IECH 2.
[32] Ryan v. A.G. [1965] IR294, O'Dalaigh C.J.
[33] Supreme Court of Israel, Yated and others v. the Ministry of Education, HCJ 2599/00, August 14, 2002.
[34] Clements/Simmons, European Court of Human Rights, in: Langford, Social Rights Jurisprudence, Emerging Trends in International and Comparative Law, 2009, p.424.
[35]Belgian Linguistics Case (No 2 (1968) 1) EHRR 252.

fringed by the French government's general lack of progress.[36] Likewise, the advisory opinions of the French National Consultative Commission defended the right for such children.[37]

Even when the right of education was not mentioned in the constitution, legal recourse has been available for this right as it constitutes an essential element for the exercise of other rights. The Supreme Court of India held that the right to education formed part of an element of the right to life and thus it is enforceable even though it was at that time not identified in the Indian constitution.[38] In India, any individual can directly go to the Supreme Court when there is a violation of the right to education since fundamental rights are considered as primordial element of the constitution. The Inter-American Court of Human rights took a similar approach and underlined in several cases that a violation of the right to life may occur when there is a lack of educational facilities for vulnerable groups.[39] The Inter-American Court of Human Rights has held in a number of cases that the special measures of protection afforded to children by the State (Art 19 of the American Convention on Human Rights) includes the provision of education.[40]

Another example of the justiciability of the right to education in India is the following: the Commission for Protection of Child Rights

[36] International Association Autism Europe vs. France, Complaint No. 13/2002. European Committee on Social Rights, 4 November 2003.
[37] Avis sur la scolarisation des enfants handicapés [http://www.cncdh.fr/fr/publications/avis-sur-la-scolarisation-des-enfants-handicapes] last visited on 12 December 2014.
[38] Krishnan, J. P. v State of A.P. (1993 I.SCC 645).
[39] Inter-American Court of Human Rights, Case of the Juvenile Re-education Institute v. Paraguay, Judgment of 2 September 2004, Series C, No. 112; Case of the Indigenous Community Yakye Axa v. Paraguay, Judgment of 17 June 2005, Series C, No. 125; Case of Sawhoyamaxa Indigenous Community v. Paraguay, Judgment of 29 March 2006, Series C, No. 146.
[40] See Inter-American Court of Human Rights, Instituto de Reeducación del Menor v. Paraguay, September 2, 2004, paras. 149, 161 and 174.

in accomplishing its task to protect the enjoyment of the right to education had examined complaints about the imposition of school fees for primary education when there should not be any. The findings of this Commission led court actions and resulted into parents having their fee reimbursed.[41]

As already mentioned, most of the states have abided by their legal obligations to implement international treaties into their national legal order. Still this is not sufficient for guaranteeing the effective and full protection of the right to education.

III. Status quo of the right to education with regards to its implementation

Human rights entail both rights and obligations. Thus, the various international and regional conventions containing the right to education not only grant this right but also impose an obligation on the state parties to guarantee the exercise of this right. As the *Limburg principles* on the implementation of the International Covenant on Economic, Social and Cultural Rights (the Limburg Principles) specifies contracting parties are accountable to their individuals as well as to the international community for their compliance to these obligations.[42] There exist different guidelines clarifying the states' duties with regards to the implementation of human rights, including the right to education. This section will expose the main obligations so far imposed on states with regards to the right to education.

The states, when implementing all human rights, must respect three landmark obligations namely: the obligation to respect, protect and fulfil. The obligation to respect prevents the states from

[41] Singh, Report of the Special Rapporteur on the right to education, justiciability on the right to education, A/HRC/23/35, 2013, para 17.
[42] Limburg Principles on the Implementation of the International covenant on Economic, Social and Cultural Rights, para 10, [http://www.escr-net.org/docs/i/425445] last visited on 10 December 2014.

interfering with the exercise of human rights. The obligation to protect requires the states to prevent third parties, such as private entities or, individuals or international organisation, from interfering with the enjoyment of the rights. The last obligation requires the states to use all appropriate measures, *inter alia*, judicial, administrative, and budgetary measures to ensure the total realisation of human rights.[43]

The *General Comment of the United Nations Committee on Economic, Social and Cultural Rights* (CESCR) number 3 clarifies the state obligation with regards to, amongst other rights, the right to education provided in the International Convention on Economic, Social and Cultural Rights (ICESCR).[44] The nature of a state's obligation is provided in article 2 of the ICESCR providing for an obligation of conduct and an obligation of result. *The Maastricht guidelines on Violations of Economic, Social and Cultural rights (Maastricht Guidelines)* specifies that the former obliges the state to take actions aiming to realise the right and the latter requires the state to realise a specific objective to 'satisfies a substantive standards'.[45] According to this article contracting parties must ensure that the rights present in the Convention will be exercised without discrimination and it must 'undertake steps with a view to achieving progressively the full realization of the rights recognized in the

[43] OIDEL Fernandez/Zachariev; Bibliographie choisie sur le doit à l'éducation, 2011, 7; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, para 10; 18-19; UN Human Rights Office of the High Commissioner for Human rights, [http://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx] last visited on 10 December 2014.

[44] CESCR, General Comment No. 3: The Nature of States Parties Obligations (Art 2, Para 1, of the Covenant), Adopted at the Fifth Session of the Committee on Economic, Social and cultural rights (contained in Document E/1991/23)

[45] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, para 7.

present Covenant'. To this end, state parties must use all appropriate means, including particularly the adoption of legislative measure in order to satisfy the obligations to take steps (article 2(1) ICESCR). Otherwise said contracting parties must incorporate the right to education into their legislation and policies at all levels.[46] The failure to effectively enforce legislation aiming to implement the ICESCR violates this Convention.[47] The Committee underlines that the adoption of legislative measures does not exhaust the obligations of contracting parties and it states that the ultimate word as to whether appropriate means have been undertaken by the states is reserved for the Committee itself.[48] Concerning the measures to be taken, the committee of the right of the child stipulates that 'each state party must respect and implement the right of the child to have his or her best interests assessed and taken as a primary consideration, and is under the obligation to take all necessary, deliberate and concrete measures for the full implementation of this right.[49]

Other measures than legislative measures must be taken for states to fulfil their obligations under the ICESCR.[50] The provision of judicial remedies with regards to rights that can be considered justiciable belongs to the means which are considered appropri-

[46] CRC, General Comment No. 1 (2001), article 29 (1): the aims of education, CRC/GC/2001/1., para 17.
[47] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, para 15.
[48] CESCR, General Comment No.3 (1991): The Nature of States Parties Obligations (Art 2, Para.1, of the Covenant), Adopted at the Fifth Session of the Committee on Economic, Social and cultural rights (contained in Document E/1991/23) paras 1-4.
[49] CRC, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art 3, para. 1).
[50] Limburg Principles on the Implementation of the International covenant on Economic, Social and Cultural Rights, para 17.

ate.[51] The *Limburg principles* provide that economic, social and cultural rights can be justiciable.[52] The committee stipulates that article 13 (2) (a), (3) (4) ICESRC, providing the right to education, seems to be 'capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain'.[53] The *Maastricht guidelines* and the *Limburg principles* stipulate that access to effective judicial or other remedies and adequate reparation should be available to any victims of a violation of an economic, social or cultural right.[54] Jurisprudence in the area of economic and social rights is also encouraged by the Committee via the *General Comment* adopted in 1998 as it states that the Covenant norms must be recognised in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring government accountability must be put into place.[55] Besides this measure administrative, financial and social measures are an example

[51] CESCR, General Comment No.3: The Nature of States Parties Obligations (Art 2, para.1, of the Covenant), Adopted at the Fifth Session of the Committee on Economic, Social and cultural rights (contained in Document E/1991/23) para 5.

[52] Limburg Principles on the Implementation of the International covenant on Economic, Social and Cultural Rights; para 8.

[53] CESCR, General Comment No.3: The Nature of States Parties Obligations (Art 2, para.1, of the Covenant), Adopted at the Fifth Session of the Committee on Economic, Social and cultural rights (contained in Document E/1991/23) para 5.

[54] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, para 22-23.; Limburg Principles on the Implementation of the International covenant on Economic, Social and Cultural, para 19.

[55] CESCR, General Comment No. 9: The domestic application of the Covenant, UN E/C.12/1998/24, para 2; see De Schutter, Economic, Social and Cultural Rights as Human Rights: An Introduction, CRIDHIO Working paper, 2013, 7.

of other appropriate measures. Moreover, impunity of any violations of the rights at stake should be prohibited.[56]

Article 2 ICESRC uses the term 'progressive realisation' of the right to education. This term must be read in the context of the general objective of the conventions meaning that it imposes an obligation on the states to realise the right at stake as quickly as possible. Any retrogressive measures must be justified.

Every contracting party must ensure a minimum core of obligation in order to guarantee the enjoyment of 'minimum essential levels' of each rights which states parties have the obligation to guarantee;[57] a failure to satisfies this 'minimum core obligations' amount to a violation of the ICESR.[58] The assessment as to whether a state has fulfilled this obligation must take into consideration resource constraints. However, to be able to justify failure to comply with minimum core obligations the state will have to proof that it did its best to use all available resources in order to be in line with these obligations. This entails that a lack of resources does not *de facto* relieve the states from guaranteeing some minimum core obligations.[59] In education, the universal minimum corresponds to primary education. When a state is unable to provide free and compulsory education, it should create strategies to do so and seek

[56] Limburg Principles on the Implementation of the International covenant on Economic, Social and Cultural Rights, para 72; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, para 27.

[57] Limburg Principles on the Implementation of the International covenant on Economic, Social and Cultural Rights, para 25; CESCR, General Comment No.3: The Nature of States Parties Obligations (Art 2, Para.1, of the Conventant), Adopted at the Fifth Session of the Committee on Economic, Social and cultural rights (contained in Document E/1991/23).

[58] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, para 9.

[59] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, para 10.

assistance from the international community.[60] In general, international cooperation in implementing the right to education is strongly encouraged.

More specific to the right to education, is that it has a social aspect and a freedom aspect. The former aspect implies that the realisation of this right demands a positive obligation from the part of the state. As providing access to education and making it available to all, demands the states to get involved and to put some efforts. The second aspect refers to the freedom of individuals to choose whether to receive education from a private or a public institution. From this arise, the freedom of legal entities and natural persons to institute their own educational establishment. This aspect implies a negative obligation and demands the states to not-interfere with this freedom.[61]

Four criteria are contained in the *General comment No. 13* on the right to education which on the one hand can be used as a tool to analyse the content of the right to education provided an on the other hand these criteria impose general obligations resulting from them.[62] The four features of the right to education are (1) availability; (2) accessibility (3) acceptability (4) adaptability. In my report as UNESCO Chargé de Mission I mentioned 4 other 'A's: adequacy, accountability, awareness and advocacy.[63] I should still add the 'autonomy' principle. Reflection should refine the 'new generation' of 'A's.

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[60] Tomasevski, Human Rights and Poverty Reduction. Strengthening pro-poor law: legal enforcement of economic and social rights, ODI, 2005, 5.
[61] Coomans, In search of the Core Content of the Right to Education, in: Chapman/Russel (eds), Core Obligations: Building a Framework for Economic, Social and Cultural Rights, 2002, 220.
[62] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 13: The Right to Education (Art 13 of the Covenant), 8 December 1999, E/C.12/1999/10.
[63] De Groof, Report on Fulfilling the Right to Education, UNESCO, 2009, 25.

However, when rating the success of the *Millennium Development Goals 2015*, and more specifically Goal 2, it is to be determined whether the measures concerning the justiciability of the right to education have been effective.

C. Failure to achieve the millennium goals

The 'Millennium Development Goals' (MDGs) cover eight development goals that were established following the *Millennium Summit* of the *United Nations* in 2000, following the adoption of the United Nations Millennium Declaration. Goal 2 aims to achieve universal primary education. More specifically, target 2A hopes to ensure that, by 2015, children everywhere, boys and girls, will be able to complete a full course of primary schooling.

However, the UNESCO Institute for Statistics found that progress in reducing the number of children out of school has come to a virtual standstill just as international aid to basic education falls for the first time since 2002. More than 57 million children continue to be denied the right to primary education, and many of them will probably never enter a classroom.[64]

Clearly, effective means of justiciability regarding the right to education is necessary.

D. Remedial actions

The *Optional Protocol* to the International Covenant on Economic, Social and Cultural Rights[65] is an international treaty establishing complaint and inquiry mechanisms for the International Covenant on Economic, Social and Cultural Rights. Another remedial action that can be taken is the example of the Optional Protocol to the

[64] UNESCO Institute for Statistics, Schooling for millions of children jeopardised by reductions in aid, June 2013, Number 25.
[65] Adopted by the UN General Assembly on 10 December 2008 and opened for signature on 24 September 2009.

Convention on the Rights of Persons with Disabilities.[66] The Optional Protocol establishes an individual complaints mechanism Parties agree to recognise the competence of the Committee on the Rights of Persons with Disabilities to consider complaints from individuals or groups who claim their rights under the Convention have been violated.[67] The Committee can request information from and make recommendations to a party.[68]

[66] Adopted on 13 December 2006, and entered into force at the same time as its parent Convention on 3 May 2008.
[67] Optional Protocol to the Convention on the Rights of Persons with Disabilities: Art 1.
[68] Optional Protocol to the Convention on the Rights of Persons with Disabilities: Art 3 and 5.

De Groof J. and Lauwers G., Nobody can be denied the right to (an own identity in) Education – Legal bottlenecks in National and international case law concerning the freedom of religious expression: the case of the headscarf in education, in *International Journal for Education Law and Policy*, Vol. 1, Issue 1-2, 2005, p. 132-155

Nobody can be denied the Right to (an own Identity in) Education

Legal Bottlenecks in National and International Law Concerning the Freedom of Religious Expression: The Case of the Headscarf in Education

Jan De Groof & Gracienne Lauwers [*]

"The right to freedom of thought, conscience and religion is probably the most precious of all human rights, and the imperative need today is to make it a reality for every single individual regardless of the religion or belief that he professes, regardless of his status, and regardless of his condition in life. The desire to enjoy this right has already proved itself to be one of the most potent and contagious political forces that the world has ever known. But its full realization can come about only when the repressive action by which it has been restricted in many parts of the world is brought to light, studied, understood and curtailed through cooperative policies, and when the methods and means appropriate for the enlargement of this vital freedom are put into effect on the international as well as the national plane."[1]

This contribution explores the outlines of the debate on the wearing of conspicuous religious symbols, more in particular the headscarf. The authors restrict themselves to providing an overview of the legal provisions that may be applicable in the search for a regulation on the wearing of the headscarf in educational institutions and they also put forward some considerations regarding its practical implementation.

I. Introduction and Problem Definition

1. Can one actually legislate on religious symbols? Was the recent Europe-wide debate on the headscarf not really about political symbols and, as the case may be, about the cultural position and/or isolation of women/girls in certain population groups? Which fundamental rights should, in the case of mutual conflicts, be given precedence? After all, the debate concerns the scope of two crucial legal concepts in Belgium's educational system and the rule of law, namely freedom of religious practice for all and the neutrality or pluralism of education provided by the State.

The debate – including in Belgium – was spread out in the media. Contradictory statements were made by persons in authority and the proposal of resolution *'for safeguarding the equality of men and women and the neutrality of the State in compulsory public education and in public services by prohibiting the wearing of conspicuous symbols of religious conviction'*[2] drew attention from the international press[3]. The *'Intercultural Dialogue'*[4]-adopted by the Council of Ministers of 12 March 2004 at the proposal of the Minister of the Civil Service, Social Integration,

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Both authors presented a lecture on the topic of this paper at DISCOR – 'Hoofddoek en fundamentele rechten en vrijheden in het onderwijs" – of 2 June 2004.

[1] KRISHNASWAMI, ARCOT 1960, *Study of Discrimination in the Matter of Religious Rights and Practices*, New York, United Nations, 1960, E/CN.4/Sub.2/200/ Rev.1 Sales No. 60.XIV.2 (1960).

[2] *Doc.*, Senate, Z. 2003-2004, n°3-451/1.

[3] See *'Worldwide Religious News'* of 28 May 2004, articles mentioned under the title *"Belgian move to ban scarves, crosses"*: "Two prominent senators have argued that the ban is necessary to combat what they call Islamic sexism".

[4] http://www.dialogueinterculturel.be/nl/

Urban Policy and Equal Opportunities and in implementation of the Federal Government Policy Accord[6] - aspires to "examine without prejudice the foundations of the Belgian democratic model so that they could be implemented more effectively in the new intercultural context"[7]. The *'Intercultural Dialogue Commission'* –whose job it is to ensure that the 'Dialogue' succeeds, albeit in cooperation with the Centre for Equal Opportunities- immediately put the headscarf issue on its agenda, together with the French source of inspiration which explicitly influenced the debate.

Precisely because religious rights and the symbols with which they are expressed are at stake here, the debate is crucially important to the individual and to society. Freedom of thought, conscience, religion, and expression of opinion constitute the foundation of democracy. *"It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life (...)[8] The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to 'manifest (one's) religion'. Bearing witness in words and deeds is bound up with the existence of religious convictions.[9]*. The tone is immediately set: pluralism is not credible if all individuals cannot explicitly express their own religious conviction – though not at the expense of others, as this would inevitably compromise the latter's liberty.

The translation of pluralism, of the balance between individual and community (or communities) and between multiformity and social cohesion, requires policy and regulation that already exhibits variation within Europe and elsewhere, and that may evolve in accordance with the societal context and cultural characteristics, including differences in the juridical culture of countries. The answer lies in the joint reading of standards of international law and the (legal) culture of a people (or peoples), while taking into account the place of religion in the societal and legal system of a specific country. As Glenn has rightly asserted, "in a curious way, the rejection of the hijab in French schools is of a piece with the positive value accorded to 'multiculturalism' in many American schools."[10]

The headscarf plays a prominent role in this debate. This is due in part to the strong presence of ethnic minorities in Western society and the growing awareness of Muslims, but also to the fact that the dominant ideology is ebbing away while individualisation and diversity have come to prominence. Moreover, a certain unease, fear even, vis-à-vis the Muslim population cannot be ignored. What is required is a contemporary interpretation of agreements on how diversity can contribute positively to the shaping of the principal values of a democracy, as in the recent wording of art. 2, para. 1 of the *Draft Constitution for Europe: "respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights"*. It is up to the competent authorities and school administrations, subject to judicial review, to attain a synthesis of freedom and responsibility. Comparative law may contribute to achieving this goal, but it is also immediately clear that it will be a perilous undertaking.

II. The limited contribution of comparative law in matters of ideology in education and the wide margin of appreciation within each Member State of the European Union.

2. By decision of 24 September 2003[11], the *Bundesverfassungsgericht* ruled that neither the constitution nor state law provided a basis to restrict teachers from wearing a headscarf at school. The religious conviction of the teacher was given precedence over the pupils' right to neutral education. Further, it gave the sixteen German states, or *Länder*, the right to legislate on the matter. The decision was carried by five votes to three. The dissenting voices[12] argued that pupils' and parents' right to neutral education is paramount and that a teacher is aware from the moment of his appointment that he or she should comply with the requirement of neutrality, and that consequently no specific legislation is required. The question also arises whether the decision is compatible with the earlier *Kruzifix-Beschluss* of 16 May 1995[13], which caused quite a controversy in traditionally Catholic Bavaria

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6 Which states that " *Belgium must remain an open society where people of different cultures can cooperate in an atmosphere of openness, tolerance, meeting and mutual respect; an open society that is permeated with divergent sensibilities, provenances and cultures, that is in constant development and is devoted to common, fundamental values of the Constitution and human rights.*"

7 In the letter of invitation to the Intercultural Dialogue on 23 February 2004, the Minister added that, what he understood this to mean, was, among other things, "equality and non-discrimination, the separation of Church and State, the special duties of government services, equality of men and women".

8 The ruling adds the following: *"... but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned."*

9 ECHR, Kokkinakis v. Greece, App. No. 14307/88, 25-05-1993 para. 31.

10 GLENN Ch. Hijab and the Limits of Tolerance, in DE GROOF J., FIERS J., *The Legal Status of Minorities in Education*, Leuven, 1996, p.136, who also points out various other contradictions and inequalities.

11 BVerfG, 2 BvR 1436/02 vom 3.6.2003, Absatz-Nr. (1-130), *http://www.bverfg.de/entscheidungen/rs20030924_2bvr143602.html*

12 Paragraphs 75-138.

13 BVerfGE, 93, 1.

and elsewhere"[4]: after all, on that occasion, the Constitutional Court ruled that the crucifix is incompatible with the neutrality of a State-run school, which is not a *Bekenntnisschule*.[5]

Clearly, then, the judgement is not entirely unequivocal: on the one hand, it allows teachers to wear a headscarf, while on the other States are left free to introduce a legal ban. Furthermore, each State was given an opportunity to formulate an answer, which will most probably happen, so that fundamental rights may be interpreted and observed differently in different parts of the country.

For that matter, divergent standards are already being applied: the *Länder* did not respond uniformly to the question regarding dispensation from physical education and swimming lessons: Münster was opposed and Bremen was in favour of dispensation."[6]

In Switzerland, religious tolerance was initially considered to be more important than any administrative complications that dispensation from certain subjects may cause for the educational authority or administration.[7] However, the outcome of the *Lucia Dahlab case* rather compromised this viewpoint. This judgement of 15 February 2001 by the European Court of Human Rights[8] (ECHR) gave weight to the margin of appreciation of the member state: the measure taken by the authorities of the Canton of Geneva to prohibit the wearing of a headscarf in class by a teacher was found not to be unreasonable, because it was proportional to the objectives of the protection of the rights of others, of public order and safety. The cantonal judge had defended the viewpoint that wearing a headscarf, in order to obey a precept laid down in the Koran, cannot be reconciled with the "message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils. The European Court did not distance itself from this point of view.

In the Netherlands, on the other hand, the *Law on Equal Treatment* states that the neutral nature of public education provides insufficient ground to ban clothing that is seen as an expression of religious conviction. Restrictive regulations should be motivated by each school separately, on the basis of objective factors.

3. The French judge initially pronounced a rather qualified judgement. The ruling by the Conseil d'Etat of 27 November 1989[9] was subsequently confirmed in several other rulings. It states that, on the one hand, pupils should be allowed to wear symbols of religious expression, while on the other, teachers are denied the right to manifest their religious conviction at school. This ruling contained a rather qualified analysis of the legal provisions and placed the wearing of a headscarf in a broader perspective[10]. The *Bernard Stasi Commission* (*Commission de réflexion sur l'application du principe de laïcité dans la République*), which published its report on 11 December 2003, put forward a stricter interpretation of the notion of *Laïcité*, arguing that there is no room for religion on the curriculum, nor for a positive acceptance of ideology and philosophy. A defensive political *discourse* is manifestly present and the tone is immediately clear from the outset, as the report claims that a certain extremism compromises republican values: *"... les comportements, les agissements attentatoires à la laïcité sont de plus en plus nombreux, en particulier dans l'espace publique. (...) Les difficultés de l'intégration de ceux qui sont arrivés sur le territoire national au cours de ces dernières décennies, les conditions de vie dans de nombreuses banlieues de nos villes, le chômage, le sentiment éprouvé par beaucoup de ceux qui habitent sur notre territoire d'être l'objet de discriminations, voire d'être rejetés hors de la communauté nationale, expliquent qu'ils prêtent une oreille bienveillante à ceux qui les incitent à combattre ce que nous appelons les valeurs de la République. Car il faut être lucides: oui, des groupes extrémistes sont à l'oeuvre dans notre pays pour tester la résistance de la République et pour pousser certains jeunes à rejeter la France et ses valeurs.*

[4] AVENARIUS H., HECKEL H., *Schulrechtskunde*, Kriftel, 2000, pp. 367-377 with extensive bibliography; RICHTER I., "Multi-Religious Instruction in a Multicultural Society? Juridical Considerations, in DE GROOF J., FIERS J., *The Legal Status of Minorities in Education*, Leuven, 1996, pp. 118-126.

[5] On the different types of schools in Germany, see among others GLENN Ch. DE GROOF J., *Finding the Right Balance. Freedom, Autonomy and Accountability in Education*, vol. I, Lemma Publishers, Utrecht, 2001.

[6] Cf. the article by VERSTEGEN B., "Over tekens en symbolen. Het dragen van de hoofddoek (in het onderwijs)", in: T.O.R.B., 1994-1995, No. 5-6, p. 299 ff.

[7] *Ibidem*

[8] http://www.echr.coe.int

[9] Assemblée générale (Section de l'intérieur) – no. 346.893.

[10] The classical doctrine of respect for the rights of others is expressed here quite accurately: "Il résulte de ce qui vient d'être dit que, dans les établissements scolaires, le port par les élèves de signes par lesquels il entendent manifester leur appartenance à une religion n'est pas par lui-même incompatible avec le principe de laïcité, dans la mesure où il constitue l'exercice de la liberté d'expression et de manifestation de croyances religieuses, mais que cette liberté ne saurait permettre aux élèves d'arborer des signes d'appartenance religieuse qui, par leur nature, par les conditions dans lesquelles ils seraient portés individuellement ou collectivement, ou par leur caractère ostentatoire ou revendicatif, constitueraient un acte de pression, de provocation, de prosélytisme ou de propagande, porteraient atteinte à la dignité ou à la liberté de l'élève ou d'autres membres de la communauté éducative, compromettraient leur santé ou leur sécurité, perturberaient le déroulement des activités d'enseignement et le rôle éducatif des enseignants, enfin troubleraient l'ordre dans l'établissement ou le fonctionnement normal du service public."

La conjoncture internationale, et particulièrement, le conflit du Proche-Orient, contribue aussi à aggraver la tension et à provoquer des affrontements dans certaines de nos villes. Dans ce contexte-là, il est naturel que beaucoup de nos concitoyens appelant de leurs voeux la restauration de l'autorité républicaine et tout particulièrement à l'école."[22]

In a tearing rush, the '*Projet de loi encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publiques*'[23] was approved by the National Assembly and the Senate (3 March 2004).[24] Art. L. 141-5-1 of Law n° 2004-228 of 15 March 2004[25] adds the following article to the *Code de l'éducation*: "*Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse est interdit. Le règlement intérieur rappelle que la mise en oeuvre d'une procédure disciplinaire est précédée d'un dialogue avec l'élève.*" In France, too, this had been preceded by a broad public debate.[26]

One of the key sentences in the abovementioned report by the Commission chaired by Mr Stasi is particularly revealing about the context in which the French debate was conducted: "*La commission, après avoir entendu les positions des uns et des autres, estime qu'aujourd'hui la question n'est plus la liberté de conscience, mais l'ordre public.*"[27] The question remains whether this assumption imposes itself to the same extent elsewhere.

4. Each country will thus need to formulate its own answer –albeit based on the same *constitutional principles* that may be derived in educational affairs[28] and which certainly include the application of basic rights in education as well as the principle of pluralism in state-run education. This search for a balance is, for that matter, ongoing in every modern state, including those with a so-called *Wall of Separation* between religion and government, as in the US, but with a substantially greater sensitivity to and explicit presence of religious symbols in public schools than is sometimes (negatively) suggested. In these countries, freedom of religion and expression is what makes the wearing of a headscarf in public school acceptable.

On the other hand, such a national interpretation of common principles adheres to the European *subsidiarity notion*[29]: the national authorities are assumed to be better placed than an international court of law to assess 'local needs and conditions'[30], the so-called '*margin of interpretation*'. The ECHR formulated it even more unequivocally in its ruling in the case of Leyla Sahin v. Turkey: "*The court observes at the same time that the role of the Convention machinery is essentially subsidiary*"[31]. The argument that the weighing up of basic rights and fundamental freedoms can vary from country to country, depending on their 'national traditions', is reiterated a little further, when it is claimed that "there is no uniform European conception of the requirements of 'the protection of the rights of others' and of 'public order'"[32], all the more so when the principles at stake are *equality* and interpretations of *secularism* in the national community concerned.

III. Headscarves in (subsidised non-governmental and official) education in Flanders: Problem definition and tentative considerations for a contextual answer.

A. Enhancement of diversity is considered optimally through local policy

5. The relationship in Belgium between subsidised non-governmental educational institutions on the one hand and parents and children on the other is of a contractual nature. The *Decree concerning equal educational opportunities-I* (known as the 'GOK Decree') largely reflects the obligations of subsidised non-governmental schools as a '*functional public service*', e.g. it extends the enrolment right of parents and pupils to subsidised

22 Ibidem, pp. 4-5.
23 http://www.education.gouv.fr., rubrique 'Actualités'. The recommendation by the Council of State was never made public.
24 Projet de loi nr. 4 (2002-2003), déposé par le gouvernement, projet de loi nr. 728, adopté par le Sénat.
25 *JO*, 17 March 2004. For the preparatory work, as well as the '*Bibliographie établie par le service de la bibliothèque de l'Assemblée nationale sur le principe de laïcité*', see http://www.assemblee-nat.fr/12/dossiers/laicite.asp
26 On this topic, and for the most important bibliography, see: J. GRANDA, L'actualité du droit de l'éducation en France, in the forthcoming issue of *European Journal for Education Law and Policy*, Kluwer Law International, available from the authors of the present contribution.
27 *Sub para.* 4.2.2.2. (p. 35).
28 Cf. volume II of the publication GLENN Ch., DE GROOF J., *op. cit.*
29 Cf. the first report of the *European Education Law and Policy Association*: DE GROOF J. (ed.), *Subsidiarity and Education. Aspects of Comparative Educational Law*, Leuven, 1994.
30 ECHR, Handyside v. the United Kingdom, App. No. 5493/72, 7-12-1976, para. 48.
31 Ruling of 6 May 2004, Application no. 34400/02.
32 See *infra*.

non-governmental education on condition that the parents agree with the pedagogic project and the school regulation of that subsidised non-governmental school[32].
In a subsidised non-governmental school, it is the organising authority that must decide on the appropriateness of prohibiting the wearing of a headscarf. If it imposes such a ban, it may refer to a religious conviction or a denominational expression as a justification. The condition remains that the pedagogic project should adequately encompass the 'denominational foundation' that the organising authority wishes to apply.[33] Parents who are unable to approve of such a ban in subsidised non-governmental education are offered the alternative of "neutral" public education.

An entirely different situation arises if the ban on the wearing of a headscarf is imposed by the management of a public school. Unlike subsidised non-governmental education, public education is accessible to anyone, irrespective of their religious conviction. This requirement of universal accessibility restricts the regulatory autonomy with regard to the banning of headscarves at a particular public school. After all, a ban on headscarves may, albeit indirectly, make it impossible for certain girls to attend that school. A number of questions therefore arise: Would such a public school be infringing upon the constitutional right of freedom of expression in conjunction with the right to education? Could the legislator impose a ban on the wearing of headscarves in public schools? In the Flemish constellation, would the legislator be guilty of *direct discrimination* if the motivation for the ban made reference to religious expression? Or indeed would he be guilty of *indirect discrimination* if the motivation for the ban did not refer explicitly to a religious conviction and yet, in practice, primarily affected people of a particular faith?
In other words, what needs to be ascertained is the degree to which a general ban on the wearing of headscarves is compatible with the ideological foundations of public education. This question will be considered in further detail later.

6. First, however, we should repeat that policymaking and regulation regarding *diversity in education* and, *a fortiori*, regarding the *non-discrimination of pupils* is *particularised* in the educational project. One of the essential options of the *GOK-I Decree* is the enhancement of diversity. The preceding broad-based *Non-discrimination declaration*–known in full as the '*Common declaration on a non-discriminatory policy in education, drawn up within the context of the Flemish Educational Council on 15 July 1997*'[34]- was explicitly aimed at encouraging cultural diversity in schools. An equal opportunities policy towards allochthones and autochthones first and foremost presupposes "*a spirit of co-operation, tolerance, consultation, intercultural exchange...*"[35]. Interculturalism' is considered an enrichment of the formative project of the educational institution[36]. In the "*Model Code*", which was to be drawn up by the organising authorities, attention is paid to school culture (incl. rules for dealing with pupils, problematic situations with a racial context) and to the formal organisation of the school. This encompasses the headscarf issue. The school regulation/school working plan, both in subsidised non-governmental and in public education, should be in implementation of this code.

Yet one cannot deny that the aspect of 'intercultural education', both in the aforementioned *Non-discrimination Declaration* and in the *GOK-I Decree*, was implemented rather carelessly[37]. The responsibility of the organising authorities and the local school community is delineated all the more sharply. This holds not only for the "integration of the components of intercultural education"[38], the autonomy of the school also necessitates that rules be provided in, among other things, the school regulation regarding the institution's 'problem-solving capacity'. Both the stipulations relating to the *Model Code*, for which the Flemish government explicitly called on the educational partners[39], and the mutual agreement to adapt conventions "if new developments unfold"[40] prevent the government from considering measures that might compromise that autonomy. We may refer, *mutatis mutandis*, to the conclusions of the scientific evaluation of the non-discrimination policy, in which it is asserted that research has shown there to be a definite connection between interculturalisation at schools

32 Art. III.1, § 2 of the GOK-I Decree. See the special issue of *T.O.R.B.*, 2003-2004, nos. 4-5.
33 Art. III.1, § 2, second clause of the GOK-I Decree.
34 Most extensive: VERSTEGEN R., *De non-discriminatieverklaring in het onderwijs. Mogelijkheden en Mogelijkheden. Cahiers voor Onderwijsrecht en Onderwijsbeleid*, nr. 5, Antwerpen, Kluwer Rechtswetenschappen, 1998.
35 Preamble to this *Joint Declaration*.
36 According to the first clause of paragraph 1 "*Een bewustere opstelling t.a.v. non-discriminatie op school*".
37 VERSTEGEN R., "Gelijke onderwijskansen in de Vlaamse Gemeenschap", *T.O.R.B.*, 2003-2004, nr. 4-5, p. 284-302, DEGROOF J., "Het decreet betreffende gelijke onderwijskansen-I", *Ibidem*, pp. 279-283.
38 Cf. the statement of principle in clause 5 of the aforementioned first paragraph of the *Non-discrimination Declaration*.
39 Clause 12.2.2. of the *Declaration*.
40 Clause 3 of the appendix: *Addendum bij de gemeenschappelijke verklaring inzake een non-discriminatiebeleid in het onderwijs, evenees afgesloten in de schoot van de Vlaamse Onderwijsraad op 9 juli 1996*.

and local social evolutions, and that, in order to give these evolutions a chance, the present top-down policy ought to be replaced with a more locally rooted policy.[44] A locally rooted policy framework could also give new meaning to the notion of 'diversity' within the 'unitary school'. In this respect, it is essential that the trust of parents in the school is respected. It could be argued that we would be giving up a particularly valuable basis of our society if parents' right to choose a type of education and a school were no longer recognised or if it were eroded in practice. Therefore, new circumstances should not be allowed to lead to a situation where our freedom of education is, either in fact or by law, transmuted into imposed education at a unitary school.[45] The previously existing 'opposition' between non-governmental and public schools is now placed in a different context, in part because private-law Islamic schools are not a self-evident option. To what extent should contemporary public education opt for a new interpretation of the notion of the 'unitary school' in which cultural diversity is actively reflected?

Consider the following question: if a public school were to introduce a ban on headscarves for educational reasons, while sufficient alternatives are available to parents in order for them to exercise their right to choose a school freely, could we rightly speak of a (possible) infringement upon the freedom of school choice? Does the introduction in certain public schools of a ban on the wearing of a headscarf for educational reasons jeopardise the "neutrality" of the entire public school network?

The invocation of the notion of the *equivalent alternative* for the passive freedom of education is not an uncommon construction in educational law and it can in fact underpin a policy response. The ECHR, too, has ruled in matters relating to the right to education that the freedom of school choice is guaranteed if parents have an alternative at their disposal that meets the requirements of their religious conviction. Moreover, the ECHR has also ruled in such cases that the fact that exercising this free choice may cause an additional cost is irrelevant: "*Although recourse to these schools involves parents in sacrifices which were justifiably mentioned by the applicants, the alternative solution it provides constitutes a factor that should not be disregarded in this case*".[46] Under (Belgian and) Flemish constitutional education law, such an approach would be deemed too minimalist.

B. The exercise of religious and ideological rights and local consultation

7. The issue touches upon other principles if the wearing of a headscarf has no religious significance. If the headscarf merely serves a materialistic purpose or if it is a material symbol, it may, for example, be seen as a manifestation of status and wealth. Particularly in the past, clothing could certainly reveal the class or social group to which one belonged. The wearing of a headscarf may also be a fashion statement, as may become apparent in the choice of fabric or in the manner that it is tied or pinned. Or it may be worn as headgear to protect against the cold or the sun, just like hats, caps, headbands or shawls. The headscarf can further be used as a means of expressing one's identity, much in the same way as the Mohican hairstyle is identity-related for punk rockers. The purpose of wearing a headscarf is then to show to which group one belongs. However, the headscarf may also be indicative of a certain religious conviction or it may be a means of cultural expression for a certain ethnic group. The notion of a group is inextricably connected with the phenomenon of social control: a code to which one must adhere in order to belong to the group.

To the extent that headgear is an expression of status, a fashion statement or a means of protection, few problems arise. Usually, such issues are dealt with in the school regulation.[47] If, however, the headgear is a means of religious expression or identity, it can meet with (other) objections: the headscarf may be experienced as a threat. However, other fundamental rights are also at stake.

In the Netherlands, if a girl or woman claims to wear a headscarf because of her Muslim faith, then the *Commission for Equal Treatment* considers the wearing of the headscarf to be a direct expression of religious conviction.[48] The fact that other Islamic women choose not to wear a headscarf is considered irrelevant.[49] A regulation or action

44 JANSSENS M., KESTELOOT Chr., VERLOT M., *Eindrubriek van het non-discriminatiebeleid. Onderzoek uitgevoerd t.o.v. de Vlaamse minister van Onderwijs*, March 2000, p. 48.

45 VAN DER VEN F.W.M., *Openbaar en bijzonder onderwijs samen?*, Groningen 1974, who quotes the words of Idenburg: "in de vrije waarop een volk de vraag van eenheid of verscheidenheid in het schoolwezen oplost, interpreteert het voor zichzelf en de anderen het wezen van zijn bestaan", *Schets van het Nederlandse Schoolwezen*, Groningen, 1964, p. 96, cited by DE GROOF, J., *Recht op en vrijheid van onderwijs*, CIP-ESS, n.d., p. 25.

46 ECHR, Kjeldsen, Busk Madsen and Pedersen v Denmark, App. No. 5095/71, 5920/72 and 5962/72, 7-12-1976, para. 50.

47 Moreover, all too long the criticism was heard that school regulations focused excessively on clothing issues and not enough on educational prescriptions and the implementation of the pedagogical project: DE GROOF J., MAHIEU P., *De school komt tot haar recht. Over de uitoefening van grondrechten in het onderwijs*, Leuven, 1994.

48 See for example: CGB 7 August 1995, judgement 95-31, Rechtspraak Vreemdelingenrecht 1995.

49 CGB 21 March 1997, judgement 97-23.

that prohibits, by law or *de facto*, the wearing of a headscarf is therefore seen to make a direct or indirect distinction on the basis of religion in the sense of the so-called General Law on Equal Treatment (*Algemene Wet Gelijke Behandeling*, henceforth GLET).[47] There is however disagreement over the *chador*. A chador is a veil that covers almost the entire face. It is seen as an expression of religious conviction (if the woman asserts that it is). In the case of this garment, a healthcare school asked for a ruling on the (im)permissibility of a clothing regulation that bans the wearing during classes of any item that make it impossible for others to observe one's facial features. The wearing of the chador was considered to impede the educational process, as this was deemed to rest largely on interpersonal contact between teacher and pupil, in which face-to-face moments play an important part. The Commission ruled that the regulation was a form of indirect distinction, given that it primarily affected persons of a particular religious conviction (i.e. Muslims) (Art. 1 sub c General Law on Equal Treatment). To make such a distinction in an educational context conflicts with art. 4 section 1 sub c GLET, as it is not objectively justifiable (art. 2 section 1 GLET). The Commission[48] felt that the educational motivation was insufficient to motivate the indirect distinction. It also argued that the teachers held divergent opinions on the need for a clothing regulation: some objected to teaching pupils whose face is only very partially visible, others did not. Moreover, there were no indications that the learning process of the pupils in question had been hampered during the period that they had worn a chador. Finally, the Commission considered that it may reconsider its viewpoint if a more students were to cover large parts of their faces, as this could give rise to compelling didactic arguments for (as yet) introducing the clothing regulation.

It is often assumed that the competence to assess whether or not the chador hampers the educational process does not lie with individual teachers, but with the school administration. If responsibility of the school administration must be consistent with the restrictive testing procedure, as the abovementioned Commission put it, is enough room left for the educational institution's own discretion and professionalism? According to European jurisprudence, "the means to achieve an objective must correspond to a real need" (on the part of the institution). The question arises whether the assessment of whether this is the case, within a certain *margin of appreciation*, should not be left exclusively to that institution. It must assure that – even if many pupils were to wear the chador- adequate communication remains possible with these pupils.

IV. Starting points for a principled response – The enforceability of a standard of international law

A) The exercise of religious freedom

Individual and collective exercise – Involvement of the state and of religious communities

8. The two 'elements of response' that have been put forward thus far, i.e. the (in)availability of adequate *alternatives* and the recognition of a margin of appreciation for the school administration, *do not preclude* that a legal rationale needs to be developed that goes beyond casuistry and endeavours to lay a foundation for a universal approach. Therefore – within the scope of the present contribution- a number of starting points need to be delineated sharply. the exercise of religious freedom and of other fundamental rights, a deliberate consideration in the case of limitation of fundamental rights, and the scope or the implications of the neutrality requirement. Subsequently, we shall briefly outline some suggestions for a problem-solving approach.

The wearing of the headscarf at school touches upon the exercise of religious freedom in an educational context. The wearing of certain items of clothing, symbols, jewellery even, and – as the case may be- the headscarf is or may be considered by people belonging to a particular ideology[49] to be a *religious duty*. This is hardly new or surprising: Jewish yarmulkes, the hoods of nuns, the Christian crucifix, Sikh turbans, the Islamic chador, and the headscarf have traditionally been prominent in the debate on the pluralistic society and the integration issue. The societal context has, however, turned the headscarf into a hot topic of debate. It would appear increasingly

[47] CGB 17 October 1996, judgement 96-85; CGB 3 February 1997, judgement 97-14; CGB 9 November 1998, judgement 98-120; CGB 22 December 1999, judgement 99-103; Rechtspraak Vreemdelingenrecht 1999, 100.
[48] CGB 6 September 2000, judgement 2000-63 (verbod op Chador niet verenigbaar met Algemene Wet Gelijke Behandeling), RR 1995-2000, no. 566
[49] Referred to in Belgian administrative jargon as '*ideologische of filosofische*' or '*levensbeschouwelijke strekkingen*'.

to be becoming a political rather than an ideological (and certainly not an educational) topic, while government action is threatening to blur this distinction.[50]

Even though it concerns a certain interpretation of Islam (or Islamic doctrine), the wearers of the headscarf may call on their *right to religious freedom*.
The active exercise of this freedom guarantees religious and ideological pluralism, a cornerstone of European society. *It would appear that, in various countries, precisely these values are under threat, while freedom of religious conviction remains a condition for a societal consensus.*
In this context, we refer to the collective exercise of religious freedom and the relation between the churches and the civil authorities. As in most other European Member States, there are two predominant principles to take into account: mutual independence on the one hand and forms of cooperation or recognition on the other. This certainly holds for Belgium, where it is an important aspect of the positive attitude with which the State has traditionally approached religious, ideological and philosophical convictions[51]. One of the aspects of the neutrality requirement for the State is that the authorities should observe the greatest possible restraint vis-à-vis the so-called 'truth value' of religions, and should not hazard any attempt at appreciation of religious content[52]. This also holds with regard to membership of any denomination and its possible impact on the pedagogical project.[53] The State will refrain from commenting on religious prescriptions, including if they concern aspects of dress. It should recognise that such regulations are justified by the freedom of religion and should merely be concerned with assuring that the rights of others are not violated by them[54]. Thus, the wearing of the headscarf or kippah (a ritual head garment for Jewish men) cannot be catalogued as an unwarranted act (or error) in itself. Belgian jurisprudence has ruled in this sense on numerous occasions[55].

9. The freedom to practice one's religion or to express one's opinion through *worship in an educational context* would appear to pose few problems[56]. In a sense, it is guaranteed by the formal involvement of the recognised religions in the establishment, the organisation and the supervision of religious instruction in official education. The *facilitating* and *positive* attitude of the civil authorities may pride itself on a consistency in Belgian educational law and administrative practice[57]. The government recognises the positive contribution of confessional and non-confessional communities and this is regarded as a touchstone in the general *cooperative* interaction between religions and the State. Confrontations with regard to the question of whether schools should provide prayer rooms so that pupils and students could worship, together or individually, never materialised. For that matter, such provisions would need to respect the equality of the various religions, as laid down by national (education) law[58], and equal access for all should not be compromised, nor, finally, should the pluralistic concept of the school be undermined under any circumstance. This also holds with regard to the question of whether schools should perhaps pay greater attention to the religious feast days of the various creeds and to optional holidays.

The limitation of fundamental rights

10. Thus, the headscarf issue also touches upon the internationally recognised freedom of religious conviction or expression of opinion, in relation to both its practical application and the maintenance of commandments and prescriptions. In this context, the distinction between types of law is useful. *Absolute* rights can never be subject to limitations; *qualified* rights can. It is up to the national courts of law to assess whether a decision, law or policy complies with this condition[59]. The ECtHR has ruled that the member states are better able to assess local needs and conditions. If it concerns a qualified right, the onus of proof lies with the authorities, who must

50 Cf. the poignant remark that "... all too often a state seeking to suppress religious freedoms characterizes the activities of religious groups and leaders as impermissible political action or subversion", SULLIVAN D.J., 'Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination', *Am. Journal International Law*, vol. 82, 1988, p. 504.
51 See among others De beschrijving van de ideologische en filosofische stromingen in België. Een inleiding, in ALEN A., SUETENS L.P., *Zeven kneilpunten na zeven jaar staatshervorming*, Antwerpen, 1988.
52 E.g. ECHR, Metropolitan Church of Bessarabia and Others v. Moldova, App. No. 45701/99, 13-12-2001, para. 115 ff.
53 Antwerp, 19 December 2000, *T.O.R.B.*, 2000-2001, no. 1, p. 314. Membership of a religion or a community within a religion is an autonomous matter of that religion: only the religious authorities possess the competence to take decisions on such issues. In this particular case, membership of Shomre Hadath was not regarded to be an acceptable ground for refusing enrolment at the Jewish school concerned.
54 See *infra*.
55 See among others Labour Court of Charleroi, 26 October 1992; also still worth reading is BLAISE P., DE COORDEYTER V., 'L'Islam et l'école: anatomie d'une polémique', *C.H. CRISP*, 1990, no. 1270-1271.
56 EHRM, Manoussakis And Others v. Greece, App. No. 18748/91, 26-09-1996, EHRM, Chappell v. The United Kingdom, App. No. 12587/86, 14-07-1987.
57 DE GROOF J., *Het recht op en de vrijheid van onderwijs*, Brussel, 1984, and *id., De overheid en het gesubsidieerd onderwijs*, Brussel, 1985.
58 Cf. DE GROOF J., MARTINEZ LOPEZ-MUNIZ J.L., LAUWERS Gr., *Religious Education in Public Schools. Comparative Studies*, Springer, publication forthcoming.
59 In other words, a matter of "margin of appreciation": cf. for example ECHR, Hatton and Others v. the UK, App. No. 36022/97, 02-10-2001 & 7-2003, para. 101.

demonstrate that the limitation imposed is justified and proportional[60]. In other words, the European Convention of Human Rights (henceforth the Convention) is interpreted here in the light of contemporary reality.[61]

The purpose of the European Convention on Human Rights is, first and foremost, to offer protection against any direct interference on the part of government with the private sphere. However, in cases where (national and other) constitutional systems require an active intervention by government in order to guarantee an effective compliance with the freedom of religion, the jurisprudence by the ECHR is rather rudimentary.[62] The *contemplative aspect* of freedom of religion cannot be restricted, unless the State avails itself of the right of derogation (Article 15 of the Convention). The *expressive aspect*, on the other hand, may be limited by government. Those calling on their religious conviction in order to obtain exemption from a regulation imposed by government must be able to provide evidence that the manner of expression is *prescribed* by their religion, rather than merely "recommended".[63]

Article 9 paragraph 2 of the Convention steers a middle course between prescriptions that "are necessary in a democratic society" on the one hand and the protection of particular rights on the other. Freedom of religious expression can only be restricted if such limitations are prescribed by law,[64] if they are necessary in a democratic society,[65] and if they are in the interest of public safety and the protection of public order,[66] health[67] or morals[68], or for the protection of rights or freedoms of others.[69] Governments have a certain margin of appreciation[70] – except in the case of an apparent violation of rights[71]. In the event of a conflict between the so-called public interest on the one hand and personal rights relating to conscience and religious conviction on the other, one should not automatically assume that the former deserves precedence[72]: they should be weighed against each other with care. The ECHR, however, tests whether any measures taken on the basis of the margin of appreciation comply with the conditions of article 9. *"Another way of describing the play of the ECHR in this context is to say that the margin within which States may opt for different fundamental balances between government and individuals. It defines the area within which fundamental boundaries may be drawn."*[73]

11. This margin of appreciation allows a contextual interpretation of freedom of religion[74]. The role of religion(s) within society is experienced differently in each country[75] and moral standards do not comply[76] with a uniform European conception[77]. The appreciation of religious freedom should be considered in the light of differences in the relationship between the Church and the State[78] that are inevitable because they are historical and are essentially reflected in education[79]: the Anglican model (State church in the UK), the principle of *Laïcité* in France (separation between State and Church), and the more cooperative model that is applied in Belgium (a system of cooperation between the State and several religious communities). Nevertheless, common patterns can be

60 "Onus of proof", see for example ECHR, Handyside v. the United Kingdom, App. No. 5493/72, 7-12-1976, para. 48; ECHR, Hatton and Others v. the UK, App. No. 36022/97, 02-10-2001; 8-7-2003, para. 101

61 "Living instrument", see for example ECHR, Handyside v. the United Kingdom, App. No. 5493/72, 7-12-1976, para. 48; ECHR, Hatton and Others v. the UK, App. No. 36022/97, 02-10-2001; 8-7-2003, para. 101.

62 EVANS, CAROLYN, *Freedom of Religion Under the European Convention on Human Rights*, Oxford, Oxford University Press, 2001, p. 67-74. A first step towards a change in attitude on the part of the ECHR is taken in ECHR, Serif v. Greece, App. No. 38178/97, 26-01-1999.

63 This is the so-called "necessity test". ECHR, Pat Arrowsmith v. the United Kingdom, App. No. 7050/75, 12-06-1979.

64 ECHR, Kokkinakis v. Greece, App. No. 14307/88, 25-05-1993.

65 ECHR, Handyside v. the United Kingdom, App. 5493/72, 7-12-1976.

66 Ouhlarouda 2nd Divine Light Zentrum v. Switzerland, App. No. 8118/77.

67 FAWCETT, J.E.S., *The Application of the European Convention on Human Rights*, Oxford University Press, 2nd ed., 1987, pp. 235-250.

68 For a critical remark about morals, see United Nations Human Rights Committee, General Comment No. 22 on Article 18, para. 8.

69 ECHR, Kokkinakis v. Greece, App. No. 14307/88, 25-05-1993.

70 HOWARD-CHARLES YOUKOW, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, Kluwer Law International, 1996; O'DONNELL THOMAS, "The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights", in: *H.Urn. Rts Q.*, 1982, 474; JONES TIMOTHY H., "The Devaluation of Human Rights Under the European Convention", in: *PUB. L.*, 1995, 430; MERRILLS J., *The Development of International Law by the European Court of Human Rights*, 2d edition, Manchester, 1993.

71 KRISHNASWAMI A., *Study of Discrimination in the Matter of Religious Rights and Practices*, UN, New York, 1960: "... so obviously contrary to morality, public order, or the general welfare that public authorities are always entitled to limit them or even to prohibit them altogether."

72 According to, among others: TAHZIB B.G., *Freedom of Religion and Belief, Ensuring Effective International Legal Protection*, The Hague, 1996, p. 292 ff.

73 WEILER, JOSEPH H. H., "Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space", in: WEILER, JOSEPH H. H., *The Constitution of Europe*, Cambridge University Press, UK, 1999, pp. 102-129 (107).

74 See, for example, RISS A.C., Permissible Limitations on Rights, in HENKIN L., *The International Bill of Rights: The Covenant on Civil and Political Rights*, 1981, p. 290.

75 ECHR, Murphy v. Ireland, APP. No. 44179/98, 10-07-2003, para. 68.

76 *Adopted by consensus by the European Convention on 23 June and 10 July 2003, submitted to the President of the European Council in Rome.*

77 ECHR, Handyside v. the United Kingdom, App. 5493/72, 7-12-1976, para. 48.

78 See also ECHR, Cha'are Shalom Ve Tsedek v. France, App. No. 27417/95, 27-6-2000, para. 84; ECHR, Wingrove v. the UK, App. No. 17419/90, 25-11-1996, para. 58; ECHR, Manoussakis And Others v. Greece, App. No. 18748/91, 26-09-1996, para. 44; ECHR, Casado Coca v. Spain, App. No. 15450/89, 24-02-1994, para. 55.

79 For an extensive discussion, see both the national reports (volume I and part of volume II) and the synthetic essay in Volume II of the previously mentioned publication by GLENN Ch., DE GROOF J., *op. cit.*

discerned in the relationship between Church and State throughout Europe, including France, arguably the most laicised country in Europe, where forms of cooperation exist even in State-run education.

Even in the *Draft Treaty Establishing a Constitution for Europe*[80], the "specific "and positive contribution from churches and religious associations and communities is mentioned explicitly and it respects the status of religious, philosophical and non-confessional organisations"[81]. However, each Member State is free to delineate the relationships with confessional and non-confessional communities, as well as to outline the neutrality principle for government. Taking into account these different approaches[82], the ECHR has produced a jurisprudence which respects the (evolving) balance between fundamental rights on the one hand and interests that must be protected by national/regional authorities on the other. Thus, the manner in which the fundamental protection developed by the ECHR impacts nationally is dependent upon the specific 'cultural' structure of a country and the national interpretation of 'pluralism' and 'public order'. The balance that needs to be attained between the rights and liberties of different population groups, mutually and in relation to the public interest of a peaceful and democratic society, will therefore perforce vary from country to country. Nevertheless, the international standard, as we have previously mentioned, will be taken into account: '*The state must respect, protect, promote and fulfil the fundamental rights*'. In a young democratic regime, such as South Africa, the conclusion drawn is that the "it may be argued that the right to freedom of religion also requires state involvement in order to facilitate the effective exercise of the right."[83] The South African constitution distinguishes between '*religious observance*' on the one hand and '*religious instruction*' on the other, and it attributes a differentiated regime to these notions. The former encompasses the wearing of any religious symbols, besides, for example, free moments for personal meditation. Thus, it is up to the school administration to 'regulate' within an essential restriction: "Such rules may only regulate the observances and may not prohibit them."[84]

12. If the wearing of a headscarf is considered to be a direct expression of religious conviction, any limitation should be meticulously and objectively motivated. The abovementioned criteria must, moreover, be applied cumulatively. The *necessity requirement*, for example, demands a justification: one must be able to demonstrate that the same objective cannot be attained by means of an alternative measure that is less discriminatory. This requirement alone prevents any competent regulator from outright banning the headscarf. However, other requirements may equally cause problems for the competent authority. A measure, such as the banning of the headscarf, must be *proportional* to the *goal envisaged*, e.g. the proper functioning of the educational process at school, the maintenance of order, or the protection of rights and liberties of fellow-pupils in the case of real or apparent evidence of individual social exclusion or influencing.[85] The goal itself must be *sufficiently relevant (pertinent or weighty), legal and non-discriminatory*. Any attempt to demonstrate the urgent social necessity of a measure must not be based on impressions or insinuations, and all other means to resist the necessity must have failed.

If Muslim girls who do not wear a headscarf are systematically pressurised, blackmailed or despised, one will still need to demonstrate that a general prohibition on the wearing of headscarves complies with all these requirements. In principle, such a State-imposed ban is not out of the question in a democratic society, provided that it meets the conditions imposed, and that the impact of the "*powerful external symbol*" and its *proselytising effect* are beyond doubt[86]. Likewise, the aforementioned ruling by the ECHR in Leyla Sahin v. Turkey, dd. 6 May 2004, tried to argue on the basis of such general principles[87] as the protection of the general interest (avoidance of civil unrest, public order and public safety), and the protection of the rights of others (ensuring peaceful coexistence between students of various faiths, protecting pluralism, preventing proselytism) and to place them in their specific context. The Court ascertained whether a sufficient analysis had been made of the *'local needs*

80 Approved on 18/6/2004, but yet to be singed – scheduled autumn 2004.
81 Art. 51.
82 Cf. http://www.sverigeskyrkan.se/sv/temp/employer.htm
83 FOSTER F.W., MALHERBE R., SMITH W.J., Religion, Language and Education: Contrasting Constitutional Approaches, *Education and Law Journal*, vol. 9, no. 2, July 1999, p. 218; see also MALHERBE R., Human Rights in South Africa: A Preliminary Assessment, in DE GROOF J., MALHERBE R., SACHS A., *Constitutional Implementation in South Africa*, Mys & Breesch publishers, Gent, 2000, p. 113 ff.; MALHERBE R., Education Rights in South Africa, *European Journal for Education Law and Policy*, 2000, no. 1, p. 59 ff.
84 Ibidem, p. 222.
85 PETTITI (the comparison is relevant *mutatis mutandis*) previously drew attention to the danger of the disproportional relationship between the behaviour giving rise to a measure on the one hand and the punishment on the other...". sanction qui porte gravement atteinte à la liberté fondamentale du requérant de manifester sa religion. De plus, une telle sanction se révèle incompatible avec l'esprit de tolérance dont doit faire preuve, de nos jours, une société démocratique. » PETTITI L.E., Liberté de religion. Textes internationaux et convention européenne des droits de l'homme, in *Présence du droit public et des droits de l'homme/ Mélanges offertes à Jacques Velu*, Bruxelles, 1992, vol. III, p. 1853.
86 ECHR, Karaduman v. Turkey, APP. No. 16278/90, 03-05-1993; ECHR, Dahlab v. Switzerland, App. No. 42393/98, 15-02-2001.
87 Cf. Para. 97 ff.

and conditions', as well as the '*initial assessment of the 'necessity' for an interference, as regards both the legislative framework and the particular measure of implementation*'.[88] In concrete terms, the ECHR, like the Turkish Constitutional Court, took account of the fact that the majority of Turkey's population adheres to the Islamic faith. It considered that imposing a ban on the wearing of a headscarf in higher education met a pressing social need, more specifically a need to assure the secularism of the State and to protect citizens who choose not to wear a headscarf, especially since the Turkish court had stated that this religious symbol has taken on political significance in Turkey in recent years and considering the impact of extremist religious movements.[89]

13. The fact that there is no uniformity across the European Union is further illustrated by the explicit exclusion of higher education from restrictive prescriptions concerning conspicuous religious symbols in the aforementioned French law. The *Rapport au Président de la République* of the abovementioned *Commission Stasi* states the following: "*La situation de l'université, bien que faisant partie intégrante du service public de l'éducation, est tout à fait différente de celle de l'école. Y étudient des personnes majeures. L'université doit être ouverte sur le monde. Il n'est donc pas question d'empêcher que les étudiants puissent y exprimer leurs convictions religieuses, politiques ou philosophiques.*"[90]
However, this reasoning also holds for the kind of education that strives towards such an open and pluralistic concept, as is the case within the Flemish Community, certainly vis-à-vis the third grade of secondary education or even earlier, and *a fortiori* with regard to pupils who are no longer of school age.

14. The notion of a '*law*' -as mentioned in the doctrine of the limitation of fundamental rights- does not refer to the formal (yet substantive) act on the part of the legislator[91]. The competent regulator, in conformity with national law[92], may therefore be the school administration.[93] To the extent that the socio-cultural context differs significantly between neighbourhoods depending on the degree of urbanisation, or between educational institutions themselves, a general, decretal order would appear harder to argue[94]. Responsibility for the fulfilment of the pedagogical project remains with the organising authority. This also applies to neutral education, as an implementation of the relevant fundamental legal standards and, as the case may be, under supervision of the judge.
In Belgium, these principles are laid down in Article 24 of the Belgian Constitution and in implementation of it. *The community guarantees the freedom of choice of the parents. The community organises neutral education. This neutrality implies, among other things, respect for the philosophical, ideological or religious convictions of the parents and the pupils.* In Flanders, "official education (...) is 'the answer to the freedom of education' for those parents who want their children to grow up in a school environment where they can meet children educated in accordance with other religious convictions, and for minorities who, without official education, would be forced to attend school at an institution that explicitly belongs to a different ideological or social persuasion."[95] We shall return to the issue of the scope and the nature of the neutrality of community education later.

B. Respect for religious or ideological convictions in education – The primacy of pluralism

15. The European Court reiterates in a number of judgements that without "pluralism, tolerance and broadmindedness" there can be no democracy. The obligation to respect religious convictions in an educational context therefore lays a special responsibility on the shoulders of the authorities, which admittedly is interpreted rather minimalistically in European case law. Article 2 of the *First Protocol* to the European Convention on Human Rights was first refined in the so-called *Belgian Linguistic Case*[96]. The ECHR ruled that the article guarantees, in the first place, (1) the right of access to educational institutions existing at a given time, (2) the right to effective education and (3) the right to official recognition of the studies which a student has completed. "*By binding*

88 Para. 109.
89 Para. 108 ff.
90 Aforementioned report, p. 58, under para. 4.2.2.2.
91 Cf. ECHR, De Wilde, Ooms and Versyp v. Belgium, App. No. 2832/66, 2835/66, 2899/66, 18-06-1971, para. 93; *Barfod v. Germany*, dd. 25 March 1985, para. 46; ECHR, Sunday Times v. UK (no 1), App. No. 6538/74, 26-04-1979, para. 47; ECHR, Sahin v. Turkey, App. No. 44774/98, 29-06-2004, para. 72 ff.
92 ECHR, Kruslin v. France, App. No. 11801/85, 24-04-1990, para. 29; ECHR, Casado Coca v. Spain, App. No. 15450/89, 24-02-1994, pa. 43.
93 See *supra*.
94 Which is not to say that a "child impact report" should be considered, as the intended measure apparently touches directly upon the interest of the child: see the decree of 15 July 1997 concerning the introduction of a child impact report and the testing of government policy for compliance with children's rights.
95 The School Pact does not restrict parents' free choice of educational institution to a choice between a "confessional" and a "non-confessional" institution. It also leaves parents free to opt for a school that does not present itself as either confessional or non-confessional. DE GROOF, J., *De overheid en het Gesubsidieerd Onderwijs*, CIPESS, s.d., p. 12.
96 ECHR, Case Relating to Certain Aspects of the Law on the Use of Languages in Education in Belgium, App. No. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, 23-07-1968.

themselves not to "deny the right to education", the Contracting States guarantee to anyone within their jurisdiction "a right of access to educational institutions existing at a given time" and "the possibility of drawing", by "official recognition of the studies which he has completed", "profit from the education received"."[97]

According to the ECHR, it is essential that, within the existing 'public' (State-run) educational system, religious convictions should be respected: "*It (Article 2 Protocol 1) enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire State education programme.*"[98] Special concessions to meet the requirement of respect may take the shape of exemptions for religious instruction.[99] Only if parents want their child to be exempt from religious teaching must their request be respected.[100] As regards other subjects on the curriculum, different interests may be weighed against each other. With regard to sexual education, for example, it will be tough to exempt a child if the course is part of an obligatory programme and is restricted to biological aspects. By analogy, a child may, in principle, not be exempt from physical education if the course is part of the mandatory curriculum. "*It follows in the first place from the preceding paragraph that the setting and planning of the curriculum fall in principle within the competence of the Contracting States. (...) It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable. (...) The second sentence of Article 2 (P1-2) implies on the other hand that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded.*"[101]

Thus, in drawing up the curriculum, the State has a considerable margin of appreciation, but it is not infinitely wide. The ECHR defines its boundary as follows: "*Examination of the legislation in dispute establishes in fact that it in no way amounts to an attempt at indoctrination (...)*".[102]
In the search for a healthy balance, the ECHR also involves the parents and the effort that may be expected from them: "*It does not affect the right of parents to enlighten and advise their children, to exercise with regard to their children natural parental functions as educators, or to guide their children on a path in line with the parents' own religious or philosophical convictions.*" This means that limitations imposed by the school, or certain courses on the school curriculum that represent a certain value judgement without the intention of being indoctrinating, are permitted, as they do not violate parents' right to educate their children in accordance with their own beliefs outside of school.

The ECHR believes that the availability of alternatives for the education of children is an important factor in the weighing up of interests, as is apparent from the rulings in *Kjeldsen, Busk Madsen and Pedersen*[103] and *Alonso and Merino*.[104] The State must, in any case, respect the rights of parents' by granting them the freedom to organise private, non-official education.[105] This implies that the State may not prohibit the establishment of such schools, without, at least in implementation of the European Convention on Human Rights, being compelled to set up such a non-official school itself or to subsidise a certain type of education to the same extent as State-run education."[106]

A joint reading of the rights mentioned in paragraphs A and B leads us to conclude that religious or philosophical rights in education should enjoy special protection: the exercise of freedom of conscience and expression can only be restricted under very exceptional circumstances[107] and the right to education leads to an explicit respect for personal philosophical and ideological convictions. Belgian and Flemish constitutional law has made more explicit the European 'minimum' by means of a positive incorporation of the neutrality principle, as we shall argue later on.

97 ECHR, Kjeldsen, Busk Madsen and Pedersen v Denmark, App. No. 5095/71, 5920/72 and 5926/72, 7-12-1976, para. 52, with reference to the "Judgment of 23 July 1968 on the merits of the "Belgian Linguistic" case
98 ECHR, Kjeldsen, Busk Madsen and Pedersen v Denmark, App. No. 5095/71, 5920/72 and 5926/72, 7-12-1976, para. 51.
99 ECHR, Valsamis v. Greece, App. No. 21787/93, 18-12-1996, paras. 36-39.
100 ECHR, Valsamis v. Greece, App. No. 21787/93, 18-12-1996, paras. 36-39.
101 ECHR, Kjeldsen, Busk Madsen and Pedersen v Denmark, App. No. 5095/71, 5920/72 and 5926/72, 7-12-1976, para. 53.
102 ECHR, Kjeldsen, Busk Madsen and Pedersen v Denmark, App. No. 5095/71, 5920/72 and 5926/72, 7-12-1976.
103 ECHR, Kjeldsen, Busk Madsen and Pedersen v Denmark, App. No. 5095/71, 5920/72 and 5926/72, 7-12-1976, para. 54.
104 ECHR, Jimenez Alonso Et Jimenez Merino v. L'Espagne, App. No. 51188/99, 25-05-2000.
105 ECHR, Ingrid Jordebo Foundation of Christian Schools and Ingrid Jordebo v Sweden, App. No. 11533/85, 06-03-1987.
106 See on this matter GLENN CH., DE GROOF J., *op. cit.*, vol.II.
107 See also VAN DER SCHUEREN G., Het concept van democratie in het EVRM, in ADAMS M., POPELIER P., *Rechten democratie. De Democratische verbeelding in het recht*, Antwerpen, 2004, p. 566.

It would appear to be a precarious undertaking to try and bring a general preventative ban on the wearing of the headscarf in line with the criteriology that applies to the limitation of fundamental (religious) rights. The French *Conseil d'Etat* therefore persisted for years with a case-by-case approach and rejected any regulation according to which "*"le port de tout signe distinctif, vestimentaire ou autre, d'ordre religieux, politique ou philosophique est strictement interdit*" is unlawful: "*...que par la généralité de ses termes, ledit article institue une interdiction générale et absolue en méconnaissance des principes ci-dessus rappelés et notamment de la liberté d'expression reconnue aux élèves dans le cadre des principes de neutralité et de laïcité de l'enseignement public*"[108]

Elsewhere, the Council of State asserted that "*"une interdiction générale et absolue est contraire au principe de notre Droit Public lorsque de telles interdictions s'appliquent à des activités licites, encore plus à des libertés; elles sont illégales.*"[109]

The so-called *Conclusions des commissaires du Gouvernement* stated among other things that "*... il nous paraît difficile d'admettre que le port ostentatoire du foulard puisse à lui seul, en l'absence d'autres éléments de fait, constituer un acte de prosélytisme et encore moins de prosélytisme abusif*».[110] The possibility of granting exemptions for certain courses, on the other hand, was approached very restrictively.[111]

C. The 'parallel functioning' of other relevant provisions of international law

Common European values

16. Other fundamental rights and liberties are also at stake. One could speak of a 'parallel functioning' of basic rights. Standards of international law emphasise the *non-discrimination* and the *equality* principles and the rights of *minorities*.[112] The application of these principles may contribute to the debate on the headscarf. Within the scope of the present article, we merely mention a few aspects.

For many young Muslim women, the wearing of the headscarf is a way of expressing their religious identity and emancipation, rather than their 'submission' under the very traditional interpretation of the relationship between man and woman. Government, including school administrations, should refrain from judging in the name of others and gauging people's personal convictions. This attitude of religious *diffidence* may only be shed if there is certainty that pupils are being coerced. After all, democracy also presupposes acceptance of other people's choices. This is referred to as *mutual tolerance*. International treaties and national policy documents emphasise the role that school plays in instilling upon pupils the values of tolerance and human rights.

As long as one respects the freedom of others, one is entitled to demand respect from others for one's own opinions. Thus, *freedom of expression* entails the right to question prevailing opinions. The jurisprudence of the ECHR on art.10 of the Convention is explicit and consistent: protection should be offered to ideas "*that offend, shock and disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without there is no democratic society.*"[113] The Court of Arbitration has tried to echo this formulation in its own rulings.[114] This does not imply that one cannot impose boundaries on the exercise of these rights. Freedom of expression can be restricted in conformity with the criteria stemming from art.10, second paragraph of the Convention and art. 19, third paragraph of the International Covenant on Civil and Political Rights, which are entirely comparable to those of the previously mentioned art.9, second paragraph of the Convention.

17. The boundaries of the margin of appreciation of the individual Member States is moreover influenced by a number of factors that are beyond the control of the national lawmaker but that nevertheless impact on the latter's legislative activities. The *Charter*, as formulated under the *Treaty of Nice*, is already applied marginally on the part of the European judge and is to be confirmed by the *European Constitution*.

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[108] Conseil d'Etat, 2 November 1992, Kherouaa et autres; see SABOURIN P., Note de Jurisprudence: L'affaire du Foulard Islamique, *Revue du Droit Public et la Science Politique en France et à l'Etranger*, 1993, p. 220 ff.

[109] Conseil d'Etat, 10 March 1995, M. et Mme Aoukili, *L'Actualité juridique – Droit Administratif*, 20 April 1995, p. 334.

[110] Conclusions des commissaires du Gouvernement, Revue du Droit Public et de la Science Politique en France et à l'Etranger, 1995, p. 1357.

[111] *l'Etranger*, 1995, p. 1357. "L'obligation est totale. Il ne peut être question de refuser d'étudier certaines parties des programmes. Une absence, même momentanée, sans motif légitime, est passible de sanction, à l'égard de l'élève et de sa famille (éventuellement suppression des prestations familiales)". ; BASDEVANT-GAUDEMET B., Le statut juridique de l'Islam en France, *Revue du Droit Public et de la Science Politique en France et à l'Etranger*, 1996, p. 374.

[112] Which will not be examined further in the present contribution.

[113] Basic ruling: ECHR, Handyside v the United Kingdom, App. No. 5493/72, 7-12-1976, par. 49.

[114] Ruling no. 10/2001, 7 February 2001, par. B.4.8.1.

According to article 2 of the draft European constitution, the characteristics of the EU member states are *pluralism*, tolerance, justice, solidarity and *non-discrimination*. *Unity in diversity* is the European motto. Therefore, with a view to the realisation of this 'unity in diversity', one may expect that, *within each member state*, space would be offered to the various religions by means of a *positive recognition* of differences in ideological and philosophical convictions, rather than a *denial of diversity*. Both this collective dimension[115] as the application of individual liberties[116], including of (the draft) article II-14 regarding the right to education, is encompassed in the *Draft Constitution*. According to the commentary on article 14, the text exudes both the spirit of the constitutional traditions that the Member States have in common and that of article 2 of the additional protocol to the European Convention on Human Rights.[117]

This *positive* interpretation of pluralism must also be apparent in the form and the content of official education. Pupils must be able to express their differences within the broader context of the school. The question therefore arises whether a Member State that excludes Islamic girls from public education because they wear headscarves perhaps sends a message to these girls that, by wearing a garment which expresses their Muslim identity, they cease to be European. Is it not so that integration of different groups into a multicultural and pluralistic society is, first and foremost, achieved by offering everyone an opportunity to obtain a good education and the prospect of proper employment, without disregarding the identity of the pupil?

The Rights of the Child

18. Unlike the ECHR, the *United Nations Committee on the Rights of the Child* and the *United Nations Committee on Economic, Social and Cultural Rights* have expressed their concern about the imposition of any ban on the wearing of the headscarf at schools.
The right to education is not only a matter of access (Article 28) but also of content. Article 29[118] of the Convention on the Rights of the Child adds a qualitative dimension to article 28, i.e. the need for education to be child-oriented. Globalisation causes tensions, between the global and the local, the individual and the collective, tradition and modernity, competition and equal chances, etc.[119] Article 29 (1) stipulates that education should promote a broad range of values that go beyond the boundaries of religion, nation and culture. At first glance, this objective may lead to conflict, e.g. in the case of the promotion of the child's own cultural identity, between the language and the values from which it hails on the one hand and the national values of the country in which the child lives and other civilisations on the other. The significance of this stipulation lies in its emphasis on the need for a balanced approach to values within education and the promotion of dialogue and respect for others. Children do not lose their rights when they walk through the school gate. Their rights must be guaranteed in the educational process, the pedagogical method, the environment in which education is provided.

Children must be allowed to express their opinions freely in accordance with article 12 (1) and to participate in a school life that respects the child's dignity. According to article 2, any form of discrimination, be it overt or covert, is in violation of the dignity of the child. Denying access to education is primarily in contravention of article 28, while there are numerous ways in which article 29 (1) is violated, with similar effect.[120] (...) Education must be organised in a manner that enhances tolerance. Promoting these values must, first and foremost, focus on the child's own community. If States fail to incorporate the objectives of article 29 into national law, it is unlikely

115 See also the previous section, with reference to preamble and article 52.
116 Art. II-70, reiterating art. 9, 52 ECHR.
117 JHR, Charte 4423/00 int/BAR/fdc, p. 26.
118 Article 28 should be interpreted within the context of the convention as a whole, including the stipulations regarding freedom from discrimination (art. 2), the best interests of the child (art. 3), the right to life, survival and development of the child (art. 6), the right to express an opinion and to have that opinion heard (art. 12), the rights of the parents (art. 5 and 18), freedom to seek, receive and impart information (art. 13), freedom of thought, conscience and religion (art. 14), access to media and information (art. 17), the rights of disabled children (art. 23), the right to the highest attainable standard f health (art. 24), the right to education (art. 28), the right of children of minority communities to enjoy their own language and culture (art. 30).
119 United Nations Educational, Scientific and Cultural Organization, *Learning: The Treasure Within*, Report of the International Commission on Education for the 21st Century, 1996, pp. 16-18.
120 "Quand l'interdiction du foulard entrera en vigueur, les filles que leurs parents forcent à porter le foulard risquent de sortir de l'enseignement public et d'être envoyées dans des écoles religieuses. Elles peuvent se retrouver mariées très jeunes à un homme que leurs parents jugent convenable et être mères de plusieurs enfants à 30 ans. Si les filles de ces milieux doivent obtenir plus de chances de décider activement de leur avenir, seule l'éducation dans un environnement culturel plus ouvert leur donnera ces chances", ANTHONY GIDDENS, "Voile islamique : la France sur la mauvaise voie", in: *Le Monde*, 14.01.2004.

to be attained in education policy. The school environment itself must promote tolerance between all ethnic, national and religious groups and persons of indigenous origin on grounds of article 29 1b and d.[224]
We look forward with interest to the implementation of art. 22*bis* of the Belgian Constitution[225], which stipulates that each child has the right to respect for its moral, physical, mental and sexual integrity.

Within the French Community, pupils' rights on such matters were clarified after an interesting exchange of ideas regarding the scope of the neutrality principle (at official schools) within the Community. This was occasioned by the recurring question regarding the ideological nature of official subsidised education. This debate also led to a new regulation in Flanders.
The recommendation from the Council of State on the so-called *Avant-projet de décret 'organisant la neutralité inhérente à l'enseignement officiel subventionné et portant diverses mesures en matière d'enseignement'* confirmed the view that the constitutional lawmaker had not wanted to impose neutrality upon municipal and provincial schools[226] and referred to its earlier recommendations[227] and legal advice obtained[228] to advocate what it called *'une neutralité moins contraignante'*, in particular based on the mandatory options in consequence of art. 24, para.1, clause 4 of the Constitution. By decree, the public-law institutions may be compelled "*à établir une sorte de glacis protecteur de la liberté de consciences des élèves.*»
Article 4 of the decree of 3 July 2003 stipulates the following: "*L'école officielle subventionnée garantit à l'élève ou à l'étudiant le droit d'exercer son esprit critique et, eu égard à son degré de maturité, le droit d'exprimer librement son opinion sur toute question d'intérêt scolaire ou relative aux droits de l'homme.*"
The article specifies in paragraph 2 what this entails and what are the (traditional) boundaries, and it also refers to the internal regulation for the fixing of the modalities.[229] Finally, the article asserts that "*La liberté de manifester sa religion ou ses convictions et d'en débattre, ainsi que la liberté d'association et de réunion sont soumises aux mêmes conditions*», and that « *aucune vérité n'est imposé aux élèves, ceux-ci étant encouragés à rechercher et à construire librement la leur.*»

The general prohibition of discrimination

19. The new protocol 12 to the European Convention on Human Rights introduces a general prohibition of discrimination. Probably under the influence of this protocol (which is not in force yet, since it has only been ratified by four Member States), the ECHR has slowly progressed towards a *positive obligation* for States to take action in order to enforce a prohibition of discrimination. What consequences might this evolution have?
On the one hand, if a female student claims that she wears the headscarf as an expression of her Islamic faith, this should in principle be adopted as the starting point.[230] The fact that other female students do not wear a headscarf would then be irrelevant. Any decision to base access to education on a distinction between female students who do and those who do not wear a headscarf is then to be regarded as a distinction on the basis of religion. On the other hand, States enjoy a certain margin of interpretation in assessing such distinctions in the interest of, among other things, public order, which is thus interpreted nationally.
The ECHR has, however, begun to interpret the notion of public order differently: "*Although the court recognises that it is possible that tension is created in situations where a religious or any other community becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.*"[231]

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224 CRC/C/128, 3 September 2002, Committee On The Rights Of The Child, 21 May-7 June 2002, Report On The Thirtieth Session "In this regard, the Committee takes note of General Comment No. 13 (1999) of the Committee on Economic, Social and Cultural Rights on the right to education, which deals, *inter alia*, with the aims of education under article 13 (1) of the International Covenant on Economic, Social and Cultural Rights. The Committee also draws attention to the general guidelines regarding the form and contents of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention, (CRC/C/58), paras. 112-116".
225 Inserted into article for a Constitutional Amendment of 23 March 2000.
226 Avis 35.846/2 of 17 and 22 September 2003. See *Doc*, Parlement de la Communauté Française, no. 450-1, S.2002-2003, 23 October 2003.
227 Avis 25.108/2 and 25.109/2 of 1 July 1996. *Doc*, C.C.F., no. 218/1, S. 1994-1995 and no. 209/2, S.E. 1995.
228 Recommendations by Delpérée and Uyttendale, recorded in the DARAS report by the working committee '*Neutralité de l'enseignement officiel subventionné* and the working group '*Extension de la neutralité à l'enseignement officiel subventionné*', published in *Doc*, C.C.F., 1998-1999, no. 209/1, p. 62 ff.
229 More in particular, "*Ce droit comprend la liberté de rechercher, de recevoir et de répandre des informations et des idées par voie ou moyen du choix de l'élève et de l'étudiant à condition que soient sauvegardés les droits de l'homme, la réputation d'autrui, la sécurité nationale, l'ordre public, la santé et la moralité publiques. Le règlement d'ordre intérieur de chaque établissement peut prévoir les modalités selon lesquelles les droits et libertés précités sont exercés.*"
230 This would imply that the ECHR would no longer concern itself with what is or is not an expression of faith. As such, it would evolve towards the view point of the US constitutional court : "[C]ourts are not arbiters of scriptural interpretation", *Thomas v. Review Bd. of Indiana Employment Sec.*, 101 S. Ct. 1425, 1431 (1981).
231 ECHR, Serif v. Greece, App. No. 38178/97, 26-01-1999.

The indirect restriction of mobility

20. The headscarf issue may be problematic, not only in view of the European Convention on Human Rights, but also in the light of European Community law.
Freedom of movement of persons within Europe is one of the fundamental pillars of the European Union. When introducing new legislation, the national lawmaker must always –even in areas that belong to the lawmaker's exclusive competence- take into account the supranational institutions, in particular the four pillars of the European Union (i.e. freedom of persons, goods, services and capital) and the principles of non-discrimination. Freedom of movement is an integral aspect of the internal market of the Union. Part 1 of the Treaty defines freedom in general terms as well as the basic principles of the European Union.[29] Part 2 of the EU Treaty deals with citizenship of the Union. Article 18 is of great importance, as it introduces the potential right for every citizen of the EU to move and reside freely within the Union.
If certain Member States were to ban the wearing of headscarves in public schools, this may significantly –though indirectly- limit citizens' freedom of movement. One could, in theory, consider exemptions from the prohibition on the wearing of a headscarf at school for female students or for the children of workers from another Member State. However, this would be in violation of the equality principle for all citizens of the European Union as laid down in the Treaty Establishing the European Community.[30]

V. Fundamental rights in neutral education- Clothing rules for certain categories – National applications

A. The proper functioning of public services and compliance with the equality principle

21. It is generally accepted that persons in an exceptional power relationship can call on fundamental rights, yet that specific restrictions apply that are connected with their special status.[31] This is in line with European jurisprudence.[32] Such restrictions are required in order to allow public services to function properly. Performing these functions implies not only certain rights but also duties connected with the office. Deontological duties may in turn imply a restriction of freedom of expression, while specific duties may bring with them restrictions on religious worship or conviction.
For example, certain categories of people in an authoritative position are expressly bound by the requirement of *impartiality*. The equality principle demands that public provisions are organised in a way that respects the ideological and philosophical convictions of all. The trust that people must be able to put in public services requires a certain amount of restraint, as specified in general, statutory or deontological rules whereby the specific nature of the position may also come into play.[33]
These principles are systematically refined by or pursuant to the law or administrative jurisprudence. They are also assumed to apply in education,[34] particularly in the case of staff at official schools[35]. The *legal position* of staff in education contains a catalogue of rights and duties[36].

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29 The purpose of the principle of legality, the principle of subsidiarity and the principle of proportionality, as laid down in article 5, is to divide competence between the Union and the Member States. Furthermore, there is the principle of loyalty, as laid down in article 10, which emphasises cooperation within the EU. Finally, there is the non-discrimination principle, which is laid down in article 12. This is a *lex generalis* and can be combined with other, more specific, stipulations. Given that it constitutes the fundamental basis of the European Union, it is interpreted by the European Court of Justice.

30 For a legal exposition on this issue, see: DE GROOF J., LAUWERS G., "Vlaamse Identiteitsvorming binnen Europa", in DE GROOF J., JUDO F., STORME M.E. (Ed.), *Vlaming zijn en de Vlaamse en Europese Uitdaging*, Lannoo Campus, pp. 139-159. The non-discrimination principle is laid down in article 12 EU, but the prohibition to discriminate on grounds of nationality is applicable only to citizens of EU Member States: "In the field of application of this Constitution and without prejudice to any of its specific provisions, any discrimination on grounds of nationality shall be prohibited." The *Directive implementing the principle of equal treatment between persons irrespective of racial and ethnic origin* gives the EU the competence to act in the field of non-discrimination at work, in social security, healthcare, education and access to public goods and services. "To this end, any direct or indirect discrimination based on racial or ethnic origin as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries, but *does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third country nationals and their access to employment and to occupation.*" (Preamble to Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, PB L 180/22).

31 See among others VELAERS J., *De beperking van de wijheid van meningsuiting*, Antwerp, 1992, part. II, p. 605 ff.

32 See among others ECHR, Vogt v. Germany, App. No. 17851/91, 26-09-1995; ECHR, Kalac v. Turkey, 01-07-1997.

33 With regard to the prescriptions for journalists of a public broadcaster, see our article 'Le droit à l'information et le devoir d'objectivité du service public de la radiodiffusion, *Administration Publique*, 1985, part 4, pp. 264-289.

34 See, for example, RIMANQUE K., *De levensbeschouwelijke opvoeding van de minderjarige – Publiekrechtelijke en privaatrechtelijke beginselen*, Brussel, 1980, part I, p. 23.

35 See among others DE GROOF J., *Het leveneschouwelijk karakter van de ondernemingsinstellingen*, *Administratief Lexicon*, Brugge, 1985.

36 See, among other publications, the special issue of *T.O.O.R.* on the occasion of the tenth anniversary of the two decrees on the regulation regarding the legal position.

For certain categories, explicit clothing rules apply. The general requirement of the proper functioning of the services implies that items of clothing must not hinder or preclude mutual communication and, a fortiori, identification. It would appear that not only the burka[87], but also the chador are incompatible with this requirement. As a guideline, one could refer to common administrative practice in relation to passport photographs for identity documents: the face, i.e. chin, cheeks, eyes and forehead, must be visible."[88] Art. 15 d) of section III of the circular letter of 7 October 1992 *concerning the keeping of population registers and the register of foreign nationals* stipulates in this context that a photo (for the purpose of an identity card) with headscarf is allowed "for irrefutable religious or medical reasons", on condition that the face (i.e. the forehead, cheeks, eyes, nose and chin) is completely visible. The circular adds that it is desirable but not mandatory that hair and ears should also be visible and that "this solution is only acceptable if the citizens concerned can submit a serious justification".
The Court of Cassation, in its judgement of 22 December of 2000, in which it considers the ruling by the Appeals Court of 14 September 1998, rules that *1. the wearing in public of a headscarf corresponds to the prescriptions of Islam; 2. the defendant has invoked an irrefutable reason and has shown convincingly to belong to the Islamic faith and generally wears a headscarf in public, that she also believes that it is her duty to exteriorise her faith in this manner"*, and concludes on this basis that a serious justification has been submitted for an identity card to be issued bearing a photograph in which she is seen to wear a headscarf and *"that therefore the ruling does not violate any of the applicable legal provisions"*. Several parliamentary debates were subsequently held on how municipal authorities should be instructed on the matter."[89]

Likewise under labour law, the required respect for religious convictions entails that the employer must, in principle, accept any dress that is prescribed by a (earnest) faith of one of his or her employees."[90] It is up to the judge to decide whether ritual clothing is an obstacle to the execution of the labour contract and to weigh up the various rights that are at stake, i.e. the interest of the undertaking must also be taken into account."[91] The ruling by the Labour Court of Antwerp of 3 June 2004 expressed the court's point of view quite unequivocally: social tolerance and the protection of religious minorities require that one take the greatest possible account of religious prescriptions. More specifically, the ruling says that, in practice, the community must allow worshippers, in the assessment of whether the position offered to them is appropriate, to respect the rules prescribed to them insofar as this does not cause an excessive burden on society. The ruling deals in rather great detail with the test of "earnestness" and of "proportionality" that need to be applied in this assessment. With regard to the former, the court reiterates that it must concern a "sincere and earnest conviction that is necessarily connected with an objective and absolute norm that is adhered to by an organised group". In testing the reasonableness, the court makes an essential distinction between serious moral or religious convictions and other motives. Therefore, argues the Court, it is wrong to assess issues of conscience in the same manner as practical objections, and it adds that the result of such an equation would be that issues of conscience are trivialised, so that they are pushed aside as being irrelevant and extremely impractical. As a result of such trivialisations, fundamental rights lose their significance and are violated.
As regards the requirement of proportionality, the Court ruled that the religious prescription for Islamic women to wear a headscarf does not make them unavailable to the labour market, as most professional activities are entirely compatible with the wearing of such attire. Further, it ruled that the federal employment agency RVA could not have taken other measures to allow the unemployed seamstress to comply with the religious prescriptions or to seek another solution.

This viewpoint is all the more relevant because the education system as a whole is committed to recognising *diversity as value added*"[92] and the education community stands behind an open and pluralistic interpretation of its own neutrality"[93].

87 The hijab is a headscarf. The chador is a veil that covers the entire head, shoulders and face with the exception of the eyes. The burka is the Afghan version of the chador: it covers the entire body and also hides the wearer's eyes.
88 Cf. VERTEGEN R., Een grondrecht beschermd bij omzendbrief? Het Hof van Cassatie over de pasfoto's met hoofddoek, *T. Vreemd.*, 2001, 206 ff.; see also MOSSELMANS S., Hoofddoekjesaffaire beslecht? Ja maar ..., *A.J.T.*, 2000-2001, p. 589 ff.
89 See, for example, the Chamber of Representatives, Commission for Home Affairs, General Affairs and the Civil Service of 21 January 2004.
90 CUYPERS D., KEMPEN M., MEDUSEN C., Culturele uitzonderheden in het sociaal recht, in *Rechten verdragen: samenleving. Bijdragen van het Centrum Grondslagen van het Recht, UFSIA*, Antwerpen, 1993, p. 263.
91 Cf. Labour Court of Charleroi, 26 October 1992; Brussels, 10 July 1992; cited by CUYPERS D. et al, *Ibidem*, pp. 263-264.
92 Flemish Education Council, *Diversiteit als meerwaarde, engagementsverklaring van de Vlaamse onderwijsraad*, Brussels, 19 February 2003, and a similar declaration on the part of the Council of Higher Education, 27 March 2004.
93 See *Infra*.

22. Symbols and dress are used to express a distinctive identity.[44] To the extent that pieces of clothing or symbols are the marks of an ideological or philosophical persuasion, another point for debate comes to the fore. More specifically, is it acceptable that a public-sector employee openly confesses to adhering to a certain creed or conviction? As a matter of fact, for quite a long time this was a requirement for certain positions in the cultural sector[45] as well as in educational legislation[46].

The *specific requirement* for teachers to adhere to the neutrality principle *in the exercise of their duties* would appear to us to be an important test. The question then arises whether the pedagogical relationship between teacher and pupil is violated in neutral education or whether the 'pedagogical diffidence' on the part of the teacher is necessarily precluded if the teacher confesses a religion, for example by wearing a headscarf. The conclusion might be that there is nothing to reproach the teacher for and that the ban on the wearing of the headscarf is in fact an intentional process, creating a new inequality of justice, i.e. an exclusive measure on the basis of religion and even gender. Even if it concerns a general stipulation regarding any external sign, in reality it affects mostly women adhering to the Islamic faith.

B. The implications of the open nature of neutral education – The role of the teacher

23. The next step requires an analysis of the neutrality principle itself. To what extent does the present interpretation of this principle - which, as we have demonstrated, can vary in Europe depending on the societal context - enhance or impede reference to '*philosophical, ideological and religious convictions*'. The gradual evolution of the *Neutrality Declaration of 8 May 1965*[47] towards a more positive interpretation of pluralism, at least in Dutch-language education'[48], and above all the subsequent constitutional review[49], bear witness to the "*positive recognition and appreciation of the diversity of opinions and attitudes*". The aforementioned '*Explanatory Note*' by the Belgian Constituent Assembly adds that *such education will help youngsters and prepare them to enter into society with a personal judgment and commitment. Only in this sense shall controversial issues be dealt with. The interpretation of such neutrality ties in closely with the educational project and the pedagogical methods.*[50]

The '*Declaration of Neutrality of Community Education, approved by the Central Council for Community Education on 25 May 1989 and ratified by the Flemish Executive*' specifies *inter alia* the following terms from the preparatory documents for the amendment of the Constitution: "*As regards education specifically, neutrality presupposes a* perfect objectivity *in the account of the facts and a* constant intellectual honesty in the service of the truth. *The pupils must be taught* respect for the most fundamental conviction of each person."[51] In this text, which is rather well-designed in comparison with similar texts elsewhere in Europe, the abovementioned *Declaration of Neutrality* stipulates that, in their contact with pupils and students, employees must not avoid issues relating to philosophical, ideological and religious convictions and states quite explicitly that *if the educational or teaching situation so requires, they can freely express their own personal commitment, albeit with circumspection, meaning that they must refrain from any form of indoctrination and/or proselytism (...) so that pupils and students would gradually become aware that motivations from different origins deserve respect and enquiry.*[52]

The so-called *Declaration of Commitment to Community Education, approved by the Central Council for Flemish Community Education on 25 May 1989* expresses, in implementation of the special decree of 19 December 1988, its commitment vis-à-vis Community Education, stating solemnly that there is place in it for all ideological views *recognises the Community school as a privileged meeting place for all those in society who, in the spirit of the neutrality declaration, want to cooperate with each other, get to know, understand and appreciate one another.*

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44. Cf. commercial use: for definitions, see VAN INNIS Th., *Les signes distinctifs*, Brussels, 1997, p. 25 ff.
45. See our previous contributions on this topic: DE GROOF J., "Welk geloofsbelijdenis is de moeder van het pluralisme ? Beschouwingen bij het arrest nr. 65/93 van het Arbitragehof inzake art. 20 van de Culturele Pact", in Nieuw Tijdschrift voor Politiek, 1992, no. 4; DE GROOF, J. en SCHRAMME, A., "Het cultuurbeleid", in: DEWACHTER, W. et al. Ed., Tussen de staat en maatschappij, 1945-1995, christen democratie in België, Leuven, 1995, pp. 426-462. See also DUMONT H., *Le pluralisme idéologique et l'autonomie culturelle en droit public belge*, Brussels, 1986, two volumes.
46. See our overview 'De bescherming van de ideologische en filosofische overtuigingen. Een inleiding', in ALEN A., SUETENS J.-P., *op. cit.*; and also WITTE B., DE GROOF J., TYSSENS J., (Ed.), *Het schoolpact van 1958. Ontstaan, grondlijnen en toepassing van een Belgisch compromis*, Brussels, VUB-press, 1999.
47. The standard work is still: HOUBEN R., INGHAM F. Het schoolpact en zijn toepassingen. Tweede herwerkte uitgave, bijgehouden tot 1/1/1962. Brussels, CEPESS, 1962.
48. See the aforementioned publication *Het levensbeschouwelijk karakter van de onderwijsinstellingen*, *op. cit.*
49. *Doc.* Senate, no. 100-1/1 and 2. B.Z., respectively of 25 May 1988 and 8 June 1988.
50. *Verklarende nota t.v.m. de herziening van art. 17 van de Grondwet*, *ibidem*.
51. *Doc.* Senate, no. 100-1/2. BZ., aforementioned, p. 43.
52. For the full text, see DE GROOF J., in collaboration with PIERS J., *De Schoolpactwetgeving. Commentaar en Annotaties*, Kluwer Rechtswetenschappen, 1996, p. 148 ff.

The commitment implies that teachers should contribute *to creating a climate of ideological openness and active tolerance*, and that they should *always to show respect for the opinions of others and to experience actively their attachment to freedom of expression*.
The *Pedagogical Project of Community Education* also emphasises that there should be room for diversity.

24. These texts recognise the principle that active, open pluralism provides an opportunity for expressing one's identity, e.g. by means of a symbol or by wearing a certain item of clothing, without this needing to be interpreted as an assault on that very pluralism. The assumption that the headscarf as such might 'disturb the feelings of others'[93] or should be equated to a 'philosophy or doctrinal explanation of facts' conflicts with the positive neutrality principle. Furthermore, the intent of the *Declaration of Neutrality*, i.e. that *pupils and students would gradually become aware that motivations from different origins deserve respect and enquiry* and that subsequently *their young minds would be made receptive for the plurality and diversity of values in society, so that they would come to respect people in their honest conviction and show an appropriate interest in all persons' manner of thought and emotions*, rather requires the exteriorisation of religious and ideological pluralism.

As regards any abuse of this right or non-compliance with the neutrality principle in the execution of professional duties, detailed disciplinary procedures and punitive measures are in place. Preventative measures, such as a ban on headscarves, do not provide a guarantee that the neutrality obligation will be respected, but would appear rather to be inspired mainly by a fear of failure in education policy or through political coercion. The enhancement of a positive pluralism would appear not to benefit from this or at least not under all circumstances within a specific school context.

C. 'Diversity' is not neutral – The task of positive recognition of diversity vis-à-vis pupils and parents

25. We have previously pointed out that the prescriptions that enhance 'diversity' are applicable in all schools, regardless of the organising authority. The *GOK Decree I* and the *Non-Discrimination Declaration* are '*particularised*' in community education. School regulations, which must contain a synthesis of the rights and duties of the pupils of a given school, translate this to the concrete situation at the school.

The rules of non-discrimination, in conjunction with the principle of neutrality, is interpreted and implemented in a particular way in community education. The constitutional review of 1988 confirmed the striving towards 'positive pluralism', which was already very much present within the Flemish Community[94], and introduced a divergent regulation for the establishment and organisation of education in each of the Communities concerned.

The *Commission for the amendment of the Constitution* recalls the educational role of schools and focuses on the entire person, adding that "*School education does, however, not exhaust the entire content of general education. The family, the social milieu, the ideological culture and the religious community also contribute in this respect*".[95]

This constitutional reading is not entirely neutral. It at least entails a mission to ascertain how the cultural and philosophical identity may be approached positively at school. The *Declaration of Neutrality* further specifies the interconnectedness between school education and the cultural and religious context in which a child is raised within the family: "*Education at school is only part of the entire education. Apart from school, the household and familial, the social and ideological, the cultural, the religious milieu and society as a whole all serve an educational purpose. The contribution from these milieus to the education and development of youths must be respected by school and be integrated into its activities.*"

The constitutional lawmaker intended to explicitly guarantee the ideological rights[96] of pupils within community education. Art. 24 para. 1, clause 3 of the Constitution stipulates that "neutrality entails, *inter alia*, respect for the philosophical, ideological or religious convictions of the parents *and the pupils*."[97] As the minor's power of

93 To reiterate the terms used in the abovementioned report by the Constitutional Assembly, *ibidem*.
94 We refer the reader to our previous study in T.B.P. "De levensbeschouwelijke verzuiling van het onderwijs: ziens wijzen van de Raad van State en lessen voor de Constituante", in T.B.P., 1988 and DE GROOF J., De grondwetherziening van 1988 in het onderwijs. De schoolwijk en zijn inspanning, E. Story-Scientia, 1989, pp. 85-86.
95 Doc. Commission for Constitutional Review, *ibidem*, pp. 42-43.
96 Besides caring for '*moral or religious education*' in conformity with other stipulations in art. 24 of the Constitution: DE GROOF J., *De grondwetsherziening van 1988 en het onderwijs*, *op. cit.*, P. 104 ff.
97 My Italics.

discernment increases"[158], a possible conflict between parents or the legal guardian or representative of the pupil will need to be assessed in balance by the judge[159].

A general 'repressive' measure, such as the prohibition of the wearing of the headscarf, is not in line with this interconnectedness. Nor is it in line with the general objective in community education to allow pupils and students to "*process the cultural goods with which they come into contact in such a manner that they clearly learn to discern facts and values*" in a "*climate of ideological openness and active tolerance*" and (not only as far as staff are concerned) while "*always showing respect for the opinions of others and actually experiencing a commitment to freedom of expression.*"

26. It speaks for itself that the documents, applying particularly to community education, also have consequences for pupils and parents, the 'users of education'. Educational standardisation in general and the pedagogical project of community education in particular instil the values of tolerance and respect for the rights of others. However, the '*neutrality requirement*' *does not hold for pupils.* The pupils themselves can hardly be compelled to adopt a neutral position. They are required to adhere to the educational project and, in case of any violation, they are subject to punitive and corrective measures. Tolerance towards, and a positive appreciation of (all) convictions is encompassed by the Flemish concept of neutrality rather than a prohibition of personal beliefs. This is very relevant to the issue of the headscarf, including under international law. Enhancing diversity is diametrically opposed to a general prohibition. This is the difference with the duty of abstinence, which is incorporated in the notion of *Laïcité.*

However, the wearing of a headscarf may, for the purpose of a proper functioning of education, be 'regulated'[160]. This implies that the wearing of head garments or scarves may be prohibited during some lessons "*if hygiene and/or safety so requires*".[161] Moreover, the teaching objectives must be attained: this concern, too, is quite rightly expressed in the abovementioned documents. Yet, any prohibition on the wearing of a headscarf must be motivated on the basis of a concern for "hygiene and safety". A general prohibition would apparently be in contravention of this restrictive condition and could therefore only be considered if public order is at stake. Note that any such motivation would require meticulous care.

We should like to add that the prohibition on the wearing of a headscarf cannot be reconciled with certain other rights, including in recent regulations, to which 'users' of education in particular are entitled. The Flemish decree maker has intended to make *pupils' and students' rights* enforceable. This also holds for freedom of expression and religion. Likewise in international perspective, the Flemish community has made it a priority to make the legal position of pupils and the exercise of rights and fulfilment of duties a priority. The guideline for the Flemish lawmaker was compliance with international standards of law in general and, in particular, "*the right to education that develops respect for the cultural values of the child itself and for others*".[162]

D. The general primacy of democratic substance in the exercise of the right to an identity

27. Another observation with regard to the constitutional reform of 1988 with regard to education is the attention that the Constituent Assembly repeatedly paid to the compliance with the democratic rights and liberties in the exercise of educational rights incorporated in or in implementation of art. 24 of the Constitution.

Art 24, para. 3, clause 1 of the Constitution sanctions the principle of the right to education, adding that this should be realised "*with respect for the fundamental rights and liberties*", a rule which holds for the exercise of any right[163]. The scope is both conformity with the exercise of *other* rights and freedoms, and the exercise of rights and freedoms *of others.*

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158 See also *infra.*

159 Cf., among others, VAN SLYCKEN J., 'Beschikkingsrecht van de minderjarige over eigen leven en lichaam', in: *Over zichzelf beschikken? Juridische en ethische bijdragen over het leven, het lichaam en de dood*, MAKLU, Antwerpen/Apeldoorn, 1996, p. 246 ff.

160 Note: '*regulated*' though not '*entirely prevented*': see *supra.*

161 TAHZIB B.G., *Freedom of Religion and Belief*, *op. cit.*, p. 396 argues that safety should be understood to mean 'public safety' or the safety of others, rather than personal safety. The author adds that "It could be argued that the burden to the Sikh's freedom seems greater than necessary to achieve the public aim": *ibidem*, p. 297.

162 *Memorie van Toelichting bij het ontwerp van decreet betreffende gelijke onderwijskansen I*, Doc. Vlaams Parlement, Z. 2001-2002, no. 1143-1, p. 9.

163 Cf. DE GROOF J., *De grondwetherziening van 1988 en het onderwijs*, *op. cit.*, p. 108

The expression of one's religious conviction in the perspective of the right to education can therefore in no way lead to an unlawful influencing of the right to self-determination of others, any qualification of the equality of man and woman, or an erosion of the democratic rules of law in whatever manner. The wearing of a religious symbol or sign is the parallel exercise of a fundamental right and is therefore, in itself, not an act of proselytism, on condition that it coincides with respect for the opinion of others. From the moment that public order or safety is disturbed through the exercise of a right, e.g. in the case of incitement through the distribution of pamphlets, such acts need to be restrained, but not the underlying beliefs as such.

This outlines a framework for an institution-imposed ban on the headscarf. The criterion for the (un)lawfulness of such a measure is, on the one hand, whether the Muslim girl in question was able to decide freely to wear or not wear a headscarf and, on the other, whether the decision to wear a headscarf was imposed by others.

28. The parents or legal guardians of a child should respect its right to education and to freedom of conviction, conscience and religion. They must assume responsibility "*in a manner that is compatible with the developing capacities of the child*".[165] In other words, it is up to the developing child to ultimately take decisions.

Under common law, an underage child who possesses the required power of discernment has judicial competence in personal matters. This holds not only for the issues of enrolment and refusal of enrolment[166] in education, but also with regard to the denial of a right of choice in the wearing of a headscarf. After all, it is assumed that "a minor who is no longer an "*infant*" is able, from a certain age, to perform acts for which no representation is possible."[167]

29. A second reference to the democratic content of the exercise of the right to education is found in art. 24, para.1, clause 2 of the Constitution, i.e. in the basic description of the neutrality of community education. The insertion of respect for the "*philosophical, ideological or religious convictions*" was restricted to those viewpoints that are compatible with the "*principles of democratic society*", according to the Constituent Assembly[167]. Non-democratic ideologies or religious fanaticism is not entitled to any understanding or tolerance. From the merest sign of racism or fundamentalism, the democratic resilience is put to the test. This is the case for any social milieu, but it holds in particular for means of education. If need be, the school in question should denounce such practices and take appropriate measures.[168]

E. Some conclusions and suggestions with regard to policy practice

30. In Belgium, an important role has always been attributed to religion, philosophy and ideology in education in general and in the specificity and organisation of community education in particular. This was not only the case in the period when the distinction between confessional and non-confessional groups was quite noticeable, but it also has a modern application in a multicultural society and the presence of the Islamic faith and its socio-cultural identity. Despite the action taken in France, banning religion from school is not an option[169].

The number of conflicts associated with the wearing of the headscarf has been rather limited. However, one does not need to wait for incidents to occur before outlining a policy approach. Successive ministers of education have, for that matter, tried to avoid conflicts or at least tried to avoid any escalation. A number of statements by policymakers may be described as 'not very helpful' in promoting a fruitful approach. They should most probably be situated within a certain political climate or context.

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165. Art. 5 and art. 14.2 of the *Convention on the Rights of the Child*.
166. See, for example, the Ruling by the Council of State, no. 32054 of 22 February 1989 concerning Van Eynde and Collier.
167. Recommendation by the Council of State no. 31 022/1 of 19 February 2002 with regard to the draft decree "concerning equal educational opportunities", *Doc.*, Flemish Parliament, no.1143, Z. 2001-2002, no1, pp. 142-143 with reference to legislation and jurisprudence.
168. *Doc.*, Senate, EZ, no. 100-1/2°, pp. 77-78.
169. Dinne Déom quite rightly asserts the following in 'La neutralité de l'enseignement des communautés et le choix entre le cours de religion et le cours de morale non confessionnelle' in *Quels droits dans l'enseignement ? Enseignants, Parents, Elèves, Actes du Colloque des 13 et 14 mai 1993*, Reuge, Die Keure, p. 110 : "L'enseignant se trouve alors investi de droit, et de l'obligation, d'exercer une sorte de contrôle marginal sur les conceptions manifestées par les parents ou les élèves, et de mesurer le respect qu'il leur témoigne en fonction de leur compatibilité avec les valeurs démocratiques". This is primarily, though not exclusively, an assignment for the teacher.
169. This form of 'secularism' is even referred to as '*State religion*': cf. GLENN Ch. Hijab and the Limits of Tolerance, in DE GROOF J. and FIERS J., *The legal status of minorities in education*, p. 140.

A general ban will simply lead to more confrontation and a politicisation of the debate. This would prevent the administration of institutions from assuming responsibility, from taking into account the local context and from striving towards concrete solutions, which should always happen in close consultation with all those involved. This is required not only with a view to a pragmatic approach, but also in order to adhere to the criteria for the restriction of fundamental rights. After all, for each case separately, an objective justification is needed that fulfils the requirements that the objective envisaged should be non-discriminatory, that the chosen means should correspond with a genuine need and be relevant and necessary in order to achieve the objective, and be proportional to it. A general prohibition cannot possible fulfil these requirements. It would tie in more closely with a uniformised and centralised educational policy like that pursued in France[67].

Nevertheless, a number of policy lines can be set out.
First, the headscarf must not prevent *identification* of the pupil.
The headscarf cannot be worn during certain courses either because this would make it impossible to *organise these courses properly* (e.g. physical education, sports) or because it would compromise the pupils' *safety* (e.g. chemistry lessons) or indeed because it would jeopardise the *accountability* of the teacher[68].
The precise interpretation of the general principles must happen locally, more specifically with the inclusion of meticulous information procedures regarding any restriction and the settlement of conflicts. The content of the school regulation is a prerogative of the school. Room should be made available for weighing up rights and duties against each other, and for safeguarding a willingness to resolve disputes.

As pupils are required to complete the entire curriculum, and to reach attainment and development targets, there can, in principle, be no exemptions for certain classes, the only exception being the regulation in both primary and secondary education regarding the choice between one of six religious courses or a non-confessional ethics course.[69] This topic is beyond the scope of the present contribution. Still, one might consider exceptionally granting dispensation[70], but only *after* alternatives or compromises have been put forward. Ultimately, it is up to the judge to balance the right of freedom of conscience on the one hand against the absence of the pupils in question during, for example, swimming classes[71] on the other.

31. The manner in which schools cope with cultural diversity also requires further *articulation*. Of course, the Islamic community has the fundamental right to establish its own autonomous schools. However, it should also be prepared to answer the question of whether the objective of integration is not better served by the participation of Islamic pupils in fundamentally pluralistic education if, in practice, they were to express their preference for this.

On the other hand, integration policy requires that the official school network be entirely accessible to this cultural community, as an exponent of multicultural society. The ban on the wearing of the headscarf and indeed of any sign or symbol that expresses a religious identity can, on the other hand, not be regarded as a positive appreciation of diversity. The school may be seen as a privileged environment for enhancing tolerance and combating obscurantism. This aim needs to be implemented in the pedagogical project, in the school regulation, and in the school working plan. In the curriculum and in the teacher training course, attention might be paid to how the principle of *tolerance as a responsibility* should best be implemented.

Finally, one should not only seek contact with the Muslim community, but possibly also strive towards a contract about the characteristics of a European Islam-oriented educational pluralism that specifies how the rights and duties of the various parties involved can best be visualised.

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67 For a similar conclusion, see VERLOT M., The Hijab in European Schools. A Case for the Court to a Challenge for the School ?, in DE GROOF J., FIERS J., *The Legal Status of Minorities in Education*, Leuven, 1996, p. 151. For an extensive report on this matter, see the first volume of CLENNI Ch., DE GROOF J., *op. cit.*

68 The *Commission for Equal Treatment*, for example, stipulates that in its decision of 17 October 1996 (*1996-85 Indirect distinction on the basis of religion*) that the objective of the clothing regulation, the safety of co-workers, i.e. the prevention of accidents, is in itself not discriminatory. The means by which the goal is achieved, i.e. a prohibition on the wearing of a headscarf, corresponds to a real need in relation to safety and conditions of labour of co-workers (in this case, within a company). The appropriateness of the means employed by the applicant, and the demonstration of the need to attain the goal, were however both judged to be inadequate.

69 On this issue, see in particular: OVERBEEKE A., "Recht op keuzevrijheid van het aangeboden levensbeschouwelijk onderricht, *T.O.R.B.*, 1999-2000, p. 255 ff.

70 OVERBEEKE A., Levensbeschouwelijke onderricht: keuzepalet en keuzevrijheid in Vlaanderen anno 2002, T.O.R.B., 2003-2004, p. 115 ff.; Id., Recht op keuzevrijstelling van het in openbare scholen aangeboden levensbeschouwelijk onderricht. Een stand van zaken, T.O.R.B., 1999-2000, p. 249 ff. Also relevant (idem, Netwerkschrijvend spreiden van migrantenleerlingen, T.O.R.B., 1993-1994, p. 220 ff.

71 See also VERSTEGEN R., *art. cit.*

VI. Synthesis

32. The Flemish Equal Opportunities Decree[175] introduced a right to/duty of enrolment. The purpose was, first and foremost, to provide certain marginalised groups with more *equality* through the introduction of an *individual right*, while integration would be enhanced by avoiding the emergence of so-called "black" schools. The protection of individual rights is also characteristic of the jurisprudence of the ECHR.

Some member states (UK, the Netherlands, Sweden) believe that individual rights do not suffice to achieve social objectives. Individual rights cannot rectify the inequality that results from structural (economic/social) causes.[176] Other countries[177] would appear to be fiercely opposed to any identity-related rights.[178] The model of a "colourless" and neutral law is particularly prevalent in France.[179] Article 2 of the 1958 Constitution stipulates equality without distinction of origin, race or religion. Origin and ethnicity are inexistent categories in French law.

The headscarf issue demonstrates clearly that the status of migrants should not be approached merely from an economic angle. The evolution in time is clear to see. In the context of the debate in France between, on the one hand, proponents of the republican notion of *laïcité* and, on the other, that of tolerance, the *Conseil d'Etat* initially left the power of decision to the school administrations.[180] After 1996, the rule was that girls wearing a headscarf should be allowed access insofar as the clothing was not provocative or geared towards proselytism. The more recent law has already been dealt with. Unemployment and poverty among Muslims has made Islam into an important factor of identification. *"It is not greater religiosity. It is that in British society, religion becomes one way of defining themselves as different"*.[181] Against a background of economic marginalisation, the question arises how a balance can be found between the individual right to equality, stipulations regarding non-discrimination, and a right to express a group-related identity, without this being in contravention of national, international or supranational regulations.

The traditional European answer to the integration of identity groups is welfare, not culture. The French Revolution was inspired by motives of redistribution. The German Federal Constitution was developed around the concept of the *Sozialstaatprinzip*. The question arises to what extent the ethnic "colouring" of redistribution of means (which is increasingly the case in a multi-ethnic Europe) will have an effect on the sustainability of the welfare state.[182] Welfare begins with access to education. Welfare is a neutral concept that can, in a sense, be described as the granting of or redistribution of means to or among less-affluent citizens. It is in this context that the GOK decree should be seen. Culture, on the other hand, relates specifically to identity and values. Culture is by definition "coloured". It is the realm to which the wearing of the headscarf at school belongs. *Measures in education that are aimed at realising social equality for identity groups meet with significantly less resistance than measures that promote the expression of cultural diversity.*

33. The dichotomy between welfare and culture in education turns out to be less contradictory than would initially appear. First and foremost, both the granting of enrolment rights and the prohibition of conspicuous religious symbols are legal solutions to a societal problem.
Furthermore, the two aspects are interconnected, as in reality there appears to be a considerable overlap between economic marginalisation and culture (identity groups). So the right to enrol (welfare) does try to fulfil the needs of a certain group and is therefore coloured in the sense that it is "group-related".

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175 See *Supra*. The Explanatory Memorandum provides insight into the willingness both to respect the international standard and to enhance the educational opportunities of cultural minorities: Flemish Parliament, draft decree concerning equal educational opportunities I, 1143 (2001-2002) no. 1, Session 2001-2002, 29 March 2002.

176 KOSKENNIEMI M., "The Effect of Rights on Political Culture", in: Alston P., *The EU and Human Rights*, Oxford University Press, 1999, pp. 99-116 (104).

177 Germany has a model of ethno-cultural exclusionism whereby ethnicity constitutes the basis for civil claims.

178 For a long time, France had a model of civic assimilation, which is now referred to as integration in order to emphasise growing sensitivity vis-à-vis diversity, while distancing itself from the Anglo-Saxon group model. See: KOSTAKOPOULOS T., "Integrating Non-EU Migrants in the European Union: Ambivalent Legacies and Mutating Paradigms", in: *Colum. J. Eur. L.* 181, 184-187 (2002).

179 BLEICH E., "The French Model: Color-Blind Integration", in: SKRENTNY JOHN D. (ed.), *Color Lines: Affirmative Action, Immigration And Civil Rights Options For America*, 2001, reports on a brief parenthesis of affirmative policies in France in the early 80s. Article 2 of the Constitution of 4 October 1958: « La France est une République indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion."

180 The *Conseil d'Etat* only put forward some general guidelines. The rights of expression could only be limited in situations where they infringe upon freedom of religion of others or were detrimental to educational programmes at school. SCALES-TRENT J., "African Women in France: Immigration, Family, and Work", in: *Brooklyn Journal of International Law*, 1999, 705.

181 Yunas Samad, a sociologist with the University of Bradford, quoted in The Economist, "Bradford's Muslims", 8 April 2003.

182 ALESINA A., GLAESER E., *Fighting Poverty in the US and Europe: A World of Difference*, Oxford University Press.

Moreover, the opposition between welfare and culture in education, as comes to the fore in respectively the GOK Decree and the headscarf controversy, unfolds against a background of more general trends in Europe. The history of the European Union is characterised by an increasing degree of pluralism. The six founding member states in 1957 were largely catholic. With the accession of the UK and Denmark in 1973 and of Sweden and Finland in 1995, a reformative element was added. And the accession of Greece in 1981 meant the Christian horizon was further extended to the orthodox branch, a move that will be enhanced by the forthcoming accession of Rumania and Bulgaria. Meanwhile, Islam has also gained a foothold in Europe.[183] In a multicultural Europe, the needs of the various groups and individuals will need to be met.

It is up to the national authorities of each member state, within the context of a country's own structure and history, to try and find a legally sound answer to all these challenges. The diversity of initiatives aimed at the integration of identity groups into the social life of a member state have further expanded after the enlargement of the Union. Moreover, the entire issue should be considered against a background of the legal protection of human rights within the EU and the supervisory role of the European Court of Justice[184], whereby that court must take into account the constitutional traditions of the member states[185]. In view of the diversity of structures, and given the great number of political and academic proposals, it is to be expected that (legal or other) solutions and decision-making in the various member states will diverge quite considerably.[186] Nevertheless, it remains essential that, at the same time, one should strive towards a level of coherence in relation to the common values and rights of all citizens within the Union. The main challenge in this respect is to bridge the distinction between cultural and political identity within Europe[187].

183 See, however, the interview with Valéry Giscard d'Estaing in *Le Monde*, 9 November, 2002, pp. 1 ff., in which the former French President and Chairman of the European Convention stated that the accession of Turkey to the European Union would signify "the end of the Union".

184 PHILIP A., WEILER J., "An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights", in ALSTON P. (Ed.), *The EU And Human Rights*, 2002, p. 19.

185 For a necessary qualification, see: LENAERTS K., Fundamental rights in the European Union, *E.L. Rev.*, 2000, vol. 25, no. 6, pp. 592-594.

186 KASTORYANO R., *Transnational Participation and Citizenship: Immigrants in the European Union*, Transnational Communities Working Paper Series, Oxford University, December 1998. Some Member States will prefer local decision-making, while others will be proponents of a uniform policy or of supranational solutions.

187 Cf. SCHOPFLIN G., Towards a European Cultural Identity, in DE GROOF J., JUDO Fr., STORME M.E., *De Vlaamse en Europese Uitdaging*, *op. cit.*, p. 61.

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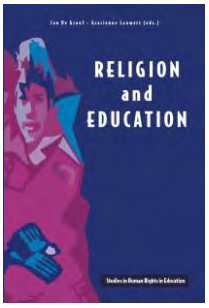

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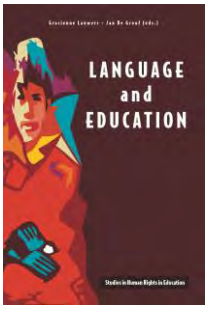
Readership: Academic lawyers; practising lawyers, students and scholars of education law and education policy; government officials.



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Thomas Misco & Jan de Groof (eds.)

This book explores controversial issue education in a variety of international contexts. Controversial issues constitute a normative anchor within citizenship education curriculum and the degree to which they are subjected to reflection has profound implications for the viability and vibrancy of democratic societies. Discussing controversial issues can overlap with ideological battles outside the school, or within it, but it trumps those given the essential mandate for students to deliberate about the common good, take a stand on issues, and explore ideas with multiple sources and perspectives. Every society privileges, in some form, the topics available for inquiry and discussion within their schools. Curriculum guidelines, exams, textbooks, colleagues, administrators, standards, teacher preparation, and local communities all influence teacher decisions and weigh upon the extent to which this normative mandate is realized.

Yet, research about these decisions is typically tied to a singular context. In response, this edited book draws upon the work of an international team of authors and cinches together single-case and context-specific studies on the pathways and challenges to teaching controversial issues and offers transferable grounded theoretical insights for

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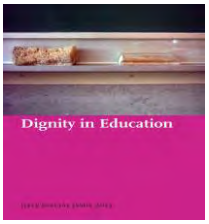

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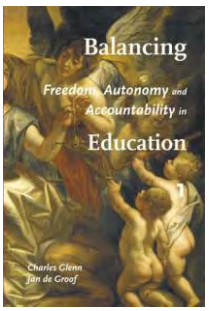

Balancing Freedom, Autonomy and Accountability in Education: 4 volume collection
C.L. Glenn & J. De Groof

Freedom, autonomy and accountability are commonly regarded as very important, but policy-makers do not always pay sufficient attention to the tensions among them. Thus freedom or school autonomy may be sacrificed to accountability, or accountability may be weakened in an effort to provide a wider range of choices for parents, or to give more decision-making authority to individual schools. The authors are convinced that wise design and implementation can produce a successful balance among freedom, autonomy, and accountability, and that considering the approaches adopted by different educational systems can contribute both to design and to implementation.

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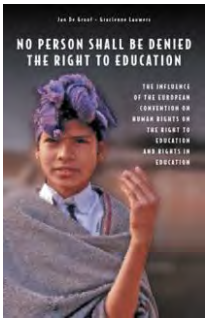
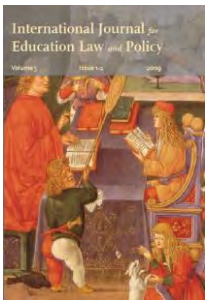
Volume 4 reviews the educational policies in the following countries: Azerbaijan, Bosnia and Herzegovina, China, Georgia, Hungary, India, Indonesia, Japan, Korea, Kosovo, Malaysia, Peru, Russian Federation, Saudi Arabia, Singapore, Ukraine, Wales. Article: How School Choice, Autonomy, and Accountability Impact Student Achievement: International Evidence by Martin R. West and Ludger Woessmann



No person shall be denied the rights to education
Groof, J. de ; Lauwers, G.

All over Europe, governance takes on an increasingly European character, thereby obliging policy makers to comply with the dictates of international and supranational organizations. Although recognizing that the influence of the European Court of Human Rights in education is fairly minor, the high level of compliance with its provisions among signatories is remarkable.

To this end, this book deals with the implementation of the rulings of the EctHR play out in education while seeking both to assess the manner in which signatories implement its provisions and reconcile domestic law with its orders dictates. The key question is whether EctHR case-law could staedily expand and develop into a kind of “Principles of Roman Law” which spread all over Europe, thereby forming the basis of modern European human rights law while contributing to the further development of educational and other legislation in member nations.



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PRACTICAL INFORMATION

TRANSFERS to *DOMUS ROMANA SACERDOTALIS*

We will provide your with the following transfers:

November 19th:

07.45 Transfer to Centro Mariapoli (Castel Gandolfo)
18.30 Transfer from Centro Mariapoli to the hotel.

November 20th:

07.45 Transfer to Centro Mariapoli (Castel Gandolfo).
18.30 Transfer from Centro Mariapoli to hotel.

Each other unscheduled transfer will be on your own.

Please refer to the **YOUR HOTEL** section below for indications on how to reach your hotel by public transportation.

BREAKFAST

Breakfast will be served every morning at your hotel starting at **07.00**

OUR ASSISTANTS

Our assistants will lead you to your bus for each of the planned transfer. They will hold a billboard with the name of your hotel written on, so please join them accordingly.

OUR HELP DESK

You will find our help desk in the Paul VI Audience Hall's lounge on November 18th, and in the Centro Mariapoli's lounge on November 19th – 20th. We will be at your disposal for any additional information and for assistance.

BAGGAGE

It is not possible to take baggage into the Paul VI Audience Hall (with the exception of hand baggage containing exclusively personal effects). There is no cloakroom service. **Participants therefore are invited to deposit their baggage in their hotels.**

These indications are valid for both the opening and closing sessions.

YOUR HOTEL

Hotel address: DOMUS ROMANA SACERDOTALIS
VIA DELLA TRASPONTINA, 18
00193, ROME

Telephone: +39 0698941

From Rome Fiumicino (FCO):

Train LEONARDO EXPRESS to Stazione Termini (approx. every 30 min.), get out at STAZIONE TERMINI (last stop).
From there, take bus 40 to Borgo Sant'Angelo, get out at TRASPONTINA-CONCILIAZIONE (7 stop).
The hotel is in front of the bus stop.

TRANSFERS to *Hotel Columbus*

We will provide your with the following transfers:

November 19th:

08.00 Transfer to Centro Mariapoli (Castel Gandolfo)
18.30 Transfer from Centro Mariapoli to the hotel.

November 20th:

08.00 Transfer to Centro Mariapoli (Castel Gandolfo).
18.30 Transfer from Centro Mariapoli to hotel.

Each other unscheduled transfer will be on your own.

Please refer to the **YOUR HOTEL** section below for indications on how to reach your hotel by public transportation.

BREAKFAST

Breakfast will be served every morning at your hotel starting at **7.00**

OUR ASSISTANTS

Our assistants will lead you to your bus for each of the planned transfer. They will hold a billboard with the name of your hotel written on, so please join them accordingly.

OUR HELP DESK

You will find our help desk in the Paul VI Audience Hall's lounge on November 18th, and in the Centro Mariapoli's lounge on November 19th – 20th. We will be at your disposal for any additional information and for assistance.

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These indications are valid for both the opening and closing sessions.

YOUR HOTEL

Hotel address: HOTEL COLUMBUS
VIA DELLA CONCILIAZIONE, 33
00193, ROME

Telephone: +39 066865435

From Rome Fiumicino (FCO):

Train LEONARDO EXPRESS to Stazione Termini (approx. every 30 min.), get out at STAZIONE TERMINI (last stop).
From there, take METRO A to Battistini, get out at OTTAVIANO – SAN PIETRO (6 stop).
Walk to St. Peter's Square and Via della Conciliazione.

UPDATES

For the ELA functions on 19 and 20 Nov:
19th - we will leave Castel Gandolfo (Conference Venue) at **5:45** for our respective hotels. We will leave **from Hotel Columbus at 7:45pm** for the Portuguese Embassy via a bus.
20th - we will leave Castel Gandolfo (Conference Venue) at **6:15** for our respective hotels. We will leave **from Hotel Columbus at 08:00pm** for the Taiwanese Embassy by foot (it is very close).