First Edition

Islam in State-Funded Schools

Religion and the Public Law Framework

PROCEEDINGS

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Preface

1

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Conclusions by the Project Coordinators

Characterized by rationalization, functionalism, and individualism, the European public sphere also offers space for communal life although to a different degree and with variations in each member state, as reflected in the so-called "margin of appreciation" doctrine of the European courts.

One can distinguish traditionally a number of players in community life and in education.

There are the traditional Christian churches. However secular European politicians may be in their outlook, they have often regarded faith and religious institutions as pillars of public order. European policy and decisions of national and European courts have fundamentally affected the relations of the churches with the respective states and societies. Nevertheless, although at present many churches have lost influence on social life, they may continue to play a significant role in education.

Although in general public schools are kept quite separate from the churches, in many European countries they offer religious instruction as a means for inculcating moral principles and historical traditions.

Denominational schools have in many cases been brought under the influence or even the control of government through public funding and requirements that they emulate many of the organizational and curricular standards of public schools. To what extent they may continue to exercise a distinctive mission is a question for public policy; to what extent they seek to do so is an equally interesting question in sociology.

There are also communal frameworks with a religious character developed by migrants, particularly those from predominantly Muslim countries. Many Muslims seek to be at home in Europe but remain marginalized. To what extent the religious institutions which migrants create sustain community life and nurture youth but also isolate them from the host society is a question of vital importance.

Many migrants and their children born in Europe could be described as having a 'denationalised identity,' belonging comfortably neither in their country of origin nor in the country in which they live, compelled to accept European values, legislation and administrative structures. They have the right to practice their faith, but not as the basis of exemptions from the principles of

the secular state. For many, the norms of Western secular culture based on individual rights and freedoms are in conflict with deeply-held communal values.

This tension is also reflected in legal doctrines. European policy and courts have accommodated national identities resulting from national histories based on the doctrine of the "margin of appreciation", but this failed to accommodate 'denationalised identities' defined by culture and religion that are not part of a country's history.

Europe has come to understand its public life as functioning in a secularized sphere in which religion does not play a significant role, having been relegated to the realm of private choice and practice. The presence of communities based upon migration that define their identity in religious terms and seek to make this the basis of their participation in public life, often invoking human rights principles of freedom of conscience and of culture, offers a fundamental challenge to European policy-makers, educators, and legal experts.

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Pictures of project events

Kick-off symposium on 'Religion and the public sphere' (Tilburg, 28 April 2010)

International workshop on 'Religion, Beliefs, Philosophical Convictions and Education' (Bruges, 7-9 December 2010)

International Conference on 'Islam (Instruction) in Education' (Antwerp, 8-12 February 2012)

1 of 25

Religious Conflicts and the Principle of State Neutrality

2

Juliane Kokott[1]

Introduction

'Religion is a matter which lies solely between a man and his God', Thomas Jefferson wrote in 1802, and that the American people therefore 'declared that their legislature should "make no law respecting an establishment of religion, or prohibiting [its] free exercise …", thus building a wall of separation between church and State.'[2] This is the principle we call state neutrality in the form of Laïcité. Under another principle, the principle of 'friendly cooperation', Jefferson's wall of separation is much more porous. The principle of friendly cooperation, or active state neutrality one might say, had already been described by Frederick II of Prussia in 1740. When he was asked, whether Catholic schools should be abolished in Protestant Prussia, Frederick replied: 'Religions must all be tolerated and the state has to keep an eye on them, that none shall derogate the other, because here everyone must find salvation in his own way.'[3] Another expression coined by Frederick II is that '[a]ll Re-

ligions are equal and good, […]; and if Turks and heathens came and wanted to live here in this country, we would build them mosques and churches'[4], a statement which was also made by Pope Benedict XVI on 20 November 2010 in a very similar way. He then said: 'Christians are tolerant, and in that respect they also allow others to have their self-image. […] It is therefore only natural that Muslims can assemble for prayer in a mosque [in Europe].'[5]

Both, Thomas Jefferson's and Frederick's approach converge insofar as religion is – and has to remain – something private. And while they also agree that the state should remain neutral in religious matters, they differ in their evaluation of the specific kind of state neutrality. Thomas Jefferson's wall of separation opts for passive neutrality in religious conflicts, in which the state should play no role at all. Frederick II, on the other hand opts for active neutrality in religious conflicts, in which the state should also be neutral, but nevertheless involved. Both the conference's topic and President van Rompuy's contribution are titled: 'from passive toleration to active appreciation of diversity'. This motto is much more in line with the kind of state neutrality Frederick II had in mind.

Religious conflicts clearly are challenges of our time. One must also keep in mind that these conflicts are not limited to terrorism or religious fundamentalism, but arise on questions closely related to our daily lives, for instance: Are teachers allowed to

wear religious symbols in class? Are state schools allowed to display a crucifix? Should the ritual Islamic prayer be allowed in school? May or even should the EU and / or some of its Member States have a ban on headscarves – burqas and niqabs – in schools or in general? And is the Swiss constitutional referendum against the construction of minarets compatible with European values?

What model of state-church relations in a modern society?

Addressing this multitude of religious conflicts, one may ask whether the easiest and most adequate approach is not just to ban religion altogether from the public sphere and thus to adhere to laicism. Such ban would affect all religions equally; there would be no problem of preferring majority religions over minority beliefs. However, as I am going to show, laicism may favour atheism over religions. Moreover, a laicistic approach risks to ignore social reality, since religious conflicts are of a great variety and of a great importance, even in a modern society. Societies and their elected representatives cannot simply ignore these problems, but have to deal with them. When doing so, they should not focus exclusively on how to deal best with or integrate Islam in Europe. Questions on the use of genetically modified crops, abortion, stem-cell research or medically assisted suicide, to name but a few, are also questions of our modern society, questions determined and influenced by religion, belief and philosophical convictions. Simply put: Religion still plays an important role in our modern society, giving us enough reasons to seek an open dialogue and cooperation. A study by the German Jurists' Forum came to the conclusion that the system of 'friendly cooperation' between church and state still remains a good basis for addressing current problems. Its strength lies in its confidence that religious matters can – and perhaps ought to be – handled in public.[6]

But what is the European answer to the question of how to accommodate state and religion, in particular in the field of education? And is there a common European answer at all?

The European Dimension in religious conflicts and State Neutrality

Although we are all aware of the complex legal status of the European Union, the question of 'state neutrality' arises all the same. Should the European Union follow the laicistic approach of Thomas Jefferson and the United States or France or the one of 'friendly cooperation' and active appreciation of Frederick II and Germany?

Article 10 of the Charter of Fundamental Rights[7] guarantees the free exercise of religion by stating that '[e]veryone has the right to freedom of thought, conscience and religion … and [the] freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance'. This provision is identical to the one used in the ECHR.[8]

Before the Charter came into effect, the European Court of Justice (ECJ) derived fundamental rights from the 'constitutional traditions common to the Member States' as 'general principles of the Union's law'; a principle also set forth in Article 6 of the EU-Treaty. To determine such common constitutional traditions, the ECJ uses the method of constitutional comparison thereby also taking into account how the national (constitutional) courts interpret the fundamental rights.

When dealing with freedom of religion and state neutrality in Europe, we are therefore faced with a multitude of national constitutions and judicial interpretations. Thus, national (constitutional) courts and two European Courts are charged with interpreting the freedom of religion in Europe. Does this amount to too many courts? Do we risk a multitude of diverging judicial interpretations?

In December 2009, the Treaty of Lisbon came into effect. Since then, the very same Article 6 of the EU-Treaty also states that the European Union shall accede to the ECHR. This will most certainly strengthen the European Court of Human Rights (ECtHR) in Strasbourg. It is therefore prudent to take a closer look at the case-law of this Court when dealing with religious conflicts and state neutrality.

I. Laicism/Passive Toleration – The crucifix-ruling of the Strasbourg Court (Lautsi v Italy)

One of the most important and certainly one of the most debated cases of the European Court of Human Rights is the Lautsi-case[9]; the Grand Chamber recently reversed the chamber-judgement of November 2009. In its chamber judg-

ment, the Court initially ruled that the display of crucifixes in public schools was contrary to the convention rights of freedom of religion and freedom of religious education. It furthermore stated that '[n]egative freedom of religion […] extends to practices and symbols expressing, in particular or in general, a belief, a religion or atheism.'[10] The Court questioned whether the display of a symbol, which can easily be associated with the majority religion in Italy, could serve educational pluralism in classrooms. The chamber judgment therefore followed a laicistic approach of state neutrality.[11] The judgement of the Grand Chamber to the contrary viewed the crucifix as a passive symbol, which results in the Court not having to decide between one of the two major approaches to freedom of religion.[12]

The case sheds light on the most difficult question of the relationship between positive and negative freedom of religion. True neutrality would require a state to give no preferential treatment at all to any religion or ideology – any ideology, including atheism! But isn't the absence of any religious symbol a symbol in itself – a symbol in favour of atheism? Is the state therefore forced to promote atheism, and would this again be in line with state neutrality? This dilemma between positive and negative freedom of religion makes true state-neutrality almost impossible.

II. **Accommodating Religions/Active Appreciation**

The same problem may arise when looking at the issue form the other side, when the state tries to accommodate the different religions: Active state neutrality in a religiously diverse context may command a state to put up symbols of all different faiths, or at least those faiths present in a classroom. But today, in some multi-cultural and multi-religious contexts, a school wall may not suffice to display the great variety of religious symbols. Moreover, such solution may not leave sufficient room for negative freedom of religion, since a classroom filled with religious symbols could hardly accommodate atheist belief.

A case pending before the German Federal Administrative Court exemplifies this problem. The case deals with the question of whether a school in Berlin needs to fulfil the request of a pupil of Muslim faith to practise ritual prayer in school. The rulings of both inferior courts, in citing the German Federal Constitutional Court, agreed that state schools are not a place free from religion.[13] However, they reached different results. The lower administrative Court [VG] quoted the Berlin school statute according to which pupils must be educated to understand the different cultures and to communicate with people from other origins and with different religions, without any prejudices and to contribute to the peaceful social interaction of all cultures and the development of intercultural competencies and thus to stand up for the dignity of all human beings. This is an important and demanding educational goal, especially at a school like

the one in question attended by pupils of 29 different nationalities with all world-religions present. The lower administrative Court indeed placed great demands on the state to actively accommodate the different religions present at the school in question, so that the particular pupil of Muslim faith and his group could practice their ritual prayer at school. It ruled that possible conflicts between different faiths should and could be handled by using separate classrooms during breaks. The approach of the lower administrative court is an illustrative example of a state's duty to actively appreciate religions.[14]

The administrative court of appeals [OVG], to the contrary, considered that the great number of religious faiths would make it practically impossible for the school to allow each and everyone to pursue their respective faith in school.[15] According to the Court of Appeals the duty to actively accommodate religions does not go this far. Thus, under the circumstances of the case, there was no constitutional right to the organizational measures necessary to render possible the ritual prayers at school. Freedom of religion only requires 'reasonable accommodation', a concept also described in this publication by Justice Albie Sachs. It remains to be seen whether the Federal Administrative Court will adopt this concept, and if so, how it might develop in practice.

European Constitutions Compared

The 'Berlin prayer room' example – as an example for the German model – stands for active appreciation. But there are 27 member states in the European Union and much variety with regard to the accommodation of state and religion:

I. Constitutional Diversity

Some Member States' constitutions establish a state church or state religion, or at least provide for a special relationship with one or few religions. The Church of England – as the name already suggests – is the official state church of England. The Queen as Head of State is at the same time Head of the Church bearing the title 'Supreme Governor of the Church of England' and 'defender of the faith'. Some Anglican bishops are ex officio members of the 'House of Lords' as Lords Spiritual – even after the Upper House reforms of the last decade.[16] Paragraph 4 of the Danish Constitution establishes that the Danish Lutheran Church is Denmark's official church, and as such is supported by the state.[17] Article 2 of the Maltese Constitution provides that '[t]he religion of Malta is Roman Catholic Apos-

tolic'[18]. Paragraph 2 of this Article even states that '[t]he authorities of the Roman Catholic Apostolic Church have the duty and the right to teach which principles are right and which are wrong'. The Greek Constitution provides in its Article 3 that '[t]he prevailing religion in Greece is that of the Eastern Orthodox Church of Christ'[19]. Also other European countries such as Iceland[20], Norway[21], Andorra[22], Liechtenstein[23], Monaco[24], or San Marino[25] have a state church or at least a state religion. Countries like Italy, Poland and Spain recognise a special relation between the state and the Catholic Church.[26]

'The State acknowledges that the homage of public worship is due to Almighty God' says the Irish Constitution, which at the same time provides that '[t]he State guarantees not to endow any religion'.[27] Until January 1, 2000 the Lutheran Church was Sweden's State Church. Separation between Church and State was implemented with the argument that in a modern day and age the state had to remain neutral.[28] The Slovak Republic, says Article 1 of its Constitution, is not bound to any religion[29] and even the Constitution of Catholic Portugal provides for the separation of church and state.[30]

II. The Example of Germany

Germany does not have a state church either.[31] The system is – similar to the one in Belgium –, one of friendly cooperation.[32] Article 181 (1) of the Belgian Constitution[33] even provides for the financing of both religious and philosophical institutions, such

as the Catholic Church, as well as the 'central laicist council' ('Conseil central laïque').[34] In Germany, the state is actively involved in the collection and distribution of church taxes. For theses services, however, the state is allowed to keep 2-4.4% of the money collected.

The German system of friendly cooperation between Church and State is currently opening up to non-Christian religions. Islamic religious instruction at state-schools has been introduced in several German Länder[35] and its further introduction to more schools and Länder, its organization and design are widely discussed.[36]

On 3 October 2010, when Germany celebrated twenty years of reunification, German President Christian Wulff gave a speech in which he stated: 'Christianity is without a doubt part of German identity. Judaism is without a doubt part of German identity. Such is our Judaeo-Christian heritage. But Islam has now also become part of German identity.'[37] Although, this last sentence was highly criticised, the speech confirmed, that strict laicism is not the German tradition. The separation of church and state according to the German Constitution has been implemented in the spirit of 'mutual recognition and cooperation'. Former German chancellor Willy Brandt described this relationship as follows: 'We do not think of the Churches as simply being a group out of many in a pluralistic society. This is why we do not want to treat their representatives as representatives of mere group interest. In the sign of freedom, we want partnership.'[38]

Under German constitutional law, this partnership, this friendly cooperation, was established almost a century ago in the Weimar Constitution of 1919 when society was still much more religiously homogeneous. But is the German model of friendly cooperation between church and state still up to date in a modern, multi-cultural, multi-religious and also sometimes a-religious society? As I just mentioned, Sweden abolished its state church in 2000 with exactly this line of reasoning. Is Laicism therefore – as the Lautsi chamber judgment could be understood to suggest – the better choice today? But for which countries? Italy? Germany and Belgium as well? The European Union or all Member States of the Council of Europe? Is laicism the European model?

A European standard on state-church relations or subsidiarity?

The question is, whether there should be a common approach to state-church relations to all Member States of the European Union at all, and if so, which one.

I. A common standard?

Several arguments could be made in favour of a common approach in Europe. For example, the statute of the Council of Europe provides that the organization's aim is 'to achieve greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage'.[39] The statute furthermore states that this cannot be realized without 'spiritual and moral values'[40], in other words, without ethics and religion. However, as we are all well aware, several motions to include a reference to God or to Christianity into the Preamble of the European Constitution and the European Treaties were explicitly dismissed.[41] But, according to Article 17 of the Treaty on the functioning of the European Union, 'the Union shall maintain an open, transparent and regular dialogue with […] churches and [philosophical and non-confessional] organisations'.[42] This is probably more powerful support for friendly cooperation and active appreciation than a reference in the preamble. Moreover, the European Union Treaties '[draw their] inspiration from the cultural, religious and humanist inheritance of Europe'[43]. Religiousness is part of a European identity. Furthermore, the European Union has evolved from a once European Economic Community into a Union of principles and values. But what principles and values does the European Union have concerning the freedom of religion and state neutrality?

I.I.Laicism/Passive Toleration as a common standard?

Since all Member States of the EU are signatories to the ECHR, the chamber judgment of the European Court of Human Rights in the Lautsi case could have suggested a laicistic approach for the European Union at first sight. Although judgments made by the Strasbourg Court are binding for the defendant state only, they define a common standard for all Member States of the Council of Europe.

Some have criticised that the European Court of Human Rights did not sufficiently make use of the method of constitutional comparison in its chamber judgment[44]. The judgement of the Grand chamber took this critic to heart and provided a thorough examination of the different national rules and regulations on crucifixes in public school classrooms, as well as the according jurisprudence.[45] In fact, a European ruling on such a basic is-

sue as freedom of religion and state neutrality should only be handed down after a thorough comparison of the Member States' constitutions. Since the provisions in the European Convention on Human Rights of the Council of Europe or in the Fundamental Rights Charter of the European Union are not unequivocal on the exact content of state neutrality, it is mainly through constitutional comparison that a common legal standard on this issue could be established. While freedom of religion is inherent to all the Member States' constitutions, the relations between state and church in Europe are very diverse and in most cases not strictly laicistic.

In order to grasp and evaluate the status of state neutrality in religious conflicts in the different EU Member States, a great deal of research would be necessary. But the rudimentary remarks on the differences in state-church-relations in the various constitutions of the EU Member States at the beginning of this article already indicate that there is no EU-wide standard on this issue. Most certainly, one can derive from the different constitutions, that neither laicism, nor passive toleration, nor active appreciation is a common standard shared by all Member States. It is against this background that we have to ask ourselves: passive toleration or active appreciation of diversity of the freedom of religion for the European Union?

I.II.Friendly Cooperation / Active appreciation as a common standard?

Article 17 of the Treaty on the Functioning of the European Union (TFEU) clearly recognises the special status under national law of churches and philosophical and non-confessional organizations.[46] It also provides that 'the Union shall maintain an open, transparent and regular dialogue with these churches and organisations'[47]. In my opinion, this provision

1.) recognizes the status religions and religious communities may enjoy under the national (constitutional) law of the Member States, and

2.) supports a friendly cooperation approach between the Union, churches, and philosophical and non-confessional organisations. This is more than mere 'passive toleration'.

II. EU-wide solution or Subsidiarity?

However, before one opts for an EU-wide model of state neutrality and EU-wide rules governing the relationship between church and state, another principle of European Union law needs to be emphasised. According to Article 4 TFEU, the Union respects the 'national identities [of the Member States], inherent in their fundamental structures, political and constitutional'.[48] Amongst these structures are the fundamentals of state-church-relations and the respective model of state neutrality in religious matters.

Any European-wide approach in this area should therefore be particularly careful in respecting these national and constitutional identities of the Member States.[49] If a constitutional tradition common to the Member States cannot be established, a large margin of appreciation and discretion must be given to the Member States. This is even more true for controversial socio-political issues – issues such as state neutrality in religious conflicts. This is why I, personally, would have difficulties in finding a Union-wide approach to state neutrality in religious conflicts. Nevertheless, one has to recognize that Article 17 TFEU supports friendly cooperation which implies to a certain extent active appreciation.

While the chamber judgment in the Lautsi-case seemed to indicate a common laicistic approach, the Grand chamber judgement now clearly opts in favour of subsidiarity.[50]

Conclusion

Freedom of Religion is granted by the ECHR and the EU Charter of Fundamental Rights. Article 17 TFEU supports friendly cooperation / active appreciation. But, in view of the many different constitutional traditions and judicial interpretations on state neutrality and state-church-relations in the various EU Member States, a Union-wide approach to church-state-relations is difficult to find. In cases of doubt and in the absence of common standards, European Courts should therefore exercise judicial self-restraint, leaving the Member States their margin of appreciation. Within these confines, we should appreciate the diversity of approaches to freedom of religion and church-state-relationships.

In Germany, in 1555 the so-called Peace of Augsburg established the principle 'cuius regio, eius religio' – 'Whose realm, his religion'. Almost 500 years later our principle should be 'cuius regio, eius religionis libertas' – 'Whose realm, his freedom of religion'.

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Erfordern weltanschauliche und religiöse Entwicklungen Antworten des Staates? C.H. Beck, Munich.

Section 8

Endnotes

1. Advocate General at the Court of Justice of the European Union, Luxembourg, Luxembourg, Visiting senior Professor at the University of St. Gallen, St. Gallen, Switzerland. The author is indebted to Martin Kaspar, M.A. for his assistance in preparing this article.

2. Thomas Jefferson, letter to Danbury Baptist Association, 1 January 1802, reproduced in: Library of Congress Information Bulletin (1998) 57/6, available at www.loc.gov/loc/lcib/9806/index.html (02.05.2011).

3. Frederick II of Prussia (Frederick the Great) on 22 June 1740 (own translation).

4. Frederick II of Prussia in a letter of 15 June 1740, reproduced in: Hastings, J. (1922), Encyclopaedia of Religion and Ethics Part 23, Charles Scribner's sons, New York, p.363.

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7. Charter of Fundamental Rights of the European Union, OJ 30 March 2010 C 83/389.

8. ECHR, Rome, 4 November 1950. The explanations to the Charter of Fundamental Rights of the European Union make it very clear that the identical wording is not just incidental, but intended.

9. ECtHR, Lautsi v Italy, Application No 30814/06, chamber judgment of 3 November 2009, Grand chamber judgement of 18 March 2011. It should be kept in mind that the speech, upon which this article is based, was given in December 2010, before a judgement by the grand chamber was reached and publicised.

10. ECtHR, Lautsi v Italy, Application No 30814/06, chamber judgment of 3 November 2009, N° 55.

11. Arguing in favour of this judgement, cf. the article by M. Stathopoulos, The state in the face of religious conflicts and intolerance in society.

12. ECtHR, Lautsi v Italy, Application No 30814/06, Grand chamber judgement of 18 March 2011, N° 72.

13. VG Berlin NVwZ-RR 2010, p. 189 (191) and OVG Berlin-Brandenburg, NVwZ 2010, p. 1310 (1312).

14. VG Berlin (above, p. 192).

15. OVG Berlin-Brandenburg (above, p. 1310).

16. The Lords Spiritual usually refrain from voting on legislation.

17. § 4 of the Danish Constitution.

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18. Article 2 of the Maltese Constitution.

19. Article 3 (1) first sentence of the Constitution of the Hellenic Republic.

20. Article 62 of the Constitution of Iceland: 'The Evangelical Lutheran Church shall be the State Church in Iceland and, as such, it shall be supported and protected by the State. This may be amended by law.'

21. §2 of the Constitution of Norway 'The Evangelical-Lutheran religion shall remain the official religion of the State. The inhabitants professing it are bound to bring up their children in the same.'

22. Article 11 (3) of the Constitution of Andorra: 'The Constitution guarantees the Roman Catholic Church free and public exercise of its activities and the preservation of the relations of special co-operation with the State in accordance with the Andorran tradition. The Constitution recognises the full legal capacity of the bodies of the Roman Catholic Church which have legal status in accordance with their own rules.'

23. Article 37 (2) of the Constitution of Liechtenstein: 'The Roman Catholic Church is the State Church and as such enjoys the full protection of the State; other confessions shall be entitled to practise their creeds and to hold religious services to the extent consistent with morality and public order.'

24. Article 9 of the Constitution of Monaco: 'The Roman Catholic Apostolic Church is the State Church.'

25. Article 9 of the Constitution of San Marino: 'The Roman Catholic Apostolic Religion is the Religion of the State.'

26. Cf. Articles 7 and 8 of the Italian Constitution; Article 25 of the Polish Constitution; Article 16 (3) of the Spanish Constitution; cf. also Article 43 of the Constitution of Lithuania, which refers to 'traditional Lithuanian churches and religious organisations'.

27. Article 44 (1) and (2) N° 2 of the Irish Constitution.

28. SOU (Swedish Government Official Reports) 1994:42, Staten och trossamfunden, p. 39-44.

29. Article 1 (1) second sentence of the Constitution of the Slovak Republic.

30. Article 41 (4) of the Portugese Constitution of 1976 (amended in its version of 2005).

31. Article 140 of the German Basic Law read together with Article 137 (1) of the Weimar Constitution.

32. On the German system and its development, Voßkuhle, A. (2010), 'Religionsfreiheit und Religionskritik – Zur Verrechtlichung religiöser Konflikte', EuGRZ, 18-21, p. 57.

33. Article 181 of the Belgian Constitution: '(1) The State awards remuneration and pensions to religious leaders; those amounts required are included in the budget on an annual basis. (2) The State awards remuneration and pensions to representatives of organizations recognized by the law as providing moral assistance according to a non-religious philosophical concept; those amounts required are included in the budget on an annual basis.'

34. In Belgium cults can officially be recognized by the Ministry of Justice, if they comply with certain criteria. The Conseil central laïque (CCL) has been officially recognized in 1993.

35. 'Islamic Religious instruction' in accordance with Article 7 (3) of the German Basic Law – which requires the religious group to name an official representative – is being taught in Berlin and Lower Saxony, where a round table (Lower Saxony) and the Islamic Federation Berlin (Berlin) serve as official representatives. In Bavaria 'Islamic instruction' is being taught by state officials from Turkey, as well as the 'Erlangen Model' which opts for a local cooperation. In North Rhine-Westphalia, local cooperation is also being practised in Duisburg and Cologne; furthermore 'Islamic studies' (see Bavarian model) has been introduced.

36. See i.e. 'German Islam Conference' (DIK) in its meetings on 17 May 2010, 25 June 2009 and 13 March 2008, and especially the study 'Verfassungsrechtliche Rahmenbedingungen eines islamischen Religionsunterrichts' of the DIK of 13 March 2008, available at www.deutsche-islam-konferenz.de (02.05.2011).

37. 'Valuing Diversity – Fostering Cohesion', Speech by Christian Wulff, President of the Federal Republic of Germany, to mark the twentieth anniversary of German Unity on 3 October 2010 in Bremen, available at www.bundespraesident.de/Anlage/original_667212/Speech-in-English.pdf (02.05.2011).

38. Official address of Chancellor Willy Brandt on 18 January 1973, quoted in BVerfGE 42, 312 (own translation).

39. Art. 1 a) Statute of the Council of Europe.

40. Ibid.

41. Cf. the speech by H. de Vries, A Religious Canon for Europe? Policy, Education and the Post-Secular Challange, p. 11.

42. Cf. the contribution by Jan de Groof.

43. Preamble of the Treaty on European Union, OJ 30 March 2010 C 83/15.

44. ECtHR, Lautsi v Italy, Application No 30814/06, chamber judgment of 3 November 2009.

45. ECtHR, Lautsi v Italy, Application No 30814/06, Grand chamber judgement of 18 March 2011, Nos 26-28 .

46. Art. 17 (1) and (2) TFEU.

47. Art. 17 (3) TFEU.

48. Art. 4 (2) TFEU.

49. Cf. the speech by P. de Hert and S. Somers, International human rights and national constitutional heritage: which legal framework so we need to manage religious tensions?, p. 10.

50. But see also the Dissenting opinion of Judge Malinverni joined by Judge Kalaydjieva in ECtHR, Lautsi v Italy, Application No 30814/06, Grand chamber judgement of 18 March 2011.

A Religious Canon for Europe: Policy, Education, and the Post-Secular Challenge

Hent de Vries[1]

3

Introduction

It should by now be clear that the scholarly stakes in discussing religion historically and systematically are much higher than those of mere impassive, intellectual interest. Even "methodological atheism" and "ascesis"—two well-known provisos made by non-confessional, non-denominational, non-sectarian inquiries into religion that espouse not so much value-free but rather differently valued normative perspectives of their own—clearly do not suffice to suppress or contain the passion the subject of religion provokes and, perhaps, deserves.

Modern states, their functionaries, and enlightened citizens have begun to take notice and express not just concern but also genuine curiosity, informing themselves more thoroughly about the cultural presence and political force of the phenomenon of "public"—or, as I would prefer to say, "global"—religion in the contemporary world. While many stress its perils far more than its promises, they are convinced—on either side of this somewhat artificial divide (artificial, since one could hardly separate such perils from their promises and the very conceptual and practical possibilities for which both stand)—that the phenomenon in question can no longer leave us indifferent, not least because it is unlikely to disappear from our expanding and increasingly flattening—worldwide, "global"— horizon anytime soon.

To take up its political no less than metaphysical challenge, much more than the call for a basic familiarity with the established canons of Western and non-Western cultures, of so-called world religions or the religions of the world that have infused our contemporary sensibilities even though they are still largely ignored by institutions of higher learning, not to mention cultural and bureaucratic elites, will, once again, be required. Religion's current publicity and globality has acquired new social and cultural dimensions that tie an increased worldwide expansion of its old and modern forms of life and everyday practices to a no less pervasive de-historicized impression of its current meaning and legacies.

As a matter of fact, there is a growing awareness that, in addition to the invaluable task of historical learning and the general cultivation of knowledge—moving us from an "ignorant" to an "intelligent" secularism (or laïcité), at best—there is an increasingly urgent need for understanding of "religious" signs and symbols, rituals and practices, acts and passions, movements and institutions, in the broadest possible sense. Such an understanding, we might venture to say with a philosophical idiom,

must be "generic" and, further, it must reach across the board, into all sectors of society and beyond (i.e., in education and the arts, local and national levels of policy and administration, international diplomacy and military intelligence, the environment and matters of health, but evidently also into the proliferation of economic markets and the diffusions of global media culture)—and, perhaps, the very "global soul" they prepare or already express.

This fact seems more and more recognized by political authorities, policy makers, independent observers and informed publics, while most commercially and ideologically driven print and electronic media and their pundits, with few exceptions, do not advance much beyond all too facile sensationalism and innuendo, caricatures and chatter, doxa and dogmatism.

This much is clear: all secularist attempts at "neutralizing" and containing global religion's recent phenomena have proven laughable at best and counterproductive at worst. Sadly, even some of the best scientific and philosophical minds—Richard Dawkins, Daniel Dennett, among other, lesser gods—waste their considerable talents on reinventing the wheel of atheism, bare bone secularism, and what have you. Yet they whistle in the dark, bark up against the wrong tree, and leave everything as it is or, worse still, fuel the very tendencies they fear most.

What better alternative, then, can we propose?

I have divided my chapter in three parts, the first entitled "The Need to Know: Public Policy and the Resurgence of Global Religion," the second entitled "The Religious Fact: Education and the Secular State," and the third "Conceptual Matters: Beyond Cult and Culture." I will conclude with some very tentative observations concerning the desirability of a religious "canon"—to begin within and for "Europe"—suggesting that, if we adopt or, rather, stipulate a plausible definition of that historical and somewhat technical term (i.e., "canon") and, indeed, apply it wisely, then nothing less—and nothing more—may be needed to avoid the old and new cultural "clashes" that so many have feared are invited by the so-called "post-secular challenge." To do so requires revisiting and reconsidering the cultural idioms and cultic practices for which this term—"canon"—once stood, not least since many of its original assumptions seem no longer valid or useful, if ever they were.

iBooks Author

The Need to Know: Public Policy and the Resurgence of "Global" Religion

Let me start out from two anecdotes that have inspired and guided the following reflections and the modest—if, perhaps, somewhat counterintuitive—proposal in which they result.

Not so long ago, I was asked to comment publicly on a surprising statement made by a senior policy advisor—more precisely, the Coordinator of Strategy Development of the previous Dutch Minister of Justice. During a symposium in November 2008, organized by the Royal Academy of Sciences (KNAW) and the Netherlands Organization for Scientific Research (NWO) on the subject of the Actuality of the Human Sciences [Actuele Geesteswetenschappen], he had claimed (and I cite verbatim): "with regard to the question as to what should be the proper role of government with respect to religion a civil servant and policy advisor [ambtenaar] can advise his or her minister adequately . . . without consulting with scholars of religion about the question what, precisely, religion [or the meaning of religion] is."[2]

Puzzled, indeed, flabbergasted, by this claim, I recall having improvised a double response, when, about a year later, in June 2009, NWO staged a debate in the Academic Cultural Center Spui 25, here in Amsterdam, with the same official, Mr. Max Kommer, a member of the Labour Party (PvdA) and responsible (by his own account) for the task "to explore developments in society and 'legal infrastructure' in order to assess their impact on the ministry's mid- and long-term strategy" as well as "policy development regarding extremism and national security." No small matters.

Of course, I acknowledged, those who prepare policy decisions and strategize cannot and need not know all there is to know and all that can be known about societal phenomena. Yet, I also felt the urge to insist that there is a minimum of "facts"—including "religious facts" (which is not the same as, say, a catalogue or catechism of principles, maxims, and values)—whose historical and analytical relevance no modern citizen and, a fortiori, no democratic policy maker or government official should ignore or set aside. But in what part of his or her education could or should this be encountered and taken in?

In other words, how does one move, indeed, progress—since this would be "progress," indeed—"From Passive Toleration to Active Appreciation of Religious Differences"? More precisely, how in fact do—or, perhaps, how ideally and normatively speaking should—"Religion, Beliefs, Philosophical Convictions and

Education" relate so that such a transformation of deeply ingrained mindsets no less than of institutional, perhaps, even legal and constitutional arrangements can be envisioned?[3] Why, finally, do the resurgence of so-called "global religion" and the ensuing "post-secular challenge" make this all the more difficult and imperative?

One reason, I suggested, may be that the post-secular challenge does not so much bespeak the resurgence of political religions and political theologies whose new assertiveness has undeniably had its moment and, perhaps, still gains in momentum; rather, it concerns the slow but steady emergence of an even more widespread and seemingly vague "global" religion that is anything but a relapse into the vicissitudes and violence of sectarianism and cults, yet also eludes our common understanding of culture and identity (hence, of cultural and identity politics, which are always off to a wrong start, premised as they are on "essentialist" and "meta-biological" categories of thought and agency that are not real or, metaphysically speaking, have no fundamentum in re).

Such "global" religion, I would claim, is neither natural nor revealed, neither private nor public, neither aesthetic nor consumerist, neither ethical nor simply political (or even theologico-political). It requires altogether different concepts and tools for its analysis and interpretation, even though it holds something in reserve for all these aspec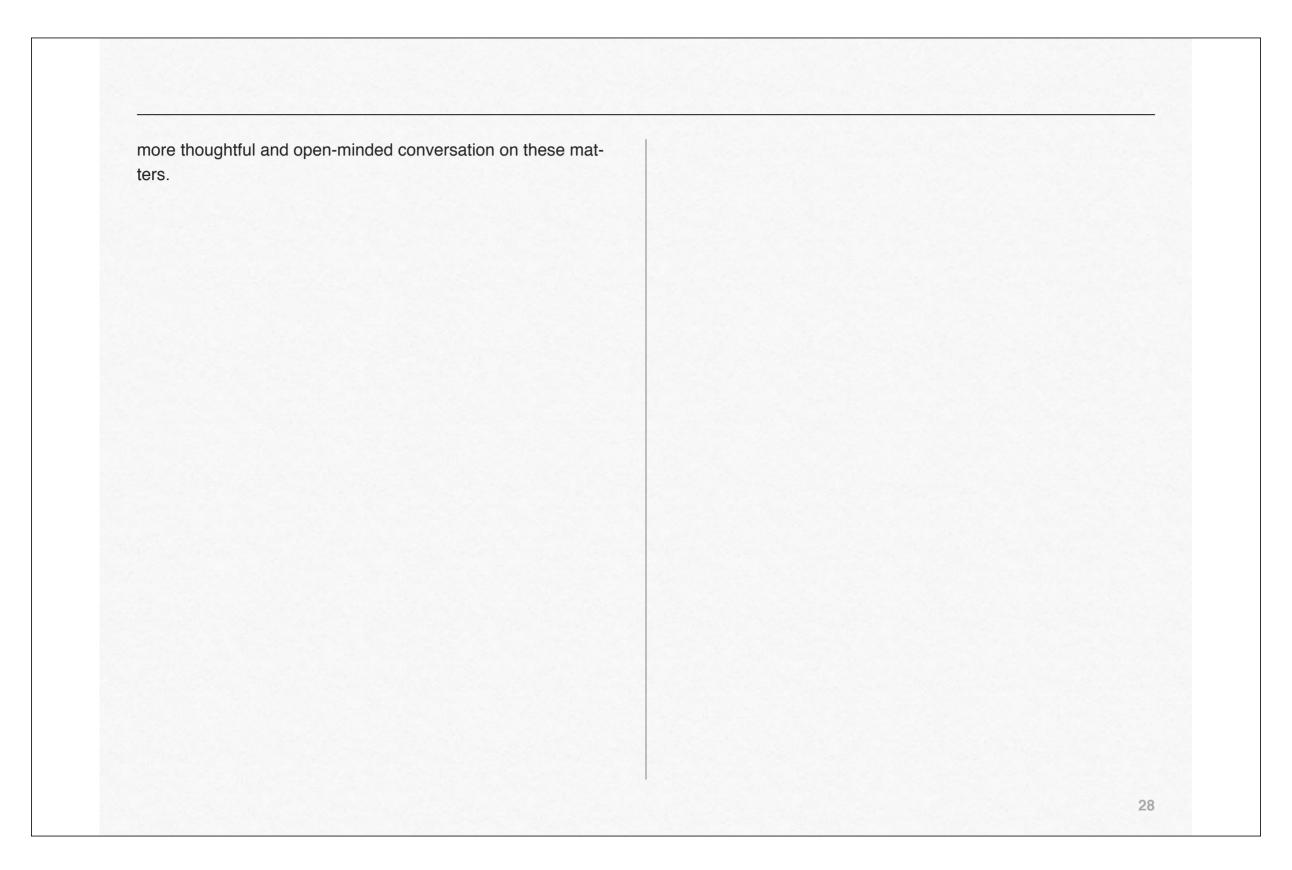ts, whose words and things, gestures and powers, sounds and silences, disarticulate and reconstellate themselves as new forms of life for the twenty-first century.

If one were to study "global religion" systematically then, obviously, the nation-state or intersections between religion and nation or state cannot be our point of departure or ultimate frame of reference. The question of nation or the state is, quite literally, a regional, local, and strangely derivative problem at best. Why assume, then, that the nation or nation-state is the locus classicus for the study of a religion that, clearly, is not identical or co-extensive with it?

Further, would a federation or union of states and nation, of nation-states—and, a fortiori, would a trans- and multi-national community (and, perhaps, "ethical community," a "community of values") such as Europe rightly claims to be—enable one to pose these problems differently?

Recent publications such as Christopher Caldwell's Reflections on the Revolution in Europe, not to mention (and in a radically different category), Thilo Sarrazin's book on immigration in Germany, Deutschland schafft sich ab, together with the disturbing phenomenon provided by the most recent parliamentary elections in The Netherlands that produced a government based upon the indirect but crucial support of an Islamo-phobic party (Geert Wilders' PVV), only underscore the need for a much

more thoughtful and open-minded conversation on these matters.

The Religious "Fact": Education and the Secular State

The second anecdote, I think, is perhaps even more illustrative of the point I would like to make in what follows.

One of the more interesting and puzzling approaches taken in recent years to tackle the question of religion and the modern nation or nation-state was the assignment given in December 2001 by Jack Lang, then Minister of National Education in France, to Régis Debray, then a professor of philosophy at the University of Lyon-III.

As Lang pointed out, Debray was the author of a much debated study, entitled God: An Itinerary (Dieu, un itinéraire),[4] as well as of numerous writings on the material—and, as he calls it, "mediological"—aspect of culture as it grounds all aspirations toward transcendence (meaning that "no society is capable of effecting its own closure" and is, hence, "necessarily incomplete."[5]). Interestingly, the book that had drawn Lang's attention sought to provide, not so much a biography, but another history of the changing "face and sense [sens]" of God, whose "original appellation"

remains while his "Being" has no longer the same characteristics, caught up as it is in "the machineries of the divine production" (as the back cover of the French version stated).

Debray was also known from his Latin American political adventures in Cuba and Bolivia and from his role as a longtime advisor of President François Mitterand, until his disappointment with the latter's second term and his own increasing "exaltation of De Gaulle as supreme exponent of the 'Europe of nations,'" led him to turn to the academic study of religion from what one of his commentators, Keith Reader, calls an "impenitent cultural materialist" perspective.[6]

Peter Sloterdijk, in one of the rare discussions of the relationship between Debray and Derrida (to whom I will return in a moment), suggests that God, An Itinerary "contains the most important hint at a mediological re-contextualization of Derrida" and takes Debray to have founded "the genre of what one might call theo-biographical discourse," with its "hybridization of theology and historical mediology" and its invention of "a new type of secular, semi-blasphemous religious science which provokes a comparison with Niklas Luhmann's 1977 work Funktion der Religion."[7]

Mediology, as defined and explored by Debray's 1991 Cours de médiologie générale (A Course in General Mediology), is introduced as "the study of the material mediations through which a

Word becomes flesh, an idea, a collective force, a message, a vision of the world."[8] In Sloterdijk's words:

If the last word of philosophy, driven to its limits, had been 'writing,' then the next word in thought would have to be 'medium.' By founding the French school of mediology—which differs from the slightly older Canadian school through its more deep-seated political orientation, but shares a sense of the weight of religion as a historical medium of social synthesis—he [Debray] had not only provided post-philosophical thought with a new material horizon, but also established the vital connection to culture-scientific research and the theoretical sciences of symbolically communicating systems.[9]

With reference to Dieu, un itinéraire as a "much-noted work on the knowledge of religions," Lang pointed to its discussion, "in passing" of the "question of teaching about religions in school." Indeed, he cited Debray's elegant diagnosis of the problem:

The Republic, rightfully, does not recognize any religious system. Must it therefore refuse to know any?[10]

Debray was asked to assess the needs of the Fifth Republic in having its functionaries and teachers—confronted with the complex demands of a multicultural, multi-ethnic society in a transnational, globalizing world and deeply troubled by the controversy over laïcité, the prohibition of veils in public schools, violence in the banlieus, and more—study and especially teach "re-

ligion" in a more engaged and useful, comprehensive, yet also intellectually acceptable, way than had been the case up to that day.

Debray's assignment was to "reexamine the place accorded to the teaching of religious facts" and this, Lang added, "within a secular and Republican framework."[11] It came some thirteen years after Lionel Jospin's request for a report by Philippe Joutard in 1989, referenced by Lang but in need, in his eyes, of a sequel and was solicited some three months after the event of 9/11, which had inspired the outcry of Le Monde's chief editorial Nous sommes tous Américains,[12] and, finally, less than a year before the report of the Committee Of Reflection On The Application Of The Principle Of Secularity In The Republic, headed by Bernard Stasi of which Debray would also become a member.Could it do so without falling in the trap of the "secular fundamentalism" that the New York Times in its editorial of December 19, 2003, attributed to the Stasi recommendations at the very moment then President Chirac signed them into law?[13] Conversely, could it avoid repudiation by secularists and religious traditionalists alike, without loosing anything of its critical edge and pedagogic corrective?

As a secular school would have to give students "access to an understanding of the world" and since religions are "facts of civilization," speaking of religion in the schools of the secular Republic had, Lang claimed, "always been possible" and had

"long" been part of its curricula.[14] In Lang's interesting phrasing of the assignment:

While respecting laïcité, a principle of harmony [sic, HdV], teachers give the knowledge of religions its fair place in the teaching of their disciplines. History, philosophy, literature, the plastic arts, music . . . here we can rightfully call upon the humanities.

Without privileging one or another spiritual option, and deliberately distancing themselves from any religious instruction, teachers approach religions as defining and structuring elements in the history of humanity; sometimes agents of peace and modernity, sometimes sewers of discord, murderous conflicts, and regression.

It is thus within the framework of the existing disciplines—and not as part of a hypothetical new school subject—that religious facts must be presented. Carrying this out, however, is difficult for a numbers of teachers. It appears necessary to better train all to address religious facts calmly.[15]

Debray's report, entitled L'enseignement du fait religieux dans l'école laïcque [Teaching Religious Facts in Secular Schools], came out in 2002 and was circulated widely. I, for one, got hold of my copy at a newsstand while waiting for my train at the Gare du Nord. An English translation came out in 2008 in a volume entitled Religion Beyond a Concept.

The slim report proposed to relegate the responsibility for the training of teachers in this old-new domain of "religious facts"—that is, of these "defining and structuring elements in the history of humanity"—to the famous fifth section, founded in 1886, responsible for "Sciences religieuses," of the École Pratique des Hautes Études (EPHE), a section in which luminaries such as Marcel Mauss, Étienne Gilson, Alexandre Koyré, Alexandre Kojève, Lucien Febvre, Louis Massignon, Henry Corbin, Georges Dumézil, and Lévi-Strauss, had taught and researched in earlier days.

Indeed, this institutional proposal has led to the establishment in 2006 of the Institut européen en sciences des religions (European Institute for the Sciences of Religion) of which Debray was the founding (and is currently the Honorary) Director. The I.E.S.R. forms an integral part of the EPHE and has instituted a host of academic initiatives and reflections on secondary education even though, to my knowledge, it has not yet succeeded in establishing a systematic or required curriculum for the training of all teachers in the public (laic or common) schools. This said, it has encouraged discussion on the content of the curriculum and offers a host of online resources on its website (www.iesr.ephe.sorbonne.fr).[16]

Debray had called for several concrete measures to regard the place of religion in course material on the school syllabus, albeit within the existing subjects such as History, French, and Civics,

and to train teachers at secondary schools on the introductory and advanced level, notably in the context of a course on religious facts and laïcité that they would need to attend at Les Instituts Universitaires de Formation des Maîtres (I.U.F.M, the University Institutes for the Training of Schoolteachers). Such enhancement of the curriculum, supported by the training of its teachers, was aimed at enabling students, first, to learn to understand their cultural heritage (in monuments, art works, and the like) and, second, to help them develop the intellectual tools necessary for improved intercultural relations and mutual respect.[17] A limited module of ten hours per year on the "philosophy of laïcité and the teaching of religious facts" was instituted.

However, from a distance it seems that the model of the I.E.S.R. is much more like that of the Collège de France, the Collège International de Philosophie, or, indeed, the system of Grand Écoles (of which, again, it technically forms part), all of which offer a wide variety of courses open to the general public. What the I.E.S.R. adds, though, is a Professional Master degree and the possibility for public educators to enroll in a program consisting of internships in relevant institutions, just as it assists the National Education Department to formulate frameworks, pursue theoretical reflection and excellence in the study and teaching of religion within the existing disciplinary structures of higher and secondary education to enable the transition "from a laïcité of incompetence (in which religion, by its very

construction, does not concern us) towards a laïcité of intelligence (where understanding becomes our duty)."[18]

I am aware of the fact that several further initiatives have been taken to address the question of religion in education in the European context, the 2008 conference and 2009 report of the European Research Project with the acronym REDCo (Religion in Education. A Contribution to Dialogue or a Factor of Conflict in Transforming Societies of European Countries), being one of them. Especially Jean-Paul Willaime, a member of that group and one of the subsequent directors of the Institut européen en sciences des religions, has made several efforts to relate this project to the original Debray proposal, producing surveys suggesting that a majority of French adolescents support "the idea that religion should be discussed impartially within existing subjects."[19] But I cannot go into them here. Their analyses and proposals do not affect the conceptual matrix that underlies them nor do they undermine my more modest—philosophical—reconstruction here.

iBooks Author

Conceptual Matters: Deconstructing "Cult" and "Culture"

Now, the principal justification for Debray's proposal for a new curriculum under the EPHE's auspices is what is taken (by him) to be an insurmountable—analytical—distinction between two categories or concepts that have accompanied and structured "religion" throughout the course of its history, namely that between "cult" and "culture," together with the assumption that preoccupation with the first (i.e., "cult") should—under proper methodological and pedagogical guidance—be replaced with an investigation of the second (i.e., "culture").[20]

While a "cult" would, first of all, be a "religious fact," but then also a fact of "civilization," one that "structures human history," at times as a factor of "peace and moderation," then again as a source of "discordance, of murderous conflicts and regression,"[21] its counterpart, namely "culture," as Jacques Lang's preface suggested and Debray reiterated, would not seem or need to display such ambiguity and volatility.

In the report it is as if Debray were arguing that whereas "cults" require our unconditional allegiance whose mythic origins and participatory modes of being must be described in "thick" language, "culture," on the contrary, is a loose descriptive—historical and empirical—notion, whose referenced reality is characterized by a regimen and adherence best captured in "thin" language.

Put differently, what is distinguished and, in fact, separated here is a certain diffuse and uncritical "appartenance" or "belonging," on the one hand, and an "autoconstitution" or "self-constitution," on the other.[22]

The pragmatic elegance and, dare we say, political and institutional courage, of Lang's and Debray's proposal thus gives way to a postulated, assumed ideological divide that rests on shaky presuppositions and condemns the whole project to failure.

After all, the differentiation between "belonging" and "self-constitution," in other words by sectarian "communitaurisme," on the one hand, and republican-democratic "laïcité," on the other, is far from evident and, in fact, is questionable as an all too simple dichotomy such as those between "faith" and "knowledge," "value" and "fact." It rests upon a naive assumption of a space of non-confessional, civic neutrality or liberality, while allowing (indeed, requiring) at the same time to conceive and speak of the common, public school in quasi-religious terms as

a "sanctuaire républicain" (as president Jacques Chirac called it in 2003).

Further, Debray claims that teaching "cults" as an integral part of the study of "culture" needs to be premised on the axiom that "the teaching of the religious is not a religious teaching."[23] Only thus could the integrity of republicanism as promulgated by the institutions of secondary and higher learning be maintained and the corresponding "demons of communitarianism" (feared by secularists) and the "Trojan horse" of "syncretism [confusionisme]" or "relativism" (scorned by clerics) be contained.[24]

All depends, therefore, on our intellectual ability and political will to avoid blurring the categorical distinctions that exist between "catechism" and "information," or between "testimony" and "reports," that is to say, between a "sacramental" relation to "memory," on the one hand, and an "analytical" attitude towards "knowledge" (as opposed to "faith"), on the other.[25]

Moreover, without allowing any single confession to make its necessarily exclusivist claim to "authority," let alone its "monopoly of meaning," the Republic should, on Debray's view, abstain from putting itself in the position of an "arbiter;" it should instead offer a merely "descriptive, factual, and notional" approach to the residual (now stable, then again growing) presence of the religious phenomenon in its midst.[26]

Its assumption is that to let "religion" circulate outside the accepted institutional channels for the publicly controlled and rational transmission of knowledge ipso facto means to relegate it to a series of "pathologies,"[27] which religious cults generate when left to their own devices. And holding these in check would require nothing less than a methodological and didactic approach, based upon sound philosophical premises, which "stipulates a bracketing of personal convictions," steers clear from the fruitless alternatives of "devitalizing" and "mystifying" tradition and opts, instead, for informed interpretation of religious, that is to say, socio-historical, literary, and cultural facts.[28]

All this does not mean that Debray—in addition to excavating its most salient and pervasive phenomena—has much use for the term or reality of "religion" (or, for that matter, any of "object" and "region of reality"[29]) per se. In fact, his more recent Les communions humaines: Pour en finir avec "la religion" explicitly calls for the concept's retirement and for its substitution with the more sober notion of "communion."[30] In either case, mediology's claim would be that "religion" has come to serve as a "medium" of sorts:

What mediology wishes to bring to light is the way in which something serves as a medium, and the often unperceived complexities that go with it, looking back over the long term (from the birth of writing) without being overly concerned with present-day media (even if certain mediologists are prepared to

consider these)… The mediologist's interest is therefore neither in an object nor a region of reality (the media, let us say), but on the relations between objects or regions; between an ideality and a materiality, a feeling and a piece of equipment, a disposition and a device. What matters is putting two terms into relation with each other… A study of the desire for immortality is welcome in itself: but it becomes a mediological inquiry only if one attempts to show how this moral sentiment has been transformed by contact with, and under the influence of, painting, photography, cinema, and television—in short, with the evolution of the apparatus of the collective imagination. Thus, what phenomenologists asked of the "eidetic variation" (namely to imaginatively modify the properties of an empirical object in order to intuitively discover its essence), the mediologist asks of the "technological variations" of supposedly invariant faculties, behaviors, and institutions.[31]

And these distinctions would seem to hold true whether one thinks of religion as an "object of culture" or an "object of cult."

We need not investigate here whether the deployment of these (or, for that matter, any other) conceptual alternatives create more clarity, allow for more resourcefulness, in assessing and addressing the phenomenon or set(s) of phenomena whose name or concept we may, indeed, have to change one day. They may or may not do so; in any case, it remains doubtful whether successive functional equivalents for—and beyond—a concept, in this case, "religion," will escape the long shadow cast by the very tradition or, rather, set(s) of traditions, whose common denominator and supposed commonality, community, let alone "communion" was admittedly something of a stretch, that is, nothing less than a violent imposition (as any concept will be). Nothing, strictly speaking, falls under a concept (albeit it the most pertinent or appropriate concept found or coined so far). In the end, there is nothing but the at once minimally different and infinitely multiple "beyond" of a concept (e.g., of "religion," but also of "God," "the Other," "communion," even of the "beyond" itself) that could possibly interest, captivate or inspire us. And when and wherever it does, this happens in barely visible (audible, tangible, etc.) yet at the same time radically, globally transformative ways.

Section 5

"A Little Further"

Jacques Derrida, who had been Debray's teacher at the École Normale Supérieure, rue d'Ulm, in Paris, was asked by Jacques Lang to critically evaluate and respond to Debray's proposals. Derrida made an important observation, on which he reported in rough outlines during a conference at Stanford University in 2002, about a year after Debray's report was first presented.[32] The change in the French government that soon followed probably explains why this invited response, at least to my knowledge, never materialized.

In 2004, Debray and Derrida appeared in a lively long televised debate with each other on France 3, in the program Culture et Dépendances, without ever touching upon these matters directly, let alone explicitly. What did become clear, though, was the sharp contrast between Debray's long held belief in "the determinant specificity of the nation-state, a belief . . . which animate[d] his hostility to pan-European federalism and his admiration for an . . . 'idealized de Gaulle,'"[33] on the one hand, and

Derrida's more radical and resolute federalism and internationalism (in matters European and well beyond), on the other.

In his remarks at Stanford, Derrida noted that the distinction between the "cult" and "culture of religion" or between "religious teaching" (or "teaching religiously") and "teaching religion" is both useful, even necessary, and unhappy, indeed, questionable and (as you guessed) deconstructable. As he put it:

I approve of Debray's distinction between culture and cult, teaching religion and religious teaching. Nevertheless, I am not totally convinced by and happy with this distinction, and I would try something else. Not to object to his rhetoric or logic, but to try to go a little further.[34]

Derrida's different approach does not so much propose to leave concepts—here those of "cult" or "culture"—behind, but instead asks what such concepts have to rely on for their distinction and application to offer any guidance at all. More precisely, he hints at a "space" or "spacing," which would allow for any concept—"religion" or each single one of "religion's" central notions, such as, say, "revelation"—to make its appearance in the first place. "Revelation" would require some "revealability," not so much in terms of the latter's logical, chronological, or ontological precedence or prevalence, but as a "condition" or "incondition" which is "conditioned" by what it "makes possible," in turn, thereby undercutting every traditional and modern assump-

tion of foundationalism, transcendentalism, possibilism, and the like. As the quasi-condition of any possibility, more precisely, as a "conditioned condition" (and, hence, no condition at all), it would "be" the impossible par excellence and, as such, irreducible to any theologico-religious or –political stratagem.

Further, Derrida invokes once more Plato's term chora, which in the Timaeus stands for the impossible possibility (rather than a possible impossibility, as Heidegger would have phrased it) of, precisely, a beyond of the concept (here: of any concept). Unthinkable that we should not attempt to think it, Derrida seems to say, unthinkable that we find it readily—or, indeed, ever at all—anywhere present. Derrida would thus insist on (what Adorno called) the "unthinkability [Unausdenkbarkeit] of despair," while acknowledging (again, like Adorno) that this difficulty can hardly be the source of much hope.

Everything comes down, then, to relating or negotiating two different endeavors, irreducible to each other, but also unthinkable without each other. On the one hand, there would be our taking "religion," in short, all our efforts to maintain the term, for lack of better substitutes, while venturing into territories and dimensions, possibilities and virtualities, that exceed its past and present conceptual grasp. On the other hand, there would be the need to study the incomplete set(s) of phenomena of apparent historical and systematic relevance for the eventual understanding of its (i.e., "religion's") phenomenon and, as we said, phe-

nomenality (studying words and things, gestures and powers, sounds and silences, smells and feels, shapes and colors, affects and effects, etc.).

Having distinguished these two—broadly systematic and roughly empirical—approaches to one and the same object, subject, name or concept, a simple but far-reaching hypothesis imposes itself. What is at stake in these endeavors is not so much a metaphysical dualism between the here and the hereafter (the Hinterwelt, before, around, beyond, under or above the world we know), than an at once ontological and methodological duality of perspective: a "dual-aspect theory of reality," to cite Stuart Hampshire's characterization of Spinoza's deus sive natura, a two-way seeing of "aspects" of which Wittgenstein speaks in his Philosophical Investigations (invoking the duck-rabbit picture), a differentiation between langue and parole, as Ferdinand de Saussure proposes in his Cours de linguistique générale, a "double séance" and "double science," as Jacques Derrida proposes in his study of Mallarmé, and the list of exemplifications is far from complete.

Instead of asking, perhaps, what the attempt "to go a little further" aspires toward, we are thus invited to see what promise and what difficulty the proposed—in Derrida's view, provisional and, at best, strategic—distinction between "cult and culture" or between "teaching religion and religious teaching," entails exactly.

The division of labor between theoretical (cultural, historical) versus confessional and ritual (cultic, confessional) interest it implies is thus at once pragmatic and deeply steeped in a metaphysical as well as societal need for separating, contrasting, perhaps, contradicting normative domains or "value-spheres." But its inevitable suggestion of dichotomy and definitional or methodological purity is, ultimately, also misleading and has no fundamentum in re.

If there is any religious "fact," it will take on the form—philosophically no less than sociologically speaking—of a "fait social total," that is of a total ("global"?) phenomenon of which it is hard to believe that its historical and more than historical presence is that of a "fact" and a "social fact" at that. As a fact of its own kind ("un fait total d'un genre particulier"), it is "multidimensional."[35] Indeed, as Marcel Mauss (on whom Debray draws here) already knew—borrowing this expression from his pupil Maurice Leenhardt (who in turn had taken his lead from Emile Durkheim)—the term "fait social total" conjures up a reference or reality that is neither purely material nor spiritual but transcends both in a way and direction that is at once magical, mysterious, mystical. Its "archive" (as Derrida will say) or "apparatus" (as Giorgio Agamben, following Michel Foucault, will add) has a certain virtuality that is not without effect—and, hence, "actuality"—in the world we experience.

Over the years, Derrida had devoted much attention to the philosophical and theological underpinnings of the French concept of laïcité in view of what Michael Naas has ventured to call "a radical secularity that inscribes faith (though not religion) at the very origin of the sociopolitical and thus . . . at the very origin of all sovereignty."[36] But what does such "radical secularity"—a "reworked and originary laïcité,"[37] as Naas also calls it—imply in more practical-institutional matters? And, can its "faith" keep "religion" at bay, that is to say, distance, separate, indeed, emancipate itself from it?

The concept and practice of laïcité would have to be "reworked" in pursuit of its "originary" meaning, sense, and force, so that its remaining—perhaps, inevitable—"sacrality" and "sovereignty" might not so much be removed but be put under erasure, deconstructed, subjected to an interminable analysis that disjoints a certain "faith" from all the historical and natural, revealed and positive, private and public forms of "religion." It is this "faith" that I am tempted to call "global."

In sum, this notion—hardly a "field"—requires a different type of analysis than the one that history or, for that matter, social science, literary studies, even philosophy are most familiar with. It is here that the question of what I would like to call "deep pragmatism" arises. For one thing, such an inquiry touches upon theoretical and conceptual problems that challenge the very basis and parameters of "History" (even "Intellectual History") as a

discipline or, for that matter, of any other field. Indeed, it requires one to invite the perspectives of scholars steeped in different domains of inquiry and reflections (philosophers and other theorists to begin with), without invoking all too facile appeals to inter- or transdisciplinary scholarship.[38]

For reasons that I cannot develop here, I take Lang's and Debray's view to be indicative of a systematic (call it conceptual or analytic, hermeneutic and normative) problem that we have long been familiar with: namely that history or historiography, whether as ancient discipline or as a modern academic field, even when it relies on the most sophisticated and nuanced among its methods, cannot adequately address or fully resolve on its own account (i.e., on its own turf) the questions raised by the modern phenomenon of "global religion." Indeed, no single field can.

A Religious Canon for Europe?

It should be noted that, for Jack Lang and Régis Debray, religion—the "religious fact"—within the French national context of the Republic and its laic public school (in the "Europe of nations," as Debray, a leftwing Gaullist, is only happy to add) does not need a new or separate field of study. In Lang's and Debray's view, religious education or, rather, the teaching of religion does not enter the curriculum as an added subject, a theme or field sui generis. The need and duty to know does not need specialized, religion oriented, disciplinary knowledge per se. It requires even less the privileged, insider kind of "thick," putative knowledge that is based upon revelation, tradition, dogma, mystic illumination, spiritual exercise or ritual practice. "Theology" is not what is called for here, as, on Lang's and Debray's terms. It can only be "cultic."

It is important to emphasize this assumption and also its relative merit, if only to get into clearer view what goes wrong with the overall argument that claims to sustain it.

Some have argued that the "cross curricular treatment" of the religious "fact" in French education is "seriously problematic" since it presupposes, precisely, a "kind of detachment from religious beliefs that is neither possible nor desirable" and also that to better understand religion (the intellectual aim Lang and Debray wish to achieve, albeit not so much for its own virtue, but as a conduit, first of all, to civic education and its ethos) "young people require a thicker encounter with religion than the study of le fait religieux will permit."[39]

Yet, this familiar objection all too easily reverts into a contrary (and no less dubious) assumption, namely that only religion gets religion, in other words, that only a "theological approach" to the phenomenon of, say, global religion has a better chance to respect and protect the very "substance" that would otherwise get lost in the methodologically atheist and neutral or secular approach that forms its alternative.

But, in this, Lang and Debray are certainly right: one does not need a separate discipline or field—a department or program of religious studies, nor, for that matter, a comprehensive or integral account of the so-called history of religions or world religions—to discuss matters of importance that find their proprium in the very "fact" (a "religious fact," if ever there was one) that they are no longer identifiable and localizable (and, perhaps, never were) and that, hence, tend to subvert all explanatory genealogies, chronologies, the very nexus of cause and effect,

law and exception, between structure and event, if you like. The study of "global religion"—of its words and things, gestures and powers, sounds and silences, smells and touches, etc.—suggests nothing else.

As a consequence, there is nothing wrong with a "thin," that is to say minimal—and be it "minimal theological"—cross-curricular and trans-disciplinary approach to "religion" per se. Provocatively put, the only elements and forms of religion that could truly and responsibly interest us all are "generic" and, hence, "generalizable," perhaps, "universal" in their intent and import.[40]

This said, it is, perhaps, more appropriate to say that the two perspectives or "takes" ("snapshots," really) on one and the same worldwide yet elusive or, as I said, "global" phenomenon—i.e., the "thin" and "thick," the "public" and "particular" (whether "private," "communal" or "national")— cannot be kept apart that easily. Nor should they be.

This is why the "movement away" from an "abstentionist" and "incompetent" laïcité to "a return of religion to public education"[41] in a laïcité of "intelligence," of sorts, leaves neither the former nor the latter untouched or intact, but traverses and transcends both. The question, really, is how one both "traverses and transcends" (to use Alain Badiou's elegant formulation) historical and legal, cultural and situational differences so as to achieve a result in which needless abstraction and all too much concretion are mostly avoided.

If what I have argued is at all plausible, then, in fact, there is no such thing as a fully "indirect" teaching of religion, just as there can be no absolutely "direct" instruction of its putative reference or lack thereof, that is to say of its experience and promise, either. In other words, the very distinction between the "teaching of religion" and "religious teaching" is misleading or somewhat artificial at best.

I would now like to turn to a question that the European Educational and Cultural Forum, among other platforms and public debates, has sought to answer, namely what does "living with religious differences in education" amount to given the historical and accelerating tendencies toward "Europeanization and globalization" that "bring people closer together than ever before" while, perhaps, prompting them to "fall back on traditional identities and private loyalties, where religion often plays a major role," as well? Put differently, how should we give new "impetus to a European dialogue on the direction of a new model in education with religious difference, moving from passive toleration and mutual misunderstanding to active appreciation and accommodation of religious difference, without surrendering the goal of a shared citizenship," indeed a "shared European space"?[42]

My tentative answer would be: by introducing a religious canon for Europe, to begin with, a canon that would be at once provi-

sional and open, limited and selective (if not restrictive, as most, perhaps, all canons are) and mobile, indeed, virtual (which I take to mean "digital" and much more).

In other words, we might concede that we do not need a separate field or set of disciplines—just as we do not need departments or programs of religious studies, divinity schools, and religious academies per se—to study contemporary religion intensively and extensively, that is to say, deeply and broadly or, as I prefer to say, globally.

It would seem that what Lang and Debray have in mind is a religious "canon" for the secular nation-state, not just for France but for Europe, convinced as they seem, in the words of Jean-Paul Willaime, that "Europe, contrary to the impression gained by a superficial study, is more laical than one would think" and assuming that that is the reason "why the French solution which is now in the process of emerging can expect a positive and interested response in other European Union member states and, possibly, in countries aspiring to membership now or in the future."[43] Willaime continues:

It is not the laïcité of understanding, brought about through the Joutard colloquium and the Debray Report, which risks a rebuff from Europe, but an abstentionist and paralysed laïcité that, in the eyes of our European partners, will appear suspicious and outdated. Between a process of internal secularization in religious education curricula in various European countries, on the one hand, and the opening of the question of introducing religious culture to school in France, on the other, there is a certain degree of convergence emerging from very different historical and legal contexts. Characterized by a longstanding secularization process and suffused with the spirit of cultural secularism, European countries face the same challenges: a growing number of Muslim school students, the threats posed to respect for civil liberties by certain religious groups, the religious ignorance of students, demands for direction and ethical guidance, and the education towards citizenship in culturally diverse societies . . . Whatever their legal frameworks, all European countries are facing the question of how to approach religious faith respecting the freedom of conscience of students and their families while at the same time educating them towards freedom of thought and a critical stance. The question is, then, how to integrate these different orientations into the school without diminishing its laical stance or its educative mission. In France it is the very success of laïcité, the maturity of the system, that allows is to open itself calmly to the question of instruction about religion in a laical school.[44]

But what form, in Lang's, Debray, and Willaime's eyes, could such a secular canon take as it moves from laical "incompetence," with its putative "abstinence" and "ignorance" in matters religious, to a "laicity" or "laicism" of "intelligence"? On the basis of their premises and going "a little further," with Derrida and others, the following might be said.

A religious canon (for instance, to begin with, for Europe), should be able to name or nominate, present and recommend, religious authors and texts, authoritative documents and doctrines, themes and concepts, images and gestures, sounds and silences, places and spaces, just as it must leave room for alternative—if not necessarily historically or culturally dominant—roots and resources, archives and apparatuses, that may well acquire more strength and prominence one fine (or terrible) day (depending on whom you ask).

That is to say that such a canon presents the—necessarily limited and selective—list of books, of authors and ideas, idioms and icons, that have been more influential than others in shaping, say, the Western imagination, like it or not, for good and for ill.

Put differently, such a canon would comprise and compress—indeed, expand and condense—a set of regulating principles and notions, values and norms, practices and ways of life, by which current intuitions and so-called maxims are measured and judged and, thereby, found to be wanting or, on the contrary, proven to be genuine innovations, improvements for learning.

Last but not least and somewhat paradoxically (since this seems to violate the very concept of "canonicity," traditionally defined), such a canon would have to be updatable and, as it were, up- and down-gradable.

After all, to propose and determine a canon—the canonicity of certain words and things, gestures and proven or supposed spiritual powers—is not necessarily an imperial, authoritarian gesture (although, of course, it can become one and, historically, this has been the default, of sorts). But just as canonization in the Roman Catholic Church does not make someone a saint but merely declares that that person is and, indeed, previously, was one, so also can the establishment of a so-called religious canon for Europe be a descriptive, if selective, as much as a normative, hence, discriminatory, act. The difference would merely be that, other than traditional canonization, a religious canon for a contemporary and future Europe remains not only open-ended—new saints, like worthy texts and words, images and sounds, may come along—but is also revisable and amendable in principle. Moreover, given the fact that it will be an inevitable compromise—no matter what consensus is reached—it will be no less inevitably compromised in ways that no "give and take" can fully balance or compensate. With religious (or, for that matter, any other) canons winner takes all is the rule of the game, at least for a certain period of time, until revisions take hold.

However, it would be unwise and presumptuous to declare what the content—here and now—of such canon or even its method of instruction might or should be. In principle, we might say, "anything goes." The canon, we can safely trust, will take care of itself.

What do I mean, then, by a "mobile" canon or by a canon pictured as a "mobile," a moving structure of cloudlike figures that revolve around each other, each of them separate and all of them synchronized as touching upon one means touching upon all others?

For one thing, it is a canon premised not so much on the selecting and (temporary) privileging, codification and memorization of texts, but it is one modeled after and profits from recent insights in so-called "serious gaming," thus offering innovative digital, image and sound based methods to envision a new Pascalian wager, if you like.

Indeed, a canon of "make believe" might well turn out to be one of "belief in the making" and create or invite new faith (but, this time, in the world, in others, and, least but not least ourselves), as we go.

One could easily imagine enlisting some of the most interesting ideas in new labs investigating digital media and learning for this task. I am thinking of the work done by scholars such as Tim Lenoir at Duke University, whose Virtual Peace and Emergence use multiplayer and transmedia simulation environments taken from the emerging field of "alternative reality games (ARG's) to help students and humanitarian groups and workers in situations of peace and conflict resolution to think and act more creatively and cooperatively.[45]

Emergence, for example, is described as "the first massively multiplayer online game that encourages diplomacy and social cooperation over violence," set in the 22nd century, in a "post-apocalyptic future," in which androids have destroyed much of humanity with few survivors left scrambling for what is next. It is intended to be played by thousands of players at a time and is "designed as an interactive ecology in which players help themselves by helping others."[46]

These online alternative reality games are thought- and act-experiments at the same time.

This is not to say that more classical formats of canons are obsolete, even in the world of today. Examples such as The Netherlands in a Nutshell: Highlights from Dutch History and Culture, the booklet produced by the Committee for the Development of the Dutch Canon which was assigned this task by the Minister of Education, Culture and Science in 2005 and published its result in 2008 (as "a canon in fifty key topics, or 'windows': important people, inventions and events which together show how the Netherlands has developed into the country that it now is"[47]), or The Bètacanon, edited under the direction of Robbert Dijkgraaf,[48] serve their purposes as they address specific domains (national history and natural science) that form an integral part of our societies and will continue to do so. These canons even present their selection of "basic knowledge" while referencing other, further points of reference (places and web-

sites to visit, popular and scholarly literature, etc.). The historical canon, for its part, was generated "in a typically Dutch way: it was not decreed by a central authority or a single lofty institution, and neither was it created by a majority vote in a referendum."[49]

That being said, "global religion" is no such domain (of either history, nature, or anything else); it lacks the specificity necessary for even a polyphonic, musical interpretation of the term "canon" that van Oostrum and his committee borrow from Edward Said. (In Said's words: "canon as a contrapuntal form employing numerous voices in usually strict imitation of each other, a form, in other words, expressing motion, playfulness, discovery, and, in the rhetorical sense, invention. Viewed this way, the canonical humanities, far from being a rigid tablet of fixed rules and monuments bullying us from the past . . . will always remain open to changing combination of sense and signification."[50])

But such an open-ended, provisional and limited, if mobile, canon for Europe, it might be objected, is hardly religious and precisely in its celebration of diversity and heterogeneity, equality and freedom, obeys a secular concept of reason and "intelligence" more than anything else. Put differently, a canon of European religion—more precisely, of religions in and (still or already) beyond the "shared European space" we inhabit—could not have the same historical and theological weight (indeed, the same existential feel and political impact) as a properly religious canon does (or, should we say, once did). It would seem that we could no longer teach religiously when we teach religion in this way, in the old-new format of a canon that from this present moment onwards would have to be principally open in all (past and present, lateral as well as future) directions at once.

But then again, it is easy to see that this objection merely reiterates and returns us to the—philosophical no less than theological—impasse into which the Lang-Debray lead us, in spite of their best intentions to solve these matters once and for all.

Should we conclude, then, first, that the concept and practice of "the secular"—and, a fortiori, secularism and French laïcité—were never neutral, value-free to begin with, and, second, that the boundaries between the two cultural domains of the religious and the secular with their respective pasts and present references are porous, even fluid? That this is the case and will, no doubt, become ever more seems obvious as current tendencies towards globalization, the expansion of economic markets and technological media, render ideological systems and ways of life associated with revealed, natural, world, private, or public religions in the modern world, if not obsolete, then in any case increasingly "global."

In contrast with the US and unlike other immigration societies (such as Canada, Australia, perhaps even Israel and Palestine),

the EU, its populations, policy makers and leading intellectuals do not tend to conceive of "their" canon—let alone, a "religious canon"—as something principally and practically mobile and open. Even less are they capable of conceiving of a canon that, while attuned to elements and forms of religious life, remains open in any imaginable direction.

The ongoing debate about Civic Integration ("inburgering") requirements and courses for immigrants and new citizens is a case in point. A religious canon "for all," that is to say, equally distributed among all—in public as well as confessional schools, in governance bodies high and low—might not only be a better substitute for them; the catch of a religious canon for Europe is, ultimately, this: it is "ok" to expect from immigrants and new citizens that they blend in, culturally no less than legally and politically, if and only if what they blend into has a genuine chance of receiving and registering what they themselves are (or even, in "their" putative original state, were) or, indeed, may yet take themselves to be and become, when their beliefs and practices enter into the mix.

But for this to happen a certain converse of this process of civic integration or "inburgering" of those who are supposedly already integral parts of the civic community (nation, state, or body politic) and tend to self-identify themselves as such is logically and practically necessary and imperative as well: a certain "uitburgering" by which I mean here an at least mental (intellec-

tual and spiritual, moral and affective) "expatriation," rather than an inner or outer emigration, a shedding of "bourgeois" identity and espousing the "coolness" of "global soul."

Even taken as a "spiritual exercise," "ideal role taking," or "serious game," such a countermove—and a move that should come first, before anyone (or any law) asks "others" to do their share—could work wonders pragmatically and politically, in Europe and beyond, as it ruptures and fractures the "natural disposition," the dogmatic slumber of identities and ethnicity that are presumably homegrown and far more ingrained than is good for us all. A gradual widening of our horizon, broadening our circle by pulling "others" (including other circles) in, won't establish this all by itself. And in this sense, the traditional and modern concept of cosmopolitanism may no longer suffice.

The risk of my proposal for a religious canon for Europe is clear. "Europe" is both too big and too small a reference to begin with. For one thing, it is too big, given that the situation in different countries varies historically and legally and given the fact the "the principle of subsidiarity, laid out by the European Union in the 11th Annex to the Treaty of Amsterdam, respects the status accorded to religious and non-confessional organizations according to national law."[51]

For another, the reference to "Europe" is still or already too narrow since global religion does not stop at the borders of the Union, nor does it originate there. It traverses and transcends na-

tional and international boundaries and helps us imagine a global civil society or public sphere that is no longer determined or restricted by the principles of national and statist—or, for that matter, federalist—sovereignty, but emerges and inspires, as it were, from the bottom up (or, if you like, from a higher "top," more precisely, a greater idea of perfection and perfectibility, down).

In other words, Willaime's assurance that "we are not talking of introducing any kind or rupture in the school's ethos"— but also that the school's contribution, not only to the transmission of knowledge, but to a whole "deontology of intellectual conduct" is, first of all, that of a "national institution which culturally and socially integrates students from different social backgrounds and educates them in civic virtues"—may be based on a silent axiom that merits interrogation.[52] After all, the "cultural dimension of knowledge transmission" opens up an understanding of known and unknown horizons of understanding, namely of "the entirety of cultures past and present," that hardly fits the mold of any given national identity, let alone the civic or intellectual "ethos" that are derived from it.[53] A different type of archive and apparatus—one that is virtual in more than one respect—is implied here.

Willaime is right to claim that the teaching of "historical method," "procedures of verification," and "critical reasoning" when applied to the "religious fact" studied in school contributes all by itself to the establishment of a distinct "citizenship education," if only because religion thus enters "a space of collective examination."[54] Indeed, Willaime continues:

The need to speak of religion in front of a diverse audience, the inability to appeal to the connivance of co-religionists, the necessity to objectify and explain the worlds of representations and attitudes proper to a given religion, alone constitute a position that marries religious belief to citizenship in a pluralist democracy. It enforces the recognition from the start that the religious worldview under discussion is not an all-encompassing symbolic structure for all society—even if it is the majority religion—but one orientation among many. Such an approach must inevitably clash with all religious self-descriptions that refuse a historical perspective. In other words, the fact that religion is treated in school means we must enter into conflict with all fundamentalists and especially with all understandings of religion that insist on forcibly applying their own norms to the whole of society.[55]

But then again, while this allows and requires pupils and parents to learn "to speak of one's own religion as though it was someone else's," it is certain that no given civic and intellectual ethos—indeed, no nation or state or union of these—can proscribe or control what its outcome will be. The aforementioned "examination" may very well end up carving out the (social, cultural, and legal) "space" in which it takes place or from which it

starts out. Indeed, treating religion at public school within the context of existing subjects creates a phenomenon of "interference" with the religious education outside of school and, as it were, in the general culture as well.[56]

An explicit reference to—and engagement with—the religious archive, in its totality no less than in its inevitable limitation (working with specific words and things, texts and practices, images and sounds, gestures and powers, etc.) literally signals and names this principal open-endedness and pragmatic depth that all education, in schools (public or not) and beyond, will have to aspire to in order to make any intellectual and ethical sense and contribution in our world at all. In the age of globalization with its predominance of economic markets and technological media, the resurgence of "global religion" serves as a reminder of just that incontrovertible "fact."

Canon and Constitution: Invocatio Dei, Minimalkanon, and the Open Archive

A final question remains. Could one imagine a religious canon for Europe without reopening the contentious debate about the explicit mentioning of religion—more in particular, Christianity—in the preamble or, for that matter, anywhere else in the European Constitution and its accompanying documents?

As I see it, plea for a canon would not need to present itself as an Invocatio Dei per se, nor need its authors and privileged texts, topics and themes, images and sounds, be seen as a prolegomenon in the theological—and, in that register, dogmatic ("cultic")—sense of the term. A canon, after all, is not a "catechism" even if it does have certain structural features in common.[57] And the last thing we should envision, let alone expect, is a re-Christianization of Europe and its formal-legal justification as a point of departure or prime reference for all future debates on education and civic integration.

Joseph H.H. Weiler makes this very clear in a host of writings, most notably his 2003 Un'Europa Cristiana. Un saggio esplora-tivo, which I have consulted in its expanded German edition, entitled Ein christliches Europa: Erkundungsgänge, published a year later.[58]

A more than merely "passive toleration" and, indeed, truly "active appreciation of religious differences," he seems to suggest, aims for less than a re-Christianization and, in fact, for more. It moves beyond the self-imposed "walls of separation" and treats constitutional documents and especially their preambles as "more than a minimal canon [Minimalkanon] of universal values," seeing Europe, instead, as an "ethical community," a "community of values"[59] of which religion—and, hence, also Christianity—forms an integral part, like it or not. The constitution, thus seen, would be a "repository [Depot] of values, ideals and symbols that are shared in a society."[60] Yet, could a more than minimal, if not necessarily maximal—by which I mean, strictly dogmatic-theological, ecclesial—canon be seen in this light, as an archive of "values, ideals, and symbols" that may or may (not yet or no longer) be shared by most? And, would not a "global" canon come closest to this ideal, which is an "Ideal of Reason"—a Kanon der Vernunft—as Immanuel Kant knew all too well?

Revisiting the debate about Europe's constitution, in this context, might be of use, then. I am thinking of the simple and elegant argument Weiler invokes to justify a reference to God or "Christian roots"—an Invocatio Dei—in the preamble of the Con-

stitution of the European Union (a reference that was in the end kept out of it and for which Weiler reclaims neither exclusivity nor privilege, but just a necessary, if not sufficient, mention and use).

Redeploying a host of terms and concepts that we encountered already—"thick" and "thin," "cult" and "culture," "laic" and faith-based—Weiler points out:

[A]ll members of the European Union, under the tutelage of the European Convention of Human Rights, are committed to the principle of the 'Agnostic or Impartial State,' which guarantees both freedom of religion and freedom from religion.[61]

Indeed, state neutrality in matters religious is a conditio sine qua non for liberal, parliamentary democracy, Weiler maintains, but this given (which is respected throughout Europe, albeit with different emphases) by no means excludes a corollary insight, namely that "a reference to God is both constitutionally permissible and politically imperative." Weiler continues:

In its substantive provisions, the European Constitution reflects the homogeneity of the European constitutional tradition. It is fully committed to the notions of freedom of religion and freedom from religion, as it should be. But when it comes to the preamble, the EU Constitution should reflect European heterogeneity. It should reflect the European commitment to the noble heritage of the French Revolution, as reflected in, say, the French constitution, but it should reflect in equal measure the symbolism of those constitutions that include an invocatio dei. The refusal to make a reference to God is based on the false argument that confuses secularism with neutrality or impartiality. The preamble has a binary choice: yes to God, no to God. Why is excluding a reference to God any more neutral than including God? It is favoring one worldview, secularism, over another worldview, religiosity, masquerading as neutrality. How, then, can one respect both traditions? The new Polish constitution gives an elegant answer: It acknowledges both traditions: 'We, the Polish Nation - all citizens of the Republic, both those who believe in God as the source of truth, justice, good and beauty, as well as those not sharing such faith but respecting those universal values as arising from other sources, equal in rights and obligations towards the common good …'A similar solution should be found for the European Constitution. Europe cannot preach cultural pluralism and practice constitutional imperialism. Indeed, the political imperative is as great as the constitutional one.[62]

On Weiler's view, the principle of the so-called "agnostic premise of the state" is, first of all, a principle of "positive constitutional law."[63] Not only does it allow, it even calls for supplementary references, mostly voiced in the preambles of constitutions and conventions, that ought to include invocations of religion (and, in the European context, as Weiler sees it, of Christianity).

Agnosticism, then, means a "pluralism"[64] that is at once deep in that it gives traditions and convictions based upon divine transcendence and human autonomy their respective due and more liberal than all too restrictive, secularist-laïcal (read: Franco-American) models, in that it does not privilege one position on either side of the supposed—and, often, exaggerated and misunderstood—ideological divide, but, instead, treats them freely and equally. Indeed, recalling Augustine and Maimonides, Spinoza and his own father, an orthodox rabbi and a scholar, Weiler claims that, clearly, the "antithesis" of religion and reason is "false."[65] Indeed, Weiler chastises:

One of the greatest obstacles to the spread of democracy is the widely held view that religion and democracy are inimical to each other: to adopt democracy means to banish God and religion from the public sphere and make it strictly a private affair. Indeed, that is the message that the Franco-American model of constitutional democracy sends to the world. But is the particular relationship between church and state at the time of the French and American Revolutions the model that Europe wishes to propagate in the rest of the world today? Is the European Constitution to proclaim that God is to be chased out of the public space? How long must we be prisoners of that historical experience? The state has changed, and the church has changed even more. In this area, as in many others, Europe can lead by example and offer an alternative to American (and French) constitutional separationism. It can be a living illustra-

tion that religion is no longer afraid of democracy and that democracy is no longer afraid of religion. The truest pluralism is embodied by states that can, on the one hand, effectively guarantee both religious freedom and freedom from religion, yet acknowledge without fear—even in their constitutions—the living faith of many of their citizens. Only this model has any chance of persuading societies that still view democracy with suspicion and hostility.[66]

To further substantiate my overall claim that a religious canon for Europe could be envisioned, provided one defines and circumscribes its content and proper function with an awareness that its "archive" and "apparatus" contain an intellectual and imaginative resource and repository whose deeply pragmatic relevance we have hardly begun to explore, I could also refer to the recent work done by Charles Taylor and Gérard Bouchard.[67]

One solution for the canon problem might be gleaned from their report. Instead of putting all cards on an unrealistic—and, in the end, counterproductive—"juridification" of these matters by conceiving of the canon as curriculum that parliaments should turn into law for public schools at the very least, one could easily think of the above proposal as part and parcel of a broader citizen's initiative that makes good upon the promises or prospects of the multicultural society that did not so much fail to realize but were never really tried out. This would resolve the dilemma as to "who decides?" since no general vote or legislation would

be necessary and the proposal might work through example, nothing more, nothing less.

This will have to be for another occasion, though, and my over-all point, I think, should be clear by now. Let me summarize it in concluding.

Section 8

Conclusion

Needless to say, the canon I have sketched constitutes a temporary and open—i.e., provisional and pragmatic—condensation and sedimentation of an immense and immemorial, indeed, virtual or absolute past that reaches deeper and wider, higher and further, than the metaphor of "roots" or the singling out of names (be it divine ones, such as "God" or "Trinity") allows or imagines. Indeed, it uproots them as well and exceeds what Weiler calls the register of "constitutional symbolism or iconography."[68] And I am not sure that Weiler would be willing to goes so far or even "a little step further" than he says.

Paradoxically, and in light of the orthodox traditions of all stripes, in all confessions where the concept of "canon" or "canonicity" plays a role (which is to say, virtually everywhere), the proposed "religious canon for Europe" would have to conceive of itself as fundamentally "open" and "mobile." It would be geared more towards topics and themes—call them words and things, sounds and silences, gestures and powers, etc.—that would allow one to loosen all too direct references to supposedly fixed historical and cultural identities (in short, all the presumed givens that theorists of the "clash of civilizations" have needlessly hypostatized with all the consequences we know). Neither final nor authoritative, such a canon would thus make an altogether different claim upon us.

The problem is not so much that we "need religion" (to use Hans Joas's suggestive expression) per se—assuming that our psychological and sociological, not to mention evolutionary, biological or neurological, condition and make-up is that of a homo religiosus, of sorts—but that in pragmatically determined contexts religion may, indeed, be a need or useful; in other words (to adopt a well-known insight and phrase by the American pragmatist, the late Richard Rorty, who, in turn, borrowed it from William James's conception of truth): "what it is better for us to believe."[69] (Indeed, to add that religion, like the metaphysical concept of truth, offers "the accurate representation of reality," Rorty claims, leads nowhere: "Or, to put the point less provocatively, . . . the notion of "accurate representation" is simply an automatic and empty compliment which we pay to those beliefs which are successful in helping us do what we want to do."[70])

Yet such need or use or belief will be conditional and provisional, pragmatic if deep, dictated by encounters, opportunities, and challenges, here and now. And a limited and preliminary, open-ended, and mobile religious canon—for Europe, its individual "nations" and "shared European space," to begin with—

might capture just that idea, give it a form and an at once political and spiritual life.

As Debray intuited—but, perhaps, did not anticipate in this fuller and at once thinner and thicker, global and post-national form—such a religious canon might, ironically, become the most promising "material mediation . . . through which a Word becomes flesh, an idea a collective force, a message a vision of the world."[71]

Section 9

Endnotes

1. Humanities Center, Johns Hopkins University

2. For a more extensive account and analysis of this debate, "Naar een dieper pragmatisme: de actualiteit van de geesteswetenschappen in de voorbereiding & uitvoering van beleid," Intelligent Verbinden: Liber amicorum ter gelegenheid van het afscheid van Wim van de Donk als voorzitter van de WRR (Den Haag: Wetenschappelijke Raad voor het Regeringsbeleid, 2009), 121-130.

3. I am referring here to the title and subtitle of a conference organized under the auspices of the European Association for Education Law and Policy and the Collège d'Europe, held in Bruges, Belgium, December 7 – 9, 2010, where these thoughts were first presented in the city's Town Hall as one of the two Piet Akkermans Memorial Lectures.

4. Régis Debray, Dieu, un itinéraire: Matériaux pour l'histoire de l'Éternel en Occident (Paris: Éditions Odile Jacob, 2001); God: An Itinerary, trans. Jeffrey Mehlman (London: Verso, 2004).

5. Keith Reader, "Régis Debray," in Lawrence D. Kritzman, The Columbia History of Twentieth-Century French Thought (New York: Columbia University Press, 2006), 490-492, 492.

6. Ibid., 491.

7. Peter Sloterdijk, Derrida, an Egyptian, trans. Wieland Hoban (Cambridge: Polity Press, 2009), 41-49, 44-45.

8. Keith Reader, "Régis Debray," 491.

9. Sloterdijk, Derrida, An Egyptian, 43-44.

10. Régis Debray, L'Enseignement du fait religieux dans l'école laïcque, Préface de Jacques Lang (Paris: Éditions Odile Jakob, 2002); "Teaching Religious Facts in Secular Schools," trans. Daniela Ginsburg, in Hent de Vries, ed., Religion Beyond a Concept (New York: Fordham, 2008), 415-431, 430. See also Régis Debray, "Qu'est-ce qu'un fait religieux?," in Études, 2002/3, Vol. 397, 169-180.

11. Debray, "Teaching Religious Facts in Secular Schools," 430.

12. Jean-Marie Colombani, "Nous sommes tous Américains" in Le Monde, September 13, 2001.

13. See Joan Wallach Scott, The Politics of the Veil (Princeton: Princeton University Press, 2007) and John R. Bowen, Why the French Don't Like Headscarves: Islam, the State, and Public Space (Princeton: Princeton University Press, 2007).

14. Debray, "Teaching Religious Fact in Secular Schools," 415.

15. Ibid.

16. For a discussion of the reception of Debray's report, see Jean-Paul Willaime, "Teaching Religious Issues in French Public Schools: From Abstentionist Laïcité to a Return of Religion to Public Education," in

Robert Jackson, Siebren Miedema, Wolfram Weisse, and Jean-Paul Willaime, eds., Religion and Education in Europe: Developments, Contexts and Debates (Münster: Waxmann, 2007), 87-101, 93 ff. Willaime served as Director of the European Institute for the Sciences of Religions (ISER), as Debray's successor. See also Luce Pépin, Teaching About Religions in European School Systems: Policy Issues and Trends—NEF Initiative On Religion and Democracy in Europe (London: Alliance Publishing Trust, 2009), 24, 72-73.

17. Jean-Paul Willaime, "Religion in the Classroom – the Challenge of a "laïcité d'intelligence" in Europe and Findings of the REDCo-Project," in: Wolfram Weisse, in cooperation with Robert Jackson, Christian Rudelt and Jean-Paul Willaime, eds., Religion in Education – A Contribution to Dialogue or a Factor of Conflict: Presentation in the European Parliament.

18. Debray, L'Enseignement du fait religieux dans l'école laïcque, 43/...

19. Willaime, "Religion in the Classroom."

20. See also Jakob Taubes's Vom Kult zur Kultur: Bausteine zu einer Kritik der historischen Vernunft, ed.,. Aleida and Jan Assmann, Wolf-Daniel Hartwich, and Winfried Menninghaus (Munich: Wilhelm Fink Verlag, 1996).

21. Jacques Lang, "Préface," in Debray, L'Enseignement du fait religieux dans l'école laïcque, 9-11, 10.

22. See Yolande Jansen, Stuck in a Revolving Door: Secularism, Assimilation, and Democratic Pluralism (Dissertation, Amsterdam 2006), 193.

23. Debray, L'Enseignement du fait religieux dans l'école laïcque, 23.

24. Ibid., 22.

25. Ibid., 23.

26. Ibid., 24.

27. Ibid., 26.

28. Ibid., 29, 30. These formulas remind one of an old debate concerning the academic study of religion and the "methodological atheism" that it should or should not—could not—entail. See for a review of some of these arguments the opening chapter of my Minimal Theologies: Critiques of Secular Reason in Theodor W. Adorno and Emmanuel Levinas (Baltimore and London: The Johns Hopkins University Press, 2005).

29. Régis Debray, "Mediology," in The Columbia History of Twentieth-Century French Thought, ed., Lawrence D. Kritzman (New York: Columbia University Press, 2006), 289-291, 289-290.

30. Régis Debray, Les communions humaines: Pour en finir avec "la religion" (Paris: Fayard, 2005), 60 ff.

31. Debray, "Mediology," 289-290.

32. I am grateful to Helen Tartar for providing me with an unpublished transcript of this intervention.

33. Reader, "Régis Debray," 491.

34. Unpublished transcript.

35. Debray, "Qu'est-ce qu'un fait religieux?," 173-175.

36. Michael Naas, "Derrida's Laïcité," in idem, Derrida From Now On (New York: Fordham University Press, 2008), 62-80, 63.

37. Ibid., 64.

38. There are several recent books that have aimed at reconstructing the modern history and construct of "religion" as a supposedly separate field of academic study, interrogating its premises along the way. Tomoko Masuzawa's Inventions of World Religions, Hans Kippenberg's Discovering Religious History in the Modern Age, and Guy Stroumsa's A New Science: The Discovery of Religion in the Age of Reason come to mind. There is no consensus as to what its alternative might look like and I will not pretend to be able to offer a definite answer here.

39. Kevin Williams, "Religious Worldviews and the Common School: The French Dilemma," in Journal of Philosophy of Education, Vol. 41, No. 4 (2007). 675-692, 685.

40. More than abstract X's, they reveal, rather than present or represent, singular and genuinely "saturated" phenomena (icons and events, miracles and special effects), whose very idea and, indeed, "immortality" requires not so much testimony and memory, but a militant "fidelity" carried by a "subject" that no longer coincides—i.e., is no longer defined and determined by—the situations in which it found and founded itself through intervention, decision, nomination, and the like. It is along these lines, using an idiom and "phenomenology" that Jean-Luc Marion and Alain Badiou develop in their alternative and contrasting projects, in Étant donné and L'être et l'événement, respectively, that I would be inclined to formalize and de-formalize the point I am trying to make here.

41. Williams, "Religious Worldviews and the Common School," 682, with reference to Jean-Paul Willaime, "Teaching Religious Issues in French Schools: From Abstentionist Laïcité to a Return of Religion to Public Education," in: R. Jackson, S. Miedema, W. Weisse and J-P. Willaime, eds., Religion and Education in Europe: Developments, Contexts and Debates (Münster/New York/München/Berlin: Waxmann, 2007), 87–101, 87.

42. These quotations are drawn from the conference announcement.

43. Willaime, "Teaching Religious Issues in French Public Schools," 100.

44. Ibid.

45. http://www.virtualpeace.org/

46. http://dukeresearch.blogspot.com/2009/10/emergence-wages-peace-not-war-after.html, accessed September 5, 2011.

47. Frits van Oostrum, ed., The Netherlands in a Nutshell: Highlights from Dutch History and Culture (Amsterdam: Amsterdam University Press, 2008), 7.

48. Robbert Dijkgraaf, Louise Fresco, Tjerk Gualthérie van Weezel en Martijn van Calmthout, eds., De bètacanon: Wat iedereen moet weten van de natuurwetenschappen (Amsterdam: De Volkskrant en J.M. Meulenhof, 2008).

49. Van Oostrum, ed., The Netherlands in a Nutshell, 7. Cf. ibid.: "This canon was created by bringing together a number of specialists and allowing them to consult for a year with one another and with a selection of interested individuals and stakeholders. A website that featured a discussion forum gave every Dutch citizen the opportunity to voice his or her opinion. The process brings to mind the way in

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which the Netherlands has succeeded for centuries in keeping its polders dry: collective craftsmanship."

50. Cited after ibid., 6.

51. Willaime, "Teaching Religious Issues in French Public Schools," 100.

52. Ibid., 98.

53. Ibid.

54. Ibid.

55. Ibid.

56. Ibid.

57. See Nils F. Schott, "Catechism and Enlightenment." Diss. Johns Hopkins University, 2010. Print.

58. Joseph H. H. Weiler, Un'Europa Cristiana. Un saggio esplorativo (Mailand: Rizzoli, 2003); Ein christliches Europa: Erkundungsgänge, trans. Franz Reimer, with a preface by Ernst-Wolfgang Böckenförde (Salzbug and Munich: Verlag Anton Pustet, 2004). See also Camil Ungureanu, "The European Constitution-Making and the Question of Religion," EUI Working Papers SPS, No. 2007/01, published by the European University Institute's Department of Political and Social Sciences.

59. Weiler, Ein christliches Europa, 28 and 34.

60. Ibid., 39.

61. Joseph H.H. Weiler, "Invocatio Dei and the European Constitution," Project Syndicate, May 2004, http://www.project-syndicate.org/commentary/weiler1/English (last accessed November 23, 2010).
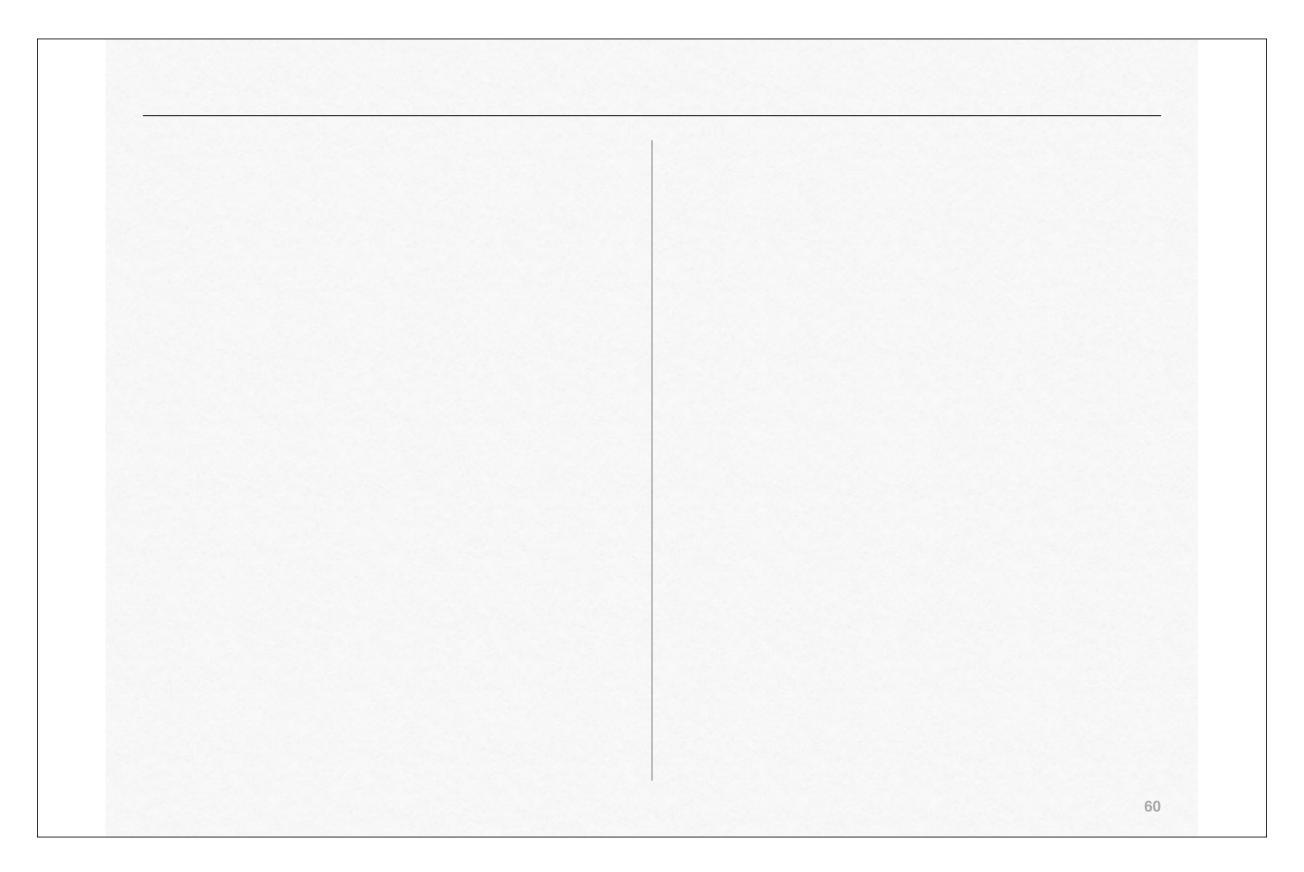
62. Ibid.

63. Weiler, Ein christliches Europa, 45, 48.

64. Ibid., 48.

65. Ibid., 57-58. Cf. also Joseph H. H. Weiler,"The Trial of Jesus," in First Things, No. 204, June/July 2010, 39-46.

66. Weiler, "Invocatio Dei and the European Constitution."

67. In the Spring of 2008, Taylor co-chaired, together with Gérard Bouchard, the Consultation Commission on Accommodation Practices Related to Cultural Differences (Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles), appointed by the Liberal government of Quebec in the wake of a series of reported incidents and cultural conflicts in 2007, and co-authored its final report (http://www.accommodements.qc.ca/). The Bouchard-Taylor report advocated a concept and spirit of so-called "open secularism" and proposed a host of "reasonable accommodations" for religious and ethnic minorities and immigrants to foster an "interculturalism" or mixing of cultures, Québécois style, that would merit favorable comparison with the much more restrictive—and, as the New York Times quipped in an editorial, "secular fundamentalist"—policies proposed by the French report of the Stasi committee, appointed by the French president Nicholas Sarkozy in 2003 and chaired by Bernard Stasi (The Stasi Report: The Report Of The Committee Of Reflection On The Application Of The Principle Of Secularity In The Republic).

68. Bouchard and Taylor observed in their introduction that, "beyond well-known hitches," their consultations demonstrated that there is an "openness to the Other," which expresses "deep-seated values" as well as "aspirations we share" and which should be the basis for "policy directions, programs and unifying projects" and could lead to "the edification of an integrated Quebec that respects its diversity" (Gérard Bouchard and Charles Taylor, Building the Future: A Time for Reconciliation, Abridged Report, 5).

69. The committee, the authors explained, took its mandate broadly and considered a more than strictly legal definition of "reasonable accommodation," taking the vehement debates around the latter in the months and years preceding its consultation as merely "the symptom of a more basic problem concerning the socio-cultural integration model established in Québec since the 1970s." They went on to stress the importance of "citizen action" and the "responsibility of individual and community to encourage deliberation, free initiative and creativity in the analysis of situations" over and against the widespread tendency to call for "external solutions in the form of new legislation or new organizations" (ibid., 8 and 10).

70. In sum, the report struck a conciliatory and hopeful note, highlighting commonalities more than differences and opting for "compromise, negotiation and balance," effectively decentralizing—and, especially, "dejudicializing"—the whole question of accommodation and sociocultural integration within the larger perspective of "openness to the world" and a stoic appreciation, even affirmation, of the undeniable "shift to globalization" (ibid., 10), which defines modern culture and its sensibilities no less than the expansive growth—i.e., ups and downs—of its financial and economic markets.

71. Ibid.

72. Richard Rorty, Philosophy and the Mirror of Nature, Thirtieth-Anniversary Edition (Princeton and Oxford: Princeton University Press, 1979, 2009), 10.

73. Ibid.

74. Keith Reader, "Régis Debray," 491.

Values and Religion. Transmission of Values and Interreligious Dialogue Today

4

Hans Joas[1]

Transmission of Values and Interreligious Dialogue Today[2]

Whenever there is talk of the necessity of a clear value-orientation, of the urgency of a reflection on one's own values, or of the difficulties of transmitting values to the next generation, the question concerning religion is not far off. This is not surprising because religions do indeed give values a graphic form. Believers gain motivation and orientation from their faith and position themselves within traditions which they also try to pass on to their children and pupils. On closer examination, however, difficulties also reveal themselves. The Christian churches, for instance, despite all the achievements in the area of transmitting values, are like other religious communities by no means unanimously enthusiastic when, in view of social ills or conflicts, they are given a kind of commission to reconstitute social cohesion. They then feel themselves to be degraded to mere tools or functional social systems, and resist faith's being put into service for exogenous ends. Their objection is that faith does not arise through a rational conviction that it is useful for the individual, or for others, or for society. Conversely, some warn against regarding religions at all as a possible source of social cohesion. Their argument is that religions are necessarily particular formations borne by particular communities. Quite independently of their orientation, they are therefore said to have a divisive potential which the state and society have to tame and to overarch with religiously neutralized institutions.

The following considerations represent a modest attempt to sketch a realistic path for religiously founded transmission of values and interreligious dialogue in a time when the various religions are coming into ever closer contact with one another through migration and globalization, but at the same time, especially in Europe, the Christian tradition has been pushed onto the defensive, and even partially marginalized through various forms of secularization.

The starting-point must be the insight that religions are indeed more than value systems.[3] Those who believe, certainly regard their faith not primarily as a logically consistent system of statements about the good, or even as a merely emotionally coloured morality. Faith is based on intensive experiences; it enables participation in rituals which themselves are in turn sources of experience; it offers exemplary models that invite us to imitate them; and it contains stories and myths that provide a thread when interpreting our own lives and history, helping us to answer questions concerning the meaning of life. What is decisive is that all these experiences, symbolizations and narratives are far too rich to be reduced to formulae. Instead of reducing

religions to value-systems or systems of doctrinal protositions, it would therefore be more plausible to ask conversely for the experiential foundations, symbolic and narrative structures in all non-religious value-systems. To be sure, orientations arise for the faithful from faith, but they are not derived from it in an abstract, logical way, but through the concrete interpretation of invariably risky situations of decision and action.

This insight into the character of religions, and in part even of stable and widespread secular interpretations of the world as well, must be taken as starting-point because it makes an effect comprehensible that many feel to be paradoxical and which recurs in attempts to provide an overview of the world's religions or competing value-systems. When religions are presented as mere systems of values or statements of faith held to be true, whether it be in school-teaching, or in a social-scientific form, the effect is initially mostly confusion, then indifference. Even when the intention of this preoccupation consists in facilitating for participants a free, individual decision in the market for systems of meaning, in such a presentation, the individual religions must appear as formations that are difficult to understand, stretch the limits of comprehensibility and in part are even odd and peculiar. And this holds not only for the religions of exotic cultures but, in such a presentation, even for those that in the past have left a deep impression on their own culture; even these religions can provoke perplexity about the irrationality of our forebears. Non-believers thus usually find a confirmation of their prepossession about how healthy it is to keep a safe distance from the peculiarities of religious life. If mere distance does not suffice for them, they can only attempt to assume an objectifying perspective on religions in their diversity, to conceive of them as the consequence of economic, political or social conditions, or to attribute them to psychological, and perhaps even biological, phenomena of human existence.

In such confrontations with the diversity of religions (and secular world-interpretations) there are for believers in principle two options. They too, like the self-assured secular thinker, can on the one hand, attribute truth, and even evidence, to their own faith only; for them, too, then all other religions are a cabinet of curiosities, a 'gobbledygook', as missionaries sometimes called the religions of their mission districts. On the other hand, some missionaries, by contrast, developed an understanding of, sometimes even gaining admiring access to the religions they found in foreign parts. They regarded the religions they struck upon as impressive interpretations of authentic experiences that people had gone through in other times and cultures in their lives, including in their dealings with the divine. According to this view, many or all religions contain an element of divine revelation.

A precondition for such a productive relationship to religions is to regard them not as value-systems, and also not as quasi-scientific doctrines, but as attempted interpretations of human

experiences. Secular and religious ways of dealing with experiences are then distinguished by the fact that the former hold that which is encountered in human experience as a purely inner-worldly phenomenon, whereas the latter declare that a genuine encounter with the divine is possible, and therefore presuppose that in experiences of self-transcendence there is also an opportunity to encounter transcendence per se. The obverse side of productive curiosity about religious interpretations of the world is thus a certain humility toward one's own interpretive background. It, too, then becomes recognizable as an expression of constitutive experiences, and the thought becomes plausible that also one's own interpretation of experiences of self-transcendence is to be regarded as never quite successful, never quite exhausting the richness of experience. This must hold true all the more when a real encounter with divine transcendence is seen in these experiences. The divine can only ever reveal itself comprehensibly in the words and symbols of human beings, but never can present itself to us as it is in itself. In such a perspective, the word of God, as it has been laid down in the holy scriptures, is not the immediate self-expression of God, but the passing-on of God's communicative intention within the referential frame of the recipients, that is, of people who are always situated distinctively in history and culture, and thus within the limits of their knowledge and imaginative powers.

Accordingly, the preoccupation with religions generates not merely confusion and indifference if it takes place with an open mind toward the other and humility regarding one's own worldview. Now, it is easy to demand open-mindedness and to declare that one is prepared to be so. A general open-mindedness, however, does not achieve any more than a search for common features, the formation of a smallest common denominator. It does not open up anything really new and therefore does not lead to any change in one's own standpoint. In this sense, open-mindedness is only a minimum condition that has to be fulfilled if an exacting process is to get underway, for the serious engrossment with religions is a strenuous process challenging one's own certainties. As in the case of understanding other people or cultures in general, a comparison with the acquisition of foreign languages helps here. When we learn a foreign language, our sensibility for the contingencies of one's own language is enhanced. We see that semantic structures and syntactic rules are not necessary per se, and are not demanded by the inherent structure of the world. The acquisition of every further language is tedious. Through the attempt to acquire several languages simultaneously, we become confused and do not make headway with any of them. A comparative lecture about the grammars of the world's languages may provide us with some information, but certainly does not teach us the use of a single language. This can be regarded as an analogy to the attempt to gain an overview of the religions. It seems as if

the acquisition of further foreign languages becomes easier if we have already learned some; but there is no completely generalized ability to learn languages which would obviate the acquisition of each concrete language.

George Santayana has put this into the famous formula: "The attempt to speak without speaking a concrete language is just as much doomed to failure as the attempt, without a calling, to be religious in a certain religion."[4] In a context marked by Christianity, the 'realistic' path which is to be sketched here must therefore begin with the ecumenical dialogue as soon as the transmission of one's own tradition of faith is to be transcended. The opportunities and difficulties of the intra-Christian ecumenical dialogue are necessary training for a more comprehensive understanding among the religions. The ecumenical dialogue can indeed lead to the overcoming of only apparent existing differences, whether these exist in theological doctrines or in mere stereotypes of mentality as they have come down from history or arise recurrently from the needs of denominations or confessions to mark oneself off and sharpen one's own profile. This dialogue can also lead to the sobering insight that the differences are not even described in a common language, and even the offers of common ground from one side are perceived by the other as mere strategies for co-option and absorption. In Germany, the ecumenical dialogue is simplified by the fact that it takes into consideration only a small segment of the Christian spectrum. The orthodox and oriental forms of Christianity play only a minor role in it, and the Protestant spectrum comprises practically none of the fundamentalist currents that are so significant in the United States, nor the Pentecostal movement whose rapid spread in parts of Latin American and Africa is nothing less than spectacular.

Apart from the ecumenical dialogue, in the second half of the 20th century, the Judaeo-Christian dialogue has become more intense. Racist anti-Semitism, and especially the murder of millions of Jews by the Nazis, have confronted the Christian churches with the inescapable task of rethinking the traditions of Christian anti-Judaism and posing the question concerning one's own guilt and responsibility for the Holocaust. The talk of the Judaeo-Christian tradition so easily spoken of by Christians today is itself only a product of the 20th century. This is often forgotten. It is itself an expression of the praiseworthy attempt to overcome a self-presentation of Christianity against the foil of a distortedly presented Judaism. Even this apparently unproblematic composite, even when it is free of all undertones that Judaism is only a preliminary step toward true faith, can be felt from the Jewish side as a smothering co-option. The deceased Pope John-Paul II sought a way out of this dilemma by taking up a formulation referring to the Jews as the "elder brothers in faith" from a 19th century Polish poem. Following the Jewish religious thinkers Franz Rosenzweig and Martin Buber, Wolfgang Huber speaks of "two ways of faith" which only come together

in an eschatological perspective.[5] Without a dialogue with Judaism Christianity cannot be.

Neither the ecumenical nor the Judaeo-Christian dialogue have so far attained their goal, but it cannot be overlooked that at the beginning of the 21st century a high-priority task is posed which could be called the dialogue among the Abrahamic religions, that is, a dialogue among Judaism, Christianity and Islam. The political charging-up of Islam in the present day can lead to Islamophobia, which does injustice to this great religion, and even transfers stereotypes of Christian anti-Judaism to Islam. Of course, anti-Jewish and anti-Christian images cultivated by Muslims are just as dangerous. Rémi Brague is certainly right to demand that a dialogue among these religions, whose history is marked by a diversity of intensive interactions, cross-influences and hostility, must not gloss over the deep differences for the sake of intellectual ease, but presupposes the endeavour "to understand the other just as he understands himself, to comprehend the meaning of words in the way he uses them, to accept the initial situation of disunity in order to attempt to achieve a better understanding starting from this situation".[6] It then quickly becomes apparent that it is not sufficient to conceive of the relation to a holy book or to Abraham or to monotheism as an assured common basis, since even the status of the book and genealogy and the conception of God differ greatly from one another. A central place in this dialogue on the theological plane seems to me to be the Christian doctrine of the Divine Trinity.

What appears from a Muslim perspective as a relapse into polytheism must be an occasion for the Christians to reflect upon the depth of their own conception of God. Islam has always considered itself a purification and critique of a Christianity that is seen as a falsification even of the true message of Jesus. For that reason Islam needs the dialogue with Christianity as Christianity needs the dialogue with Judaism. And Christianity needs the dialogue with Islam for an examination and potential correction of its self-perception.

Although the political priority of the 'Abrahamic dialogue' today seems indisputable, the next great task is already announced: the dialogue of the Abrahamic religions with the forms of religiosity in southern and eastern Asia. Like the other attempts at reaching an understanding discussed here, this dialogue, too, has already begun, in this case, at the latest in the 19th century. Very frequently, however, it is not really a dialogue with representatives, for instance, of Buddhism itself, but with European or American experts or converts or contemporaries who merely flirt with dropping out of the Jewish-Christian-Muslim tradition and thus out of the monotheistic reference-system. This will change, and that not only because of the growing economic and political significance of Asia, because of migration and politicization also of Hinduism (in India) and in part even of Buddhism (in Sri Lanka), but also because of the considerable attractiveness, especially of Buddhism, in the West. In his speculations on an imminent "age of conciliation"[7] Max Scheler al-

ready anticipated this necessity. Not only the murmuring praise of Asian mysticism as an alternative to monotheistic faith, but also the general claim that the mystical traditions of the Jews or Christians or Moslems already contained what was to be learnt from Asia, are of no assistance here. Once again it is only the willingness to enter into a genuine confrontation with the other without renouncing one's own standpoint that can be productive.

My plea is thus for the thesis that today, only such a form of the transmission of faith is in keeping with the times which poses these tasks of dialogue for itself, and which also, conversely, does not bracket off its own tradition of faith, but regards it as a necessary precondition for a productive confrontation with the other. Two objections against this thesis are close at hand. Some will object that religions mutually exclude each other. The perspective sketched here of a multi-stage, difficult dialogue would then be simply illusory; much more likely would be the conflict among the religions which, when religions become political, must become a clash of civilizations. Others will object that, at least in the radically secularized parts of Europe, a link with one's own tradition precisely cannot be assumed. The multi-stage interreligious dialogue would then have to fail even at the first stage and, despite all the disadvantages, only a neutral overview of the diversity of worldviews and religions would remain.

Both objections should be briefly responded to. The first objection proceeds from a fundamentally false premise, namely, that religions or cultures could act at all. In contrast to this premise, the preceding considerations presuppose that it is always only people who act, that is, individuals and their associations, organizations and institutions.[8] These people believe and disseminate their faith; they go through experiences and interpret them; they have many different needs and interests, aims and values. Therefore, religions or cultures as such cannot clash, but only human beings who define their faith or their political objectives, among other things, in certain ways. People, however, can join together in joint actions, even when their culturally shaped motives differ. They can also bring together impulses from different traditions in new, creative ways; they can discover new shared interests and values; and they can orient themselves toward precisely such values which cannot be conceived as the exclusive property of their own community. The dissemination of Christianity in late antiquity seems to have been significantly furthered by a willingness of the Christians to assist not only other Christians, but all people.[9] This does not yet say anything about the concrete dangers of religiously motivated political, or politically motivated religious conflicts. It is only a matter of repudiating the thought of inevitable clashes among differing religious traditions.

The second objection takes a real situation seriously, namely the extensive de-christianization, for instance, of eastern Ger-

many, but also of many cities in the old West Germany. Nevertheless, this objection does not describe the situation precisely enough. Intact religious milieus, namely, still coexist with largely secularized milieus; innumerable buildings, symbols, rituals, norms and values are witnesses of a religious past which in this way is once again raised to awareness and then quickly made recognizable at least as a force leaving its imprint upon a culture. To this is added the fact that the religious vitality of immigrants partly, as Muslims, represents a challenge to a secularized self-conception, and partly, as Christians, also contributes to a revitalization of Christian communities. From low numbers of church-goers or church members, it also does not follow necessarily that all people lacking such activity or membership regard themselves as being non-religious. What is called for, therefore, is a self-conception of religions that, in its articulation, reaches both those schooled in a certain faith and those whose knowledge is sparse or who have turned away from faith on the basis of a good level of knowledge. At least for the latter two groups, what has been asserted as a precondition for a productive interreligious dialogue holds true. Without a relation of faith and all binding values and interpretations of the world to constitutive experiences, no genuine and honest discussion between the faithful and non-believers can get underway. Through this relation, however, the interpretation of the world by non-believers can become more transparent to them, just as the meaning of the truths of faith can be made freshly aware to the faithful.

So far these considerations have left one aspect largely to one side, namely, that of a properly political ethics and the affinities between religions and specifically political values, such as those of democracy. The emphasis on the religious in the narrow sense derives from caution about attributing at all to religions a kind of inherent political ethics. Today we are inclined to attribute to Christianity a self-evident tendency toward democracy and human rights. Historically, however, that is untenable. It would be more appropriate to trace the historical path on which Christian foundations for democracy and human rights were developed. From this self-critical, careful and non-triumphalist perspective on the history of Christianity, a bridge could then be built in search of religious foundations for democracy and human rights in other religious traditions. In this way, the religious traditions could enter into an interreligious dialogue also about political ethics without having their dialogue reduced to it. It has also become apparent that it is the ethos of democracy and human rights that has inspired this idea of interreligious dialogue. It is a matter of a universalism that does not impose upon people any breach with the particular binding powers of those traditions out of which they understand themselves. The demand for such a rupture, for a transition to rational universalisms, for foundational arguments without any self-

reflective anchoring in experience and binding power is downright counter-productive in this context.

We remain obliged to adopt this stance in our preoccupation with other religions, even when there is no concrete partner to the dialogue or the partner denies us a dialogue. Politically, we may and must fight religiously motivated opposition against democracy and human rights; but our transmission of values must be oriented not toward struggle but toward productive dialogue.

This dialogue connects religious and secular forms of moral and legal universalism. They stand united against racist and other forms of anti-universalism, against a post-modern indifference with regard to universal validity claims and against the exaggeration of a single one of the competing universalisms to be the only one. In dialogue the coexisting universalisms may discover their hidden particularities.

Section 2

Endnotes

1. Universität Erfurt/ Max-Weber-Kolleg für kultur- und sozialwissenschaftliche Studien; University of Chicago.

2. This article is the revised version of an essay that appeared in Liz Mohn et al. (ed.) Werte. Was die Gesellschaft zusammenhält Gütersloh 2006 pp. 19-32. An English version of the original article appeared in the Korean periodical Indigo 2 (2010), pp. 72-80.

3. For details on the understanding of religions, faith and values cf. Hans Joas Do We Need Religion?On the Experience of Self-Transcendence Boulder, Co 2008; Hans Joas The Genesis of Values Chicago 2000.

4. George Santayana 'Reason in Religion' in Santayana Works Vol. IV. New York 1936 pp. 3-206; here p. 4.

5. Wolfgang Huber, The Judeo-Christian Tradition, in: Hans Joas / Klaus Wiegandt (eds.), The Cultural Values of Europe. Liverpool 2008, pp. 43-58.

6. Rémi Brague 'Schluß mit den "drei Monotheismen"!' in Communio 2007 pp. 98-113.

7. Max Scheler 'Der Mensch im Weltalter des Ausgleichs' (1927) in: Scheler Späte Schriften Gesammelte Werke Band 9. Berne-Munich 1976 pp. 145-170.

8. This seems to me to be a common feature of the research programs of Max Weber and the American pragmatists.

9. W. G. Runciman argues thus in 'The Diffusion of Christianity in the Third Century AD as a Case-Study in the Theory of Cultural Selection' in Archives européennes de sociologie 45 (2004) pp. 3-21. An overview of competing explanations is provided by Christoph Markschies 'Warum hat das Christentum in der Antike überlebt? Ein Beitrag zum Gespräch zwischen Kirchengeschichte und Systematischer Theologie' Leipzig 2004 (Forum Theologische Literaturzeitung).

Balancing non-discrimination & equality and the (right to) identity of non-governmental schools in Dutch law

5

B.P. Vermeulen[1]

Introduction

The question how to balance equality (non-discrimination, equal opportunities etc.) on the one hand, and the rights and freedoms of non-governmental schools to maintain there own identity (freedom of education and religion) on the other, is not an easy one. Difficult moral, legal and conceptual issues are involved. In this article I will only touch upon a few topics, without pretending to solve these issues.

The term "balancing" rightly indicates that we are dealing here with compromises. The assumption that it might be possible to reach a harmonious solution, that all relevant parties would or at least should accept, disregards the great differences in views and the impossibility to fully reconcile these values. Indeed, there is a fundamental tension, a real conflict between the freedom of education and religion, that non-governmental schools can invoke, and the right of the individual pupils/parents and teachers to equal acces to school places and jobs. To put it simply: on the one hand there is the freedom of the collectivity to maintain its group identity, and on the other hand there is the right to equal treatment of the individual.

It must be stressed, however, that there is also an equality issue that can be called upon by the collectivity, the non-governmental school. Article 2 Protocol 1 of the European Convention on Human Rights (ECHR) and similar provisions in the UN-covenants on civil and political rights and on economic, social and cultural rights give groups and legal persons the right to freedom of education, which includes the freedom to establish non-governmental schools, and to base their curriculum on a distinct religion, philosophy or pedagogical theory. However, there is the question whether this freedom, in conjunction with the demands of equality, includes an enforceable claim to public funding, equal to that of governmental schools. Interesting though this issue is, and relevant as it may be to effecting equal access for minority groups, I will not discuss it here.

There is also an identity issue for the individual: his right to freely live his life according to his own plans, his own identity, including his right to be free within his private sphere, without being hindered in his equal right to be admitted to the school. This privacy issue is so directly connected with the claim to equal treatment, that I will touch upon it.

In sum: in this paper I will concentrate only on the conflict of collective identity rights of schools (freedom of education in con-

junction with the freedom of religion) versus the rights of the individual to equality/non-discrimination and privacy. Furthermore: I will only discuss the primary and secondary school sectors, draw my examples and cases primarily from the Netherlands, and concentrate on non-governmental schools with a strong identity (the religiously orthodox[2]). However, I believe my analysis may also to some extent apply to other educational systems: the problems discussed here are relevant in the school systems of most other Western-European countries too.

Relevant provisions

There are five levels of legal rules to be distinguished here. First there are national constitutional provisions and principles concerning the freedom of education and religion, and on equality and privacy. So the Dutch Constitution guarantees the freedom of religion and education (articles 6 and 23) as well as the right to equality and privacy (articles 1 and 10). Second, there is national statute law grounded in these rights and freedoms, further elaborating them and often trying to balance them where they might conflict with each other. The most importante statute is the General Equal Treatment Act (1994), that intends to reach a compromise between the rights to equality and privacy on the one hand and the fundamental freedoms on the other hand.

On the international level there are more or less similar human rights treaty provisions that protect both aspects: the right to collective freedom and autonomy on the one hand, and on the other hand the right to protection against discrimination, and guarantees for equality and privacy. For instance the European Convention on Human Rights in article 8 protects the right to privacy, in article 9 the freedom of religion, in article 14 and the Twelfth Protocol equality and non-discrimination principles and in article 2 Protocol 1 the right to and freedom of education.

Then on the supranational (EU-)level there is primary European Union law, the Charter of Fundamental Rights which protects the right to privacy in article 7, the freedom of religion in article 10, the right to and freedom of education in article 14, and provisions on equality- and non-discrimination in article 20, 21 and 23. There are also several more specific instruments of Community law – secondary Community law - guaranteeing equal treatment. Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[3] must be mentioned in this regard. Article 2 in conjunction with Article 3 of this Directive forbids direct and indirect discrimination on the basis of race and ethnicity in the fields of labour, social security, education and housing.

Also relevant are Articles 2-4 of Council Directive 2000/78/EC, providing for equal treatment in labour relations irrespective of religion or conviction (as well as handicap, age or sexual orientation).[4] However, according to Article 4(2) of this Directive, churches and other denominational organisations nevertheless may differentiate on the basis of religion or belief, when a person's religion or belief constitutes a genuine occupational requirement, having regard to the ethos of the organisation. This

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implies that these organisations under certain conditions still may require their staff members to adhere to their ethos.[5] Finally, in 2008 the Commission has proposed a Council directive on implementing the principle of equal treatment - including the field of education - between persons irrespective of religion or belief, disability, age or sexual orientation,[6] which however in article 3(3) gives the schools the right to diffentiate on the basis of their religious ethos.[7]

Restricting the autonomy of denominational schools: recent proposals in the Netherlands

There is a tendency – at least in Dutch law and politics – to restrict the autonomy of denominational schools as guaranteed through the freedom of education (in conjunction with the freedom of religion). The freedom of education as enshrined in the Dutch Constitution, to a certain extent also guaranteed in human rights treaties, guarantees denominational schools the right to express their own religious and philosophical views on man and society in their ethos and curriculum. This right also implies the freedom to select teachers and pupils on the basis of criteria derived from these views. Denominational schools can demand of their employees and students to commit themselves to the (religious, philosphic) mission of the school, and if they are not willing or capable to do so to choose not to admit them.

The limits of this 'right to select' have been made explicit in the General Equal Treatment Act (1994) (Algemene Wet Gelijke Behandeling, AWGB). This Act – which to a large extent implements the EC directives and treaty provisions on anti-

discrimination just discussed - intends to give "more substance" and more effectiveness to the principle of equality. The AWGB is applicable not only to vertical relations between government and citizens but also, to a certain extent, to horizontal relations, relations between individuals and private organisations (for instance business enterprises, housing corporations and non-state denominational schools).

The structure of the AWGB is determined by the principle that differentiations based on specific (suspect) grounds like political persuasion, race, sex, religion, etc. are prohibited in particular areas (work, commercial transactions, education, etc.).[8] Article 5(1) AWGB for instance prohibits differential treatment on these grounds in the case of – inter alia - conclusion and termination of a labour contract, appointment of a civil servant and termination of his engagement, as well as the terms of employment. Article 7(1) AWGB prohibits differential treatment when "offering goods and services" (that includes education).

The AWGB distinguishes between direct and indirect differential treatment. Direct differential treatment explicitly refers to suspect criteria like religion, race, etc. and is always prohibited, unless the AWGB contains an explicit exception. Indirect differential treatment is a form of differential treatment in which a criterion is applied that seems to be neutral, but in practice disproportionately targets persons sharing a common characteristic like religion, race, etc. Indirect differential treatment not only

may be justified on the basis of an explicit exception, but also by giving an objective justification (Article 2(1) AWGB). With regard to education, for instance, indirect differential treatment under the guise of an ostensibly neutral dress code that nevertheless disproportionately affects religious persons, is prohibited unless the school board can rely on an explicit provision or is able to come up with strong arguments (safety, order, educational purposes etc.) to justify it.

According to Article 5(2) AWGB, the first paragraph of this provision does not eliminate the freedom of faith-based private schools and other denominational organisations to lay down requirements concerning the fulfilment of a position that the organisation may regard as necessary in order to realise its religious or philosophical principles. However, such requirements may not lead to differential treatment based on the sole fact of political persuasion, race, sex, nationality, sexual preference or civil status; but differential treatment solely on the basis of religious grounds is permitted. Article 7(2) AWGB contains an exception for faith-based schools with regard to the (non-)admission of pupils similar to that in Article 5(2) AWGB. The aim of these exeptions is, of course, to respect the freedom of education and religion, allowing denominational organisations to select on the basis of criteria flowing from their specific ethos and thereby maintaining their collective identity.

The exceptions of Article 5(2) and 7(2) AWGB are inspired by the famous Maimonides judgment (1988), in which the Supreme Court held that an orthodox Jewish school could exclude a pupil from a liberal Jewish family because that exclusion was based on a consistent policy, and because that policy was directly related to the religious foundation of the school. The school therefore could rely upon its constitutional freedom of education.[9] Because of procedural obstacles, the Court could not decide the other issue, whether the application of religion-based criteria that were linked to ethnicity – in this case, the criterion that a nonbeliever was nevertheless regarded as Jewish if (s)he had a Jewish mother, and would be admitted – should be regarded as racial discrimination.

In line with the Maimonides decision, the AWGB leaves denominational schools and other institutions based on a religious ethos freedom to apply criteria derived from their religious "mission" and to select on the basis of such criteria, as long as they do so in a consistent manner. This means that the Maimonides case would probably be decided in the same way under the regime of the AWGB as it was in 1988.[10] It also means that if a denominational organisation selects its employees or pupils on denominational grounds on a case-by-case basis rather than in a consistent manner, it cannot appeal to the exception of the AWGB and thus will be in breach of article 5 or 7 AWGB. In practice this implies that the non-orthodox organisations – even though based on a religion or belief – in general are bound by

the non-discrimination principle, because they do not rely on a strict and consistent policy (based on their religious views) with regard to their teachers and pupils, and therefore cannot invoke the exceptions.

Most cases involving religion until now have to do with dress codes.[11] They often concern the Islamic headscarf. In general the refusal of teachers and pupils because they are wearing the Islamic headscarf is regarded as justified under articles 5(2) and 7(2) of the AWGB, if and only if this refusal is an inherent consequence of the denomination of the school, and is consistently applied. For instance it has been ruled that a Roman Catholic school could expel Muslim students because they began to wear headscarves. The school could rely on a strict policy forbidding – on denominational grounds – clothing with non-Christian connotations.[12]

The locus classicus from a symbolical-political viewpoint, concerning the question whether a Christian school may refuse to appoint a teacher because of his or her sexual orientation, though much debated in Parliament until now has never been decided by a court. Nevertheless this issue is the main reason for a bill recently introduced in Parliament[13], to eliminate the so-called "sole fact"-construction, that denies denominational schools to exclude teachers because of the sole fact of their orientation (which includes the fact of living together with a person of the same sex), but still allows additional circumstances to

sometimes refuse them. The MP's introducing the bill refer to an infraction procedure by the European Commission based upon directive 2000/78, and intend to diminish the room that the AWGB still allows strict Christian and Muslim schools to exclude homosexual teachers.[14] The reason for this bill thus is to make absolutely clear that sexual orientation – including the behaviour associated with it, even outside the private sphere – may never be a reason (not even for instance for orthodox schools who reject homosexuality) not to hire a teacher; it is submitted that that clarity is essential on the grounds of non-discrimination and privacy-protection.

Other initiatives only concern the freedom of denominational schools to select their pupils on the basis of their religious mission. One option put forward in a bill is to strengthen the legal position of pupils and parents, in that they should have a virtually unconditional right to be admitted to the school of their choice, regardless of the admission policy of that school.[15] Quite often it is assumed that denominational schools abuse their right to select in order to refuse minority children, leading to a concentration of these children in public authority schools, which do not have that right. For instance it is suggested that dress codes, though formally inspired by the religious views of the school as laid down in its charter, in fact often is used to refuse admission of girls from migrant minorities. By giving them a strong right to be admitted, such discriminatory practices will

be countered, and they will be given choices equal to that of other children/parents.

Strengthening parental choice is also seen as one of the means to limit a further growth of the number of so-called "black" schools. In the last 40 years, the ethnic and cultural composition of the Dutch schools has changed considerably. The percentage of "ethnic minority" children in primary and secondary schools has risen, and the number of so-called "black schools" has grown considerably. Now several hundreds out of the 7000 primary schools are "black schools"[16]: schools with more than 50 percent of ethnic minority pupils that may be presumed to have learning disadvantages and therefore receive additional funding. This development has created a lively political debate about whether the trend toward further segregation between "white schools" and "black schools" should be countered by legal measures. An argument in favor of such measures is that it is more difficult to realize a minimum of communication and social integration between "black" and "white" children in ethnically segregated schools than if the school population consists of an adequate ethnic mixture. One way to stop this trend towards further segregation is a policy requiring schools to achieve an adequate mix of "black" and "white" pupils. It is yet unclear whether the current legal framework contains the competence of local government to oblige schools – including the orthodox - to work together in order to achieve that mix.

Furthermore, schools more than before are required today to do their share in strengthening social cohesion, in teaching civic virtues, in making pupils "citizens", in short: to fulfill an integrative function. A shift in emphasis from multiculturalism towards integration becomes evident in the changing definitions of the general aims of education. For instance, article 8 section 3 of the Primary Education Act and article 17 of the Secondary Education Act formerly prescribed that schools should take into account that pupils "grow up in a multicultural society." These provisions suggested that schools should instill in their students a positive attitude towards the multicultural character of society. In the new version of these provisions, in force since 2006, the reference to the "multicultural society" has been changed into a "pluralist society". But most telling is the fact that a new goal – the advancement of "active citizenship and social integration" - is added (article 8 section 3(b) of the Primary Education Act and article 17(b) of the Secondary Education Act).[17] In addition, the curriculum is recently adjusted, in that in all primary and secondary schools explicit attention must be devoted to the "canon", a set of fifty historic events and persons which have shaped Dutch society.[18] These requirements demand of schools to be open to society and its history, and not to settle themselves within the boundaries laid down in the school's charter.

Finally a bill has been introduced to strengthen inspection of new schools as to their school plan, in which the board expounds how the school will try to attain the targets set by the

education legislation. The school plan not only concerns the subjects to be taught, but also how the school will endeavour to further active citizenship and social integration. Until now the school plan will only be checked when the school already is in operation for some time, when it can be examined how the plan actually is put into practice. But the bill proposes to examine the school plan immediately from the start[19], or even – as proposed in two amendments to the bill[20] - before that, when the minister is deciding whether the school will be funded. It may be assumed that this examination will turn out to be disadvantageous for new schools, Islamic schools and other minority schools in particular.

I believe that these proposals are difficult to reconcile with the constitutional freedom of education. In the next paragraph the one-sided ideological assymptions of these proposals will be discussed.

Ideological assumptions[21]

The proposals sketched in paragraph 3 are based on some fundamental ideological assumptions.

(a) They presuppose that religion – Islam in particular, but also orthodox Christianity – is a dark and irrational force, a source of deep divisions and conflicts, and that the answer is adherence to the ideal of the common school.

(b)They are inspired by demands for a stricter separation of church and state, a further secularisation of the public sphere, limiting the role of religion and religious collectivities to the purely private sphere. (c) These demands are also connected with a market ideology, and with the assumption of the primacy of the privacy of the individual above the school as a community.

(a) One of the recurrent discussions in Dutch politics – which lies at the base of the proposals just mentioned - is whether the state should only fund the common school, one that is equally accessible to all and free of religious sectarianism, and should stop funding denominational schools.[22] Indeed it is often argued that the principle of separation of church and state demands that the state should not support denominational schools.[23] A basic premise is that in a society as religiously and culturally differentiated as the Dutch, it is necessary to use the educational system as an instrument to further integration. Schools should teach children of different ethnic, religious, social and cultural backgrounds to live peacefully together, to respect each other, instilling in them the basic values of democracy and the rule of law. In general this position is combined with the ideal of the secular state school, which is not only "common" in that it is open and available for all, but also in that it teaches the values and norms that are common to western society. Thus, schools should link individuals to a shared belief in the same basic, non-sectarian and impartial principles of the Enlightenment - somewhat like John Dewey's civil religion or the French republican école laïque.[24] Seen from this perspective, the common public school stresses basic virtues and attitudes, such as autonomy, citizenship, tolerance and rationality, thereby creating a shared understanding. Religious schools on the other hand are sources of social division, devoted as they are to their own sectarian purposes, keeping pupils apart in separate schools and strengthening oppositions.

Therefore – critics of the dualistic school system argue – we can and should make do with the common state school; a plea

furthermore supported by the presumpotion that this system leads to a split between schools along ethnic and religious lines. Authorities should require schools to make a contribution to the removal of social inequalities and religious/cultural "apartheid", a precondition for full participation of all in society. However, because private (and especially orthodox denominational) schools are established to perpetuate rather than to remove group loyalties, they cannot adequately contribute to cultural integration. So they should give up their (distinctive) religious character. But when they have done that, they have thereby lost their legitimacy to stay apart from the public school system and should simply be taken over by the state, or at least give up their claim to the right to a separate collective identity.[25] This argument seems to put the strict denominational schools in an impossible position. As long as they are truly distinctive and really religious, it is claimed that they cannot fulfil their integrative tasks, and should therefore not be funded by the government. But as soon as they begin to adequately fulfil these tasks and contribute to social integration, they cannot but give up their religious characteristics, and no longer have any reason to stay outside the state school system.

It is true that the freedom of education may have as a side-effect the existence of mono-religious and mono-ethnic schools. However, the large majority of formally denominational schools (mainstream Catholic and Protestant schools) do not select on the basis of religion; only a limited number of schools consistently do so. It should be stressed once again that a denominational school that is not consistent in its selection criteria thereby forfeits its right to refuse pupils on religious grounds. Furthermore, it is indeed the case that for some 25 years now there is a trend towards a division into mono-ethnic "white" and "black" schools. It is debatable, however, whether this trend is mainly caused by the Dutch school system. It seems that this trend to a larger extent merely reflects demographic and housing patterns, and can also be found in countries where the common secular school is strongly favoured, as in the United States and France. In general, a school in a "black" neighbourhood is "black", whereas a school in a "white" neighbourhood is "white", irrespective of whether it is a neutral public-authority school or a private denominational school.[26]

Finally, I believe that the critics of the Dutch school system create the false impression that orthodox denominational schools by definition are unable to fulfil the necessary integrative functions. Indeed, I believe that these schools are able to create a sense of community – quite often absent in Dutch mainstream society – characterized by an atmosphere in which civic virtues can effectively be cultivated. But this may be a subjective observation. Unfortunately there are as yet but few objective empirical data on the relation between integration and denomination.[27]

(b) These proposals are connected with a trend away from pluralist accommodation (multiculturalism) towards individualist secularism. They are defended by an appeal to the neutrality of the state, demanding a strict separation of church and state. However, this appeal to neutrality and church-state separation overlooks the fact that these principles themselves are not neutral: they have multiple and contested meanings, corresponding to at least three different models. The strict neutralist view – strong secularism - reflects but one of these models. In fact, in the past two centuries there has been a gradual shift from the established church system towards strict separationism. In the first half of the nineteenth century Christianity, institutionalised in the Reformed Church, was still the dominant, state-supported religion. In the twentieth century the pluralist-cooperationist view took over, according to which government should not take sides among the plurality of religions and secular worldviews, but should treat and support them in an even-handed manner. And now, in the twenty-first century, there is a tendency towards a strict dualism between the public and the private sphere, between the state on the one hand and religion and culture on the other, demanding uniform neutrality in the public sphere and cutting the traditional ties between the state and faith-based organisations.

This dualism draws its inspiration from the French ideal of citizenship, based on the republican values of laïcité, individualism and equality.[28] According to this ideal the law should not recognise other subjects than the individual citizen, who has an exclusive legal bond with the nation-state, not mediated through collectivities. This direct relation should not be interfered with by legal recognition of intermediate structures and organisations – religious or other – in public life. Corporate and group rights would only disturb the unique relation of loyalty between the state and the individual. It is this notion of shared Dutch (secular-individualist) values that also inspires the plea in favor of the public school as the common school, and against the denominational school which perpetuates (religious) group loyalties. And it is this notion that generates the idea that religion must be restricted to the private sphere. At its basis lies the ideal of the self-determining autonomous individual, who follows his own plan of life while at the same time respecting the free spheres of the other individuals.

Individual autonomy is of course an inspiring ethical ideal, to which I subscribe personally. At the same time, I think it is too "thick", too "full", too "all-encompassing" to be the only basic principle in the politics concerning education and citizenship. The liberal-pluralist state is precisely liberal in that it rejects the idea of state-enforced concepts of the good citizen and the worthy individual, whose standards are obligatory for all. In a liberal state, the source of unity and integration cannot be a substantive view of the "good" – a "thick" version of public morality – but only a procedural agreement on what is "right" – a "thin" notion of public morality. Though it should be admitted that the ideal of

personal autonomy is less substantive than competing ideologies – because it leaves the individual a fair amount of self-definition, and thereby presumes a minimum level of relativism. Still it is too insensitive to alternative, more collectivist concepts, based on religion, tradition, culture, group identities and loyalties that cannot be reduced to individual choices.

(c) Finally, this reasoning has links with a market philosophy, that to a certain extent also pervades European Community education law. For instance, as the Explanations relating to the Charter of Fundamental Rights[29] state concerning Article 14 of the Charter (on the freedom of education): "Freedom to found public or private [educational] establishments is guaranteed as one of the aspects of freedom to conduct a business". It seems, then, that school primarily should be a business, should be part of an education market. It is merely an economic institution that acts efficiently, and not a community based on (other than rational, economic) values. This means that school should select its personnel on a non-discriminatory basis (article 2 of Directive 2000/78), differentiating solely on the basis of functional criteria – objective criteria inherent in the function at hand (article 4(1) of Directive 2000/78). Only by way of an exception other, additional criteria, derived from the normative ethos of institution, may be added (article 4(2) of Directive 2000/78). And furthermore, it should to a large extent respect consumer sovereignty (article 2 of the proposal for a Council directive on implementing the principle of equal treatment), in principle demanding equal acces of pupils/students to the education offered; only by way of exception requirements of loyalty based on the religious ethos of the school are allowed (article 3(3) of the proposed directive).

The purely functional relationship inherent in the economic viewpoint also reflects the primacy of the individual's right to privacy. In general, it is sufficient to fulfil the functional requirements, strictly necessary for the job. Apart from strictly job-bound criteria loyalty requirements that concern a person's lifestyle - his private sphere - are fundamentally suspect. So orthodox institutions, who insist on a moral unity of theory and praxis, of verbal adherence to the ethos of the school and actual behavior loyally expressing that ethos will be severely limited in applying their standards. The question may be raised, whether the Council directives have sufficiently taken into account the sovereignty of the Member-states, explicitly endorsed in the subsidiarity provisions on education (articles 165 and 166 of the Treaty on the Functioning of the European Union).

Section 5

Conclusion

There is a tendency to restrict the rights of orthodox schools to maintain their identity in selecting their teachers and pupils, and in their freedom to follow their own educational ethos and school plan. This tendency is inspired by various ideological assumptions concerning the irrationality of religion and denominational schools and the rationality of the common school; is based on the individualist-secularist belief in the necessity to realize a stricter separation of church and state; and is linked to an economic view on the school as just a business. What I would not want to argue is, that these assumptions are wrong in themselves. To a large extent they reflect basic values of our societies. However, they are one-sided, and overlook other, more collectivist-communitarian views on religion and education, held by orthodox minorities. These views, however, also deserve adequate attention and care when laws are enacted and decisions are made that really endeavour to balance non-discrimination & equality and the (right to) identity of non-governmental schools.

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Endnotes

1. Council of State, the Netherlands; Prof. of Education Law Radboud University Nijmegen

2. The issues in so far as they concern the larger - settled - denominations (Roman Catholic, mainstream Protestantism) are less 'bitter' and problematic.

3. Official Journal of the European Union (OJ) L 180, 19 July 2000, pp. 22-26.

4. OJ L 303, 2 December 2000, pp. 16-22.

5. Article 4(2) of Directive 2000/78/EC reads as follows:

6. " 2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement,

having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

7. Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos."

8. (COM (2008)0426), amended by the European Parliament (OJ C 137 E/68).

9. Article 3 – paragraph 3

10. -Commission:

11. "This Directive is without prejudice to the responsibilities of Member States for the content of teaching, activities and the organisation of their educational systems, including the provision of special needs education. Member States may provide for differences in treatment in access to educational institutions based on religion or belief."

12. -Parliament:

13. "This Directive shall not apply to the content of teaching, activities and the organisation of national educational systems, while Member States shall ensure the rights of persons with disabilities to education without discrimination and on the basis of equal opportunities. Member States shall also ensure that, in determining which type of educa-

tion or training is appropriate, the views of the person with a disability are respected. Member States may allow for differences in access to educational institutions based on religion or belief, so as to maintain the particular character and ethos of such establishments and a plurality of educational systems, provided that this does not represent an infringement of the right to education and does not justify discrimination on any other grounds. Member States shall ensure that this does not lead to a denial of the right to education."

14. Article 3 – paragraph 4

15. -Commission:

16. "This Directive is without prejudice to national legislation ensuring the secular nature of the State, State institutions or bodies, or education, or concerning the status and activities of churches and other organisations based on religion or belief. It is equally without prejudice to national legislation promoting equality between men and women."

17. -Parliament:

18. "This Directive shall not apply to national law ensuring the secular nature of the State, State institutions or bodies, or education, or concerning the status, activities and legal framework of churches and other organisations based on religion or belief where this falls outside the competence of the EU. Where the activities of churches or other organisations based on religion and belief fall within EU competence, they shall be subject to the Union's non-discrimination provisions. It is equally without prejudice to national legislation ensuring equality between males and females."

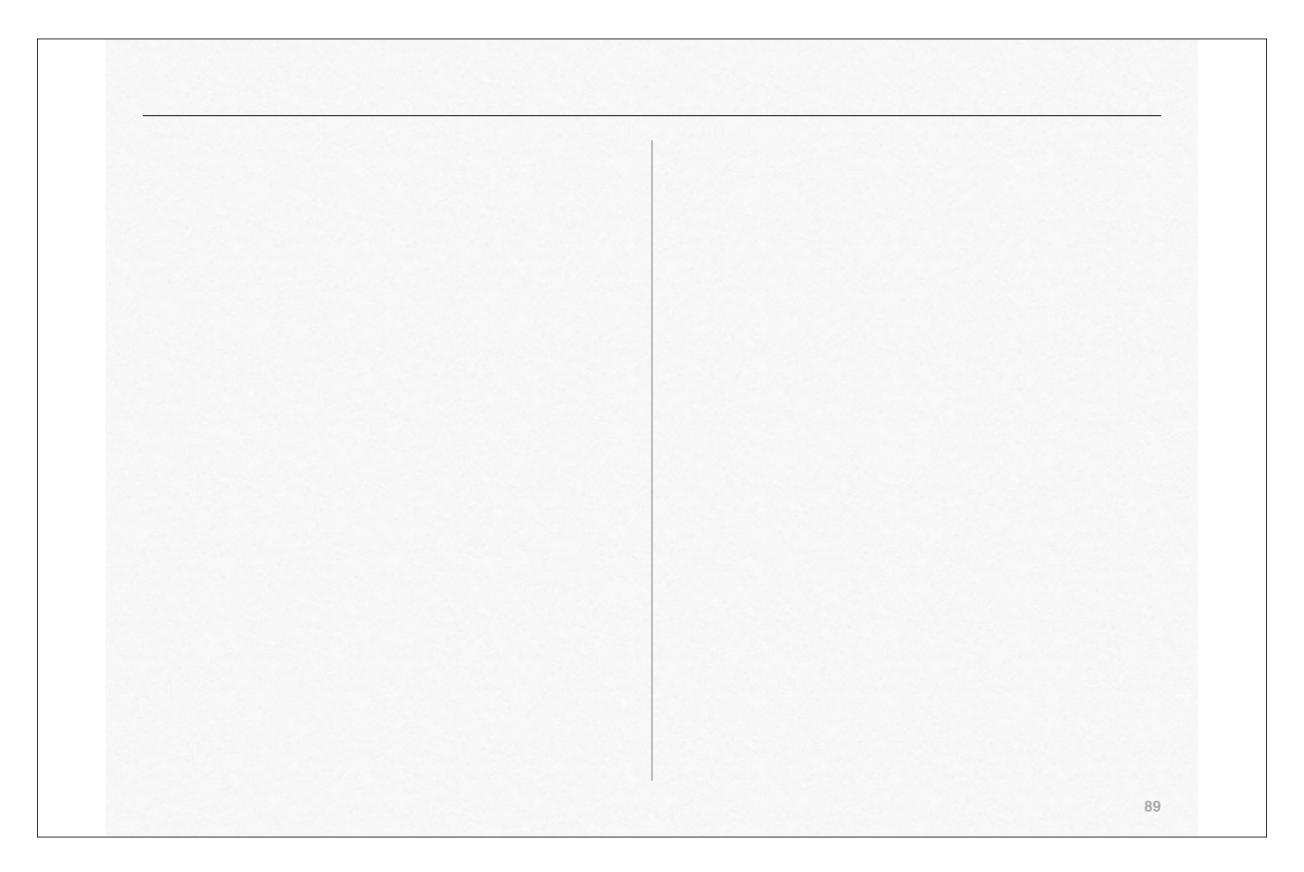19. The AWGB does not forbid differentiation on the grounds of race, etc. when the purpose of such differentiation is to put an ethnic or cultural minority group in a favourable position in order to diminish or abolish inequalities (positive discrimination/action), and ifthis measure is proportionate to this goal (article 2(3) AWGB).

20. Hoge Raad 22 January 1988, Administratiefrechtelijke Beslissingen 1988, 96.

21. Hof Arnhem 24 July 2007, NJCM-Bulletin 2008, 498.

22. A comparative survey of European state practice – with an extensive discussion of the French position - can be found in Dominic McGoldrick, Human Rights and Religion: The Islamic Headscarf Debate in Europe, Oxford, Hart Publishing, 2006; and in Françoise Lorcerie (ed.), La politisation du voile en France, en Europe et dans le monde arabe, Paris, L'Harmattan, 2005.

23. Commissie gelijke behandeling (Equal Treatment Commission) 5 August 2003, decision 2003-112, Administratiefrechtelijke Beslissingen 2003, 375.

24. Kamerstukken II 2009/10, 32476, nrs. 1-3.

25. Kamerstukken II 2007/08, 27017, nr. 34. See on the infraction procedure the Council of State, Kamerstukken II 2009/10, 28481, nr. 7; and A.B. Terlouw & A.C. Hendriks, 'Gebrekkige implementatie gelijkebehandelingsrichtlijn door Nederland', NJCM-Bulletin 2008, pp. 616-629.

26. Kamerstukken II 2006/07, 30417, nr. 5.

27. Aanhangsel Handelingen II 2005-2006, 1922.

28. Wet van 9 december 2005, Staatsblad 2005, 678 (Kamerstukken 29666).

29. Besluit van 29 april 2009, Staatsblad 2009, 223.

30. Kamerstukken II 2008/09, 32007, nrs. 1-3.

31. Kamerstukken II 2009/10, 32007, nrs. 13 and 14.

32. I use the term "ideological" in a neutral sense.

33. For an analysis of this position see B.P. Vermeulen, "Een schets en evaluatie van de kritiek op de overheidsfinanciering van het bijzonder onderwijs", in W.B.H.J. van den Donk, A.P. Jonkers, G.J. Kronjee and R.J.J.M. Plum (ed.), Geloven in het publieke domein. Verkenningen van een dubbele transformatie, Amsterdam, Amsterdam University Press, 2006, pp. 353-366.

34. See for recent examples the papers published by the Teldersstichting (the think-tank of the Liberal Party VVD): S. Bierens and P. van Schie, "Neutraliteit van de staat, godsdienstneutraal onderwijs en liberalisme", 147-154; N. Dodde, "Offers uit openbare kassen. De geschiedenis van de huidige invulling van artikel 23", pp. 155-172; C. van den Berg, "Onderwijs en segregatie. De invloed van 'vrijheid' van onderwijs op de huidige integratieproblematiek", pp. 173-186, all published in W.P.S. Bierens et al., Grondrechten gewogen. Enkele constitutionele waarden in het actuele politieke debat, Den Haag, Teldersstichting, 2006.

35. Cf. Charles Glenn's excellent study of the development of this ideal in the United States, France and the Netherlands, The Myth of the Common School, Oakland, ICS Press, 2002.

36. A.P.M. van Schoten and H. Wansink, De nieuwe schoolstrijd: Knelpunten en conflicten in de hedendaagse onderwijspolitiek, Utrecht, Bohn, Scheltema & Holkema, 1984.

37. S. Karsten et al., Schoolkeuze in een multi-etnische samenleving, Amsterdam, 2002.

38. A.B. Dijkstra, "Opbrengsten van onderwijsvrijheid. Over de effecten van verzuild onderwijs", in T.J. van der Ploeg et al. (ed.), De vrijheid van onderwijs, de ontwikkeling van een bijzonder grondrecht, Utrecht, Lemma 2000, pp. 243-260.

39. Cf. the analysis of the French secularist-republican theory of the state in McColdrick 2006 [footnote 10], pp. 38-51.

40. OJ 2007, C 303/17.

International human rights and national constitutional heritage: which legal framework do we need to manage religious tensions?

6

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Introduction

The ongoing globalisation processes – or should we say 'glocal-isation', in line with Ronald Robertson, to refer to the connection between global homogeneity and local plurality[1] – foster a multicultural society where religious diversity is growing and religious tensions are increasing. As a result of this, two important aspects of Western culture are challenged.[2] First, the assumption that as the West became more modern it would become more secularised and religion would disappear is fainting. Secondly, and more important for this paper, the idea that religion and politics should occupy radically differentiated spheres in which private conviction may not exert itself within the public realm is challenged. Because of this growing importance of religion within the public sphere, religion is increasingly becoming a topic in court. As such, legal practice[3] has to deal with rising religiosity and academic writing[4] pays more attention to the topic.

As the importance of religion has been growing in the courts, it has also become more and more relevant in the field of educa-

tion. Since schools are somehow the first 'thermometers' of societal evolutions, they have to cope more than ever with religious diversity. Especially the growing numbers of assertive Muslim students in Western schools has lead to religious tensions. In many Western countries in recent years, this has fostered debates on a possible prohibition of wearing headscarves at school.[5]

This evolution confronts us with the question of how to handle religious tensions. In this paper we will try to answer this question from a constitutional viewpoint. In our opinion, constitutionalism is a set of high legal norms that contain institutional mechanisms for the limitation and the control of power on the one hand and for the protection of individual rights and freedoms on the other. We are of the opinion that in the past constitutionalism has carried out this task with great devotion and success. In Europe, constitutionalism has not restrained religious diversity. Instead, constitutionalism has offered a framework to settle violent religious conflicts in a peaceful and judicial way.

Basic assumptions

Before we discuss the subject of constitutionalism and religion in detail, we want to briefly deal with some basic assumptions of this paper. Some of these will be discussed more exhaustively later on.

First of all, there is the ethical and judicial relevant distinction between minors and adults. Within the debate on religion and education, we want to stress the special status of a minor. Since religious claims are often the expression of identity claims, we assume that it is by no way a surprise that minors (and young adults) often raise religious claims. Minors have not yet found their identity. While grown-ups are mature citizens, underage persons still have to walk a long path towards maturity. This is a basic assumption in law. The law departs from the idea that minors are not capable of looking after their own interests. Because of this, the law contains restrictions on dealing with minors in judicial matters.[6] For example, guardianship is common for children but not allowed for grown-ups.

Although there is a distinction between adults and minors, we must admit that a binary approach to minors is not entirely accurate from a human rights perspective. The approach of the United Nations Convention on the Rights of the Child is an approach of gradual emancipation. Lenient to this approach, we still think that the notion of minority is germane. Thus, we are of the opinion that there is not one debate on religion and law but that there are several. The debate on the prohibition of headscarves at school (for minors) is thus different from the debate concerning grown-ups.[7]

A second basic assumption is the relationship between human rights and constitutionalism. Individual human rights are just a part of constitutionalism. Thus, human rights by themselves cannot cover the substance of constitutionalism. Put differently, constitutionalism has a broader scope than human rights. Apart from human rights, it contains – among other principles – the organization of state powers, the idea of the separation of powers, the separation between church and state, and the principle of neutrality. To discuss religious problems solely in light of human rights will in our view not grasp this broader constitutional context. What this means is that human rights form only a part of constitutionalism - they do not replace it.

Furthermore, we are – in line with Pavlos Eleftheriadis – of the opinion that international human rights, such as the European Convention on Human Rights, are of a different nature than na-

tional constitutional rights. Whereas national constitutional rights concern basic questions on political legitimacy, international rights try to establish legal relations between states. As Elefteriadis expresses:

'In the domain of international law, rights have a distinct role. They bring about secondary international remedies, ie standards for institutional intervention (persuasive or even coercive) into the domestic affairs of a state whenever that state is responsible for the most serious violations of human dignity and has not been willing or able to remedy the violations within its own legal system.'[8]

Both of these arguments point to the idea that the European Convention on Human Rights is unlike constitutionalism; it is not a 'blueprint' of a state but has restricted significance. In line with this, we have noticed that the European Court on Human Rights in Strasbourg – in cases such as Leyla Sahin v Turkey and the French headscarf cases – has introduced the member states' constitutionalism into its jurisprudence.[9]

This broader perspective on constitutionalism has some important consequences. Constitutionalism grew gradually out of local legal systems. During this process, there was not one universal model of constitutionalism. Constitutionalism differs from country to country. The protection of the freedom of religion thus takes a different form in France with its tradition of laïcité

than in the United States, which departs from a more liberal approach.[10]

Apart from the broader point of view that constitutionalism requires, one must also take the specific reading of individual human rights into account. First, there is the problem surrounding the hierarchy of human rights. Although the different human rights in the European Convention on Human Rights seem of equal standing at first sight, a thorough study of the Convention reveals the opposite. The exception in article 15 of the Convention, which proclaims that a state can deviate from the convention in cases of emergency, is, for example, not applicable to articles 2, 3 and 4 of the Convention. Articles 8, 9 and 10 have their own exception-clause in the second section. Besides these differences within the treaty, the practice of the Court in Strasbourg reveals even more differences and graduations. The jurisprudence of the Court shows that (in the opinion of the judges) some human rights are more important than others. Our analysis of jurisprudence has demonstrated that the right of free speech in many cases trumps the right to privacy.[11] Also within the applicability of a human right – such as the right to privacy – there are differences in application between divergent aspects of the right.

Within the scope of this paper, it is important to remember that according to article 9 of the ECHR, the freedom of religion is not an absolute right. Or at least we should say that the free-

dom of conscience and religion in the first paragraph – the so-called forum internum – may be absolute but the freedom to manifest religion – the forum externum – is not.[12] Thus, we can conclude that although its position within the hierarchy of human rights cannot be pointed out exactly, it is clear that the freedom of religion is not a 'leading human right'. The freedom of religion is thus not a preeminent human right that nullifies other human rights or interests such as constitutional arrangements.

The last basic assumption of this paper concerns the plea for active pluralism that often rises as an argument in the debate on religion and religious conflicts. Adherents of this theory preach that there is a duty of both the government and its citizens to actively involve religions in public decisions and deliberations. Active religion becomes a driving force for governance and human contact. Although we will not examine this topic here any further[13], we want to indicate that the European Court on Human Rights does not rule on the necessity of active pluralism in her jurisprudence within article 9 of the Convention. Thus, although an active pluralistic approach may be normatively desirable, the ECHR does not contain a legal obligation of active pluralism.[14]

Constitutionalism as a peaceful site

As we already mentioned before, constitutionalism is a legal model that contains institutional mechanisms for the limitation and the control of power on the one hand, and protects individual rights and freedoms on the other. From this perspective, constitutionalism makes an important contribution to religion. The separation of church and state – one of the main characteristics of Western constitutionalism – constitutes a framework in which religion can be practised freely. Conversely, religion has also made a contribution to the development of constitutionalism.[15]

This reciprocity between religion and constitutionalism can be found throughout Western history. Alicino gives the example of Hobbes, the founding father of social contract theory.[16] The basic assumption in Hobbes's theory is the subjection of the citizen to the sovereign. For Hobbes, personal convictions and the distinction between secular and metaphysical powers were fundamentally impermissible. Because of these convictions and because of his experiences with the religious wars during his lifeti-

me[17], Hobbes thought religious homogeneity – whether or not imposed by the sovereign – was an indispensable condition for the state.[18] This harsh approach made Leibniz declare that: 'Hobbes… croit (et au peu prés pour la même raison) que la véritable religion est celle de l'état'[19].

Modern constitutionalism, however, developed due to the contributions of thinkers who contradicted Hobbes's opinions. Like Hobbes, Locke also explained his arguments via social contract theory. Nevertheless, Locke contradicted Hobbes's harsh approach by introducing natural law. In Locke's opinion, the law of nature was created by God and understandable for every reasonable human being. The law of nature teaches us that nobody may be harmed in his life, health, freedom and property.[20] In addition to this, Locke interpreted the freedom of religion and conscience as one of the main foundations of constitutionalism.[21] Locke could not believe in the possibility of an imposed religious homogeneity. He believed that – contrary to the opinions of Hobbes – attempts to impose religious homogeneity would result in growing social conflicts. For Locke, Hobbes's Leviathan was probably constitutional science fiction. Since it is impossible for the state to impose its will concerning religious matters on society, the state should not engage in religion at all. In this vision, Locke starts from the idea that if one cannot solve the problem itself, one should change the context so that the problem cannot be framed as a problem anymore.

Thus, since religious homogeneity cannot be imposed on society to stabilise the state in a Hobbesian way, one should change the state so that religion is no longer an issue in the public sphere, but an issue contained within the private sphere. Although Locke – like Hobbes – saw the state as the product of a social contract, that contract, in his opinion, could not reach so far as to deprive the contractors of their freedom of religion and conscience. Therefore, citizens should possess inalienable rights that protect the private sphere of their lives.

A second illustration of the significance of the freedom of religion and conscience for modern constitutionalism is made by Roger Williams, the 'founding father' of Rhode Island and – in Marta Nussbaum's opinion – one of the founders of the American vision on freedom of religion and conscience.[22] In Williams's opinion, conscience is the main characteristic of human beings. Because of this, humans are able to make judgments on normative questions. For Williams, denying this ability would be like denying the very nature of humankind.[23] Apart from his vision on the freedom of religion and conscience, Williams stated that the state should serve its citizens and not the other way around. In line with both these visions, Williams made the same conclusions as Locke did on the role of the state in religious matters: the state should not interfere in religion.

Being Rhode Island's founding father, Williams had the opportunity to apply his theory in practice. Thus, Rhode Island, and its 17th century constitutionalism, served as a site for religious freedom. Because of the decoupling of public politics and private philosophical convictions, different religions could live peacefully side-by-side.[24] However, at the other side of the Atlantic, Europe still had to wait more than a century until both constitutionalism and the freedom of religion and conscience were realised.

The different appearances of constitutionalism

As mentioned in our points of interest, constitutionalism appears in different forms. Western constitutionalism grew gradually within the different legal systems. The separation of church and state had an influence on this process. Step by step, the state became emancipated from the church and conversely religions were freed from governmental interference. Because this historical evolution differed from legal system to legal system, the separation of church and state now varies from state to state. Consider the following example:

The United States and France have a similar constitutional framework regarding the separation of church and state. Article VI.3 of the US constitution and article 6 of the French Déclaration des droit de l'homme et du citoyen from 1789 guarantee equal access to public offices for both believers and non-believers. Apart from this, the non-establishment clause in the First Amendment of the US constitution has its French counterpart in the law concernant la séparation des Eglises et de l'Etat from 1905. This law has constitutional value in France. A third

comparison can be found in the 'free exercise clause' of the US, which has a French counterpart in article 2 of France's 1958 constitution. This article establishes the obligation of the state to respect all different faiths.

Notwithstanding these similar provisions in French and American constitutional law, the Americans are of the opinion that the French prohibition on conspicuous religious expressions in public schools of 2004 would – if it were an American law – breach the constitution of the United States. Alicino[25] points to several factors to declare these different constitutional interpretations. First of all, she points to the important role of the 'founding myth' in the United States. Similar to Williams's vision on religion and constitutionalism, religion plays an important role in the 'founding myth'. Apart from this, American law strongly protects the right of students to express their religious views.

Whereas the US constitutional model is grounded on a very liberal approach, the French constitutional model takes a republican approach. The republican model does not overly stress the prohibition of government interference. Whereas the state in the US is limited to watching religious matters, and it may certainly not interfere with them, the French approach allows more state action. Governance has an important function in society. A republican vision on religious freedom requires the state to actively guarantee this freedom. The French laïcité must enforce the freedom of religion because of its strict neutrality. In the re-

publican view, neutrality has an even wider focus than the functions of the state. The entire public sphere needs to be imbued with neutrality. This is the result of the fact that French constitutionalism connects the principle of laïcité with the principle of égalité. Citizens must be treated in an equal way. Thus, neutrality towards all citizens is the only possible way to reach religious equality among citizens.

One can find another illustration in the comparison between the European Convention on Human Rights and the US constitution.[26] On the American side of the Atlantic, the government has the absolute duty to protect religions and the freedom of religion. Conversely, Article 9 of the European Convention on Human Rights does not guarantee full protection since the article contains exceptions in its second paragraph[27]. Thus, other human rights or interests can limit the scope of Article 9 of the European Convention.

The end of the old and the birth of a new constitutionalism

Notwithstanding the different appearances of constitutionalism, it is criticised at the present time. The idea that constitutionalism does not work anymore is becoming more frequently voiced. The argument insists that constitutionalism – or at least some of its forms – cannot be reconciled with the rise of multiculturalism in Western societies. For example, the occasional visitor in France might notice that the laïcité is not accompanied with an actual égalité.[28]

The cause for this is that religious diversity rises at an unseen rapidity. Multiculturalism also causes serious challenges for constitutionalism in Western countries with a more liberal constitutional approach towards the freedom of religion.[29] Because of the new societal constellation, people question the old consensus. The separation of church and state was created to protect quite homogenous societies against the involvement of the state. With the growing number of immigrants with diverse religious backgrounds, new challenges occur. Religious claims are now expressed in the public sphere. Western societies have to

deal with religious tensions yet the freedom of religion restrains governments from interfering in society. [30]

Thus, after a break of more than a century, 'religion is back' and Western countries are in search for methods to restore the peace and quiet. For this reason, different approaches are used to readjust the law with a multicultural society. The reformation takes place on all societal levels. On the level of societal customs, we can see, for example, that politicians participate in religious rituals less than their predecessors did. Another example is the removal of crucifixes in public buildings. Apart from these customs, Western countries are reforming their national laws and on the European level directives have been enacted to fight discrimination. Another remarkable approach of reformation on the European level was the debate on the mentioning of religion in the European constitution. This last example shows that even constitutions are not immune to the reformations.

Notwithstanding these far-reaching reforms, the most fundamental reform in recent history is the use of international human rights. Nowadays, a process of denationalisation affects human rights. National judges and non-governmental organisations use human rights as an instrument for the creation of a 'supranational constitutionalism'[31]. The main actors in this process are, however, international courts, such as the courts in Strasbourg and Luxembourg. One can conceive this evolution in two ways. From a positive point of view, this evolution permits us to

examine and improve national law via pluralistic debate on an international level in a constructive way. Local democratic practices can gain legitimacy by way of these international debates. From a negative point of view[32], this 'new constitutionalism' becomes an instrument in the hands of an international activist judicial elite that imposes external standards on countries. Thus criticasters as Alexander Somek point out that: 'The emergence of transnational constitutional law is correlated with the demise of parliaments as representative institutions'[33]. From this viewpoint, supranational courts protect human rights, which are used by religious minorities to support religious claims to slam on national arrangements.

Dissatisfaction with the chosen path

Today we find that dissatisfaction prevails from the results of these reforms. Often one points to the de facto exclusion of religious minorities. Dissatisfaction also rests with the rulings of the European Court of Human Rights in Strasbourg. The criticism is that the Court is too conservative and does not pay enough attention to the peculiarities of Islam.

One can partially understand these criticisms from the viewpoint of a new vision on the separation between church and state and on the role of religion within society. Especially the European Muslims whom specialist in Islamic studies Olivier Roy calls the 'new parishioners', often take this point of view.[34] Roy points out that religious claims seldom result from socio-economic circumstances and that they more often result from feelings associated with identity. This is especially the case with the 'new converts'. In an interview with a Belgian journal, Roy pointed out that the debate on headscarves began when three young girls, who were integrated into French society and were diligent students, one day came to school with a headscarf and

declared: 'My body is my business'.[35] This example illustrates that Islam has adapted itself to Western society and that – as a result of this – immigrants draw upon Western values such as human rights to protect their identity.[36] International human rights are thus used to protect the identity of different minorities.[37] Departing from this viewpoint, some critics are indignant about the jurisprudence of the Court in Strasbourg in the case of Leyla Sahin v. Turkey[38] and the cases concerning the French law of 15 March 2004 on the prohibition of le port de signes ou tenues manifestant une appartenance religieuse.[39] Most of this criticism targets the 'margin of appreciation' that the Court grants to the countries and the rash – almost mechanical – way in which the Court has allowed these national prohibitions on the wearing of headscarves.

Without neglecting the de facto exclusion and sharing the indignation on several somewhat 'lazy' judgments of the European Court of Human Rights, we find that there is a movement within Western society that wants to do justice to the fact that there are a multitude of religions, including atheism. Furthermore, we are of the opinion that the reforms exist on several levels and that they have produced some results. The growing importance of international human rights is just one out of many reforms. There are plenty of reforms on the local level as well. A good example of this can be found in the voting rights that immigrants recently have acquired in local elections throughout Europe and

in the change of names of several institutions and associations. These reforms continue to produce change. Consequently, more time is needed to examine the results of these reforms. For example, it is not yet clear what impacts the new EU anti-discrimination law[40] will have. In sum, we are of the opinion that profound reforming, without waiting for the initial results of the actual reforms, is unadvisable.

We not only think that one must evaluate the reforms of the Court in a broader context, but we are also of the opinion that one must not think too lightly of the impact of the jurisprudence of the Court in Strasbourg. Notwithstanding the margin of appreciation of the member states, the Court guarantees that the countries do not erode human rights. In the past, the Court has not hesitated to condemn some member states. In the Lautsi-case, the Court condemned Italy for the violation of Article 2 of the first protocol juncto Article 9 of the Convention.[41] The case concerned the presence of crucifixes in classrooms. The Court found that the presence of these objects, which are – notwithstanding the fact that they are closely tied to Italian culture and history – clearly Catholic symbols, possibly has a negative influence on non-believers and on students of a different faith.[42] In Susanna Mancini's opinion, the novelty of the Lautsi-case is 'therefore to be found in the Court overcoming its previous ultra-cautious position of traditional deference to states in the sphere of religious freedom.'[43] Another example is the Kavakçi-case of 2007 wherein the Court condemned Turkey. The case concerned madam Kavakçi. After she was elected a Member of the Turksih Parliament, the majority of the parliament decided that she could not lawfully remain a MP and even forbade her from participating in politics because she wore a headscarf in parliament. For the majority in the Turkish parliament, the wearing of a headscarf in parliament was a clear violation of the neutrality of the state. The Court of Strasbourg did not take Article 9 of the Convention into account but condemned Turkey because of a violation of Article 3 of the first protocol that ensures free and democratic elections.[44]

In our view, the approach of the Strasbourg Court shows great prudence. The Court is cautious in its judgments – and in the past was maybe 'ultra-cautious', in the words of Mancini – not to harm the existing constitutional arrangements of the member states.[45] From another point of view, the Court tries to manage the paradox between the universality of human rights and the peculiarity of national cultures.[46] This is the main purpose of the margin of appreciation. As Judge Martens noted in his dissenting opinion in the Borgers-case:

'On the one hand the Convention does not aim at uniform law but lays down directives and standards, which, as such, imply a certain freedom for member States. On the other hand, the Preamble to the Convention seems to invite the Court to develop common standards. These contradictory features create a certain internal tension which requires that the Court to act with pru-

dence and to take care not to interfere without a convincing justification.'[47]

Thus, managing the paradox between universality and peculiarity requires prudence.[48] The cautious approach of the Strasbourg Court seems to be a proper assumption in our views. Moreover, as we already mentioned before, constitutionalism encompasses more than only human rights. Constitutionalism has a long history in each of the member states and it has grown partly out of the religious wars in the early modern ages. The Court introduced the constitutionalism of the member states into its jurisprudence out of respect for the peculiarities of these historical constitutionalisms. By doing this, the Court draws a line for the legitimacy of religious claims at the base of national constitutional principles. Thus, although the Convention does not mention these constitutional principles like the separation of church and state and the principle of neutrality, we are of the opinion that the approach of the Court is highly advisable.

Moreover, this interpretation of the Court's approach also clarifies the jurisprudence of the Court in cases like Leyla Sahin and Lautsi. Firstly, in the Leyla-case the Court grounded its judgment on the Turkish[49] constitutional principle of the separation between church and state. We are of the opinion that a large part of the criticism of this judgment either did not grasp the significance that the Court attached to the particular Turkish consti-tutional model of laïcité – as expressed by the Turkish Constitutional Court[50] - either did not sufficiently consider the importance of national constitutionalism.[51] Turning to the Lautsi-case, the Court for the first time used the principle of neutrality in very clear terms.[52] On top of that, the Court expressed that the principle of neutrality – as recognised by the Italian Constitutional Court – is necessary in a plural society:

'L'exposition d'un ou plusieurs symboles religieux ne peut se justifier ni par la demande d'autres parents qui souhaitent une éducation religieuse conforme à leurs convictions, ni, comme le Gouvernement le soutient, par la nécessité d'un compromis nécessaire avec les partis politiques d'inspiration chrétienne. Le respect des convictions de parents en matière d'éducation doit prendre en compte le respect des convictions des autres parents. L'Etat est tenu à la neutralité confessionnelle dans le cadre de l'éducation publique où la présence aux cours est requise sans considération de religion et qui doit chercher à inculquer aux élèves une pensée critique. La Cour ne voit pas comment l'exposition, dans des salles de classe des écoles publiques, d'un symbole qu'il est raisonnablement d'associer au catholicisme (la religion majoritaire en Italie) pourrait servir le pluralisme éducatif qui est essentiel à la préservation d'une 'société démocratique' telle que la conçoit la Convention, pluralisme qui a été reconnu par la Cour Constitutionnelle en droit interne.'[53]

In our opinion, prudence is needed if one appeals against old constitutional principles in the name of human rights. The appeal of individual human rights cannot automatically disregard national constitutional arrangements. The different national and international principles should be balanced with one another. Consequently, the new 'transnational' constitutionalism needs to be a 'thin' constitutionalism[54]. In essence we want to slow down the evolution which Jean-Bernard Auby, describes as an 'intrusion massive des normes et standards externes dans les droits publics internes.'[55] Thus, the content of transnational constitutionalism must be narrower in scope than the content of national constitutionalism.[56] As Fassbender noted, an international 'constitutional order must be understood as an autonomous concept rather than an extrapolation of national constitutional law. […] its content depends on the specific tasks and responsibilities of the international community.'[57] The approach of the new constitutionalism needs to be sufficiently removed so that – as is the case with federal constitutions – it leaves room for the constitutionalisms of the national member states. Thus, if one wants to adapt constitutionalism with the upcoming demands of religion, the action should take place on several levels, and not just on the local national level.

In this respect, the role of the Court in Strasbourg is first and foremost to supervise the local reform processes and to guarantee that individual human rights are not eroded on the national level. Secondly, the Court has to monitor the consistency of the reforms. This second task also has consequences for the possible measures of national governments. An example can clarify this. In the cases concerning the French prohibition of headscarves, the Court of Strasbourg judged that France could only appeal to the principle of laïcité because in France this principle had had a long and coherent history. Emmanuel Decaux points out that:

'La loi du 15 mars 2004 est prise en application du principe constitutionnel de laïcité qui est un des fondements de l'école publique. Ce principe, fruit d'une longue histoire, repose sur le respect de la liberté de conscience et sur l'affirmation de valeurs communes qui fondent l'unité nationale par delà les appartenances particulière.'[58]

To conclude this section, we are of the opinion that the supervision of the European Court of Human Rights on both the margin of appreciation and the coherence of a constitutional arrangement (which is disputed via religious claims) offers sufficient protection against potentially Islamophobic laws or measures on the national level. If a national state takes a measure with direct or indirect negative consequences for the freedom of religion, and if these measures are not in line with the existing constitutional arrangements, the Court of Strasbourg will stop these measures. The key to the argument is that coherence serves as a contra-indication for discrimination.

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A roadmap for Belgium

With regard to the question of whether Belgium uses constitutionalism or international human rights to solve the growing religious tensions, it is interesting to consider a specific case on the national level. Therefore, we will briefly discuss the Belgian situation.

In our earlier work we have emphasized the hybrid character of the separation between church and state in Belgian constitutionalism. On the one hand, the Belgian approach has elements in common with the French approach, but in the north of the country there is an opening towards the Dutch approach. The constitutional heritage of the principle has a broad scope but not a clear focus. Because of the elegant jurisprudence of the Court of Strasbourg, Belgium has the possibility to examine whether it has been sufficiently consistent to follow the path of either the laïcité or the liberal path of multiculturalism.[59] Belgium can make a policy choice.

In our opinion, the path of laïcité is desirable.[60] On a principal level, we think that it is not advisable to interpret religious freedom in such a broad way so that it becomes a right that protects cultural identities. In line with Edouard Delruelle, we are of the opinion that a strong human rights protection of cultural identities – in principle – will lead to societal fragmentation and thus inequality.[61] Such fragmentation cannot be accepted. A strong protection of religious freedom encompasses the threat that the legal system itself becomes fragmentized. In such a scenario different faiths will have different legal systems. As the Court of Strasbourg found in the Refah-case, is such a vision on society incompatible with the Convention since the states have the positive obligation to ensure the full enjoyment of human rights so that people cannot wieve them. Thus, people may not be able to waive their fundamental rights because of religious reasons. This would lead to inequality on the enjoyment fundamental rights.[62]

From a historical point of view, we also want to highlight the roots of the freedom of religion. As mentioned before, freedom of religion was meant to pacify the public sphere. Thus, the recognition of a cultural identity is only – as is now in the Convention – absolute in the private sphere, in the forum internum. Freedom of religion is not meant to create unlimited freedom in the public sphere; on the contrary, the main idea was that religious opinions should be neutralised in the public sphere so that

religious tensions would not lead to public conflicts. On this basis, we think that the French approach of the laïcité is in principle preferable to manage religious conflicts in the public sphere.[63] The question then is how to draw the line between the public and the private sphere. In this respect, cautiousness is advisable.

In line with this, we do not think that the French measures are so extreme that they breach the private sphere of the students. The law of 2004 does not , for instance, prohibit students to wear religious symbols in any case. The law only prohibits students to wear religious symbols if they 'ostensiblement' express a religious affiliation. In line with this, the Court of Strasbourg expressed:

'La Cour rappelle avoir jugé qu'il incombait aux autorités nationales, dans le cadre de la marge dont elles jouissent, de veiller avec un grande vigilance à ce que, dans le respect du pluralisme et de la liberté d'autrui, la manifestation par les élèves de leurs croyances religieuses à l'intérieur des établissements scolaires ne se transforme pas en acte ostentatoire, qui constituerait une source de pression et d'exclusion.'[64]

As a result, a prohibition in line with the French law of 2004 can contain a margin of appreciation with regard to the question whether or not the wearing of religious symbols 'se transforme en acte ostentatoire'. Moreover, because the debate surrounding headscarves focuses on education and, consequently, for the most part on minors, we are of the opinion that if schools have the authority to prohibit objects as baseball caps and nose piercings, schools should also be granted the authority to limit or prohibit – if necessary for legitimate reasons – the wearing of religious symbols.

Apart from this, we want ongoing reforms to continue. An example of a local action that we strongly recommend is religious education in line with the proposals of Patrick Loobuyck and Leni Franken. If pluralities of religious and philosophical ways of life are being taught with a certain detachment and with the necessary differentiations, religious education can certainly contribute to social criticism and tolerance.[65]

Towards a new vision on the separation of church and state?

There are, however, limits to the reforms. The separation of church and state and the principle of neutrality draw the boundaries, which the reforms cannot exceed. It is necessary that these boundaries indicate whether or not the government can pass judgments on religious matters. In the Belgian jurisprudence it is, for instance, clear that judges may not pass judgments on the orthodoxy of religious actions and statements.[66]

The same line of reasoning can also be found in the jurisprudence of the Court of Strasbourg.[67] The Court explicitly emphasized this line of reasoning in the recent case of Sinan Isik v. Turkey.[68] Sinin Isik was a member of the Alevite community in Turkey. He had a problem with the Turkish obligation to mention one's faith on identity cards. The Turkish department on religious matters decided that Alevism was not an independent faith but part of Islam. Because of this judgment, Sinan Isik appealed against the obligation to mention one's faith on identity cards. He preferred to have no reference to any religion at all than a reference to Islam. After the case was referred to the Court of Strasbourg, Turkey changed the obligation into a voluntary mentioning of one's faith on identity cards. For the Court, however, this voluntary mentioning was still a violation of the negative obligations of the state. The Court found that, because of the voluntary mentioning of someone's faith on identity cards, one still needed to reserve space on the identity cards. The Court argued that if the space that was reserved for religion stayed empty – like in the case of Sinan Isik – the sole fact of its emptiness inevitably implies a specific connotation.[69] The key to the argument of the Court is that the voluntary mentioning of religion on an identity card will probably have negative consequences for minorities.

After the Court ruled on the mentioning of one's religion on identity cards, the Court took a wider view on the relation between state and religion. The Court continued by examining the function of the department on religious matters in light of Article 9 of the Convention. In this respect, the Court concluded that the activities of the department violated Article 9. The Court assessed that the neutrality principle – the duty of the government to take a neutral stance towards different religions within society – could not be accommodated with the authority to judge on the legitimacy of a faith:

'dans une société démocratique où l'État est l'ultime garant du pluralisme, y compris du pluralisme religieux, le rôle des autorités ne consiste pas à prendre des mesures qui peuvent privilé-

gier une des interprétations de la religion au détriment des autres, ou qui visent à contraindre une communauté divisée ou une partie de celle-ci à se placer, contre son gré, sous une direction unique.' [70]

In line with this judgment of the Court of Strasbourg, we are of the opinion that reforms to adapt the legal system to the growing religiosity of society on the local level must respect the constitutional boundaries. Because of this, it is not appropriate that governments take up the role of safeguarding religions or that the government becomes an active architect that designs society with a pluralistic blueprint. The government should not interfere in the private sphere. In the debate surrounding the headscarves, this means that it does not fall under the authority of the government to decide whether or not a headscarf is an Islamic symbol. The only question which the government may ask, is whether a prohibition of the headscarf is in line with the constitutional heritage and with the limitations set out by the Court in Strasbourg and the European Convention on Human Rights.

Conclusion

This paper was not intended to provide an exhaustive discussion of the topic of religion, constitutionalism and human rights. The purpose of this article was to argue that the challenges, which the new religiosity poses for Western legal systems, should be dealt with from a constitutional point of view. A perspective that focuses purely on human rights cannot suffice. National and local reforms have to take the national principles of neutrality and the separation of church and state into account. For this reason, we welcome the new approach of the Strasbourg Court towards Article 9 of the Convention wherein the Court has discovered the constitutional heritage of the member states and wherein it introduced parts of this constitutional heritage into its jurisprudence.

Apart from this, we have also emphasized the necessity to match the religious challenges on several levels. Since this is a complex approach, one should not take rash decisions. First and foremost, we need to wait for the results of recent reforms. Secondly, we want to emphasize that constitutionalism is a peaceful possession. It has localised and settled religious conflicts for ages. Because of this, we are of the opinion that constitutionalism is capable of settling contemporary religious challenges and of facilitating the admittance of the 'new parishioners' into Western society.

Untitled

1. R. Robertson, 'Glocalization: time-space and homogeneity-heterogeneity' in M. Featherstone, S. Lash and R. Robertson (eds.), Global Modernities, Sage Publications, London, 1995, 25-44.

2. See the reference to Graham Ward and Michael Hoelzl in the article of Badering: A.M. Baderin, 'Religion and International Law: Friends or Foes?', E.H.R.L.R., 2009, (637) 638.

3. In their work on the European Convention of Human Rights also Harris, Boyle, Bates and Buckley point to the growing importance of religion in society to declare why article 9 of the convention concerning religious freedom leads to more and more cases at the Strasbourg Court. D.J. Harris, M. O'Boyle, M.P. Bates and C.M. Buckley, Law of the European Convention on Human Rights, Oxford, Oxford University Press, 2009, 425.

4. In the Netherlands, for example, a new journal was launched this year with the title: 'tijdschrift voor religie, recht en beleid' which means 'journal for religion, law and governance'. In the introduction of the first edition, Berger points out the need of academic research on the topic of law and religion because of the growing importance of religion in contemporary society. M. Berger, 'Nieuwe spelers, nieuwe regels?', Tijdschrift voor religie, recht en beleid, 2010, (1) 3.

5. S. Knights, 'Religious Symbols in the School: Freedom of Religion, Minorities and Education', E.H.R.L.R., 2005, 507-515.

6. For Belgian law see: F. Swennen, Personenrecht in kort bestek, Antwerpen, Intersentia, 2008, 114-115.

7. We also find support for this argument in the Travaux Préparatoires of the Convention. The topic of freedom of religion in education was highly questioned during the preparatory work of the ECHR. The main assumption in this was that minors were easy to indoctrinate. Some countries feared that the refusal to grant parents the right to choose the religious education for their children would be an instrument for the state to indoctrinate the children while other negotiators were of the opinion that a wide freedom would create the possibility that parents could force their children in anti-democratic philosophies. The negotiators of the Convention could not reach an agreement on the topic before the Ministers signed the Convention. Because of this, the controversial issue of freedom of religion in education only became settled in article 2 of the first protocol. Evans, C., Freedom of Religion Under the European Convention on Human Rights, Oxford, Oxford University Press, 2003, 46-48.

8. Carolyn Evans expresses the sensitivity of religious education as follows: 'This is one area in which a modern, democratic State has the opportunity, even the obligation, to become involved in shaping the views and ideas of particularly vulnerable members of society. The line between indoctrination that is prohibited as an intrusion into the forum internum and an education that appropriately assists young people to deal with the (often religiously pluralistic) society in which they find themselves can be a difficult one to draw.' Evans, C.,

Freedom of Religion Under the European Convention on Human Rights, Oxford, Oxford University Press, 2003, 88.

9. Concerning religion, Eleftheriadis refers to Rawls and states that: '[t]he point is that an acceptable law of peoples cannot "require decent societies to abandon or modify their religious institutions and adopt liberal ones".' P. Eleftheriadis, 'Human Rights as Legal Rights", Transnational Legal Theory, 2010, (371) 389-390.

10. See infra.

11. See infra.

12. P. De Hert, 'Balancing security and liberty within the European human rights framework. A critical reading of the Court's case law in the light of surveillance and criminal law enforcement strategies after 9/11', Utrecht Law Review, 2005, Vol. 1, No. 1, 68-96.

13. Notice, however, that some authors make the distinction between the 'general right to freedom of thought, conscience and religion' as expressed in first paragraph of art. 9 – which is an absolute right – and the freedom to manifest religion in the second paragraph of art. 9 – which is subject to limitations. See for example: Jacobs, R.C.A. White and C. Ovey, The European Convention on Human Rights, Oxford, Oxford University Press, 2010, 409.

14. For a deeper investigation into the topic see: P. DE HERT & K. MEERSCHAUT, Scheiding van Kerk en Staat of Actief Pluralisme? Een benadering vanuit de mensenrechten, Intersentia, Antwerpen, 2007, 290p.

15. P. De Hert, 'Sterven als vorm van integratie. Een republikeinse halt tegen actief pluralistische begrafeniswetten' in E. Brems and R. Stokx (eds.) Recht en minderheden. De ene diversiteit is de andere niet, Brugge, Die Keure, 2006, (107) 120-121.

16. In the case of religious education, Carolyn Evans even states that, in the jurisprudence of the Court in Strasbourg, it is clear that the state has no obligation to provide for education in the religious beliefs that parents ask for. In her opinion – which dates from 2001 – the only obligation that arises from the jurisprudence of the Court is the negative obligation not to indoctrinate the students in another religion than the parents prefer. C. Evans, Freedom of Religion Under the European Convention on Human Rights, Oxford, Oxford University Press, 2003, 88-96.

17. The next parts of this article are mainly inspired by: F. Alicino, 'Constitutionalism as a Peaceful "Site" of Religious Struggles', Global Jurist, 2010, Vol.10 iss. 1, article 8. An other major source of inspiration is: S. Gutwirth, 'De polyfonie van de democratische rechtsstaat' in M. Elchardus (ed)., Wantrouwen en onbehagen, Brussels, VUB-Press, 1998, 137-193.

18. Concerning the contribution of Religion to constitutionalism, Van Caenegem, in his general study on the history of Western constitutionalism, noticed that: 'The outcome of the European Investiture Struggle (…) was advantageous to the Church. (…) Papal authority consequently reached its zenith and the Roman curia intervened constantly in political affairs. (…) In the long run this ecclesiastical emancipation has had unforeseen consequences for the states. By forbidding the kings to perform the clerical investiture because they were laymen, a process of secularization was inaugurated and the road opened for a clear conceptual distinction between the organs and aims of secular society and those of the Church.' R.C. Van Caenegem,

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An historical introduction to western constitutional law, Cambridge, Cambridge University Press, 1995, 70-71.

19. In a similar way, but with its main focus on early modern history, Leonard Hammer points out that the freedom of conscience emerged out of the freedom of religion and that in the opinion of many commentators both of these rights were the forerunners to the notion of civil liberty. L.M. Hammer, The International Human Right to Freedom of Conscience. Some suggestions for its development and application, Aldershot, Darthmouth Publishers Company, 2001, 9-27.

20. A last argument on the importance of the freedom of religion is in line with the secularisation process as described by Max Weber. The main idea is that the secularization process and the separation between church and state, created the opportunities for the functional differentiation between art, religion, morality, politics, economy and law. For an exhaustive investigation on this topic, see: J. A. Van Der Ven, Human Rights or Religious Rules?, Leiden, Brill, 2010, 304-355.

21. F. Alicino, l.c., 9.

22. See for example: V. Sullivan, 'Machiavelli, Hobbes, and the Formation of a liberal Republicanism in England', Cambridge, Cambridge University Press, 2004, 85.

23. Hobbes's analysis did not start from a religious point of view. Hobbes's main concern was the stability of the state. Religion became totally subjected to this concern and thus to the sovereignty of the Leviathan. L. Nauta, 'Hobbes on Religion and the Church between "The Elements of Law" and "Leviathan": A Dramatic Change of Direction?', Journal of the history of ideas, 2002, 577-598.

24. Hobbes's line of reasoning was not that strange in early modern Europe. With regard to the general approach towards church and state in that period, Guido Ceccoli said : 'La force de l'Etat était donc fondée sur l'unité religieuse du peuple, selon le principle « un Etat, un roi, une religion ». Les différences religieuses au sein d'un royaume étaient vue comme un vrai danger pour le souverain. Par conséquences, les minorités religieuses étaient systématiquement persécutées dans le Pays européen.' G. Ceccoli, 'La Liberté de Religion et la Convention Européenne des Droits de l'Homme', Bull.dr.h., 2000, (89) 90.

25. Citation taken from: F. Alicino, l.c., 11.

26. In his writings, Hobbes indeed comes very close to state religion. For example, in chapter XV of his 'Philosophical Rudiments concerning Government and Society', Hobbes discusses what citizens must do when the demands of the secular government conflict with those of Christianity. Herein, he states that the secular government may decide what kind of religious worship the citizens must obey and that the secular governors are the true interpreters of both secular and sacred law. In §17 of the chapter he states that: 'And as for the secular laws (…) those who have the sovereign power, are the interpreters of the laws. As for the sacred laws, we must consider what hath been before demonstrated in chap. v. art. 13, that every subject hath transferred as much right as he could on him or them who had the supreme authority. But he could have transferred his right of judging the manner how God is to be honoured; and therefore also he had done it. (…) Wherefore subjects can transfer their right of judging the manner of God's worship, on him or them who have the sovereign power. Nay, for they must do it.' In paragraph 18 Hobbes goes even further. He asks the question: 'if that man or councel who hath the supreme power, command himself to be worshipped with the same

attributes and actions, wherewith God is to be worshipped; the question is whether we must obey?' The answer to this question is that, as long as we do not think that the sovereign is God, we must obey his wish to worship him as God since: 'divine worship is distinguished from civil, not by the motion, placing, habit, or gesture of the body, but by the declaration of our opinion of him whom we do worship.' T. Hobbes, Philosophical Rudiments concerning Government and Society, 1651, chapter 15, §17-19.

27. M. Adams, Recht en democratie ter discussie, Leuven, Leuven Universitaire Pers, 2006, 175.

28. J. Swomley, Religious liberty and the secular state. The constitutional context, New York, Prometheus Books, 1987, 18-19.

29. M. Nussbaum, Liberty of consience. In Defence of America's Tradition of Religious Equality, New York, Basic Books, 2008, 406p. See also: F. Alicino, l.c., 15-18; W.K. Jordan, 'Roger Williams' in R.S. Alley (ed.), James Madison on Religious Liberty, New York, Prometheus Books, 1985, 115-142.

30. Williams's basic assumption is in line with the reason why John Rawls in his theory endows human beings with dignity and autonomy. Rawls's main assumptions are that humans possess a high level of consciousness, independent thought and the potential to develop an individual concept of the good. J. Rawls, A theory of Justice, Oxford, Oxford University Press, 1999, 560.

31. One should notice that, although Rhode Island was a forerunner, it was not an isolated case in the United States. Some other states also developed a constitutional structure respecting the separation between church and state before the war of independence. J. Swomley, Religious liberty and the secular state. The constitutional context, New York, Prometheus Books, 1987, 25-41.

32. F. Alicino, l.c., 25-26.

33. On the different approach towards human rights in the United State and the Council of Europe, see: P. De Hert and S. Gutwirth, 'Grondrechten: vrijplaatsen voor het strafrecht. Dworkins Amerikaanse trumpmetafoor getoetst aan de hedendaagse Europese mensenrechten' in R.H. Haveman and H.C. Wiersinga (eds.), Langs de randen van het strafrecht, Nijmegen, Wolf Legal Publishers, 2005, 141-175.

34. 'Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others'.

35. 'When Yazid Sabeg, the government's diversity commissioner, set up a group to find the best way to collect information to make it possible to measure "diversity", critics see this 'ethnic and religious data' as an assault on the 'principes fondateurs de notre République', that is the French Republic's secular principles. In any case, or we'd better say at the same time, this cannot remove the fact, that even the casual tourist notices, of how multi-ethnic and multi-religious France is.' F. Alicino, 'Constitutionalism as a Peaceful "Site" of Religious Struggles', Global Jurist, 2010, Vol.10 iss. 1, article 8, 25-26.

36. For a study on the debate in Britain see: D. McGhee, The End of Multiculturalism? Terrorism, Integration and Human Rights, Berkshire, Open University Press, 2008, 198p.

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37. Generally speaking, governments cannot interfere in religious debate but can only act in those cases where religious convictions lead to certain physical action. B. Koolen, 'Integratie en religie. Godsdienst en levensovertuiging in het integratiebeleid etnische minderheden', Tijdschrift voor religie, recht en beleid, 2010, (5) 26.

38. This concept originates from: F. Alicino, l.c., 25-26.

39. An elaborated axample of this can be found in the writings of Alexander Somek. See: A. Somek, "Transnation constitutional law: The normative question", International Constitutional Law, 2009, 144-149.

40. A. Somek, "Transnation constitutional law: The normative question", International Constitutional Law, 2009, (144) 148.

41. O. Roy, De globalisering van de Islam, Amsterdam, Van Gennep, 2003, 51-74

42. G. Goris, 'Interview met Olivier Roy: we begrijpen niets van de nieuwe godsdienstigheid', mondiaal magazine, februari 2010, nr. 71, 21. Also in: O. Roy, De globalisering van de Islam, Amsterdam, Van Gennep, 2003, 51-74. The same vision is also expressed in the book: S.T. Hunter (ed.), Islam, Europe's Second Religion. The New Social, Cultural, and Political Landscape, Londen, Praeger, 2002, 294p.

43. See for example: A. Barras, Using Rights to Re-invent Secularism in France and Turkey, EUI Working Papers, Firenze, European University Institute, 2008, 20p.

44. Roy points to the fact that Muslims appeal to the concept of human rights and minority rights, even though they were created to defend social groups – like homosexuals – with values that are not accepted in Islam. O. Roy, De globalisering van de Islam, Amsterdam, Van Gennep, 2003, 113.

45. See for example: S. Langlaude, 'Indoctrination, Secularism, Religious Liberty and the ECHR', International and Comparative Law Quarterly, 2006, 929-944

46. In the conclusion of their discussion on Article 9 of the Convention Jacobs, White and Ovey found, for example, that it is 'extremely regrettable that the Court has, in its judgments on the Islamic headscarf, shown a lack of understanding of the meaning of this symbol.' Jacobs, R.C.A. White and C. Ovey, The European Convention on Human Rights, Oxford, Oxford University Press, 2010, 424; see also: N. Gibson, 'Right to education in Conformity with Philosophical Convictions: Lautsi V. Italy. Case Analysis', E.H.R.L.R., 2010, 211-212.

47. The French headscarf cases are: ECtHR 4 Dec. 2008, Case No. 27058/05, Dogru v. France; ECtHR 4 Dec. 2008, Case No. 31645/04, Kervanci v. France; ECtHR 19 March 2008, Case No. 14308/08, Hatice Bayrak v. France; ECtHR 4 Dec. 2008, Case No. 18527/08, Mahmoed Sadek Gamaleddyn v. France; ECtHR 19 March 2008, Case No. 29134/08, Sara Ghazel v. France; ECtHR 19 March 2008, Case No. 25463/08 J. Singh v. France and ECtHR 19 March 2008, Case No. 27561/08, R. Singh v. France.

48. F. Alicino, l.c., 30.

49. For an in-depth analysis of the Lautsi-case see: N. Gibson, 'Right to education in Conformity with Philosophical Convictions: Lautse V. Italy. Case Analysis', E.H.R.L.R., 2010, 208-212; S. Mancini, 'The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty', European Constitutional Law review, 2010, 6-27.

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50. ECtHR 3 Nov. 2009, Case No. 30814/06, Dogru v. France, §55.

51. Mancini goes even further in this approach and warns the Court: 'If the European Court, as the Lautsi case might suggest, abandons its traditional judicial self-restraintand becomes a true arbiter in highly divisive issues, such as religion, it will face many challenges. A crucial one will be to gain the confidence of European citizens, in order to avoid provoking populist resentments when establishing rights in a context of cultural controversy.' Mancini, S., 'The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty', European Constitutional Law review, 2010, (6) 26-27.

52. The same idea underlines the opinion of Bribosia and Rorive in the Leyla case. They argue that the decision of the Court in the case was to be expected because of the great diversity in approaches between the member states on the topic of headscarves in education. Bribosia, E. and I. Rorive, 'Le Voile à l'Ecole: une Europe Divisée', Rev. trim. Dr. h., 2004, (951) 982-983.

53. ECtHR 5 April 2007, Case No. 71907/01, Kavakçi v. Turkey.

54. Françoise Tulkens on the one hand, emphasizes the idea that the Court in Strasbourg cannot take over the role of the national constitutional courts and on the other hand emphasizes the necessity for the Court to take account of the religious diversity within and between the member states. F. Tulkens, 'The European Convention on Human Rights and Church-State relations: Pluralism vs. pluralism', Cardoza Law Review, 2009, (2575) 2576-2578.

55. The Court quite explicitly showed its awareness of the religious diversity and the implications thereof within law and society in the Otto-Preminger case. In this case, the Court held that 'it is not possible to discern throughout Europe a uniform conception of the significance of religion in society; even within a single country such conceptions may vary. For that reason it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others.' ECtHR 20 Sept. 1994, Case No. 13470/87, Otto-Preminger-Institut v. Austria, §50.

56. Point 4.2. of the dissenting opinion of judge Martens in the case ECtHR 30 Oct. 1991, Case No. 12005/86, Borgers v. Belgium.

57. Also Kirsten Hastrup came to this conclusion in discussing the paradox between equal rights and different cultures by stating that: 'It is a paradox that is often cast as a choice between universalism and relativism, but as we know all too well there is no choice to be made but an unstable balance to uphold – between a claim to universality and equal worth of humans on the one hand, and a sensitivity to particularities on the other." Further on, she says that: "to discuss culture and human rights is not to take sides pro or contra human rights on behalf of culture or vice versa. It is to discuss how far the legal culture of human rights may accommodate cultural difference without jeopardizing the fundamental idea of equal dignity and human worth. At the European Court of Human Rights in Strasbourg, the cultural variation within Europe is explicitly acknowledged in the notion (and practicing) of a "margin of appreciation".' K. Hastrup, 'Accommodating Diversity in a Global Culture of Rights: An Introduction' in K. Hastrup (ed.), Legal Cultures and Human Rights. The Challenge of Diversity, London, Kluwer Law International, 2001, 2, 16-17.

58. We have to stress the fact that the Court in Strasbourg uses the Turkish principle. Thus, the line of reasoning in this case relates to the fact that Turkey has a strong constitutional emphasis on the separa-

tion between church and state. Öktem, E. and M.C. Uzun, 'IACL National Report: The Republic of Turkey' in Martinez-Torron J. and W. Cole Durham (eds.) Religion and the Secular State: National Reports, 2010, 701-718.

59. The importance of the principle in Turkish constitutional law also appeared in the drafting of article 9 ECHR. In the preparatory debates, the Turkish representatives expressed their concern that a wide provision for article 9 would not undermine Turkey's attempts to reform and modernise. Evans, C., Freedom of Religion Under the European Convention on Human Rights, Oxford, Oxford University Press, 2003, 42-43.

60. See: ECtHR 10 Nov. 2005, Case No. 44774/98, Leyla Sahin v. Turkey, § 116.

61. Langlaude, for example, criticises the case due to the generality of the concept of the separation between church and state, but does not pay any attention to the specific notion of that concept in Turkey; Langlaude, S., 'Indoctrination, Secularism, Religious Liberty and the ECHR', International and Comparative Law Quarterly, 2006, 929-944.

62. Decker and Lloydd, from their part, pay much attention to the weight that the Court attaches to the Turkish peculiarities but they think that the Court gave too much weight to the Turkish situation. C. Decker and M. Lloydd, 'Leyla Sahin v Turkey. Case Analysis', E.H.R.L.R., 2004, 672-678. See also: Burgorgue-Larsen, L. and E. Dubout, 'Le Port du Voile à l'Université. Libres Propos sur l'Arrêt de la Grande Chambre', Rev. trim. Dr. h., 2006, (183) 191-194.

63. On the other hand, it is hard to disagree with those who criticise the Court on the basis that it did not take into account the fact that the case concerns university education and thus adults. See: Langlaude, S., 'Indoctrination, Secularism, Religious Liberty and the ECHR', International and Comparative Law Quarterly, 2006, 929-944; Jacobs, White R.C.A. and C. Ovey, The European Convention on Human Rights, Oxford, Oxford University Press, 2010, 413.

64. See also: C. Mathieu, S. Gutwirth, S. and P. de Hert 'Liberté religieuse: vers un devoir de neutralité de l'Etat dans l'enseignement public?', Journal de Droit Européen, 2010, 133-138.

65. ECtHR 3. Nov. 2009, Case No. 30814/06, Lautsi v. Italy, §56.

66. It must be addressed that, in this case, the Court refers to the principle of neutrality and not to the right not to be confronted with, or insulted by another religion. This must be clear when one compares the case with a German case from the Bundesverfassungsgericht concerning the presence of crucifixes in classrooms in Bayern. In this case, the Bundesverfassungsgericht based its judgment – in Renata Uitz's opinion – on the assumption that: 'from the premise that while in a multi-religious society individuals do not have a right not to be exposed to symbols of religions other than their own, this does not empower the state to expose individuals to religious symbols. The justices stated that in a multi-religious polity, a neutral state is a guarantor of peaceful co-existence.' R. Uitz, Europeans and their rights. Freedom of religion, Belgium, Council of Europe Publishing, 2007, 125.

67. For the notion of this concept, we refer to the notion of a thin constitution for the European Union: P. De Hert, 'Europe of the 21st Century and the Fears and Formulae of the 18th and 19th Century', in A. Kinneging (ed.), Rethinking Europe's Constitution, Nijmegen, Wolf Legal Publishers, 2007, (63) 73.

68. Jean-Bernard Auby, 'Globalisation et droit public', European Review of Public Law, 2002, (1219) 1232.

69. We refer to the 'substance' of national and supranational constitutionalism instead of referring to the hierarchy of both legal systems, since we think that constitutional law in general will develop in a pluralistic way. For an elaborated discussion on constitutional pluralism see: A. Peters, 'Supremacy Lost: International Law meets Domestic Constitutional Law, International constitutional law, 2009, (170) 195-198.

70. B. Fassbender, 'The meaning of international constitutional law' in N. Tsagourias, Transnational Constitutionalism; International and European Perspectives, Cambridge, Cambridge University Press, 2007, (307) 325.

71. E. Decaux, 'Chronique d'une jurisprudence annoncée: laïcité française et liberté religieuse devant la cour européenne des droits de l'homme', Rev.trim.dr.h., 2010, (251) 263.

72. Aernout Nieuwenhuis came to the same conclusion: A. Nieuwenhuis, 'Tussen Keulen en Parijs. Naar een duidelijker regeling van de verhouding tussen staat en religie in Nederland', Tijdschrift voor religie, recht en beleid, 2010, 56-57.

73. We think that there is some support for this in Belgium: S. Eggerickx, P. Galand and D. Pollock, 'Overheid en levensbeschouwingen: neutraliteit vormt geen belemmering voor verdraagzaamheid', UVV belicht, maart-april 2010, 30-31.

74. E. Delruelle, 'Droits de l'Homme et "Choc de Civilisations"', Rev. tr. dr. h., 2010, (573) 580.

75. ECtHR 13 Feb. 2003, Case No. 413400/98, Refah Partise and others v. Turkey, §117-119. See also: D. McGoldrick 'Accomodating Muslims in Europe: From Adopting Sharia Law to Religiously Based Opt Outs from Generally Applicable Laws', Human Rights Law Review, 2009, 603-645.

76. Because we think that the right to religious freedom is not meant for the public sphere and that it may not be interpreted as a right to cultural identity, we also think that a maximal and inclusive approach of human rights as proposed by Eva Brems is not preferable. For the vision of Brems see: E. Brems, 'Droits Humains, étrangers et multiculturalisme: pour une approche maximaliste et inclusive des droits fondamentaux', Rev. trim. Dr. h., 2010, 237-249.

77. ECtHR 4 Dec. 2008, Case No. 27058/05, Dogru v. France and ECtHR 4 Dec. 2008, Case No. 31645/04, Kervanci v. France, §71.

78. P. Loobuyck and L. Franken, 'Het schoolpactcompromis in vraag gesteld: pleidooi voor een nieuw vak over levensbeschouwingen en filosofie in het Vlaams onderwijs', T.O.B.R., 2009-2010, 44-64.

79. In our opinion, this approach is also preferable in the context of a deliberative democracy. Gonzalez, Lozano and Pérez show that religion can support the deliberation. Taking the view of Habermas's notion of churches as 'communities of interpretation', they show that it is impossible to exclude religion entirely from the public sphere. On the other hand, they show that when believers and non-believers respect each other, it can contribute to the development of the public sphere. E. Gonzalez, J.-F. Lozano and P-J. Pérez, 'Beyond the Conflict: Religion in the Public Sphere and Deliberative Democracy', Res Publica, 2009, 251-267.

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80. Thus – in line with Gonzalez, Lozano and Pérez - we accept that religious education can contribute to the public sphere. But we want to stress that the contribution of religion on the public sphere has some limits. In line with the Jean-Marc Piret, we think that Habermas in his recent work goes too far in pointing to the importance of – almost an obligation to – religious tolerance. Habermas goes too far in his approach of political correctness. The purpose of the freedom of religion is that citizens can freely experience and criticise religions. See: Piret, J.M., 'Kritische beschouwingen bij Habermas' theorie over de religie in de publieke sfeer', filosofie, 2010 n°5, 11-16.

81. We are also of the opinion that unperturbed religious education fits better with the jurisprudence of the Court in Strasbourg in the cases of Folgerø and others v. Norway (ECtHR 29 June 2009, Case No. 15472/02, Folgerø and others v. Norway) and Hassan and Eylem Zengin v. Turkey (ECtHR 9 Okt. 2009, Case No. 1448/04, Hassan and Eylem Zengin v. Turkey). See also: Ducoulombier, P., 'Folgerø v. Norway: Dispensation from Religious Education: From the United Nations Human Rights Comitte to the European Court of Human Rights. Case Analysis', E.H.R.L.R., 2008, 391-399; Leskovar, V., 'Parental Rights and religious freedom in education considering the case-law of the ECHR', International constitutional law, 2009, 232-239.

82. H. Vuye, 'Hoe gescheiden zijn Kerk en Staat? Interpretatiemogelijkheden omtrent artikel 21 van de Grondwet. Het arrest van het Hof van Cassatie van 20 oktober 1994', Recente arresten van het Hof van Cassatie, 1995, (49) 50.

83. Harris, O'Boyle, Bates and Buckley state that: 'The Strasbourg organs in the past often stressed on the 'necessity' of certain religious practices, but there has, in recent years, been a move away from this approach. Thus in Leyla Sahin v. Turkey, the Court accepted the applicant's opinion that in wearing an Islamic headscarf she was manifesting her faith.' D.J. Harris, M. O'Boyle, E.P. Bates and C.M. Buckley, Law of the European Convention on Human Rights, Oxford, Oxford University Press, 2009, 433-434.

84. Apart from the debate surrounding the necessity of religious practices, the Strasbourg organs have also taken a generous approach to deciding what a religion is. In the past, the Court and the Commission accepted that, among others, scientology (EComHR 5 May 1979, Case No. 7805/77, Pastor X. and Church of Scientology v. Sweden), Druidism (ECtHR 30 March 1989, Case No. 10461/83, Chappel v. The United Kingdom), the Divine Light Centrum (ECtHR 19 March 1981, Case No. 8118/77 , Omkarananda and the Devine Light Zentrum v. Switzerland) and the Osho movement (ECtHR 6 Nov. 2008, Case No. 58911/00, Leela Föderkreis E.V. and others V. Germany) are religions.

85. For a detailed analysis, see: A. Hoefmans and P. De Hert, 'De overheidsplicht tot neutraliteit en onpartijdigheid inzake religie. Annotatie bij Sinan Isik t. Turkije (EHRM 2 februari 2010, nr. 21924/05)', European Human Rights Cases, 2010, 458-468.

86. ECtHR 2 Feb. 2010, Case No. 21924/05, Sinan Isik v. Turkey, §42.

87. The negative obligation for the government implies that the government may not interfere in the religious conviction – the so-called forum internum – of the citizen. Thus, there is no right, (ECtHR 12 Dec. 2002, Case No. 1977/02, 1988/02 and 1007/02, Sofianopoulos and others v. Greece) nor a duty (ECtHR 18 Feb. 1999, Case No. 24645/94, Buscarini and others v. San Marino and ECtHR 21 Feb. 2008, Case No. 19516/06, Alexandridis v. Greece) to show your religion.
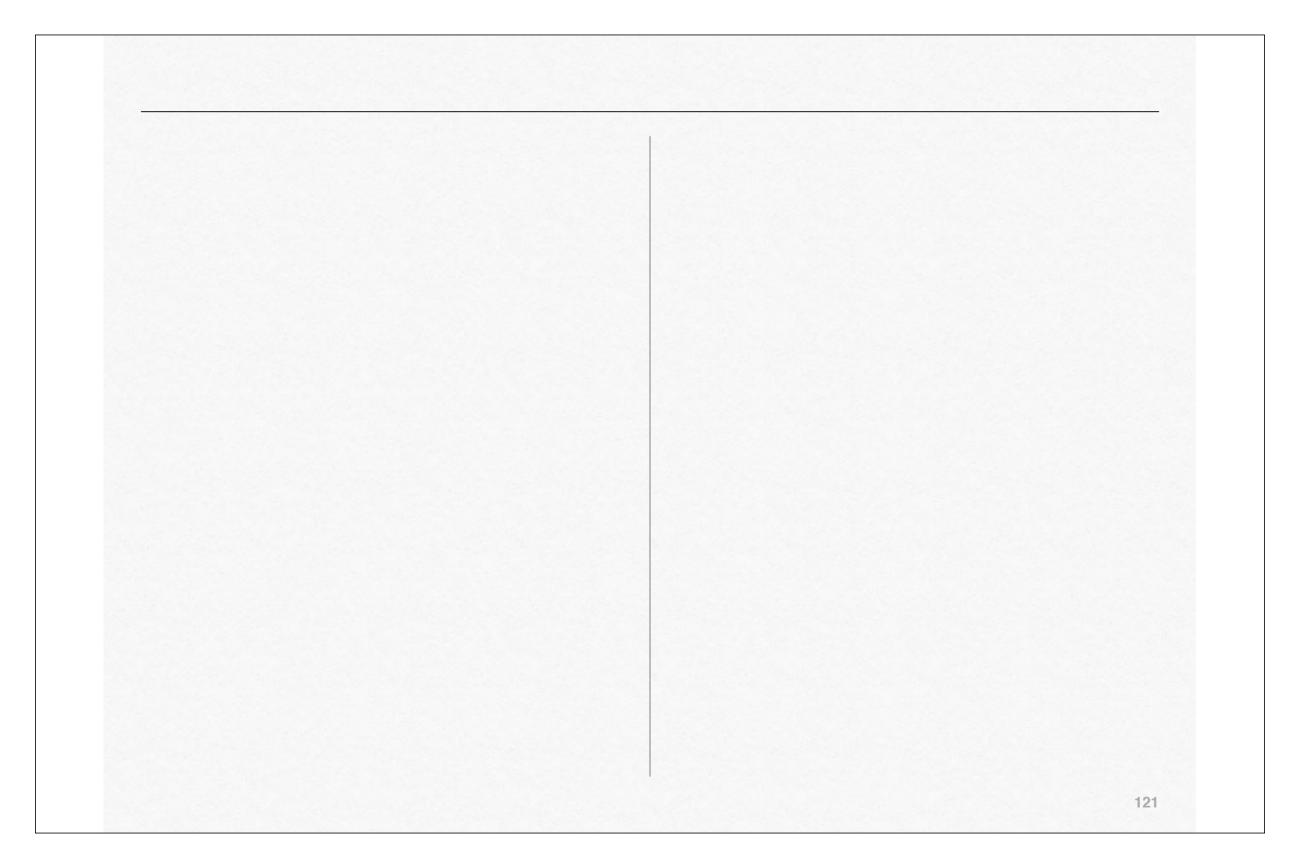
88. Sinan Isik v. Turkije (EHRM 2 februari 2010, nr. 21924/05) §45.

Public Funding of Religious Education in Finland

7

Päivi Gynther[1]

Introduction

not counted as member of any religious community. Nonetheless, many members of, for instance, the Pentecostal and Muslim communities appear in the statistics as non-affiliated, as will be discussed in greater detail later.

For readers familiar neither with the religions nor the education system of Finland, it may be convenient to start with a couple of introductory notes. The first concerns the religious landscape. No detailed statistics are available about the religious affiliations of people permanently residing in Finland, and the numbers from different sources vary quite a bit. In the table below, the number of Lutherans is estimated to be 84%, whereas data from Statistics Finland shows that the number of Evangelical Lutherans is as low as 79% and the number of non-affiliated as high as 17.7%. Small minorities of Greek Orthodox Christians, other Christian denominations and churches, and non-Christian communities total together less than 3% of the population.[2]

Whatever the exact figures may be, most of the Finnish people are members of the Evangelical Lutheran Church. The second largest group of the population is registered merely in the statutory Population Information System maintained by the Population Register Centre and local register offices. Thus they are

Table 1. Churches and religions in Finland		
		%
Lutherans	4,378,000	84
Orthodox	57,000	1
Pentecostals	50,000	1
Members of Finnish Free Church	13,000	-
Roman Catholics	7,900	-
Adventists	4,100	-
Baptists	2,500	-
Methodists	1,200	-
Anglicans-Episcopalians	100	-
Members of other Christian churches	1,000	-
Muslims	30,000	-
Jehovah's Witnesses	19,200	-
Mormons	3,300	-
Jews	1,200	-
Non-affiliated	700,000	13

Another introductory note concerns the position of religious education in the school system of Finland. As will be described, publicly-funded religious education and ethics actually already starts, in one form or another, at day care. Every child under school-age has a right to day care arranged by the municipality, and religious and ethical teaching is a statutory part of the day care. Likewise, each municipality is obliged to offer pre-school education for 6-year-old children, even if attendance is not compulsory. Comprehensive school is usually started at the age of seven. The completion of the basic education syllabus takes nine years. The general upper secondary education – divided into academic and vocational paths – starts on average at the age of 15/16 and the syllabus is completed in about three years.

II. Constitutional Context

Freedom of religion and conscience is acknowledged in the Constitution of Finland (731/1999), Section 11, which reads as follows: "(1) Everyone has the freedom of religion and conscience. Freedom of religion and conscience entails the right to profess and practice a religion, the right to express one's convictions and the right to be a member of or decline to be a member of a religious community. (2) No one is under the obligation, against his or her conscience, to participate in the practice of a religion." Besides, the right to freedom of religion is supported by the general clause on equality and non-discrimination, contained in Section 6 of the Constitution. Accordingly: "no one shall, without an acceptable reason, be treated differently from other persons on the grounds of religion, conviction, opinion…" among other prohibited grounds of discrimination.[3]

Section 11 of the Constitution is implemented, first of all, through the Freedom of Religion Act (453/2003). This Act addresses the legal status of churches and religious associations by distinguishing between three different types of religious communities: (1) the Evangelical Lutheran Church of Finland; (2) the Greek Orthodox Church of Finland, and (3) the registered religious communities. Entities falling into the third category achieve legal capacity once they are entered in the register of associations kept by the National Patent and Register Board. A group consisting of no less than 20 individuals, who are above 18 years of age, can become officially registered as a religious community organization. The right to profess and practice a religion per se does not require that the community is registered as a religious association. Nevertheless, only the official registration brings with it the right to school religious education, as will be described below.

This paper is organized as follows: Chapter 2 discusses the place of religious education (hereafter RE) in the current education law of Finland. Chapter 3 examines what types of implementative regulations are issued for the provision of religious education, followed by a discussion on publicly-funded denominational schools and their state supervision in Chapter 4. Chap-

ter 5 makes some observations on the limitations of freedom in respect of religious education in general and Chapter 6 in respect of Islam in particular. Chapter 7 concludes by highlighting some of the recent reform efforts concerning the topic at issue.

The Place of Religion in Current Education Law

The constitutionally-guaranteed freedom of religion and conscience does by no means mean total liberation from religious education. Neither does it mean an obligation on the state to provide religious instruction in schools. In the current education law of Finland, religious education exists as subject in its own right for all pupils of comprehensive school level and in the academic path of upper secondary level. The Basic Education Act (628/1998) and the Upper Secondary Education Act (629/1998) were both amended on this point in 2003 (Amendments 454/2003 and 455/2003). Before then, education law acknowledged no more than a negative right to be exempted from religious instruction. The Basic Education Act, Section 13, concerning religious education and ethics, now reads in its entirety:

1. The provider of basic education shall provide religious education in accordance with the religion of the majority of pupils. In this case, religious education is arranged in conformity with the religious community to which the majority of pupils belong. A pupil who does not belong to this religious community may attend the said religious education after the provider of basic education has been notified of the matter by the parent/carer.

2. Three or more pupils not belonging to the Evangelical-Lutheran Church or the Orthodox Church who do not participate in religious education referred to in subsection 1 shall be provided education in accordance with their own religion.

3. Three or more pupils belonging to a religious community other than those referred to in subsection 2 who do not participate in religious education referred to in subsection 1 shall be provided religious education in accordance with their own religion, if their parents/carers so request.

4. If a pupil belongs to more than one religious community, the pupil's parent/carer shall decide in which religious education the pupil will participate.[4]

5. Pupils who do not belong to any religious community and do not take part in religious education referred to in subsection 1 shall be taught ethics. A pupil belonging to a religious community who is not provided religious education in accordance with his or her religion shall be taught ethics when requested by his or her parent/carer. The provider of basic education shall organise ethics education if there are at least three pupils entitled to it.

6. A pupil who does not belong to any religious community may, at the request of his or her parent/carer, also participate in religious education provided by the provider of basic education which, in view of his or her upbringing and cultural background, evidently corresponds to his or her religious beliefs.

As subsection 13.1 states, religious education shall be provided in accordance with the religion of the majority of pupils. In practice, this means that religious education in public schools is rendered mostly in the creed of the Lutheran majority. As to minorities, the case of the Orthodox Christian religious education differs somewhat from other religions, in line with the special position of the Evangelical Lutheran Church and the Orthodox Church in Finnish legislation.[5] Religious education is automatically provided when there are at least three Orthodox children in municipality schools, without parents requesting it. Religious education in other religions is provided only if the following three prerequisites are fulfilled: there is a minimum of three pupils representing that faith in the municipality; the religion in question is officially registered in Finland; and the parents/guardians of the pupils make a request to this effect.

The Upper Secondary Education Act, Section 9 is almost identical to Section 13 of the Basic Education Act, quoted above. However, whereas in basic education it is the parents/guardians that shall request religious education in other than Evangelical-Lutheran or the Orthodox Christian faith, in upper secondary school the request is to be made by the student herself/himself. In the pre-primary education, the core curriculum does not divide instruction into subjects or lessons, but it does include ethics and philosophy as a subject field of its own. At this level, parents/guardians may decide among the same options as in primary education.[6] In the Vocational Education Act (630/1998), nothing is stipulated about religious education.

Religious education in schools shall not involve the practice of religion. When each pupil is entitled to education in her/his own faith and also obliged to participate in it, s/he also needs protection against abuse through religious indoctrination. As a solution, given by the Finnish legislature, the term "religious education according to the pupil's denomination" used in the previous statutes, is replaced by the term "religious education in accordance with their own religion".[7] Pupils that are not members of any congregation or religious group are provided education in secular ethics, with the same preconditions as for pupils belonging to religious minorities, as described above.

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Section 3

Implementative Regulations

Under the Finnish law, the syllabus of comprehensive and upper secondary school shall contain studies in religion or ethics. The Government decides on the allocation of the time to be used for instruction in different subjects. The National Board of Education is authorized to decide on the objectives and core contents of the different subjects, inclusive of religious education.[8] The statutory requirement that applies to all religious education in public education institutions is laid down in the National Core Curriculum for Basic Education (2004) and the National Core Curriculum for Upper Secondary Education (2003) respectively. These core curricula define the purpose of religious education in the following words: "The main purpose of religious education is to offer stimuli for the construction and development of students´ own religious view on life by teaching them about their own religion, the life and thinking of various religions, and by giving students the readiness to understand different world views."

It is the duty of the provider of education to draw up the local curricula based on the national core curriculum.[9] In the case of religious education, the National Board of Education elaborates, in cooperation with the respective religious communities, a separate RE curriculum for each religious community officially registered under Finnish jurisdiction.[10] That is to say, for any religious education provided under Section 13 of the Basic Education Act, or for Section 9 under Upper Secondary School Act, a curriculum shall be accepted by the National Board of Education.

At present, there are RE curricula in basic education for the following religious communities, of which some half are different forms of Christian faith; Adventist, Bahá´í, Buddhist, Christian Community, Evangelical Lutheran, Free Church, Greek Orthodox, Hare Krishna, Islamic, Jewish, Latter Day Saints, Lord's People (Herran kansa ry.) and Roman Catholic. The reason for each officially registered religious community having a curriculum of its own is that more denominational content of the religious community at issue can be included, although other religions are also studied.

Publicly-funded denominational schools and state supervision

I. Estimate Figures

Of all Finnish children subject to compulsory education, less than 3 per cent attend private schools. Most pupils complete the basic education syllabus by attending comprehensive public schools, which are run primarily by the municipalities and financed by local and central governments. At the upper secondary level, the number of private education providers is higher as there is no statutory duty for local authorities to arrange education above compulsory school age.

Statistical information provided online by the National Board of Education does not contain data about the number of pupils in denominational schools.[11] According to the Association of Private Schools in Finland, some 80 private schools provide general education. Among the publicly-funded private schools, only a small number are denominational. There are 25 Steiner-schools, based on anthroposophy, with some 5500 pupils altogether, and 15 Christian schools, with the number of pupils in them totaling some 1000.

The number of other faith-related schools is very low. Religious education in Judaism takes place in the Jewish School in Helsinki, which is maintained by the Jewish Community. Finnish Jewry numbers some 1500, of whom most live in the capital area. The school offers tuition at the comprehensive school level and has as its special responsibility the teaching of Hebrew and Judaism. The English School in Helsinki is a private Catholic foundation, offering tuition at primary and secondary levels. The Catholic Church in Finland has some 11,000 members. The English School in Helsinki has the special responsibility of teaching the Finnish and English languages, along with the culture of the Finnish and Anglo-Saxon countries.

II. Control of publicly-funded denominational schools

The education referred to in the Basic Education Act may be provided only by a registered association or a foundation that has been authorized by the State Government.[12] When founded, private schools are given state subsidies comparable to that given to a municipal school of the same size.

Homeschooling is also permitted in Finland, and according to the National Board of Education, is favored increasingly among those religious minorities that have no faith schools of their own.[13] Nonetheless, the number of homeschooled children is low, totaling in 2009 only some 400 pupils. According to Section 26 of the Basic Education Act, the local authority of the pupil's

place of residence shall supervise the progress of homeschooled children.

As to the control of the content of teaching in publicly-funded denominational schools, these schools follow the same distribution of lesson hours and national core curriculum as the schools maintained by local authorities or the state. Moreover, their RE curriculum must be accepted by the National Board of Education, as was described in Chapter 3 above.

Limitations of Freedom in Respect of Religious Education

It is unlikely in Finland that a pupil applying for a school place in a publicly-funded denominational school is refused access for reasons of conviction or belief. If this were to happen, it would violate the non-discrimination clause of the Constitution.[14] Furthermore, any private school that has been authorized to provide education referred to in Basic Education Act, must admit all its pupils on the same basis as the corresponding municipal school.

It is noteworthy, however, that the Finnish system itself maintains the grouping of pupils along religious lines, instead of enabling joint religious education. Border-crossing between different religious education classes is not a matter of free choice. Only those pupils that are not members of any religious community are free to opt for ethics. In addition, several conditions must be met before a non-Lutheran pupil can take part in Evangelical Lutheran religious education. First, reading verbatim subsection 13.6 of the Basic Education Act,[15] a pupil shall not belong to any other religious community; second, a request from her/his parent/carer is required; and third, the religious education provided shall be "in view of his or her upbringing and cultural background" and "evidently correspond to his or her religious beliefs", as subsection 13.6 of the Basic Education Act puts it. Only students that start upper secondary school when they have reached the age of 18 are free to choose whether they want to study religious education or ethics. Total exemption from both religious education and ethics is not possible, as the basic education syllabus shall contain one of these subjects.

The Peculiar Position of Islam

I. Random Statistics

As appears in the Table 1, presented at the beginning of this article, Finland has an estimated 30,000 followers of Islam. That figure is available at the website of the Evangelical Lutheran Church of Finland. In other sources, the number varies from 8,200 to 45,000. For instance, Statistics Finland underlines that the information on religious community collected by it by does not represent inhabitants with a foreign background accurately. This may be because not all immigrant religious communities are officially registered, and not all those practicing a religion belong to parishes. For example, according to the Population Information System maintained by Statistics Finland, some 72% of Somali-speaking people permanently residing in Finland do not belong to any registered religious community.[16]

For the same reason, there are no exact statistics about the religious affiliation of pupils in general education. As Table 2 illustrates, this particularly concerns children of non-Christian faith.[17]

Table 2. Attendance of religious education and ethics in Finnish comprehensive schools

	2003	%	2008	%
Evangelic-Lutheran faith	552958	94.53	512 705	93.57
Orthodox faith	6934	1.19	7 003	1.28
Ethics	14056	2.40	15 543	2.84
Other religions	6775	1.16	8 919	1.63
No attendance	4257	0.73	3 763	0.68
Total	584980	100.00	547 933	100.00

Interestingly, detailed numbers concerning pupils in two forms of Christian faith (Evangelic-Lutheran and Orthodox) are discerned in Table 2, whilst other forms of Christian faith (Catholic, Free Church etc.) along with all non-Christian religions are grouped as one single category. Altogether, some 20 officially registered communities of Islamic faith (Sunnis, Shias etc.) are also included in this category. However, it has been estimated that only some 10-15% of Muslims in Finland are members of a registered Islamic community. As was mentioned above, only those pupils that are members of an officially registered religious community have the subjective right to receive minority religious education of their own. The rest falls into the categories of ethics, no-attendance or remain uncounted.

II. Teacher Competence

One of current controversies in religious education debate revolves around teacher competence. All Finnish teachers are required to be Master's degree graduates, no matter whether they teach primary or secondary level students. The majority of subject teachers in RE are Masters of Theology who have specialized in teaching. Since the law reform of 2003, teachers of RE do not have to be members of the religious community of the religion they teach. The main emphasis is placed on pedagogical skills instead of the conviction of the teacher. Members of minority religious communities, again, may find it difficult to accept that their religion is taught to their children by someone not sharing their faith, with how ever high academic degree. There may be mistrust towards non-confessional education, along with a fear of a covert attempt to convert Islamic children away from the faith of their parents.

On the other hand, from the formal qualification requirements it follows that there are hardly any competent Islamic religious teachers available. When unqualified persons are employed as Islamic teachers, they are paid less, often lack pedagogical skills, and also may be unwilling to teach their pupils about other religions, as expected in the national core curricula. An additional teaching challenge follows from the fact that minority religious education groups are often linguistically very heterogeneous, pupils coming from many different parts of the world.

There has been public debate on the establishment of an Islamic School in Finland. Those arguing for it say that it is a better alternative than Islamic parents sending their children to Qur'an Schools abroad. However, for instance, the current Minister of Immigration Astrid Thors has stated as her opinion that no Islamic schools shall be established in Finland.[18]

Latest reform

In Finland, where the system of public schools prevails, the challenge of intra-school multi-faith reality is more acute than the supervision of private schools. Honkaheimo & Luodeslampi (2009) raise the following standpoint: "In contemporary Finland the multi-faith schools have concentrated around the largest cities, especially in the areas of (capital) Helsinki. If there are many more faith traditions who want to have their own curricula in schools, the costs of RE will become higher than nowadays. It might put pressure on RE integration."

Just lately, a committee has been deliberating on reforms to the distribution of lesson hours. It proposes, among other reforms, that ethics be introduced as a new compulsory subject for all. Another new proposal, relevant for the issue dealt with in this article, is that there should be at least ten pupils requesting minority religious education classes – instead of the current three – before the education provider shall be obliged to provide for it. The proposal of the committee has been circulating for comments during the summer of 2010. Both of the suggestions mentioned here have been far and wide resisted by religious communities, both those in the majority and those in a minority. A government decree will be drafted to be issued in early 2011 on the basis of the committee proposal.

Publicly-funded religious education in Finland strives to be non-confessional. Yet, it is far from easy to provide religious literacy for all pupils irrespective of their denominational affiliations.

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Section 8

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KOTA, on-line database of the Ministry of Education, Finland, https://kotaplus.csc.fi/online/Etusivu.do?lng=en, accessed 4 October 2010.

Statistics Finland, www.stat.fi/til/akop/index_en.html, accessed 4 October 2010.

Endnotes

1. University of Jyväskylä, Department of Educational Sciences

2. These figures are from the website of the Evangelical Lutheran Church of Finland
http://evl.fi/EVLen.nsf/Documents/230282E6EFEF75C6C225730E00426EE1?openDocument&lang=EN

3. It is also worth mentioning that Section 76 of the Constitution guarantees autonomous status for the Evangelical Lutheran Church of Finland. For historical reasons, it is the national Parliament that has ratified the Church Acts of the Evangelical Lutheran Church (1054/1993) and the Orthodox Church (985/2006).

4. The question of who decides on the denomination of the child is laid down in Freedom of Religion Act (453/2003), Section 3. This Act also permits a person to belong to several religious communities concurrently. It is up to the religious communities to decide whether or not they allow for a dual membership.

5. See above, footnote 2.

6. The National Board of Education defined the core curriculum for pre-primary education in 2000.

7. See subsections 13.2 and 13.3 of the Basic Education Act, above.

8. Basic Education Act, Section 14 (13.6.2003/477).

9. Ibid, Section 15.

10. On official registration of associations, see Chapter 1.2, above.

11. http://www.oph.fi/tietopalvelut/tilastotiedot

12. Basic Education Act (628/1998), Section 7.

13. Counsellor of Education Irmeli Halinen, 5.7.2010
http://www.mtv3.fi/uutiset/kotimaa.shtml/arkistot/kotimaa/2010/07/1152076

14. See above, Chapter 1.2.

15. See above, Chapter 2.

16. Source:
http://www.stat.fi/til/vaerak/2009/vaerak_2009_2010-03-19_laa_001_en.html

17. Table 2 was delivered by the Counsellor of Education responsible for religious education at the National Board of Education as a reply to my request for RE statistics. According to the same source, there are no figures of even this precision for upper secondary schools. E-mail correspondence with Counsellor of Education Pekka Iivonen 9.9.2010;
http://www.oph.fi/download/119433_Koulutuksen_maaralliset_indikaattorit_2009.pdf

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The state in the face of religious conflicts and intolerance in society

Michael Stathopoulos

8

Religious freedom and religious neutrality of the state

A starting-point for the shaping of the relations between state and religion and for dealing with the tensions created by the phenomenon of religion must be, I believe, respect by everyone, and first and foremost by the state, for religious freedom, which is a fundamental human right. Religious freedom, moreover, is not just one of many human rights; it is the root of individual liberties, since it is deduced from freedom of conscience, of which, in the course of history, it has been a basic expression. So it is self- evident that religious freedom is internationally accepted and recognised in international Conventions, which bind the national legislators, at least as far as the core and essence of this freedom is concerned.[1]

Religious freedom as an individual right justifies in principle the (often argued) need for its individualisation, which puts each believer, and not the religious community, at its epicentre. But it must also be borne in mind that freedom of belief and worship is usually exercised (and must be able to be exercised) collectively. Both forms of exercise of this freedom, collective or individual, are an expression of religious freedom.

If, now, the state must respect and protect the freedom of religion of all its citizens, even of the smallest religious community in society or of the very last citizen, it must be - as to its state functions, which are addressed to all citizens - neutral in terms of religion, as well as towards the religion which may prevail in that society, so that it does not have first and second-class citizens, depending upon their religious creeds; so that a situation does not arise, directly or indirectly, of diminished respect, for example, for religious minorities or for citizens of no religion. Furthermore, the indirect pressure which is usual - at least in my own country - to take part in religious occasions, in violation of the free and uninfluenced choice of each individual as to his/her participation or non-participation, is to be avoided. All this means that the state must be secular.

These things could be regarded as self-evident - and they are, in fact, self-evident when we examine religious freedom as a value per se and the religious neutrality of the state as a consequence of that value. Things become, however, difficult when even great values and human rights are in conflict with other values or rights. Could it be that in that case some compromise between the conflicting values is called for, that is, in the present instance, some concession of religious freedom and of the

state's neutrality? And what happens if the state laws are in conflict with religious imperatives?

I believe (and what follows can serve to confirm this consideration) that any solutions which are found to the problem of religious confrontations and conflicts and the satisfaction of any legitimate needs can be reconciled with respect for religious freedom, and that there is no reason for the religiously neutral, secular state to be sacrificed; that there is no need for us to move, as many maintain that we should, into a post-secular age.

However, a misunderstanding which is frequently encountered should be dispelled, and it should be made clear that religious neutrality and secularism apply to the state, and not to society. Secularism does not drive out religion and religious traditions from society.[2] God is not chased out of the public sphere, as is sometimes argued. It is the state, not society, which must be neutral. I am not talking, of course, about the extreme forms of secularism in which the state prohibits the practice of religion or the practising of religion in a different way, thus infringing, the first victim, religious freedom. The secular state must respect religious freedom in society, religious freedom as an individual and collective right. Society and its members may of course be religious. It is simply that the state itself should not be religious. Secularisation does not mean, as is rightly pointed out,[3] 'fin de la religion' as other voices claim. Religious feeling and metaphysical concerns, and, together with them, religions will always exist in society and will appeal to a (greater or lesser) part of its population. It is perhaps an exaggeration to speak of a 'return of religions' in modern societies; nevertheless, in any event, the social significance of religion, religious institutions, and belief practices even in democratic societies where the state is secular should not be underestimated. The state must recognise that there is something beyond its sphere, that there is, in particular, the spiritual sphere, which must remain accessible to anyone who feels the need for it[4]. Moreover, the secular state can show respect to religious traditions without losing its religious neutrality and without the religious freedom of all its citizens being affected.

Today's challenges

Today we are faced with new challenges and difficulties. The growth of transnational migration has changed the picture of European societies and causes conflicts both because the immigrants are often not able to integrate into the host societies and because of the intolerance with which in many cases they are treated in their new environment; there are conflicts between religious communities and between the state and religious communities. Phenomena of religious fanaticism and fundamentalism and of the use of violence and terrorism aggravate the situation.

The new question which has arisen is whether the integration of non-European immigrants into European societies is possible. The problem is mainly, but not exclusively, Islamic. Furthermore, there are not only religions, but also immigrants who are underprivileged because of their racial and socio-economic status who remain different in their new surroundings and remain 'other' in a European society. But the overwhelming majority are Muslim. Xenophobic feelings, conservative defence of

Christian culture lead in these countries to an anti-Islamic attitude in a great part of the indigenous population and hinder understanding between immigrant groups and host societies, and function to the detriment of efforts at incorporation. The strong presence of Islam in European states has become a major political problem. And the question is whether the state's neutrality and secularism are sufficient to deal with these conflicts and this intolerance. Can we be indifferent to religions today by appealing to neutrality?

Indifferent neutrality or responsible neutrality in the face of the problems

The opinion is heard on many sides that the tensions and disturbances which are caused in present-day societies arising from religious confrontations have to do with secularism and with the indifference which that involves towards the phenomenon of religion, and therefore the abstention of the secular state from any measure of intervention to deal with this phenomenon. And this is precisely the reason why it is said that we must enter upon a new, post-secular age.[5] I cannot agree with this conclusion. Secular democracy and religious neutrality of the state are not to blame for these tensions, but, at the most, passive, indifferent neutrality is responsible. These voices of criticism have not explained - nor do I think they can explain - why it is not possible for passivity and indifference to be abandoned without the good of state neutrality, called for by human rights and particularly by the religious freedom of all citizens, being sacrificed. The state which is neutral towards religion both can and should concern itself with the religious phenomenon, not, of course, at its spiritual level, but in its social dimension, to the extent, that is, that it harms or threatens peace in society (external

relations of a religion, i.e., its relations with the rest of society - 'forum externum'[6]). The same is true of the judge who resolves social disputes which are brought before him/her and who does not lose sight (must not lose sight) of his impartiality and neutrality towards the litigants.

It is true that indifference on the part of the state nurtures the confrontations which manifest themselves or lurk in society. Passivity, on the one hand, favours those groups with a dominant position in society in imposing their own morality, their own way of life, their own views on what is right and not.[7] In the end, that is to say, passive neutrality ceases to be neutrality at all, since it does not prevent the ruling class from imbuing and shaping policies in society in the light of its own views. This passive policy is not a liberal, but a too liberal, policy and is close to indifference, carelessness, if not to irresponsibility.[8] On the other hand, passivity leaves religious minorities to entrench themselves and to make no effort at incorporation into the societies in which they live. Thus the secular state needs to be active through interventions, which, however, will not entail any abandonment of religious neutrality. Secularism should be (according to an eloquent terminology) an 'intelligent', not an 'ignorant' secularism. These interventions should be based on the following principles and pursue the following objectives:

I. First principle: Respect for pluralism

The state must recognise, not only in word, but in deed, all religious, metaphysical, and philosophical convictions which have their adherents in society (the active appreciation of diversity, which is the subject and title of our conference). It should show its respect for all these convictions, and, consequently, create the conditions and the prerequisites necessary to ensure religious pluralism, which it should guarantee, if need be, by the provision of sanctions for those who by their actions do not show the appropriate respect. It is only in this way that confidence will be created in religious minorities that the state takes seriously and protects their religious freedom.

In the particular case of Muslims, it should not regard them as a monolithic community all of whose members, without exception, swear by the Prophet's creed. There is no such Islamic homogeneity. The example of the Turkish Muslims, to take one example, demonstrates this.

Recognition in practice can also take the form of support for religious communities, on condition that the support is provided proportionally (depending upon their size) and impartially to all religious communities. Such support is not contrary to neutrality, because the members of religious communities are also citizens of the state, and the state thus helps its citizens to satisfy their religious needs. Naturally, this support should not have the form of the promotion of the positions of particular religious communities, but only of rendering possible their development, thus making possible religious pluralism, instead of that monolithic version of religion which marginalises those who dissent.

At the same time the state should prevent the views prevailing in society (for example, by reason of superior numbers) from claiming power over society as a whole and regulating problems or interpreting situations in need of regulation in the light of these views. The state is even less entitled to grant to one church the status of 'state church'. Secularism should be compatible with pluralism. The views of the majority on public life should not be regarded as 'the core' of society to which those who do not believe in the views in question should orientate themselves.

An example: public places, particularly courtrooms and classrooms of state schools, or the premises of parliaments, or of town halls, etc. belong to all the citizens, whatever religious beliefs they have or do not have. They must, therefore, observe religious neutrality, with which the display of crosses, icons, and other religious symbols is not in keeping.

But the question arises: what about the cohesion in society?[9] Will it be sacrificed? The answer is that the common identity of society should be sought not in religion, because that would conflict with religious freedom and the need for protection of human rights, which means protection of pluralism. Besides, there is no society at the present time with religious homogeneity.

Therefore, the common identity should be sought in other features which can serve as a common basis for all.

Indeed, the cause of the cohesion of society can be satisfied by cohesive bonds which are suited to all citizens, such as the 'nationality' (common citizenship), which binds all the citizens to the state and its laws, including whatever is shared and must be shared in common. No citizen can place him/herself outside the laws, whereas he/she could, for example, place himself outside a religion.[10] It is another matter that people of the same race or religion or language can cultivate the characteristics which they have in common and observe their cultural traditions. But these cohesive features (religious, linguistic, etc.) are not appropriate for society as a whole.
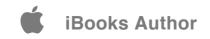
All this means that we must accept multiculturalism as a necessary consequence of the freedom of religious and philosophical convictions and of freedom of choice of a way of life. We cannot say that multiculturalism has failed, because that would be like saying that these freedoms have failed. Multiculturalism is a value identified with these freedoms, with pluralism, with the avoidance of Procrustean restrictions on the members of a society and the imposition upon them of a certain way of life. The presence of Muslim communities is not a problem for democratic states. What is a problem is the xenophobic reaction which leads to racialist behaviours against them, and their marginalisation - often their self-marginalisation.

By way of conclusion: we should accept multiculturalism both as an expression of principles and values (particularly of tolerance) and as the only practical solution for the safeguarding of social peace in a spirit of conciliation and not of oppression.

II. Second principle: Acceptance of necessary limitations to deal with conflicts - Respect of otherness

The state, on the one hand, is entitled to set limits (quantitative and other) on the acceptance of immigrants who flow in particularly - at the present time - from Eastern and African countries - limits on the criteria of how many people, and whom, the host society can and is willing to absorb. As long as there are states and state power, there are also borders of states, and therefore the state power can control how many new citizens it can and will absorb in its territory. And, on the other, the state must set limits to the exercise of religious or philosophical convictions (on their exercise -forum externum- and not on the convictions themselves).[11] This exercise must show respect for the views of others, respect for human rights.[12] The possibility of limitations is also provided for in international conventions which guarantee religious freedom.[13]

The state must impose sanctions upon acts (a fortiori acts of violence) which call into question religious pluralism and show lack of respect for otherness. These are acts which disrupt the peace of society. Otherwise, the individuals or groups involved will not be deserving of incorporation into the host society. It

goes without saying that the sanctions should be the ultimum remedium, that is, they should be activated only if dialogue and an attempt at reaching an understanding have failed. Furthermore: the State expects from all religions respect for the religious freedom of others.

The application of this to immigrants and to members of all minority groups means that they must be loyal to the state in which they have settled. They must realise that religious views which forbid them to be loyal to the host state are not tolerated and deprive them of justification for their integration. Integration is not justified, in general, by acts which fanatisise or by rules of a religion which adversely affect human rights, for example, which entail oppression of women (wives or daughters).[14] For the same reason, school students who, for example, object, under the influence of their own sacred rules, to receiving teaching which belongs within the field of general scientific or historical knowledge, as, for example, about Darwin, the Holocaust, etc., should not be regarded as suitable for integration. The state must guarantee to its religious citizens respect for their religion, but at the same time it must imbue them with values which help the citizen to develop a free spirit, even if this may reduce the influence of religion. The individual's autonomous choice, free as far as possible from the influences of any religious or other power, must be guaranteed, so that individuals decide on their own world views. And in any event the state must help them to learn to respect difference. Those who cannot fulfil

the fundamental duty of a citizen to accept otherness can hardly live in that society. They can go to another, non-democratic, society, or to a monastery, or make another choice outside a democratic society.

An issue of heated discussion is that of the Muslim women's head-covering, which has also been dealt with by the European Human Rights Court.[15] The Court held that "it is difficult to reconcile the head-covering with the message of tolerance, respect for third parties and, above all, respect for the equality of the two genders and of non-discrimination which every teacher[16] in a democracy should convey to the students". These principles, generalised and reinforced by the need which we have noted to help all citizens to develop a free spirit, justify, in my view, the legislative measures in France and Belgium which prohibit the veil.

On the other hand, the German Federal Constitutional Court held that a teacher may wear the Muslim head-covering in class. This is because, as the Court held, there is no relevant prohibitory provision of law regarding those employed in education.[17] I fear that the German court did not take into consideration that the rules of law are not to be found only in express provisions (which it clearly looked for in vain), but may be deduced indirectly from a conjunction of provisions or from general principles of law, particularly those having to do with human rights.

III. Third principle: Positive measures for incorporation

In parallel, the state, when immigrants fulfil the above conditions, should take positive measures (affirmative action) to ensure for them a prospect of their incorporation and a guarantee of equal access. This applies especially to young immigrants. The state must also show strictness towards racialist phenomena coming from the host society which threaten social peace.

In a recent referendum in Switzerland, the majority expressed their opposition to the building of a mosque. Furthermore, in Greece, in spite of the constant assurances of the political authorities that they will facilitate the building of a mosque in Athens, the issue is repeatedly postponed, clearly under the influence of circles within the prevailing Orthodox Church or other conservative circles. In both instances, if the matter were to reach the European Court of Human Rights, its judgment would, I think, vindicate Muslim citizens who wish to have a place where they can perform their religious duties. The state, as we have already pointed out, must, in respecting religious freedom, assist them in this.

IV. Fourth principle: Intervention in disputes between religious groups (which disturb peace in society)

Nor should the state remain indifferent when there are tensions in the relations between religious communities. It must intervene in order to impose the peaceful settlement of religious disputes; to ensure tolerance between religious communities and their freedom of expression, which includes also the freedom of criticism of religious doctrines to the extent that it does not constitute insult; to promote dialogue between religions; to obviate instances of privileged treatment, for example, tax privileges, or discrimination, for example, treating some churches as public law legal persons (a status which strengthens the position of the Church in society, but also involves obligations of a public nature which are not compatible with religious freedom) and others as private law legal persons. In the last analysis, it is not necessary for religious communities to be squeezed into one of these two categories of legal persons. In any event, a church neither exercises public authority - for it to be a public law legal person - nor can it be equated with an ordinary association - for it to be a private law legal person. It would be more correct for the status of a sui generis legal person to be recognised to all religions - that is, a third category of legal person, with its own consequences in law. If they need state support in order to function, this must be provided for all of them, as has already been stressed, on the basis of proportional equality.

V. The importance of education - Application of the first principle

The major issue which is chiefly of interest to our conference is the relation between Religion and Education. We have here to apply the imperatives of the first principle, so that the state's educational policy guarantees freedom of religious and philosophical convictions and, finally, freedom of choice of a way of life for everybody.

The negative phenomena of religious fanaticism, of hate for the different, etc. start out from the indoctrination which young children receive in school. Unless the problem is dealt with in education, it will be perpetuated. With this matter the previous panel concerned itself, and so will the ones that follow. I shall confine myself to saying that a confessional or catechetical Religious Instruction lesson is not appropriate to state schools as being contrary to the above principle. Catechism can be undertaken by the religious authorities outside the state school.

Nor would a right on the part of the students to choose between religious instruction and another lesson (e.g., religious studies) be the right solution, because, on the one hand, there will usually be indirect coercion of the pupils under the influence of the majority in society to choose the former, and, on the other, it will lead to discrimination within the student community, with the further consequence of probable unfavourable treatment of the minority group.

By way of contrast, the religious studies lesson should be a unified, historical, cultural lesson for all, in which the phenomenon of religion will be taught, as this is undoubtedly an important factor in the evolution of the human spirit. This lesson should be, according to the jurisprudence of the European Court of Human Rights, interpreting Art. 2, sentence 2, of the 1st Protocol to the European Convention on Human Rights,[18] "objective, pluralistic and critical".[19] In my view, this provision of sentence 2 gives parents the right to intervene in cases of indoctrination which their children receive in school, not in cases where the lesson is "objective, pluralistic and critical" (restrictive interpretation of the sentence). The parents should not have the right to raise objections to such a lesson, for the same reasons that they may not hinder the teaching of history or biology, etc.

Epilogue

In my view, religion should not be a problem or a threat for Western societies. Only it must be clear that religious freedom is a major good which should be respected by the state as a right which every citizen can exercise either individually or collectively, as he/she chooses. But it must also be respected by every citizen, religious or otherwise, in his/her attitude towards others. We must accept that there is a tendency for this respect, or even tolerance, not to be shown by large sections of religious citizens. This has been down the centuries a characteristic chiefly of the followers of the three great monotheistic religions (Judaism, Christianity, Islam), which have laid claim to unique 'truth' for themselves, thus creating a situation of intolerance for the 'truth' of others. We must also accept that this phenomenon today manifests itself more acutely among large sections of the followers of Islam.

It should be made clear to anyone who cannot show this respect towards those who are religious in a different way or to those who are not religious at all by the state in which he/she lives that if he/she persists in not respecting difference, he/she has no place in the society of that state. Only in this way can and should European secularism deal with the new challenges. It should deal with them without passivity and indifference, but by taking active measures, without abandoning what religious freedom and equal treatment of citizens call for - the religious neutrality of the state. It must be demonstrated that anti-secularism is in the end anti-liberal, that it conflicts with fundamental freedoms, and leads to fanaticism, which shatters social peace.

My conclusion is, therefore, that we should not enter upon a post-secular age, but on an age of active secularism.

Endnotes

1. Of course, the international Conventions leave some room for the national legislators, who nevertheless, when they make use of their 'margin of appreciation' (e.g., when religious freedom is in conflict with other rights – see further text), must respect at least the essence of religious freedom.

2. However, as Lucian Hölscher ('Civil religion and secular religion' in Religion and democracy in contemporary Europe, ed. Gabriel Motzkin and Yochi Fischer, Van Leer Jerusalem Institute, 2008, p. 60) points out, in religious discourse the term 'secular' is usually used as implying a lack of religion in society.

3. See Korioth/Augsberg, 'Neue Religionskonflikte und staatliche Neutralität', Juristenzeitung 2010, 830.

4. Cf. Gabriel Motzkin, 'Secularization, knowledge and authority' (in Religion and democracy in contemporary Europe, ed. Gabriel Motzkin and Yochi Fischer, Van Leer Jerusalem Institute, 2008, p. 52), who maintains that "in a system in which all possibility of belief in anything is vitiated, there can be no articulation of the emotional life of the self".
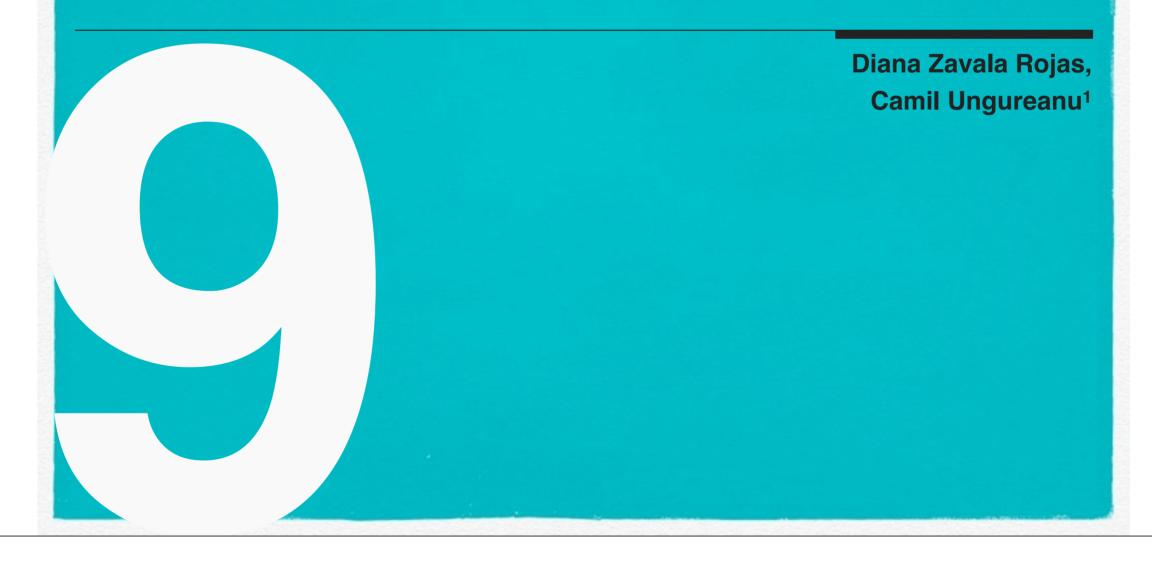
5. Cf José Casanova, 'The problem of religion and the anxieties of European secular democracy', in Religion and democracy in contemporary Europe, ed. Gabriel Motzkin and Yochi Fischer, Van Leer Jerusalem Institute, 2008, pp. 73-74.

6. On the other hand, the internal relations of a religion - 'forum internum' – should not be affected, as a matter of principle, by the state.

7. See Korioth/Ausberg, op. cit., p. 832.

8. Thus, it is the French 'laïcité' which has the great advantage of accepting that freedom of religion may not restrain the State from intervening in society.

9. Cf. Silvio Ferrari, 'Nationalism, Patriotism, and Religious Belief in Europe', in University of Detroit Mercy, Law Review 2006, pp. 626 et seq., on the need of a common identity or common bond in society, and on the question of what constitutes 'the core of a nation' and whether religion should be a unifying factor.

10. Concerning the question of the reference to the Christian tradition in the Preamble of the European Charter of Fundamental Rights, see Stathopoulos, 'Can the democratic state impose limits on religion?', in Religion and democracy in contemporary Europe, ed. Gabriel Motzkin and Yochi Fischer, Van Leer Jerusalem Institute, 2008, pp. 148 et seq.

11. See Korioth/Augsberg, op.cit., p. 834.

12. As Ernst Hirsch Ballin ('Europe's Values' in Cultural and Educational Rights in the Enlarged Europe, ed. Jan De Groof and Gracienne Lauwers – Wolf Legal Publishers, 2005, pp. 62-63) maintains, "inter-religious dialogue can only bear fruit if one is prepared to respect the

other as a human being" and "a peaceful dialogue can only be established in mutual recognition of diversity on the basis of universal and unifying values".

13. See, inter alia, Art. 8 § 2 of the European Convention on Human Rights of 1950: "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society 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".

14. Here one has to agree with Viviane Reding (Member of the European Commission) when she says ('Dialogue between peoples and cultures', Conference in Brussels, 24 and 25 May 2004, publ. European Commission, 2005, Introductory address, p. 26) that "certaines interprétations du Coran aboutissant à avilir la femme dans la famille et dans la société ne sont pas acceptables pour l' Europe, pas plus que ne le sont les atteintes aux droits de l' homme et à la liberté d' expression". It is fair to add that the same is true of some passages of the Gospel.

15. Dahlab v. Switzerland judgment of 14.2.2001, http://www.echr.coe.int

16. The case concerned a Muslim woman teacher in a public primary school in Geneva who claimed the right to wear the Muslim hijab in the school classroom.

17. BVerfG, 2 BvR 1436/2002, 3.6.2003.

18. This provision reads as follows:"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".

19. See its decisions: Kjeldsen, Busk Madsen and Pedersen v. Denmark, of 7.12.1976; Campbell and Cosans v. UK, of 25.2.1982; Folgero and others v. Norway, of 29.6.2007.

From confessionalism to positive secularity? The ambiguous case of teaching religion in Spain

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9

Introduction

Pedro Almodóvar's Mala educación ("Bad Education", 2004) famously portrays an authoritarian type of education established by the Catholic Church during Franco's dictatorship. Almodóvar's cinematic re-presentation is, by and large, a far cry from the reality of the educational processes in today´s democratic Spain – a country where there is no official Church, teaching religion is not compulsory, and homosexual marriage is legally recognized.

Nonetheless, the arrival of democracy has not brought about transparent solutions with respect to the place of religion in the Spanish educational system and society. Instead, new tensions have emerged given. Spain has made important steps in implementing the principles of state neutrality and separation between State and Church in addition to recognizing the "fact of pluralism".[2] But the Spanish democracy is characterized by forces pulling in different directions – forces that have been played out differently by the main political parties, socialist and popular.[3]

First, even if there is no official religion, the Catholic Church retains a special if not privileged relation with the State, and an advantaged role in education.[4] The Catholic Church has a huge impact on the private and public sphere, and it has been a factor of resistance to the recognition of pluralism.

Second, there is a significant secularizing movement in Spain that can take on radical anti-Catholic forms. This radicalism has deep historical roots in Spain, and – in most recent times – has been nourished by the Catholic Church's collaboration with Franco's dictatorship.[5] More broadly, the number of non-believers, agnostics and secularists has grown and has become politically significant in the past decades, with the result of challenging elements of the privileged status of the majority Church. This has caused significant tensions and polemics: it is telling that, in his November 2010 visit to Barcelona, Pope Benedict XVI complained about the "aggressive secularism" of the Spanish socialist government in power. In a controversial analogy, the Pope went as far as to compare the current government's stand with what "we saw in the 1930s".[6]

Third, the Spanish "landscape" is rendered even more complex by growing religious and spiritual pluralism. This pluralism is largely due to processes of transformation of religious search through individualization,[7] and to the constitution of new religious communities resulted from immigration.[8] For instance, although Islamic communities enjoy a fundamental place in Span-

ish history, they have re-entered in the limelight after the recent waves of immigration, and have naturally required more recognition in the educational process (see below).[9]

The tension between these forces is reflected by the Spanish "model" to teaching religion. Spain has moved away from the state religion model and its standard upshot – a full-fledged confessional approach of education.[10] However, we will argue that the current Spanish "approach" is mixed: it it combines traits of different models (confessionalism, positive secularity), and has a remarkably variable geometry, as it is substantially decentralized.[11]

From our perspective, teaching religion could be instrumental to the constitution of a society made of persons who are tolerant, informed and capable to enjoy flourishing lives based on (non)religious values, open dialogue, and mutual learning. The current Spanish approach has the merit of taking stock of the importance that religion can have for identity-building and democratic practice, and of having institutionalized dialogue with an increasing number of religious communities. Yet the extent in which the Spanish educational "model" fosters pluralism and the realization of freedom of religion on an egalitarian basis remains a controversial matter.[12]

In this article, we will proceed as follows. In order to situate and assess the merits of the Spanish approach, we will outline five approaches to the question of teaching religion – confessional-

ism, secularism, exclusive laicism, multiculturalism, and positive secularity[13]. Then we will analyse the elements of the Spanish case, and argue that it is situated half-way between the confessional model and a model of positive secularity that grants equal recognition to religions in public sphere and education as a way of fostering a culture of tolerance and learning.

Models of teaching religion

For the purpose of our discussion, we distinguish five types of religious education.

I. The Confessional Model

Confessionalism is rooted in a political theology that has been dominant for a large part of European and Spanish history, and that is based on the belief in harmony and mutual support between State and Church. According to this political theology, the members of the Spanish political community are essentially Christian or, more precisely, Catholic. It follows that Catholicism should be central to the educational curriculum. The objective of confessional education is instilling Christian values, practices and dogmas. Teachers are priests and there is no opt-out possibility.

The confessional model is not entirely adequate for a pluralist democracy that is based on the protection of (non)religious minorities and freedom of religion. It is significant that, in an ever more diverse Europe, the full-fledged model of confessional education has been in relative decline.[14]

II. The Secularist model

The "secularist model"[15] is rooted in an influential Enlightenment tradition that goes from d'Holbach and Marx to Dennett and Dawkins, and that opposes modernity and religion, reason and faith. At the political level, the ideology of secularism has led to the attempt to banish religion from the public sphere and, in certain cases, from society altogether. In France or Spain, for instance, anti-Catholic anarchists and republicans led acts of political violence against the Church.[16] However, militant secularism was most systematically pursued by the atheist communist regimes, and most often led to ousting completely religion from public education (e.g. Soviet Union, Romania, Bulgaria, etc). In its soft version, the secularist model aims only at privatizing religious belief. According to it, one's religious belief is not a state's concern, but a personal preference. This entails that religion should not be part of the public education system.

The secularist model is questionable even in its soft version. First, from A. de Tocqueville to R. Bellah, social scientists have demonstrated that religious education can be useful in fostering democratic participation and relations of mutual toleration.[17] Second, the state´s lack of involvement in religious education may entail that certain groups learn only about their religious tradition, and are indoctrinated in stereotypes of other (non)religious citizens. Third, the absence of religion from the curriculum may lead to the impoverishment of the contexts of

choice in a democratic society. Individual choices become meaningful when taken in substantial value contexts, and not in a social vacuum.

III. Exclusive laicism (laïcité)

The French model of laïcité emerges from the French Revolution – as does the conflict between the state and the Catholic Church.[18] As Gauchet notes, in the clash with the Church, the newly born laic state adopted the paraphernalia of its enemy in order to remove its spell over people's imagination and feelings.[19] Laïcité becomes a "civil religion" - a "religion" of citizens united in the pursuit of public good (res publica) and virtue. At the level of education, laïcité aims to cultivate republican values and virtues so that pupils gradually convert into true citizens.[20] The "republican catechism" replaces the Catholic one: upon entering the school gate, pupils are supposed to strip off their religious differences in order to be able to assimilate into the unitary political body of republic.

Nonetheless, exclusive laicism is a paternalistic model in so far as it imposes values and virtues without room for genuine dissent or recognition of difference. This model is at loggerheads with the recognition of religious minorities and their right to express their views in public sphere. It is also excessively rigid as it does not admit of reasonable exceptions, and it assumes that everyone will abide by a set of values that is not unanimously shared. Religious pluralism remains a thorn in the "flesh" of laïcité: pluralism is, for it, either a problem to be overcome, or a threat to be kept under control.[21]

IV. Multiculturalism

Multiculturalism regards society as constituted of different cultural-religious communities that express their values in public sphere, and are able to live peacefully side-by-side.[22] Multiculturalism advocates public recognition of cultural-religious communities under the form of collective rights, including under the form of multiple jurisdictions. Concerning education, the multicultural approach is radically pluralist, and it fosters the formation of faith-schools.

The multicultural model is currently under strain. Especially in its more radical versions, the multicultural model fails to provide standards in case of conflicts between religious claims and general policies and laws. Multiculturalism has also turned out to be over-optimistic as to the possibility of avoiding segregation and integrating newcomers and their differences. This model is insufficiently concerned with a certain degree of commonality and political integration, including through educational policies.[23]

V. Positive secularity (laicidad positiva)

Positive secularity aims at merging the positive side of the models of laïcité and multiculturalism, and at avoiding their failures. It takes from the former model a concern with state neutrality, autonomy and integration, and from the latter a concern with recognition and pluralism. Concerning education, positive secu-

larity entails that, in a pluralistic democracy, public schools should be neutral with regard to the choices children might make and, at once, provide them with a broad array of cultural-religious "materials" for developing individual moral ideas and life plans.[24] This approach has important merits: first, it is better equipped to take stock of the fact of the increasing pluralization of contemporary democracies since it provides for protecting religious and nonreligious minorities from a majoritarianism. Second, it supports the idea that "religious education" can be useful to citizenship-building, given religion´s role in present-day societies. third, it is premised on the idea that learning about the religious beliefs of others may be a foundation for promoting a culture of toleration and learning by fighting ignorance and prejudice amongst pupils. Increasing awareness and knowledge of a range of religious beliefs may, help to reduce mutual intolerance and, on the other hand, help to validate and integrate as citizens pupils from minority religious groups. By the same token, religious education can contribute to maintaining rich value contexts wherein meaningful choices and decisions can be made.

Positive secularity is not inimical to the idea of a special relationship between state and majority religion: the acknowledgment that, in specific contexts, a religious tradition has played a crucial role in the identity-formation and history of a people is not incompatible with the recognition of pluralism. In contrast to French laicism, for positive secularity the state can engage in relations of recognition, cooperation and dialogue with the relevant religious communities. However, positive secularity is distinct from confessionalism: the latter is based on imposition, indoctrination, lack of real opt-out solutions, and an unilateral cooperation between state and one privileged religious group. In contrast to positively secular model, confessionalism is thus founded on a biased relationship with the majority religion to the detriment of the pluralism of (non)religious opinions, values and attitudes.

The Spanish approach to teaching religion (1)

I. **Elements of the historical-legal context**

The Spanish "model" of education is mixed: in the past decades it has made decisive steps in the direction of positive secularity, but elements of the previous confessionalism are still in place.[25] Historically speaking, Spain´s trajectory has been dominated by the close relation between Catholicism and the Spanish State: to be a proper Spaniard meant, for a long time, to be a good Catholic. Before the democratic transition in the 70s, the established status of Catholicism was rarely interrupted, most recently between 1931-1939, when it was adopted a Constitution hostile to Catholicism.[26] This hostility is part of a strong Catholic/anti-Catholic cleavage deeply rooted in Spanish history: protests against centralist or absolutist authority have often been linked to anti-clerical and anti-religious liberal, anarchist or republican movements.

The Spanish transition to democracy was based on negotiations and compromises between the regime and the opposition elites. These negotiations and compromises had the merit of avoiding violence, and of producing a "pacted transition" that J. Linz and A. Stepan famously characterized as "reforma-pactada, ruptura-pactada".[27] The place of religion in the new democratic configuration is largely due to this consensual type of transition from authoritarianism to democracy. In contrast to the Constitution of 1931, the newly adopted Constitution in 1978 adopted a moderate solution: it abandoned the state religion model but acknowledged the role of Catholic Church in the Spanish society. More specifically, according to the Spanish Constitution, there is no official religion.[28] With respect to the religious issues, the Spanish Constitution rests on the laicist principles of religious freedom, non-discrimination, and state neutrality. Religious freedom refers to the right of choosing, manifesting or changing one´s religion. Non-discrimination means that citizens cannot be disadvantaged on religious grounds. Neutrality means that the state is agnostic as to the value of specific religions.[29]

However, the new democratic State did not adopt an exclusive laicism based on a rigid interpretation of freedom of religion and neutrality. The democratic Spanish Constitution did not aim at building a "wall of separation" with respect to religion. In contrast, the Constitution advances, next to the principles of neutrality, freedom of religion and non-discrimination, the principle of cooperation with the Catholic Church and other religious communities. According to article 16 (3): "public authorities shall

take the beliefs of Spanish society into account and shall in consequence maintain appropriate relationships of cooperation with the Catholic Church and the other religious denominations". This article establishes two crucial things: first, it singles out the Catholic Church due to its importance for the history and identity of the Spaniards; second, it opens up the possibility that the State cooperates with a plurality of other religious communities. Thereby, the Constitution establishes the basis for the Agreements with the Catholic Church and other religious communities.[30]

The Constitution provides that fundamental rights and liberties, such as education and religious freedom, should be translated in Organic Laws approved by absolute majority in the Parliament (Section 81). The legal framework of the Spanish educational "system" is further complemented by the Concordat between the Spanish State and the Holy See on Education and Cultural Affairs (AEAC)[31], the Organic Law on Religious Freedom (LOLR)[32] and the Organic Law in Education (LOE).[33] Immediately after the ratification of the Constitution, the Spanish State and the Holy See signed four Agreements establishing a new Concordat between them. The Agreement on Education and Cultural Affairs configures a substantial part of the Spanish model of religious education in public schools. First, it states that the Spanish educational system will be respectful to Christian principles (Article 1). There is no similar statement regarding other religious principles. Second, it introduces courses on

Catholicism in public-funded schools at all levels of basic education. Third, it gives autonomy to schools to design alternative activities for pupils who do not participate in courses on Catholicism. Finally, it allows ecclesiastical hierarchy to organize complementary religious activities in schools (Article 2). It also sets the principles for financing (Article 7) and appointing teachers (Article 3): the religious hierarchy proposes teachers and the State finances them.[34]

If the Concordat ensures the continuity in terms of the influence of Catholicism in the Spanish "system" of education, the LORL translates the secular constitutional principles into a regulatory framework. The LORL protects the right of receiving and giving religious instruction within and outside the sphere of school (Article 2.1). It allows the Spanish State to establish cooperation Agreements with well-rooted religions in Spain (Article 7.1). Furthermore, the LOE implements the right of receiving religious education in public funded schools, and it establishes that courses on religious education will be organized according to the Concordat with the Holy See and the Agreements signed with well-rooted religious communities (Second Additional Provision). The LOE also organizes the appointment and financing of teachers (Third Additional Provision).

Organic Laws are implemented by norms with the rank of laws decreed by the government. Such norms constitute the Royal Decrees on the Minimum Contents of Education in Primary and

Secondary School[35], the Agreements with three minority religious communities: Islamic, Jewish and Protestants[36] (1992) and the Provisions[37] and Resolutions[38] derived from the Agreements on the contents of religious instruction and financing of teachers.

The 1992 Agreements represent an important step forward in acknowledging the increasing pluralism of the Spanish society. The three Agreements were signed between the Spain State and representatives of the Protestant, Islamic and Jewish communities.[39] The timing for the definition of the Agreements between the State and the minority religious communities was different. The State required that the religious communities would organize themselves so that each generated a single and valid partner of dialogue. However, while the Protestant and Jewish communities started the negotiations in 1987, the negotiation of the Islamic Agreement started only in 1992.[40] This was in part due to the division of the Islamic community into two associational bodies, the Spanish Union of Islamic Communities (UCIDE)[41] and the Spanish Federation of Islamic Religious Entities (FEERI)[42]. The Agreement was finally signed by Spanish Islamic Commission (CIE) created by the association of the UCIDE and FEERI. However, the internal differences within the Islamic communities affected the later implementation of many aspects of the Agreements, including that of teaching religion[43] (see below).

The Agreements recognized the right to receive religious education in public-funded schools. The Agreements adopted the model of the Concordat for the regulation of teachers. The religious representatives of the minority have the right to propose teachers and the State would finance them. Nonetheless, there were two important differences between the Concordat with the Holy See and the Agreements with the minority religious communities. First, the Concordat was comparable to an international treaty. Second, the Concordat was negotiated before the Constitution was approved; its aim is different than that of the Agreements with minority religious communities. The Concordat was aimed at ensuring a consensual transition to democracy; to this end, by institutionalizing a privileged relationship between the Catholic Church and the State, it had a reassuring impact on the Catholic elites. In contrast, the Agreements are meant to build a relationship of recognition between the State and the "well-rooted" religious communities (see below).

II. Organizing and financing education

According to current legal framework, the coverage of education is universal and free for Spaniards. Compulsory education starts at the age of six and lasts until the child is sixteen. Private schools can offer services and receive public financing through a legal arrangement named "consortium". The consortium allows a public-private partnership to run public services. The State pays the services to providers, citizens have free access but the ownership of the facilities and the management of

the services can be private, a mix of public-private, or a mix of public agencies in different levels of government.

There are three types of schools in Spain: public-owned, private-owned under consortia and private-owned out of consortia. On average, for the course 2008-2009 they have enrolled respectively 67%, 29% and the 4% of the pupils in primary school, and 66%, 31% and 4% of secondary school[44]. Regardless of their main source of financing, private schools can be confessional or secular. The State finances denominational schools once they are under consortium. It is common that concerted schools initiate their activities without public financing; then, according to the demand of students, and by fulfilling specific quality criteria demanded by the educational authorities, they can opt for applying to participate in the network of schools under consortium.

The Catholic Church runs the vast majority of concerted schools at the level of basic education. Approximate data for 2008-2010 indicate that 70% of the pupils enrolled in concerted primary schools attended Catholic schools. The proportion was 74% for pupils enrolled in secondary level.[45] The numeric importance of State-funded Catholic schools varies from region to region. Some Autonomous Communities (A.A. C.C.)[46] deviate from the mean. In Aragon, Asturias, La Rioja and Castile and Leon above 93% pupils enrolled in primary education attend Catholic schools. In Canary Islands, Murcia, Ceuta and Melilla

enrolled students in Catholic public-funded schools are around 50%.

Children attending private schools out of consortia are around 4%. Approximately 7% of pupils who enrolled in a non-public funded school during 2008-2009 attend a Catholic school. The majority of non-state funded denominational schools in Spain are also Catholic. Minority religions own a very small number of schools. There is one Jewish institute in Barcelona and few Protestant schools in Madrid and Barcelona[47]. There are no Islamic schools funded by the State or depending on the official representatives of Muslim communities,[48] although there is a project to open the first Islamic primary school in Granada.[49] There are three private Islamic schools authorized in Spain.[50]

Table 1 ("Distribution of Pupils in Primary Education in Spain") shows the percentage of pupils enrolled in primary schools by Autonomous Community divided in private schools under consortia, private out of consortia and public-owned schools.

Table 1. Distribution of Pupils in Primary Education in Spain					
Primary education	Public owned-schools	Public-funded private schools	Pupils in catholic public-funded schools	Pupils in Catholic public-funded schools over all pupils in public-funded private schools	non-public funded private schools
TOTAL	67,19	28,89	20,30	70,28	3,93
Andalusia	75,81	20,98	16,45	78,39	3,21
Aragon	66,94	30,14	28,16	93,45	2,92
Asturias	68,50	29,07	27,17	93,46	2,43
Balears	63,28	33,70	27,93	82,87	3,02
Canary Isl.	75,00	19,72	10,09	51,19	5,28
Cantabria	63,35	36,26	29,48	81,30	0,38
Castile & Leon	66,83	32,73	30,93	94,50	0,43
Castile-La Mancha	82,25	17,16	13,98	81,49	0,60
Catalonia	63,72	33,90	20,11	59,30	2,38
Valencia	67,10	28,50	22,59	79,26	4,41
Extremadura	78,61	20,86	16,95	81,28	0,54
Galice	68,58	29,42	20,27	68,89	2,00
Madrid	53,15	34,14	21,24	62,20	12,70
Murcia	71,75	26,72	13,69	51,22	1,53

Table 2 ("Distribution of Pupils in Secondary Education in Spain") shows the percentage of pupils enrolled in primary schools by Autonomous Community divided in private schools under consortia, private out of consortia and public-owned schools.

Table 2. Distribution of Pupils in Secondary Education in Spain					
Secondary education	Public owned-schools	Public-funded private schools	Pupils in Catholic public-funded schools	Pupils in Catholic public-funded schools over all pupils in public-funded private schools	Non-public funded private schools
TOTAL	65,89	30,52	22,55	73,89	3,59
Andalusia	75,35	21,73	17,66	81,29	2,92
Aragon	63,70	33,88	32,49	95,89	2,42
Asturias	64,98	32,67	30,37	92,96	2,35
Balears	61,13	35,83	30,79	85,95	3,05
Canary Isl.	75,54	20,31	11,21	55,20	4,15
Cantabria	62,24	35,88	31,01	86,42	1,88
Castile & Leon	63,33	36,04	34,20	94,90	0,63
Castile-La Mancha	80,52	18,21	16,19	88,87	1,27
Catalonia	59,62	38,22	23,03	60,24	2,16
Valencia	66,17	30,10	24,61	81,74	3,72

III. Offer of religious instruction

In the current educational system, four religion courses are offered at the primary level in public-funded schools: Catholicism, Judaism, Protestantism and Islam.[51] Secondary schools must also offer an alternative course in "History and Culture of Religions" for those pupils who wish to attend a "religious course" that is not centred on a specific religion. The curriculum of this alternative course depends on the Educational Departments of the A.A. C.C.[52]

Pupils have the right of exemption from "religious courses" at all levels of compulsory education. Those pupils who do not wish to attend any "religious course" can opt for alternative activities defined as "educational assistance" which are organized by different schools. These activities do not amount to alternative courses.[53] Schools have interpreted "educational assistance" in many different ways: given the absence of any guideline from the central State, school authorities design the content of activities. The range of interpretation is wide: in a number of schools, students spend time with no assigned activities, while in others local folklore activities are organized. The 2008/2009 Report on Education published by the Spanish Ministry of Education admits that there is a lack of guidelines in the legal framework for evaluating and designing alternative activities for those students who opt out from religious instruction. These activities depend entirely on individual schools.[54]

Table 3 shows the number of students attending religious courses at each level of basic compulsory schooling by type of school.

PRIMARY EDUCATION	Catholic	Protestant	Islamic	Jewish	Hist. & Cult. of Rel.	Opt out
ALL SCHOOLS	75,48%	0,31%	0,40%	0,01%	--	23,80%
PUBLIC OWNED-SCHOOLS	70,25%	0,41%	0,58%	0,01%	--	28,76%
PRIVATE SCHOOLS	86,37%	0,09%	0,03%	0,03%	--	13,47%
PUBLIC-FUNDED PRIVATE SCHOOLS	88,37%	0,10%	0,02%	0,02%	--	11,49%
NON-PUBLIC FUNDED PRIVATE SCHOOLS	69,19%	0,05%	0,14%	0,13%	--	30,49%
SECUNDARY EDUCATION	Catholic	Protestant	Islamic	Jewish	Hist. & Cult of Rel.	Opt out
ALL SCHOOLS	55,29%	0,09%	0,03%	0,01%	3,60%	40,99%
PUBLIC OWNED-SCHOOLS	41,41%	0,09%	0,03%	0,00%	3,96%	54,50%
PRIVATE SCHOOLS	82,56%	0,07%	0,03%	0,02%	2,89%	14,43%
PUBLIC-FUNDED PRIVATE SCHOOLS	84,71%	0,06%	0,02%	0,02%	2,17%	13,03%
NON-PUBLIC FUNDED PRIVATE SCHOOLS	61,09%	0,26%	0,15%	0,03%	10,02%	28,45%

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The Spanish approach to teaching religion (2)

The teaching of Catholicism is prevalent, and is organized at all levels of basic education. Offering courses on Catholicism is compulsory for schools but pupils' attendance is optional. Teachers are nominated by the Church, appointed by school authority and financed by state.[55] The Spanish Episcopal Commission establishes the curriculum, and the courses have to be offered in the same conditions as other fundamental subjects of the curriculum.[56] The courses on Catholicism are evaluated in the same terms as other courses, but the grades are not taken into account for admission into higher levels of education. In turn, courses on other religions are established in accordance with the Agreements; none of them provides guidelines for the evaluation of courses.[57]

Articles 120 and 121 of the LOE give administrative and "ideological" autonomy to schools for developing an educational project.[58] Therefore, denominational schools receiving public financing have autonomy to form their educational model under a religious "doctrine". In the A.A. C.C. where the number of

public-owned schools is historically low, children attend confessional schools regardless of their affiliation to Catholicism. Members of minority religions, as well as non-confessional families, attend public or private schools financed by the State. Surely, in principle, pupils belonging to other religions or non-confessional at all have access to confessional public-funded schools. In practice, the confessional character of the majority of schools under consortium results in a widespread presence of Catholicism beyond the "religious courses" proper. These schools can organize or co-organize services such as masses, first Holy Communions, etc.[59]

The LOE provides that enrolling a child in a school implies accepting its educational project (Article 84.9)[60]. But a State-funded denominational school does not have the right to limit the number of pupils from other religious beliefs in order to support a specific project. The LOE specifies that it is not possible to discriminate pupils due to their origin, race, sex, religion, etc. However, there are some priority criteria for selecting students when places are less than demanded are: 1) sibling attendance, or parents/ tutors working in the school; 2) proximity to the household or to parents' work place; 3) annual income (poorer and larger families have priority); 4) pupil's or sibling's disability. The school's Council[61], namely the highest body for decision-making of each school, has also an important influence on admission (Article 84.1-2).

The Agreements are distinct from the Concordat in at least three fundamental aspects concerning religious instruction. First, in the Concordat the only course that is explicitly mentioned as compulsory is on Catholicism[62]. Second, the Agreements with minority religious communities do not explicitly regulate the financing of teachers, while the Concordat is explicit in providing that teachers of Catholicism should be financed by the State and appointed by the Spanish Episcopal Commission.[63] Third, the Agreements do not provide that religious instruction of minority communities would be designed in comparable terms with other fundamental courses.[64] However, after the Agreements, the minority religious communities entered further negotiations in order to demand courses on religious instruction in comparable terms with the courses on Catholicism. The curriculum was one important part of the negotiations. The Jewish representatives already designed the contents of a curriculum in 1981.[65] The representatives of the Protestant community presented them in 1993 - one year after signing the Agreements.[66] In turn, the CIE did not agree on the contents of a curriculum of the course on Islam until 1996.[67] The second negotiated issue regards the procedure of appointment and financing the teachers. The educational authorities and religious communities adopted a model similar to that applied in the case of Catholicism: religious representatives appoint teachers in public schools, and educational authorities finance them.[68] Nonetheless, one difference with respect to the Catholic instruction is that the organization of a course on a minority religion requires at least ten parents demanding it.[69]

Given Spain´s decentralized model, the implementation of courses on minority religions has been different for each religious community. Until 2004 few schools offered other religious courses than Catholicism – and these were on Protestantism and Judaism. When demanded, courses on Protestantism and Judaism have been made available without any controversy.[70]

Even if the Muslim population is the largest minority religious community in Spain, [71] the implementation of courses on Islam has been the most delayed. There are no entirely accurate estimates as to the number of Muslim pupils in the primary educational system. However, scholars have attempted to determine their number by taking into account the origin of the pupils. Table 4. "Muslim pupils in primary and secondary school" shows the number of pupils in the Spanish educational system for the academic year 2007/2008 from a country of origin where more than the 50% of the population is Muslim.

Table 4. "Muslim pupils in primary and secondary school"			
	TOTAL	**Primary**	**Secondary**
Total	495,025	295,477	199,548
Algeria	3,342	2,050	1,292
Morocco	73,815	48,568	25,247
Senegal	1,780	1,056	724
Pakistan	2,686	1,600	1,086

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After the publication of the curriculum of Islamic instruction, the first regions where Islam started to be taught were Ceuta and Melilla. By 2003-2004 four schools in Madrid and twenty in Ceuta and Melilla taught a course on Islam. Furthermore, by 2005 three other communities started to offer Islamic instruction in about 50 schools (Andalusia, Aragon and Basque Country). Overall, around 119,994 pupils have asked the option of Islamic instruction in 2009. [72] However, one of the main difficulties that religious parents and children have had in receiving Islamic education is the inability of the CIE to reach an agreement on the teachers to be nominated. The two associational bodies of the CIE have, in general, conflicting views as to the profiles of the teachers. They have frequently presented two lists of teachers, in spite of the State´s repeatedly asking for a single list. This problem has delayed the implementation of courses in various A.A. C.C where the demand is sizeable.[73]

The Agreements signed with minority religious communities do not require private schools receiving public funding to offer courses on Islam, Protestantism or Judaism, if this is at odds with their educational project.[74] If there is a strong tension between parents' requirements and the school's "philosophy", the educational authorities reallocate the student.[75] Denominational Catholic schools teach minority religions' courses at their own initiative, as the Spanish Episcopal Commission does not define any uniform school guidelines. Negotiation to offer courses on minority religions is possible through the school's Council.

The Council "system" has large influence on defining schools policies, for example it can support a one-gender school or decide on the admission of students if places are less than demanded. Since the Council has competences on the approval of changes in the organization of the school, it can also decide if implementing courses on minority religions favour or not the coexistence in the school.

As the Agreements with minority religious communities do not oblige confessional schools to implement courses on minority religions when they contradict the schools´ educational project, there have emerged important differences across regions and schools. Traditionally, a good part of the conservative and well-to-do sector of the Catholic members attends private schools that do not receive public financing. In turn, public-funded confessional schools are progressively adopting a more laic and plural character: first, because there are few available options of other public-funded schools and, second, because the density of migrant population has been increasing for specific communities.

Religious symbols in public schools: the question of school environment

The issue of religious symbols in schools is relevant as a marker of the model of "religious education". According to the European Court of Human Rights, the state "is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical conviction".[76] From this perspective, the state should avoid religious indoctrination at two levels - the curriculum and the school environment. First, the state must take care that "information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner".[77] Second, the "school environment", to which symbols pertain, should not lead to indoctrination, but foster a culture of respect and pluralism.

The Spanish approach to this issue has been, so far, relatively flexible. There are two types of contentious symbols relevant for the school environment: minority symbols (e.g. headscarf) and "majority symbols" (e.g. crucifix).

a. With respect to the headscarf, Spain has managed to avoid the black-and-white treatment. In Spain, the dressing code in schools is not regulated from the centre. The decision concerning the dressing code pertains, as a general rule, to the sphere of school autonomy. At the level of A.A. C.C, the educational authorities deal with the conflicts between school authorities, pupils and their parents. In some cases, they have reallocated students in other schools where there is no prohibition of the Islamic headscarf; in some other cases, the pupil was expelled from the school; still, in other cases, the school´s autonomy has been restricted. The first such controversy benefitting from media coverage surfaced in Madrid in 2002. Fatima Ledrisse´s school in Madrid did not demand any specific uniform, yet it did not allow wearing garments such as the Islamic headscarf. The pupil was relocated into a public-owned school, but a debate emerged as to whether the headscarf discriminate women, and whether pupils and parents should respect the school autonomy in establishing the dressing code [78] Starting with this highly publicized case, other similar cases have emerged in different regions of Spain. The most recent one occurred in 2010, and concerned Najwa Malha – a girl from Madrid who was expelled for wearing the Islamic veil in a public secondary school.[79] The educational authorities reallocated her into a Catholic school under consortia. Before the girl started classes again, the school Council voted to change the norms on dressing code, banning pupils who wanted to cover their heads. Najwa Malha was real-

located into a third school. In the aftermath of Najwa's case, the Spanish Ministry of Education declared that Spain would not regulate the dress code in schools; this decision would fall within the autonomy of the school. Similar cases have been reported in other A.A. C. C. such as Galicia, where the school denied access to a girl wearing the headscarf. Interestingly, in Catalonia the educational authorities obliged a school to readmit the wearing the headscarf, arguing that the protection of the right of education was more important than the internal norms of individual schools.[80]

b. Concerning the crucifix as a "majority symbol", so far it has not been turned into a major contentious issue. One case concerning the crucifix was decided by the High Court of Justice in Castile and Leon (TSJCL) where a group of parents appealing to Article 9 of the ECHR demanded a public-funded Catholic school to withdraw crucifixes.[81] The Court argued that Lautsi (2009) needed to be interpreted within the Spanish constitutional context, which precluded its mere "linear or literal extrapolation".[82] The Spanish constitutional framework is constituted, next to the principles of neutrality, freedom of religion and non-discrimination, the principle of cooperation with the Catholic Church and other religious communities (art 16, 3). By developing this collaborative approach between state and religion, the Spanish Constitutional Court adopted the concept of laicidad positiva (positive secularity) as part of its constitutional doctrine.[83] As the TSJCL underscores, according to this doctrine, "non-denominationally" (aconfesionalidad), secularity (laicidad) and secularism (laicismo) should not be confused. The non-denominational state is a "State without religion".[84] Secularism (laicismo) is defined as an "ideological current" characterized by its "rejection of the religious fact in all its public manifestations".[85] In turn, a state that is positively secular[86] interconnects the principles of religious freedom, neutrality and cooperation as recognition of a pluralism of (non)religious options.

The TSJCL agreed with some of the main tenets of Lautsi 2009: since the presence of the crucifix as a religious symbol may have had an influence on vulnerable pupils, it followed that it undermined the parents' right to educate their children according to their beliefs. Yet this did not entail the general ban of the crucifix in all classrooms. The Catholic Church should be acknowledged as having a special role in the Spanish history and society. In addition, the Court pointed out that there is no principled conflict between the presence of the crucifix and the current constitutional framework unless parents make a petition to remove the crucifix. The legitimate removal of the crucifix should be conditional upon the existence of a "request of withdrawal of the religious symbols" from the part of the parents, and for a determined period.

The debate about religious symbols in public schools is thriving in all corners of Europe. The decentralized and flexible Spanish

"system" is not a panacea. Decentralized decisions can be exclusionary, and domination is often exercised in implicit ways. Yet the merits of the Spanish "approach" become relevant in particular when we compare it to the ECtHR´s one-sided treatment of Islamic symbols[87] and, even worse, to the "othering" of Muslims currently taking place in long-established democracies like Switzerland or France.

Instead of Conclusion: the Spanish case in the European context

Spain has made major albeit incomplete steps from transforming a full-fledged confessional model into a model of positive secularity. Spain has enhanced the basic laic principles of freedom of religion and neutrality and has developed the cooperation with various religious minorities. The recent developments towards positive secularity in Spain are in tune with the emerging European "approach" to teaching religion. It is beyond the aim of this article to reconstruct the complexities of the European "approach".[88] However, there is a relative convergence[89] in terms of advancing a "neutrality-and-cooperation" approach.[90] Different European institutions have combined the principles of principles of freedom of religion, neutrality, pluralism and cooperation (or dialogue). Despite their differences, this perspective is neither based on an ideology of secularism inimical to religion in general, nor has it attempted to construct a "wall of separation" between state and religion, nor it rules out the possibility of a special relation with the majority religion. First illustration: from the perspective of the ECtHR´s jurisprudence (namely of the main instance of judicial review dealing with religious matters in Europe), the state is not purely neutral and separate, but has the positive obligation to protect and enhance a culture of mutual tolerance and learning. This inclusive-pluralist perspective has at times been linked to the claim that religious and non-religious diversity represents a positive contribution to identity-building and democratic life. For instance, in Gorzelik v Poland, the Court argued that, "proclaiming or teaching religion... are also important to the proper functioning of democracy. For pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs ...". [91] This standpoint has lead the ECtHR to question biases of the traditional bond between majority religion and nation-state (e.g. its support of opt-out solutions and pluralistic curricula),[92] while it has acknowledged that a state can have good reasons to develop a special relationship with a majority religion that is central for its history and identity.

Second illustration: at the level of the European Union, the support for the principles of freedom of religion, non-discrimination and neutrality has, most recently, been interlinked to that of the legal principle of dialogue. In article 17, The Treaty of Lisbon adds to the basic principles of constitutionalism the notion of co-operation and dialogue between European institutions and religions, churches and communities of conviction: "Recognising their identity and their specific contribution, the Union shall main-

tain an open, transparent and regular dialogue with these churches and organisations."[93]

While the Spanish approach is in tune with this European neutrality-and-cooperation "model", there is a major difference between the two. In Spain, the Catholic Church still maintains a disproportionally asymmetric position with respect to the other religious communities. From our perspective, so far the Catholic Church has often interpreted the principle of cooperation in its favour, as a way to preserve the status quo, and resist the increasing pluralism of the Spanish society.[94] For instance, an initiative to reform the Law on Religious Liberty was initiated in 2004 so that to move closer the Spanish "system" to a positive secularist model that takes stock of the increasing pluralism of society.[95] This initiative was meant to facilitate the cooperation process with more religious communities, and provide recognition to Buddhism, Jehova's Witnesses Christian Orthodox and Mormons as "well-rooted" religious communities. It also aimed at establishing clear guidelines to define a religious community as "well-rooted", i.e. number of members, number of worship places, and duration in Spain, etcetera.[96] The reform initiative was not against the Catholic Church per se, but purported to balance some of the benefits of the Catholic Church and increase the prerogatives of other religious communities. Unfortunately, the Catholic Church and the Popular Party stopped this initiative, blocking the Spanish system in an intermediary space between confessionalism and positive secularity.[97]

There are no panacea for reaching a balance between recognizing at once Catholicism as a majority religion and the increasing pluralism, between justified forms of special treatment and egalitarian dialogue, between decentralization and coordination. Disagreements about how much each religious community should be represented in the educational process will not disappear any time soon. How Spain and its autonomous communities will combine state neutrality, the acknowledgment of a special relationship with Catholicism, and the recognition of religious diversity through cooperative agreements, remains an open issue in need for a more egalitarian solution.

Endnotes

1. Camil Ungureanu is Lecturer in Political Theory at the Department of Social and Political Science (Universitat Pompeu Fabra) and Diana Zavala Rojas is Junior researcher at RECSM Research and Expertise Centre for Survey Methodology (Universitat Pompeu Fabra)

2. See Martínez-Torrón, (2005) J., "School and Religion in Spain", Journal of Church and State, 47, pp. 133-150; Martínez-Torrón (2006), "Religious Freedom and Democratic Change in Spain", Brigham Young University Law Review, 3, pp. 777-810; Seglers, Gomez-Quintero A., (2004) "Religious Education in the Spanish School System", Journal of Church & State, 46, pp. 561-573; Ibán, I., State and Church in Spain, in Robbers, G., (ed.), State and Church in the European Union, 2nd. ed., Nomos, Baden-Baden, 2005, pp. 139-155. These writings provide also useful guidance into the relevant bibliography in Spanish.

3. The main political parties in Spain are the Socialist Party and the Popular Party. The former has had a much more secularizing stand than the later. For an analysis of the relation between Church and party politics in Spain, see the Montero, J. R., Gunther, R., Botella, J. (2004), Democracy in Modern Spain, Yale University Press and, in an updated and shorter version, Gunther, R. and Montero, J. R. (2009), The Politics of Spain, Cambridge University Press.

4. Ibid. and Martínez-Torrón (2006), op. cit.

5. The relation of the Catholic Church with Franco´s regime was, especially after the Vatican Council II, ambivalent. See for instance, Casanovas, J. (1996) Public Religions in the Modern World, University of Chicago Press.

6. The Christian Monitor, (7 November, 2010), available at: http://www.csmonitor.com/World/Europe/2010/1107/In-Spain-Pope-Benedict-XVI-lambasts-aggressive-secularism. The Pope´s analogy is questionable. The violent conflicts characteristic of the beginning of the XXth century are, by and large, overcome in to-day Spain.

7. Davie, G. (2002), Europe: The Exceptional Case. Parameters of Faith in the Modern World, Darton, Longman and Todd Ltd.; Taylor, Ch. (2007), A Secular Age, Harvard University Press.

8. González-Ferrer, A. & Cebolla-Boado, H. (2008), La Política de Inmigración en España (2000-2007). De la gestión de flujos a la integración de los inmigrantes, Centro de Estudios Políticos y Constitucionales, Madrid.

9. Cortés, V. (2009) "Hacia el primer colegio musulmán de España", El Pais.

10. A state religion model is not always accompanied by a confessional model of education. Consider the United Kingdom, where the educational model is, by and large, multicultural.

11. Alternatively, Torreblanca defines Spain as semi-confessional, in Torreblanca, J. "Laicidad y religión en el sistema educativo español." Revista Internacional de Filosofía Política (2004): 47–60. However,

this does neither account for the processual character of the Spanish "approach" nor for the other "half" of it.

12. Martínez-Torrón argues that "religion has ceased to be, for the first time in many centuries, a source of social and political conflict", in ´School and Religion in Spain´ (2005), op. cit., p. 134. If we interpret "conflict" restrictively, namely as violent conflict, then Martínez-Torrón is right. However, one of our aims is to convey the idea that the Spanish "constellation" is not devoid of meaningful tensions and conflicts with respect to the proper role of religion in the public sphere and educational system.

13. For an alternative classification, see Evans, C. (2008), ´Religious education in public schools: an International Human Rights Perspective´, Human Rights Law Review, 8 (3): 449-473.

14. S. Ferrari (2008), "State regulation of religion in the European democracies: the decline of the old pattern", in G. Motzkin and Y. Fischer (eds.), Religion and Democracy in Contemporary Europe, Alliance Publishing Trust, p. 109

15. We distinguish between secularism as an ideology and secularization as an historical movement: the former is a view inimical to religion, while the latter refers to a process whereby religion loses its hold over politics and law, without being anti-religious per se.

16. Manuel, P. (2002) "Religion and Politics in Iberia: Clericalism, Anti-clericalism and Democratization in Portugal and Spain" in Jelen, T. G. and Wilcox, C. (2006) (eds) Religion and politics in comparative perspective: the one, the few, and the many, Cambridge University Press, pp. 123-125.

17. See also Glenn, C. L. (1999) "Character-building and freedom in education", European Journal for Education Law and Policy 2, pp. 125–144.

18. On laïcité, see especially Roy, O. (2005), La laïcité face à l'islam, Paris, Stock; Laborde, C. (2008) Critical Republicanism: The Hijab Controversy and Political Philosophy, Oxford University Press; Laborde, C. (2010), Français, encore un effort pour être républicains, Seuil.

19. Gauchet, M. (2001) La réligion dans la démocratie: parcours de la laicité (Romanian translation), Humanitas.

20. Laïcité refers to a specific version of civic republicanism. We can distinguish it from civil liberalism which puts more emphasis on individual liberty. For civic liberalism, see Levison, M. (1999), The Demands of Liberal Education, Oxford University Press.

21. The place of religion in the educational process in France is currently under reform. See Debray, R. (2002), 'L'enseignement du fait religieux dans l'école laïque', a report ordered by the ministry of national education, F. Lang, available at: http://lesrapports.ladocumentationfrancaise.fr/BRP/024000544/0000.pdf.

22. Parekh, B. (2000), Rethinking Multiculturalism: Cultural Diversity and Political Theory, Macmillan; Kymlicka, W. (1995) Multicultural Citizenship, Oxford University Press; Modood, T. (2005), Multicultural Politics: Racism, Ethnicity and Muslims in Britain, Edinburgh University Press; Tully, J. (1995), Strange Multiplicity: Constitutionalism In An Age of Diversity, Cambridge University Press.

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23. For a critique of multiculturalism from the perspective of education, see Macedo S. (2000), Diversity and Distrust; Civic Education in a Multicultural Democracy, Harvard University Press; Joppke, C. (2004) 'The retreat of multiculturalism in the liberal state: theory and policy', British Journal of Sociology, 55(2), pp. 237–257.

24. On positive secularity in the Spanish context, see inter alia R. Díaz-Salazar, (2008) España laica: ciudadanía plural y convivencia nacional Madrid: Espasa, and the interesting debate contained in Navarro-Valls, R. And Ruiz Miguel, A. (2008), Laicismo y Constitución, Ed. Fundación Coloquio Jurídico Europeo, Madrid. See Ungureanu, C. (2008) ´The Contested Relation between Religion and Democracy: towards a "discursive" approach?´, European Journal of Political Theory, 7, 2009, pp. 405-429

25. Democragraphically, the membership to the Catholic Church is approximately 73% (Cf. Centre of Sociological Investigations, October Barometer, 2010 available at: http://datos.cis.es/pdf/Es2847mar_A.pdf, 2010). Around 28% Spaniards declare that they do not belong to any religious community, 2.3% declare themselves Protestants, Christian Orthodoxies or belonging to other Christian denominations; 2.2% declare themselves as Muslims, and 0.4 to Eastern religions or other non-Christian denominations. From those declaring themselves Catholic, 37.2% attend to religious services only on special holidays or less often and 28.3 never attend religious services (cf. ESS, 2008). 7% of the population living in Spain is Muslim (but they are not necessarily nationals) (see Bravo, F. (2010) "Islam in Spain : Euro-Islam: News and Analysis on Islam in Europe and North America", available at http://www.euro-islam.info/2010/03/08/islam-in-spain/)

26. Martínez-Torrón, "Religious Freedom and Democratic Change in Spain", op. cit.; Cuenca Toribio, J. M. (1985), Relaciones Iglesia-Estado en la España contemporánea: 1833-1985, Madrid; Díaz-Salazar, R., (2008) España laica: ciudadanía plural y convivencia nacional, Madrid: Espasa.

27. Linz, J. and Stepan, A., Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe, The Johns Hopkins University Press, pp. 61, 87-115.

28. The Spanish Constitution (official translation) is available at: http://www.senado.es/constitu_i/index.html. Art 16 states:

    (1) Freedom of ideology, religion and worship of individuals and communities is guaranteed, with no other restriction on their expression than may be necessary to maintain public order as protected by law

    (2) No one may be compelled to make statements regarding his or her ideology, religion or beliefs

    (3) No religion shall have a state character." Furthermore, art. 14 provides: "Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance".

29. For more comprehensive analysis of these principles, see Martínez-Torrón, "Religious Freedom and Democratic Change in Spain", op. cit.; Amoros, J.J. (1984), La libertad religiosa en la Constitucion española de 1978, Madrid.

30. Spain has also subscribed the International Convent on Civil and Political Rights (Article 18.4), the ECHR (Protocol Article 9 and 1.2) and the International Convent on Economic, Social and Cultural

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Rights (Article 13.3) which protect religious freedom and parents´ right to educate children according to their religious or non-religious convictions

31. "Instrumento de Ratificación del Acuerdo entre el Estado español y la Santa Sede sobre Enseñanza y Asuntos Culturales, firmado en la Ciudad del Vaticano el 3 de enero de 1979. Boletín Oficial del Estado (BOE) núm, 300; Ibán, I. (2003) "Concordats in the European Union: a Relic From the Past or a Valid Instrument for the XXI Century?", in Canon Law Consultation and Consotalation. Monsignor W. Onclin Chair 2003, Faculteit Kerkelijk Recht Katholic Universiteit Leuven, Vitgverij Peeters, Leuven, pp. 99-157.

32. (1980b), Ley Orgánica 7/1980, de 5 de julio, de Libertad Religiosa. Boletín Oficial del Estado (BOE) núm, 177 (LOLR)

33. (2006b), Ley Orgánica 2/2006, de 3 de mayo, de Educación. Boletín Oficial del Estado (BOE) núm, 106. (LOE). Other Ordinary Laws and Royal Decrees related to the educational system are "derived" from the LOE.

34. Section 27.3 of the Constitution guarantees the right of the parents to educate their children according to their moral and religious convictions. The Spanish Constitutional Court decided in 1981 that Section 27.3 should be implemented in two ways: 1) through the right of choosing the school and 2) through confessional religious instruction in public-funded schools. See Tribunal Constitucional de España (Constitutional Court of Spain) Sentencia núm. 5/1981 of 13 February. Boletín Oficial del Estado (BOE) supplement to num 47. This decision was strongly contested on the basis of the argument that the Constitution did not necessarily support confessional religious teaching in public-funded schools. The critics further argued that the confessional character of religious instruction in the educational system was derived from the Concordat with the Holy See, which was negotiated before the adoption of the Constitution. The Concordat remains up to this day a bone of contention between the main political forces in Spain.

35. Real Decreto 1631/2006, de 29 de diciembre, Boletín Oficial del Estado (BOE) núm, 5.; (2006a), Real Decreto 1513/2006, de 7 de diciembre, Boletín Oficial del Estado (BOE) núm, 293.

36. (1992a), Ley 26/1992, Boletín Oficial del Estado (BOE) núm, 272; (1992b), Ley 25/1992, Boletín Oficial del Estado (BOE) núm, 272; (1992c), Ley 24/1992, Boletín Oficial del Estado (BOE) núm, 272.

37. Orden de 9 de abril de 1981, Boletín Oficial del Estado (BOE) núm, 95; (1993b), ´Orden de 28 de junio de 1993´, Boletín Oficial del Estado (BOE) núm, 160; (1996b), Orden de 11 de Enero de 1996, Boletín Oficial del Estado (BOE) núm, 16.

38. (1996a), Resolución de 23 de Abril de 1996, Boletín Oficial del Estado (BOE) núm, 108

39. Martínez-Torrón, Separatismo y cooperación en los acuerdos del Estado con las minorías re- ligiosas, Ed. Comares, Compares, Granda, 1994; Estado y religión en la Constitución Española y en la Constitución Europea (ed.), Ed. Comares, Granada 2006.; Rodríguez-Moya, A. (2009), 'Libertad religiosa y enseñanza de la religión: Especial atención al caso islámico', Revista General de Derecho Canónico y Derecho Eclesiástico del Estado, 20, pp. 1-20; Lorenzo, P., and Peña, M. T. (2004), 'La Enseñanza Religiosa Islámica', in: Motilla A. (ed.), Los Musulmanes en España: libertad religiosa e identidad cultural, Trotta, Madrid, pp. 249-79.

40. Jiménez-Aibar, I. (2004), El Islam en España: aspectos institucionales de su estatuto jurídico. Berrizoar, Navarra Gráfica, Navarra.

41. Unión de Comunidades Islámicas de España

42. Federación Española de Entidades Religiosas Islámicas

43. Fernández-Coronado, A. (1995), Estado y Confesiones Religiosas: Un Nuevo Modelo de Relación (Los Pactos con Las Confesiones: Leyes 24, 25 y 26) (1st ed.), Civitas Ediciones, S.L., Madrid; Jiménez-Aibar, op.cit.

44. Own calculation based on data from Oficina de Estadística del Ministerio de Educación (Statistics Office of the Ministry of Education) (2011), Las cifras de la Educación en España. Estadísticas e indicadores (2008-2009), Ministerio de Educación y Ciencia, Madrid.

45. This estimation is illustrative and not completely precise. We combined official data from the Statistics Office of the Ministry of Education on pupils attending public, private concerted and private-non concerted schools for academic year 2008-2009 and data published by the General Council on Catholic Education (Servicio de Estadística y Archivos del Consejo General de la Educación Católica) on pupils enrolled in Catholic schools in 2009-2010.

46. Spain is divided politically in 17 self-governed regions called Autonomous Communities.

47. According to data from the Spanish Federation of Islamic Religious Entities (Federación Española de Entidades Religiosas Islámicas, FEERI) URL: http://feeri.eu/; the Spanish Union of Islamic Communities (Unión de Comunidades Islámicas de España, UCIDE) URL: http://es.ucide.org/home/; the Spanish Federation of Jewish Communities (Federación de Comunidades Judías de España, FCJE) URL: http://www.fcje.org/; and the Spanish Federation of Protestant Religious Entities (Federación Española de Entidades Religiosas Evangélicas, FEERE) URL: http://www.ferede.org

48. Spanish Islamic Commission (Comisión Islámica de España, CIE)

49. Cortés, V. (2009), ´Hacia el primer colegio musulmán de España´, El País

50. Royal decree 806/1993 May 28 (Real Decreto 806/1993 de 28 mayo) regulates foreign schools established in Spain. Lorenzo and Peña, op. cit.

51. The Royal Decrees 1513/2006 and 1631/2006 establishes a minimum of criteria for the contents of primary and secondary education. The Ministry of Education rules 55% of the schooling schedule in the A.A. C.C. with a co-official language and 65% in those without a co-official language. The minimum hours of religious instruction for each level is 105 hours in primary education; 140 in the first three courses of secondary school and, 35 in the fourth course of secondary school. Parents should declare at the beginning of each period if they wish or not their children attend the different religious courses on offer at the school. See 2006a, 2007, op. cit.

52. Royal Decree 1631/2006, Second additional provision. Teachings of religion. Art. 6 b) Ibid.

53. Royal Decree 1513/2006, First Additional Provision and Royal Decree 1631/2006, Second additional provision.

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54. Consejo Escolar del Estado (Nacional School Council) (2010), Informe sobre el Estado y Situación del Sistema Educativo. Curso 2007/2008, Ministerio de Educación, Madrid.

55. 1979, op. cit; LOE Second Additional Order 2006, op. cit.

56. Royal Decree 1513/2006, First Additional Provision, and Royal Decree 1631/2006

57. Consejo Escolar del Estado (State's School Council), op, cit.

58. Ibid.

59. However, parents decide if children participate in additional religious activities or not.

60. Cf. Art. 84.9. The enrolment of a pupil in a public or a public funded private school will imply respect to its educational project, without prejudice to the rights granted to students and their families in the laws (…) Ibid; Consejo Escolar del Estado (National School Council) (2010), 'La Enseñanza de la Religión', in: Consejo Escolar del Estado, Informe sobre el Estado y Situación del Sistema Educativo. Curso 2007/2008, Ministerio de Educación, Madrid

61. The composition of the school's Council is plural. It is made of the school's director, a representative from the municipality, a group of teachers' representatives, a group of parents' representatives, a representative of the administrative staff of the school, etc.

62. 1979, op.cit.

63. Ibid, Art. 7.

64. Ibid; Lorenzo and Peña, op. cit.

65. In 1980 the government approved a provision with "experimental character" to regulate teaching of "several Churches, denominations or religious communities". See the introductory text of (1980a), Orden de 16 de julio de 1980 sobre la enseñanza de la Religión y Moral de diversas Iglesias, confesiones o comunidades en Educación Preescolar y Educación General Básica. Boletín Oficial del Estado (BOE) núm, 173. In this context, the Jewish community published the curriculum of Jewish instruction for basic education in 1981. See 1981, op. cit.

66. (1993b), op.cit.

67. (1996a), op.cit; see also Planet, A. I. (2005), ´Islam y Escuela´, in García, B. and M. Berriane, M. (eds.), Atlas de la inmigración marroquí en España. Taller de Estudios Internacionales Mediterráneos, Madrid.

68. 1996a, 1996b, op.cit.

69. LOE Second Additional Order 2006, op. cit.; Laws 24/1992, 25/1992 and 26/1992 op. cit. Royal Decree 1513/2006, First Additional Provision, Royal Decree 1631/2006, Second additional provision (Teachings of religion. Art. 4. and 5)

70. "Pluralismo y Convivencia" (2010), Recursos didácticos por confesiones, Pluralismo y Convivencia, available at: http://www.pluralismoyconvivencia.es/recursos_didacticos/confesiones/evangelicos

71. Bravo, F. (2010), ´Islam in Spain: Euro-Islam: News and Analysis on Islam in Europe and North America´ available at: http://www.euro-islam.info/2010/03/08/islam-in-spain/

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72. Rodríguez-Moya, op.cit. p. 16

73. Planet, op. cit.

74. Laws 24/1992, 25/1992 and 26/1992 Art. 10.1., and 1992a, 1992b, 1992c, op. cit.

75. See section below on religious symbols in public schools

76. Ibidem

77. Ibidem. See also note 11, supra

78. Motilla, A. (2004a), 'La Libertad de Vestimenta. El Velo Islámico', in: Motilla A. (Ed.), Los Musulmanes en España: libertad religiosa e identidad cultural, Trotta, Madrid, pp. 107-35.

79. Alvarez, P., ´Najwa vuelve a clase en un instituto cercano al que no la admitió con "hiyab"´, El País, 28 April 2010

80. Obelleiro, P., ´La Xunta respalda al colegio que sanciona a una niña por usar velo´, El País, 10 February 2011; Jimenez Barca, A., La polémica en un pañuelo´ El País, 10 February 2008.

81. Tribunal Superior de Justicia de Castilla y León (High Court of Castile and Leon). (2009). Sentence number. 3250 of December 14. Centro de Documentación Judicial.

82. Ibid, para 4.6.

83. Para 4.4

84. Ibidem

85. Ibidem

86. Cf. the Spanish Constitutional Court Ruling, STC 46/2001, of 15 February (e.g. para 4). The concept of positive secularism has been a constant of the jurisprudence of the Constitutional Court. Most recently, see STC 51/2011, of 14 April (BOE n. 111, 10 May 2011).

87. McGoldrick, D. (2006), Human Rights and Religion: The Islamic Headscarf Debate in Europe   Hart Publications: Oxford University Press. We do not want to suggest that the stand of the Court in cases involving Islam is completely one-sided or problematic. For instance, in Eur. Ct. H. R. (2d section), Ahmet Arslan and Others v. Turkey, 23 February 2010 (not final), the Court upheld the right of women to wear the headscarf in the street.

88. The European "approach", as conveyed by the jurisprudence of the ECtHR, the 2007 Toledo Guiding Principles or the European Union "system" does not aim to a full-fledged model of "religious education", but it is by definition minimal. Part of the "grammar" of the European "approach" is the recognition of the legitimacy of the European plurality of models (of "religious education").

89. See also S. Ferrari´s parallel argument with respect to the state models in Europe: for him, we assist at a "convergence from extreme positions towards the center is taking place in Europe, where the extremes are church-of-state systems on the one hand and rigid separation on the other." S. Ferrari, 'State regulation of religion in the European democracies: the decline of the old pattern', in G. Motzkin and Y. Fischer (eds.) (2008), Religion and Democracy in Contemporary Europe, (Alliance Publishing Trust, p. 109.

90. See Ungureanu, C. ´Toward a European "approach" to religion?´ in Zucca, L. and Ungureanu, C. Law, Religion and State in the New Europe: Debates and Dilemmas, Cambridge University Press, 2011 (forthcoming). The "Toledo Guiding Principles on Teaching about

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Religion and Beliefs in Public Schools" are available at: http://www.osce.org/odihr/29154. See Martínez-Torrón Principios de la OSCE para la enseñanza sobre las religiones y creencias en las escuelas públicas, en "Revista General de Derecho Canónico y Derecho Eclesiástico del Estado" 16 (2008), pp. 1-7 (www.iustel.com).

91. Eur. Ct. H. R. (Grand Chamber), Gorzelik and others v. Poland, 17 February 2004, para. 92. For a broad perspective on religion and education law, see Ahdar, R. and Leigh, I. (2005), Religious Freedom in the Liberal State, Oxford Univ. Press, 2005; Kuyk, E., Jensen, R. Lankshear, D, Löh Manna, E., Schreiner, P. (eds.) (2007), Religious Education in Europe, IKO – ICCS, Oslo, and Jackson, R., S. Miedema, Weisse, W., Willaime, J.-P. (eds.) (2007), Religion and Education in Europe, Waxmann, Münster.

92. See the Eur. Ct. H. R. (Grand Chamber), Folgerø and others v. Norway, 29 June 2007 and Hasan and Eylem Zengin v. Turkey, 9 October 2007.

93. The Lisbon Treaty is available at: http://europa.eu/lisbon_treaty/index_en.htm

94. A positive secularist approach does not aim to sever the link to the Catholic Church, given the importance of Catholicism for the Spanish history and identity. However, it attempts to combine it with an open and hospitable attitude to religious and non-religious pluralism.

95. Martínez-Torrón, J., Navarro-Valls, R. and Mantecón, J. (eds) (2009), La libertad religiosa y su regulación legal. La Ley Orgánica de Libertad Religiosa, Ed. Iustel, Madrid.

96. Currently, establishing a religious community is decided without clear guidelines by the Adviser Commission on Religious Liberty - a collegiate body dependent on the Ministry of Justice. This body has representatives of several Ministries (Treasury, Education, Health, Labour and Security), central government, representatives from already recognized well-rooted religious communities in addition to well-recognized experts on religious issues.

97. Cembrero, I. and Ceberio, M., ´Ni crucifijos ni funerales católicos´, El País, Madrid. 13 June 2010; Garea, F., ´Zapatero se escuda en la falta de consenso para paralizar la ley de libertad religiosa´ El País, 10 November 2010.

Inclusive Neutrality in the Classroom

10

Wibren van der Burg[1]

Introduction

Both in law and in political philosophy, the idea of a neutral state is an important principle. It is rarely noticed, however, that there are important differences in how the principle is interpreted in each of the two disciplines.[2] Most (though certainly not all) liberal philosophers consider state neutrality to be a foundational principle, whereas most lawyers see it as merely an interstitial principle, derived from principles like non-discrimination, freedom of religion and separation of state and church. For most philosophers, neutrality is a criterion for the justification for laws and policies, whereas in law, the focus is usually on the content of those laws and policies themselves. In law, neutrality is often a criterion for the treatment of religious groups and institutionalized religions, whereas in philosophy, the focus is usually on individuals. In particular, philosophers have used neutrality as an explicit, clearly formulated, foundational principle upon which substantive elements of a liberal political philosophy rest, whereas in law it is usually a largely implicit, highly contextual and variable principle with an unclear and contested meaning. Finally, in law, neutrality's domain of application is usually restricted to religion and similar philosophical doctrines such as humanism, whereas philosophers also apply the principle to cultures, lifestyles and other views of the good life. Consequently, appeals to neutrality have also been made in philosophical debates about issues that arise in a multicultural society and about the legal enforcement of morals.

In this light, we may wonder whether philosophers and lawyers may have a fruitful discussion on neutrality at all. Indeed, one might reasonably ask oneself: are they not talking about completely different ideas under the same name? Before jumping to that conclusion, we should first try to explore their different positions more thoroughly. Perhaps, in some respects, legal doctrines on neutrality can be clarified and improved with the help of philosophical insights (and vice versa). In my view, there are good arguments for why legal doctrines of neutrality are, in general, to be preferred to philosophical doctrines, especially because of their contextual, variable and interstitial character. Nevertheless, philosophical analysis might assist lawyers in better understanding and improving the doctrine of neutrality, as it is understood in law, in some respects. In this paper I will make three interrelated points, first about the domain of application of neutrality, second about the various versions of neutrality and finally about the implications for public education.[3] I have structured my contribution around the following theses.

State neutrality should be broadly interpreted to refer not only to religion and belief, but to views of the good life, which also includes culture- and identity-connected lifestyles.

In legal doctrine, neutrality is usually only applied to religion and beliefs that are very similar to religion, such as humanism. Philosophers such as Robert Nozick, John Rawls, Ronald Dworkin and Will Kymlicka, however, apply neutrality not merely to religion, but to 'conceptions of the good life' or to so-called 'comprehensive doctrines'.[4] Initially in the philosophical debates, the focus was also narrowly on religion, but soon they broadened to include all controversial views of the good life and practices associated with those views. This broader interpretation makes neutrality relevant to many issues that arise in a multicultural society and to debates on the legal enforcement of morals. From my perspective, law might profit from philosophy here, as there are good reasons for this wider application.

The main argument is based on the equality principle. In a neutral and secular state, the law can and should give special protection or respect to religion but there must be a good argument for it to do so. This cannot be the argument that the state believes that religion as such is of value, nor can it be that it holds that one specific religion is the true one. This kind of reasoning is simply not available in a liberal democratic state because it would violate religious freedom (including the freedom of citizens not to believe in a religion) and equality. The state, therefore, must treat religion as worthy of protection or respect because of the value of religion for some of its citizens. The argument should be, then, that in order to respect those citizens as equals, the state must sometimes take their religion into account. This argument is based on two presuppositions.[5] First, that religion is, for some citizens, a special aspect of their life because of the strong commitments associated with it that are closely connected with an individual's deep personal identity. Second, that these strong commitments may often be the grounds for persecution, discrimination or unfair treatment by the state or by other citizens and that, therefore, we need special institutional safeguards to protect citizens in their religious identity. Examples of these special institutional safeguards are, of course, the freedom of religion, and the prohibition of discrimination on the basis of religion.

If this is the argument for providing special protection to religion, then this same argument should be applied to all dimensions of human life that are sufficiently similar to religion in those two respects. This holds true, therefore, for personal beliefs that directly resemble religion, such as humanism. Nowadays, this idea is familiar in most liberal democracies – although

often not fully implemented.[6] However, the implications of the equality principle do not stop there. We should also treat other deep commitments similar to those of religion in the same way. These deep commitments may also include dimensions of personal identity other than a person's beliefs. Other important aspects of personal identity are cultural identities, such as language and clothing customs, and sexual identities, such as a bi- or homosexual orientation. Moreover, for both of these categories, it is true that they often give rise to persecution, discrimination and unfair treatment, both by the state and by other citizens.[7]

A second, auxiliary argument is that there is often no clear boundary between religion, culture, and other deep commitments. Not only are these commitments frequently seen as connected in the eyes of the believer, for the state it is often impossible to distinguish objectively whether something is a cultural or a religious practice, or both. A good example of this phenomenon is the use of the headscarf with its mixture of religious, cultural, moral and political meanings.[8]

There are two basic versions of state neutrality: inclusive and exclusive. Inclusive neutrality can be subdivided into proportional and compensatory neutrality.

We may distinguish between two main versions of neutrality.[9] On the one hand, there is exclusive neutrality, which contends that the state should be completely blind to religious and cultural differences, and every religious or cultural expression, both in terms of arguments, organizations and symbols, should be excluded from the public sphere. Inclusive neutrality, on the other hand, maintains that, both in political discussions and in laws and government policies, there is room to take account of religious and cultural differences. Citizens are free to express and organize themselves in the public sphere on a religious or cultural basis and the state supports some religious and cultural activities.

We may find this distinction between inclusive and exclusive neutrality under many different labels in the literature. Joe Carens uses the term evenhandedness in contrast with neutrality of grounds.[10] Monsma and Soper distinguish the structurally pluralist model from strict separation of state and church.[11] We may also discern exclusive neutrality in the currently dominant inter-pretation of the French laïcité, and inclusive neutrality in a more moderate interpretation.[12] I choose the broader distinction between inclusive and exclusive neutrality which I have introduced here, because these other formula usually only describe some aspects of the relation between state and religion and are restricted to religious and similar world views.

Inclusive neutrality may be further subdivided into proportional neutrality and compensatory neutrality. Proportional neutrality takes account of different comprehensive views by making representation of minority groups or state support for their culture proportional to their size. It requires that every group get representation in advisory councils and policy boards or funding for schools, broadcasting unions, and so on, in accordance with its share of the population. Compensatory neutrality requires that a smaller group get more than its proportional share in order to ensure that the members of the group have equal chances to participate in society and enjoy the good life they prefer. It aims to level the playing field and accommodate special needs. Examples of compensatory neutrality are additional financial subsidies for minority cultures, for example, for books in Frisian, quality seats for minorities in advisory boards or local parliaments, support for gay and lesbian organizations, and a temporary subsidy for building mosques and Hindu temples in order to compensate new religious minorities for their disadvantaged starting position.[13] As the latter examples shows, even though compen-

satory neutrality may sometimes be theoretically justified, it may often be highly controversial politically.

Debates on church-state relations are often presented as wholesale choices between one of Soper and Monsma's three models: the established church, structural pluralism or strict separation of church and state (usually identified with the French laïcité).[14] The underlying idea is that a state can only follow one model, and the question is which model is best. I believe that this is a very unproductive way of structuring the debate. What we need, instead, is a more contextual approach, which is open to variation.

The distinction between the various versions of neutrality offers such a context-sensitive framework. With this neutrality framework, the state need not make a general choice between the various versions of neutrality, nor would it be required to make a declaration as to which one it considers best or universally valid. Instead, for each specific issue the state would be required to carefully weigh which version provides the most adequate answer to the issue confronting it.

A theory of neutrality should be context-sensitive in various ways. First, it should be sensitive with regard to the national and local context. In situations with an almost homogeneous majority belonging to one dominant religion (such as France or Turkey in the early twentieth century), we may need another approach than in contexts with a plurality of minorities (such as in the Netherlands). In the first context, there may be stronger arguments for exclusive neutrality than in the latter context. Second, it should be sensitive with regard to the specific issue at hand. For example, it makes perfect sense to prefer exclusive neutrality with regard to religious symbols in the classroom and the courtroom, because it is usually almost impossible to construct inclusive religious symbols. Furthermore, it is perfectly legitimate to combine this position with inclusive neutrality with regard to the content of education, and with regard to dress codes for students and (depending on the circumstances) with inclusive or exclusive neutrality with regard to dress codes for teachers. Each specific issue should be judged on its merits in light of an ideal of reasonable accommodation. That may mean that a state has good grounds for choosing different versions of neutrality when making decisions regarding different issues.

There are good reasons why, in general, public education should be inclusive.

In various publications, I have argued that inclusive neutrality is, in general, to be regarded as the philosophical and legal default position.[15] Ronald Dworkin's justification of neutrality provides a good starting point. Dworkin starts with the basic principle that the government should treat its citizens with equal concern and respect.[16] In a liberal interpretation, this ideal implies that autonomous citizens should have equal opportunities to live their lives according to their own views of life and in line with their deep felt commitments and identities.[17] Equal concern and respect for autonomous citizens means that the state – especially in its modern form, the welfare state – should not only refrain from interfering with the exercise of this freedom, but it should also equally protect and, if necessary, support it. Requiring a citizen to leave her religious, cultural or sexual identity at home when entering the public sphere is, prima facie, not consistent with this ideal.[18]

Democracy provides a second argument for preferring inclusive neutrality: citizens should not be asked to completely ignore their religious views when participating in public debates as their religious views are often intrinsically interwoven with their political views and, as such, a separation of the two can only be artificial. A third argument is based on social cohesion: it is plausible that citizens who can fully participate in the public sphere and whose cultural, religious and sexual identity is officially recognized will feel more respected as full members of society and, therefore, will more easily remain or become integrated members of society. Moreover, if specific identities are not excluded and privatized but, instead, open to public debate and reciprocal criticism, this may also allow for possibilities of critical revision of views and practices. Thus, instead of declaring these views and practices as out of order, which, in effect, may mean that they become immune to criticism, such views and practices can be opened up to substantive criticism in debates by fellow-citizens.

The Toledo guidelines provide an additional argument with regard to education. According to these guidelines, inclusive education on religions and beliefs is an essential part of a quality education. It will "foster democratic citizenship, promote understanding of societal diversity and, at the same time, enhance social cohesion."[19] We might even consider inclusive neutrality in the sphere of education to be a human rights requirement in line with the argument made by Jeroen Temperman.[20] Temperman argues that as children "should be prepared for a responsi-

ble life in a free and tolerant society where human rights are respected," neutral education on the issue of religious and non-religious beliefs is a duty of the state.

Even if inclusive neutrality is the default position, it is not always possible. A good example here is a school prayer. We could envision a school prayer that is inclusive. The teacher might pray to God, to Allah, to the Eternal, and to a plurality of Hindi gods, and then might add that those who do not believe in any gods at all might be simply silent for a moment. That might be an inclusive formula, but it would hardly constitute an acceptable prayer for most of the students. The same holds true with respect to religious symbols. We might think of a classroom where both a crucifix and a simple cross (for many Protestants, a crucifix is certainly not a symbol of their religion) hang alongside religious symbols of other religions and with cultural symbols. Yet, this would likely be neither acceptable for many orthodox believers, nor would it be for many non-believers. Indeed, they would still be required to learn in the presence of religious symbols that might offend their sensibilities.

In situations like the foregoing, the only truly neutral alternative is exclusive neutrality: no religious prayers, symbols or rituals at all. A crucifix in the classroom or a common school prayer are, therefore, clear violations of neutrality.21 Both for Protestants, Jews and Muslims, as well as for atheists, they can be offensive signs that their views are not included in the supposedly shared values that these symbols or rituals are supposed to embody. Exclusive neutrality is then the only approach that reasonably accommodates all students. Therefore, we may conclude that public education should be based solely on exclusive neutrality with regard to issues for which inclusive neutrality is not possible.

The Dutch ideal of active pluralism for public education should be interpreted more broadly than including merely religion and belief; active pluralism should also include cultural diversity and diversity with regard to sexual orientation.

This idea of inclusive neutrality in the classroom corresponds with the ideal of active pluralism of the Dutch public school system. Active pluralism, as it is commonly understood in Dutch policy documents, is the idea that public schools should pay attention to diversity in religious and ethical views. An active dialogue rather than confrontation should be the leading principle. Therefore, we must educate students about the various religions and fundamental views of life and teach them how to understand religious differences and deal with them in a democratic, respectful way.

Similar arguments as arise with respect to religious diversity in the classroom can be made in support of paying attention in a neutral way to cultural diversity and diversity in sexual orientation. Indeed, in my view, active pluralism should address all major dimensions of neutrality with regard to deep personal commitments. We should educate students adequately and this means also preparing them for a society which is diverse in both religious and cultural respects, as well as with regard to

lifestyles, sexual orientation and gender. Therefore, active pluralism includes in its purview not only religion, but also cultural diversity and diversity with regard to sexual orientation and gender.

Is this inclusive neutrality only proportional or is there a place for compensatory neutrality in the classroom as well? In order to answer that question, we must understand the justification for the latter: it is required to level the playing field for minorities who are strongly disadvantaged or to accommodate their special needs. One important disadvantage minorities can confront is the existence of strong prejudices and discrimination against them; and it is especially with regard to fighting this kind of prejudice that education can and should play an important role. Therefore, in order to decide whether there is a place for compensatory neutrality in a given classroom, it will be necessary to analyze whether there are strong prejudices and patterns of discrimination in that society with regard to the specific minority group. In most European societies, there are at least three or four groups that stand out in this respect: the religious minorities of Jews and Muslims, the cultural minority of the Roma, and the sexual minorities of gays, lesbians and bisexuals. This means that in education programs aiming to realize active pluralism, special attention should be given to promoting knowledge about and attitudes of tolerance and acceptance towards these minorities.

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If we take the arguments of Ronald Dworkin and Jeroen Temperman seriously, there is a public duty as well as a right of children to be taught in line with the ideal of active pluralism. This is a requirement both because of equal concern and respect and because of the right to an adequate education. We should also take seriously the philosophical insight that active pluralism must be applied not only to religious and similar convictions, but also to cultures, and to other deeply held commitments connected with personal identity. Therefore, we may conclude that the implementation of active pluralism should also pay attention to cultural diversity and to diversity in gender and sexual orientation, and that this attention should be guided by the ideal of neutrality.

If active pluralism is the standard of good quality education in a pluralist society, this standard does not only apply to public schools, but to all schools. After all, children in private schools also need to be prepared for living in a pluralist society, and for them it is also necessary to "foster democratic citizenship, promote understanding of societal diversity and, at the same time, enhance social cohesion," as the Toledo Guidelines phrase it. Therefore, we should, at least prima facie, accept active pluralism as a guiding ideal for all forms of education.

Of course, this claim may conflict with competing claims to freedom of religion and freedom of education. However, we should not overemphasize the potential for conflict. At least in the Netherlands, most publicly financed private schools are either non-denominational (they are, e.g., based on the ideas of Rudolf Steiner and Maria Montessori) or belong to mainstream Protestantism or Catholicism. Most of these schools already practice something like active pluralism; they provide information about various religions and cultures in a respectful, open way and pay attention to various religious festivals. Some schools also implement an open confessional identity through school prayers and religious education in the tradition of their school, but usually they practice it in an inclusive way, in which humanist, Jewish, and Muslim children need not feel excluded. For those schools, there may be a tension between the educational ideal of active pluralism and their confessional identity, but for practical purposes, it seems that most of the implications of active pluralism can be largely integrated into their open confessional identity.

A real conflict may exist with regard to some 5 or 10 % of Dutch schools – those with a more orthodox identity. Most of these schools are orthodox Protestant; a tiny minority is orthodox Muslim or Jewish. In the case of these schools, the idea of a neutral education oriented towards the ideal of active pluralism clearly conflicts with the doctrinal beliefs central to these schools. For example, a neutral presentation of homosexual lifestyles as equal to traditional different-sex marriage would conflict with various religious orthodoxies.

At this stage, we should discern two aspects of active pluralism. On the one hand, the ideal requires the preparation of children for a pluralist society, by providing fair information about various cultures, religions and lifestyles, by promoting democratic virtues such as mutual respect and tolerance, and by combating prejudice. This part of the ideal can and should be made obligatory for all publicly financed schools, as it is simply a standard for good education. Freedom of education is not a license to spread hatred of other minorities or to withhold knowledge and capacities from pupils which are essential for living in a pluralist society. On the other hand, the ideal requires a neutral presentation of all cultures, religions and lifestyles. The line between neutral and fair may be thin, but there is a difference here. A fair presentation of alternative religious views need not conflict with a strong confessional identity. Confessional schools may still teach in light of their own religious beliefs, but they too have an obligation to provide their students with adequate information about the pluralist society and to prepare them for life in such a society. Moreover, each of the religions that are associated with religious schools also includes principles of respect and tolerance towards those who do not belong to the religion.

In the end, a conflict may, nevertheless, remain between the standard of active pluralism and the confessional identity of a school. There are no easy solutions for this conflict. However, in order to address the conflict adequately, we must first formulate it explicitly. In order to do this, the first step is to accept that active pluralism is a sound educational ideal not only for public schools but also for private schools, including schools with a religious identity. The next step is then to see how a reasonable accommodation of this ideal is possible within the context of the religious identity of the school.

Section 6

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Endnotes

1. Professor of Legal Philosophy, Erasmus School of Law, Erasmus University Rotterdam. Presentation at the Bruges Conference on 'Religion, Beliefs, Philosophical Convictions and Education - From Passive Toleration to Active Appreciation of Diversity', from 7 till 10 December 2010. I would like to thank Jeroen Temperman, Yasmine el-Messaoudi and Beth Spratt for their helpful suggestions and criticisms on a draft version of this paper.

2. I have elaborated those in Van der Burg 2010.

3. Another point which would merit a separate article is that the collectivist interpretation of legal doctrine and of some multiculturalist philosophers leading to forms of group rights and consociational democracy may no longer do justice to hybrid identifications among modern citizens; it may even artificially keep alive and reinforce outdated group identities. For a criticism along those lines, see Phillips 2007. One of the major challenges of systems characterized by consociational democracy, pluralist cooperation and inclusive neutrality is to deal with this problem.

4. Cf. Nozick 1974; Rawls 1971 and 1993; Dworkin 1985; Kymlicka 1989.

5. My argument here is inspired by the justification Ronald Dworkin provides for fundamental rights in his article 'Liberalism', in Dworkin 1985.

6. Jeroen Temperman's overview of state-religion relations (Temperman 2010a) shows that most countries violate the principle of neutrality at least in some minor respects. One of the issues on which many countries are negligent, is equal recognition of humanist and atheist citizens and organizations.

7. We might also be tempted to include gender here, as it is also central to personal identities and often gives rise to discrimination and unfair treatment. However, it seems to me that legal and political theory can better deal with gender discrimination directly on the basis of the equality principle and non-discrimination, rather than indirectly through the neutrality principle. Usually, gender discrimination is primarily an issue of unequal status of women as persons, whereas with the other categories considered, such as sexual orientation and religion, the focus of discrimination is more on lifestyles, practices and beliefs. In discussions of how the state should deal with lifestyles, practices and beliefs, neutrality is a more productive concept, whereas discrimination is a more adequate concept with regard to guaranteeing equal status. The two concepts are related, of course, and many discussions in the context of non-discrimination law may have parallels in the context of neutrality.

8. An interesting example is also the South African case of a Tamil girl wearing a nose stud. The Constitutional Court decided it was an expression of both religion and culture; it held that in that matter "culture and religion sing with the same voice". Cf. 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), at 60.

9. Van der Burg 2007 and 2009. In those publications, I regarded exclusive, inclusive (proportional) and compensatory neutrality as three separate versions. In light of discussions with Roland Pierik, I have revised my original division and now present compensatory neutrality as a subcategory of inclusive neutrality as it is merely one of the two defensible neutral ways to take views of the good life into account. See Van der Burg and Pierik (forthcoming).

10. Carens 2000.

11. Monsma and Soper 2009.

12. See Bauberot 1998, 131 who refers to the idea of a laïcité ouverte, which has various similarities with the idea of inclusive neutrality.

13. Another example might be the permission to wear a kirpan in school, where other knives are prohibited. See the Supreme Court of Canada in Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256 [Multani].

14. Monsma and Soper 2009.

15. Van der Burg 2007 and 2009, Van der Burg and Pierik (forthcoming)

16. Dworkin 1985. The Constitutional Court of South Africa has accepted the norm of equal concern and equal respect as a requirement of both the Constitution and the Equality Act. Cf. MEC for Education: Kwazulu-Natal and Others v Pillay at 103.

17. This means that I regard equality rather than freedom (of religion or otherwise) to be the primary basis for state neutrality. In most legal discussions, a strong emphasis is on religious freedom as the justification for state neutrality. In my view, this is a legitimate additional argument, which may be indirectly based on the principle of equal concern and respect, as religious freedom may be derived from this principle.

18. Cf. The Canadian Supreme Court in the Chamberlain case: "Religion is an integral aspect of people's lives, and cannot be left at the boardroom door." McLachlin, C.J. in Chamberlain v. Surrey School Board District 36 (2002), 221 D.L.R. (4th) 156 (SCC) at para 19.

19. Toledo Guiding Principles on Teaching about Religion and Beliefs in Public Schools, p. 76, Conclusion 1.

20. Temperman 2010b.

21. Cf. Van der Burg and Brom 1999 for a philosophical analysis with regard to the older debate on crucifixes in Germany.

Parental Rights and Educational Freedom

11

Svein Egil Vestre[1]

Parental Rights and Educational Freedom

Parents' right to decide what kind of education their children receive and their right to ensure religious and moral education in conformity with their own convictions, raise pressing questions in multicultural societies. The idea of parental custody may be seen as a "natural law" that is unrelated to time and place - parental responsibilities and rights can be seen as a natural consequence of the biological relationship between parents and children.

In recent times human rights conventions have been used to argue for and to legitimate parental rights. The Parliament in Norway in 1999 adopted a Human Rights Act. The following four conventions apply as superior to Norwegian law: (1) Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe 1950), (2) International Covenant on Economic, Social and Cultural Rights (UN 1966); (3) International Covenant on Civil and Political Rights (UN 1966); (4) Convention on the Rights of the Child (UN 1989). All four conventions assert the principle of parental rights.

Several human rights conventions are a mixture of (1) declaration of freedom (everyone has the right to freedom of thought, conscience, religion and expression), and (2) statements of rights combined with performance requirements: The International Covenant on Economic, Social and Cultural Rights (Art. 13) states such as: - The States Parties to the present Covenant recognize the right of everyone to education…primary education shall be compulsory and available free to all; …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 …

The complimentary principle here laid down requires an economic contribution from the state. We can argue that the right to basic education must also entail financial obligations for the state not only in relation to public schooling, but also in relation to the options that the law recognizes, i.e. private school or homeschooling. Otherwise it will seem inconsistent that the same convention both gives the right to free education and gives the parents a right to choose other training than the publicly organized.

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Conventions seem to put religious freedom in a separate class in relation to the choice of educational options. Freedom of religion and freedom of expression are in Norway constitutional rights independent of conventions. But constitutional provisions should be viewed in light of the European Convention on Human Rights (ECHR), Article 9 & 10. Thus, private schools or other forms of alternative education are rooted in both freedom of religion and freedom of expression. The Human Rights Convention states that freedom of expression should include not only the freedom to hold opinions, but also to receive and impart information and ideas without interference by public authority. Dissemination of information and ideas has always been a school issue.

In 2008 we got a statutory provision for a new mandatory subject (RPE) in Norwegian schools:

Religion, Philosophies of life and Ethics is an ordinary school subject that shall normally be attended by all pupils. Teaching in the subject shall not involve preaching.

The teaching in Religion, Philosophies of life and Ethics shall provide knowledge of Christianity, other world religions and philosophies of life, knowledge of the significance of Christianity as a cultural heritage and of ethical and philosophical topics.

The teaching in Religion, Philosophies of life and Ethics shall promote understanding, respect and the ability to carry out a dialogue between people with differing views concerning beliefs and philosophies of life.

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. (Ed.act §2-4)

The new mandatory subject and accompanying curriculum is particularly problematic in relation to parental custody. First, a limited exemption scheme has become a contentious issue. Secondly, the concept of preaching is problematic. It can be interpreted as a ban on intentional and active influence in religious and ethical context or requirement of so-called "neutral teaching". It is argued that the conventions require a neutral instruction if the subject is to be a common core for all without right of exemption; teaching the new subject is to be neutral - objective, critical and pluralistic - and not affect students in the direction of a particular faith or attitude. The condition for a religious subject without right of exemption or only limited exemption seems to be that the subject is communicated with no impact. This stands in contrast to the Norwegian school tradition in religious education (Christianity). The National Curriculum of 1939 suggests (p. 25): ... The teacher must always remember that what children learn in religious education, should be the basis for their faith and to rule their lives ... And in the NC of 1987

stated (p.102): ... Christian knowledge can in a special way help parents in the task of raising their children. The content of the subject is important for developing moral awareness and conduct, which is also a responsibility of the school. While the subject still represents a cultural and religious heritage, the students learning the subject, will receive guidance and help in clarifying questions of personal faith.

 The RPE-subject, in contrast, does not aim to assist parents in the upbringing of their children. Rather, the subject is assumed to be so neutral and pluralistic that it hardly gives answers if the parents should ask: what impact has the school for my child in relation to religious education?
The state might in the curriculum of the public school choose a neutral educational concept for common religious education. It is in this case an ideological choice. But the state's legitimate right to set academic requirements for private education should not be confused with ideological claims. To require that private schools and home education shall follow the public school's ideology as it is formulated in a national curriculum is, in my view, unreasonable and in violation of parental custody. - The spirit of the conventions is positive obligations in relation to parents' wishes for the education and upbringing of their children. Parents are interested in influencing the curriculum in accordance with their own beliefs. Parents' rights to educate in accordance with their own beliefs are not respected by the formula "objective, critical and pluralistic education". In the conventions for pro-

tection of Human Rights religious influence is seen as a positive right for parents and children, and not something they must be protected against.

When the convention speaks about compulsory education, this is to be understood as mandatory education for all, but it is not mandatory to attend a public school. The freedom to organize alternatives should to be observed. But it follows of the conventions that the state can set certain minimum standards for education. - The question of which national requirements that should apply to private schools and private home education, can easily result in difficult disputes. In the Norwegian Education Act of 1999 it is determined that the public school's mission statement, curriculum, and provisions on mandatory knowledge about "Religion, Philosophy of Life and Ethics (RPE)" shall also apply to private schools and training at home. For private schools and home education there is a "negative" reference to human rights conventions: - regulations issued pursuant thereto apply for the content of private primary and lower secondary education in the home insofar as the regulations do not violate Norway's obligations under international law (Ed.act § 2-13). - The phrase is perhaps chosen based on a desire to be as restrictive as possible to private schools and home education without coming in obvious conflict with the conventions.

The minimum requirements can, in my view, not be defined beyond the skills and general knowledge we need to act as citi-

zens in the society. - Skills in reading and writing, communicative competence, mathematical skills like calculations with Arabic numerals are basic; in addition students should have knowledge of key elements from history and civics. Or, alternatively, the requirements could be defined as a legal standard with regard to academic level or performance for private schools or home instruction to be recognized as equal to what is normally required in the public schools as measured by national exams or tests.

Generally, it is a policy goal in our society to put the citizens and their needs at the center. User-orientation is particularly relevant when it comes to health, social and educational services. Within these sectors an increasing number of complaints are reported. The issues apply to both qualitative aspects of services and individual legal protection against abuse of authority. In the field of education they will be most pronounced in elementary school because it has a compulsory character, and because the public in fact has a monopoly on provision of service.

In educational policy we can see two trends dominate the thinking:

I. Uniform schooling: - students in the local community should go in the same school, the local school should be a social and cultural meeting place for all. Schools have geographical criteria for recruitment of students. As for user orientation, they will primarily have to orient themselves towards the systems-

related instruments such as the school evaluation and complaint mechanisms.

II. Free choice of school: - with the emphasis on free school establishment and "competition" between schools for recruitment of students. Arrangements like this will need less institutionalized legal protection because users will have a major influence on how alternative schools get money. Free school election establishes a contractual basis for claims on defined benefits and mutual rights and obligations. Parent power is in the money and is not embedded in complaint mechanisms. - If we want to make parents more powerful than they are today, we can let the school-money follow the student to alternative education institutions.

Endnotes

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Islam and Democracy in Morocco and Algeria. What can we do?

Fouad Laroui

12

Introduction

Democracy's reputation has taken a severe beating in recent years in many areas around the globe—namely, in certain Arab and Islamic quarters. While in the past century, there has been no shortage of governmental and non-governmental opposition to democracy in practice, in theory, virtually every country on earth has proudly trumpeted support for this principle of popular sovereignty. Whether in Eastern Europe, Africa, or elsewhere, venal dictatorships and centralized one-party states have all referred to themselves as the "Democratic Republic of" their respective countries. Even Enver Hoxha—the Albanian Communist who was so hard-line that he returned from visiting Kim Il Sung's North Korea convinced that it was "dangerously implanted" with bourgeois revisionism—organized regular elections in which the people could, in theory, turn him out of power. To take one election during the last years of his reign as an example, some seven people did vote against him—but they were outweighed by the 2 million who approved of the "Paradise on Earth" that the dictator was establishing. To the north of this Eden lay the German Democratic Republic, for whose regime the presence of the sacred word in the state's name was sufficient proof of its virtue (certainly, compared to the mere German Federal Republic to the West). As the saying goes, hypocrisy is simply the homage that vice pays to virtue!

Now, however, it is evident that times have changed. On any visit to Algeria or Saudi Arabia, one can meet plenty of people who squarely reject democracy, whether in practice, or simply in name. In fact, there is no need to travel at all: turn on the television and watch Al-Jazeera, or any of the 250 satellite channels available to the Arab world, and before long you will see these kinds of pronouncements. I must add, however, that I believe Al-Jazeera is a quality network that is having success at promoting free speech in the Arab world. The problem is not with Al-Jazeera, but with some of the self-proclaimed "true Muslims" who appear on it regularly to air their points of view—thus taking advantage of the same freedom of speech that they themselves would abolish immediately were they to seize power!

The Strange Case of the FIS—And What It Teaches Us

In Algeria, attitudes toward democracy are clouded by the nearly schizophrenic relationship many people still have with France. To give just two examples, they hate France, but with so much passion that it seems like unrequited love, and they celebrate independence from France with not one, but two, national holidays, yet every year they apply for more and more visas to visit France. Algerians understand "democracy" only as "something that came ashore with French troops when they invaded in 1830." There is no use explaining that nineteenth-century French democracy was not exactly a paragon, even by the standards of its day; furthermore, even the relatively limited rights enjoyed by French citizens in 1830 were never granted to the indigenous population of Algeria.

For the two-thirds of the Algerian population that voted for the Front islamique de salut (FIS, or "Islamic Salvation Front") in 1991–92, democracy was indeed something foreign—and something French. The FIS had clearly identified the enemy as the "Hizb Fransa," the Party of France. Though there was no

such party on the ballot, FIS claimed to know exactly who its members were. First, all those in power were members of Hizb Fransa, as were all those who spoke French, read French-language newspapers, or watched French channels. Of course, many such "members" were outraged, as they had taken part in the War of Independence in 1954–1962, and lost family and friends. Their indignation at these accusations of treason was ignored, as it was when they protested the unsubtle religious implications of the Front's rhetoric. In the Quran, the faithful are called "Hizb Allah," the party of God; thus, both the FIS and its opponents understood the charge of belonging to another party as a charge of apostasy, of being an enemy of God.

Against this background, the FIS was able to exploit the government's declared commitment to democracy, charging that only the Hizb Fransa would be concerned with democracy. The Berlin Wall had fallen, and the Cold War was over. Throughout the globe, a virtual spring cleaning was taking place, as regimes began dismantling the hollow façades that had served them during the previous half-century and replacing them with more substantial democratic structures. There were no more excuses; the right-wing authoritarian regimes no longer had a communist bogeyman, and the Marxist-Leninist claim that a small "advance guard" was "the people" no longer had any authority.

Democracy, then, was the order of the day, and while the term was borrowed directly for the Arabic-speaking world, in Arabic,

dimoqrattiya has a definite alien flavor. All "true"—that is, linguistically Semitic—Arabic words derive from a three-consonant root, and are immediately recognizable. But how many consonants are in this strange word dimoqrattiya? Four, five, no, six! Its sound is unmistakably foreign. To Western readers, this may seem to be an arcane, exotic, or contrived point: since when does the number of consonants in a word explain such critical events as a revolution, a campaign of repression, or a civil war—all of which occurred in Algeria?

Yet it is undeniable that discussion about "the word" took place at the beginning of a series of events that would lead, in turn, to civil war. Since dimoqratiyya does not sound like Arabic, it was easy for the FIS to label it a foreign import, and to charge those who promoted it with being foreign sympathizers and traitors, conveniently bundled together into the concept Hizb Fransa.

To further understand how this was possible, recall that for devout Muslims—including even those of the second and third generations in Europe—there is nothing worse than bid'a, or "innovation." By the time they reach adulthood, they will have heard the phrase "all innovations lead to hell" (kull bid'a fi-nnar) a thousand times; the association becomes automatic in their minds. It is true that by "devout" I mean "Orthodox" here, but unfortunately, there has not been much that is outside this orthodoxy for at least eight centuries—ever since the last true Muslim philosopher, Ibn Roshd, died, heartbroken and bitter. In that

period, the Abbasid caliphate established the rule that "the doors of ijtihad"—independent interpretation of scripture—"are closed." The little refrain we learned as children—that all innovations lead to hell—dates from this period. One decision to close a door, and no one would be allowed to innovate! Anyone who wonders why the once-glorious Islamic civilization wilted, and then virtually died, should wonder no longer; the explanation is as loud and clear as the thud of a giant door slamming shut.

This shared psychological background made it simple for the FIS to give democracy a bad name. They shouted at rally after rally, "Don't you see, it's not even an Arabic word! It is a bid´a! And what happens to a bid´a?" That was enough; the mobs knew the answer all too well.

The FIS made a huge mistake: it was too candid about its intentions. Since it hated democracy, item number one on its agenda was to abolish it after seizing power. The fact that it was using elections—that is, democracy—as a means of taking control did not in any way trouble it. If turkeys want to vote for Christmas, as it were, why would we stop them? On a more sinister note, even Hitler was duly elected chancellor according to strict democratic procedures, following a reasonably free and fair election.

The overconfident leaders of the FIS, by contrast, did not even attempt to be seen as playing by the rules—and thus overlooked the fact that the army, still accorded the legitimacy it earned during the bloody eight-year war against France, had no

intention of turning over power to a party keen on destroying before it created. It was not a stretch for the army to imagine a scenario in which the FIS would decide to dismantle it; every single one of the generals spoke French, and indeed, had begun their careers in French uniforms. Indeed, what institution better represented the hated Hizb Fransa than the army? A shiver went down the collective spines of the generals, who canceled the expected second round of the elections—which the FIS was predicted to win easily—and declared a state of emergency. Thus passed the only genuine attempt at democracy in Algeria.

Morocco: Between the PJD and the Qawma

Next door, in my own country of Morocco, Islamists steadily gained political strength, becoming one of the key stars in Morocco's political constellation. The lessons of the FIS debacle in Algeria have not been lost on them: you could not imagine gentler and more modest Islamists than those of the Moroccan species —at least for the moment. They go by the name of "Hizb al-adala wa at-tanmiyya," the Justice and Development Party (PJD in its French acronym). This name offends no one—after all, who opposes justice or development? If you ask party members why their group shares a name with the party now governing Turkey—albeit under the watchful eyes of the military—they point out that it was they who first chose the name, which was copied later by the Turks. If you ask them whether democracy is a bid´a, an innovation, they quickly reject the idea: democracy is in fact an Islamic value, they say. After all, doesn't the Prophet recommend that Muslims establish a shurah council in order to govern a city? Shurah means something like "consultation." One must "consult" the people on every question—how democratic, after all! And when pressed to explain how they will strike a balance between the tenets of Islam and the principles of democracy—such as freedom of speech, freedom of conscience, absence of religious discrimination—they repeat ad nauseam that they do not see any contradiction between the two. Even when confronted with unavoidable contradictions, notably regarding equal rights for women or homosexuals, they repeat their vague credo that "there are no problems."

Not everyone is convinced. Many people, in fact, think that the PJD is practicing what is known as taqiyyah, which could be loosely translated as "sacred hypocrisy," and means that it is permitted to lie about one's faith or intentions when under duress, or when circumstances require it. Ironically, taqiyyah has come to be associated with Shia Islam, and is used routinely by Sunnis as an insult (Hypocrites! Liars!). Morocco is entirely Sunni, so it is quite puzzling that the PJD is practicing taqiyyah—if that is indeed what is going on. (It would be interesting—but beyond the scope of this paper—to explore whether taqiyyah is practiced in Europe by those well-dressed and soft-spoken Islamists, pampered by the governments of countries such as Britain and the Netherlands as "good Muslim" partners, in contrast to the "bad guys" of al-Qaeda.)

Here, at least, we have yet another example of an uneasy, if not strained, relationship between Islam and democracy. Certainly, in light of the disastrous experience with the FIS, the more cautious PJD has taken to heart the idea that if you can't beat 'em,

join 'em. And thus it claims to be as democratic as any other party, if not more so. Its evidence for democracy, the divine concept of shurah, carries more weight than something devised by sinners named Rousseau or Mill. Should we believe the PJD? As a French politician once said, "Promises only bind those who listen to them . . . "

In its defense, the PJD can at least point to a group nastier than itself: the illegal (but tolerated) Islamist group called "al-Adl wa al-ihsan," meaning something to the effect of "Justice and Good Deeds." The name itself has no significance. Al-Adl, as it is commonly known, is in fact a cult, led by a Sheikh Yassine—no relation to the Hamas leader, also Sheikh Yassin, killed by Israel in 2004. (Actually, many followers of al-Adl used to believe that the two sheikhs were the same man. This truly amazing Moroccan ex-schoolteacher could be in two places at the same time! His ubiquity was proof of his quasi-prophetic status; the sect's leaders never denied such rumors, which were certainly lapped up by the rank-and-file. I point to this and other absurdities to indicate just what kind of struggle democrats face in a country like Morocco!)

Al-Adl has a clear view of democracy: it hates it. (This is not an exaggeration or a hostile characterization; in fact, it has to hate it, because democracy is a bid´a, and God has ordered the group to hate such things.) And so we return to a similar situation. Democracy is a despicable innovation propounded by the frenchified elite of Morocco— so explains Nadia Yassine, the fanatical daughter of the sheikh, in the perfect French she acquired in the French schools to which her father sent her, long before he discovered his divine mission on earth. In contrast to the FIS of old, al-Adl takes this belief to its logical consequences; since it does not believe in democracy, it will not participate in elections. Why would people want to join a party if it does not plan to seek power? The answer is that it does plan to attain power, not through elections, but through a qawma, that is, an insurrection, which is supposed to take place soon. Since the PJD also plans to accede to power soon, though by democratic means, it is understandably uneasy about al-Adl's prophesies. Yet such unease is also beneficial to the PJD, which gains thereby an aura of respectability. Its unspoken question to Moroccans seems to be: since Islamists are going to govern you in the years to come, wouldn't you prefer the PJD, which plays the democratic game, to that madman Yassine and his qawma? I must say that many Moroccans seem to answer with a resounding "yes," whereas many others frown at having to choose, as they say, between cholera and the plague.

What It Means for Europe

Almost all of the 250 satellite TV channels in the Arab world can be watched in Europe, which causes an interesting dilemma: should we, in the name of democracy, allow anti-democratic voices to be heard? This is especially relevant in the country where I live today; integration in the Netherlands has become harder now that you can easily immerse yourself, twenty-four hours a day, in an entirely non-Dutch world, where Arabic is the language, and a bearded, anti-democratic TV imam is the authority. Should that imam be tolerated? This is a well-known problem: more than two centuries ago, Saint-Just and Camille Desmoulins were already shouting, "Pas de démocratie pour les ennemis de la démocratie!" (No democracy for the enemies of democracy!) Regarding the FIS, the PJD, or al-Adl, all we can do at the moment is pay close attention to the situation. After all, the qawma might not take place anytime soon; in the 2007 election, for example, secular political parties won a majority.

But here in Europe, where there are millions of hearts and minds to be won, this is an existential question. The second and third generations of Muslims are Europeans, and they are here to stay. No discussion about the need to protect and promote democracy can ignore the fact that these men and women have been exposed to the ideas outlined above. In this light, a careful distinction must be made between two possible attitudes regarding Islam and democracy.

The first concerns the question of bid´a. If we engage in a debate on whether democracy is an innovation, it is soon lost. Instead, we must reject the whole notion of denouncing "innovations" to begin with. This notion has nothing to do with Islam as a faith, and is certainly not one of the religion's tenets. Even the most orthodox Muslims have to concede that there is only one equivalent of the Roman Catholic "mortal sin" in their religion, polytheism (as-shirk), and therefore, innovation cannot be a mortal sin. Even the most orthodox Muslims have to concede that there are exactly five canonical obligations, no more, and no less: the shahada (profession of faith), daily prayer, fasting during the month of Ramadan, the giving of alms (zakat), and the pilgrimage (hajj) to Mecca, for those who can afford it. Therefore, rejecting every bid´a cannot be a canonical obligation. One can be a good Muslim and embrace any innovation that does not contradict the five canonical obligations. Simply

stating that democracy is a bid´a does not imply anything about its value or pertinence.

Much less clear is the second attitude, that the umma (Islamic community)is supreme over all other groups, distinctions, or differences in opinion. For the most extreme proponents of this idea, the umma is still waiting for its caliph, or supreme ruler. Since the catastrophic day in 1924 when Turkey's founder Ataturk abolished the caliphate and sent the last caliph into exile in Switzerland, some Muslims have hoped for a kind of restoration. In Morocco, I was surprised to encounter recently some individuals who refuse to pray in the mosque on Fridays, because it "makes no sense" to them without a caliph in whose name to say the collective prayer. I refrained from asking them whether the new caliph should be a Turk, an Arab, or an Iranian: the resulting discussion would have been never-ending.

I also did not share with them the conclusive answer given by the Muslim judge Ali Abderraziq, who showed in 1925 that it did not make much sense to have a caliph. One can be a perfectly good Moslem without having a person who is the incarnation of a kind of spiritual power. And as for secular power, a caliph made even less sense, according to the esteemed judge. Shortly after meeting those unusual individuals, I saw Abderraziq´s booklet, Islam wa usul al-hukm [Islam and the origin of government], on sale in Marrakesh for a very reasonable price. This shows that there is no shortage of serious reflections on Muslim culture and religion, whether from the early twentieth century, or afterward. What is missing is a serious effort to promote and spread these works. There are plenty of petrodollars set aside to promote the views of those who mechanically repeat orthodox teachings. Perhaps some European institution should devote funds to translating and distributing books like Abderraziq's? Maybe it should be given free of charge to every young person, in the same way extremist propaganda is distributed gratis?

But what about those young Muslims who are not waiting for the new caliphate, but who are, nonetheless, very much seduced by the idea of an umma? The problem is simple to grasp when stated clearly: the notion of a community that transcends all geographic boundaries, all social classes, all personal differences, and the like, is at odds with the idea of democracy. If a Muslim in the Netherlands feels that he is closer to a Pakistani five thousand miles away than to a next-door neighbor who happens to be Christian, agnostic, or Jewish, then something is wrong. Politics refers, most of all, to the running of the polis, the "city" where people live—not some imaginary polity made of people separated by thousands of miles. The geographic position of the Netherlands means that it is constantly threatened by floods, rivers, water, and similar natural disasters. Keeping the country running means ensuring that all inhabitants care enough to cooperate closely to address each problem. The degree of "cohesion" of European (or any other) societies is deter-

mined by such practical issues. Dutch Moroccans or Dutch Turks, many of whom have dual citizenship, cannot delete the part of themselves that makes them responsible for fighting the clear and present danger of, say, flood. They can feel nostalgic toward the country where their parents were born, they can be devout Muslims if they want to, but they must fight against the water with their fellow Dutchmen.

If you do not think you are in the same boat, then something is wrong. This is exactly what is happening with some second- and third-generation Muslims in Europe. It is a worrying development, and is far from being strictly theoretical. Think of the two Dutch teenagers of Moroccan origin who died in Pakistan, trying to find a way to join the Taliban. Think of the young Frenchmen who died in Chechnya fighting the Russians. Think of the young British men who blew themselves up in the London tube, killing other Britons with whom they felt no solidarity or sympathy because they were not part of the umma.

In the Netherlands, this does not appear to be seen as a problem. The Dutch are used to the verzuiling system of denominational "pillarization," which divided much of social life along religious lines. We may ask, since it worked in the past, why it should not work now. There is one good reason, however: the understanding of the umma now propagated in Europe, even by those whom the foreign minister is glad to host in The Hague for a cup of coffee, is an aggressive one. They say that the

umma is in a fight to the finish. Either they will destroy us, or we will destroy them. The clash of civilizations was not invented by Samuel Huntington or Bernard Lewis (who did use the phrase first), but by the founders of the Muslim Brotherhood, many decades before. As long as such ideas are allowed to prevail, pillarization will not bring pacification. On the contrary: forcing people into a Moslem pillar will in some cases breed resentment. This is what a young man could say: "I was born in this country, I was raised in it, I have a Dutch passport, and yet you see me primarily as a Muslim? Okay, I will be that, and even worse: I will be an alien. I will have nothing to do with your society." So much for democracy. Those who think that this is fictional should read what Mohammed Bouyeri—the young man who killed Theo van Gogh—and people like him, have said or written.

I remember how shocked and angry I was when, some years ago, I received a letter from the head of the Amsterdam Police Department wishing me a happy Ramadan. The intention was good, but then again, bid'a is not the only thing that leads to hell. What shocked me most was that the police seemed to have a list of all "Muslims" living in Amsterdam. That raised an interesting question: did the police have a list of all Jews living in Amsterdam during the war? Of course—something the Germans found very useful. When I inquired, I was told that such a list did not exist—the police had, instead, used the highly sophisticated method of sending the cards to those with "Muslim-

sounding" names. Thus, a fashion boutique, owned by a very blue-eyed Dutch person, received a card congratulating the store on the occasion of Ramadan. The boutique's name: Bao-bab. Definitely "Muslim." This is not merely all in good fun, as it proves my point: people do not seem to realize how dangerous it is for a democracy to allow groups to form that then begin to estrange themselves from the nation.

What to Do?

What can be done? It seems to me that we must be unrelenting in explaining, again and again, that the whole progress of civilization was based on the emancipation of the individual. And we must be equally unrelenting in defending the rights of the individual, specifically those of individual women and individual members of all minority groups. As for groups, we should treat them along the lines of the famous speech of Clermont-Tonnerre to the French Constituent Assembly in December 1789, when he stated what emancipation really meant: "We must refuse to give anything to the Jews as a nation, and to give everything to the Jews as individuals!"

What would the proponents of the FIS have to say in response? No doubt they would criticize the author as another frenchified person trying to introduce an alien concept into our glorious Islam. This could impress some people who are ignorant of history, but those who are familiar with the past know that it is not so alien. One could argue that the whole movement of emancipation of the individual began on Islamic soil, first in the Baghdad of the Abbasids, and later in Muslim Andalusia. To state but one fact, how many of these so-called Muslims have ever heard of the Ikhwan as-safa (the Brothers of Purity), the first encyclopedists, who tried to record on paper the whole profane knowledge of their times? Answer: zero. I asked the question repeatedly during my last trip to Morocco. Nobody seemed to know anything about the Ikhwan as-safa. Does it matter? It does. The French Encyclopedists, led by Diderot and d'Alembert, represented an essential moment in the emancipation of the individual, which eventually led to democracy in its present form. Would democracy and the primacy of the individual not be more acceptable to Muslims—more natural—if they knew that these are not alien innovations? Here again, we see how destructive ignorance can be.

Yet ignorance comes from both sides, alas. In all my years of studying in various French schools, lycées, and universities, I never heard any mention of the Ikhwan as-safa. I never heard anything said about Ibn Roshd (Averroes) or al-Farabi, either, though I did learn a lot about Voltaire and the French Encyclopedists, which has instilled in me a profound attachment to freedom and democracy. But for the new generations in Europe, subjected to the propaganda of anti-democratic fundamentalists at home and in the mosque, Voltaire may not be enough. We must tell them—and show them—that the desire for freedom and democracy ran in the veins of their own ancestors.

What about teaching about religions in Europe?

13

Luce Pépin[1]

Ignorance provides the fuel for fears, prejudices and hate

The issue of religious education in Europe is a complex one which is deeply rooted in Member States' history, culture and education policies and, in many cases, is highly dependent on the degree of separation between State and Church. Closely connected with the broader issue of the evolving links between religions and the public sphere, it gained in importance over the past decade in particular since the dramatic events of September 11, 2001 in New York and the various terrorist attacks on the European soil. Suspicions, fears and hate vis-à-vis religions in general, and islam in particular, have dramatically developed. They must also be understood within a broader context of societies characterised by an increased secularism and multiculturalism and also, most importantly, a growing ignorance among young people as far as religions and religious issues are concerned.

The latter is a key question confronting most of the European education systems. It should be the priority concern when discussing the place of religions within the school system and reassessing what has been done so far in this respect. As underlined by the Council of Europe Secretary General at the first forum of the Alliance of Civilizations in Madrid in 2008 "Cultural diversity is something to be enjoyed. It is not a problem. The problem is ignorance that provides the fuel for fear, prejudice and hate". The challenge is particularly important in European state schools (whose mission is to accept all children irrespective of their ethnical origin, their culture and religion) which are characterised by increased cultural and ethnic diversity, in particular in urban areas (in cities like Rotterdam, Birmingham or London, almost half of the school population has an immigrant background). Within the EU, at least 10% of the school population aged 15 is either born abroad or has both parents born in another country. The figure is even more (around 15%) at primary school level[2].

Through the Debray report to the Minister of Education in 2002 (Debray, 2002), France was one of the first European countries to clearly analyze and voice at the top political level the reasons and the worrying consequences of this growing ignorance among the young population as far as religions and religious issues are concerned. Ignorance indeed prevents young people "from understanding an essential part of their own heritage as well as the contemporary world they live in. Ignorance and a lack of cultural reference cut young people off from their own roots (...). It lays the foundation for intolerance and prejudice"

(Pépin, 2009). A weak position of humanities studies in the curriculum and the decline in religious practice and in the religious transmission through families are major reasons explaining this growing ignorance and lack of interest.

Political consensus about the way to go

A political consensus on the need to teach about religions and religious diversity within the broader framework of pupils' intercultural education has been built over the past decade and is clearly expressed in a number of European policy statements. The Council of Europe has made education for democratic citizenship, the management of socio-cultural diversity and intercultural education and dialogue (Council of Europe, 2007 and 2008b) action priorities and had its Committee of Ministers adopt in 2008 a specific Recommendation on the dimension of religions and non-religious convictions within intercultural education (Council of Europe, 2008a). Conceptual and pedagogical instruments have been developed to support the implementation of these policy statements at school[3]. In the same vein, and with the similar objective of helping policy-makers and education practitioners to go from theory to practice, the OSCE (Office for Security and Cooperation in Europe), with the support of recognised experts, issued in 2007 a set of key principles and recommendations to support teaching about religions and beliefs in public schools (OSCE, 2007). Mainly due to its politi-

cal sensitivity, the issue as such has not yet been addressed at EU level by the long-standing education cooperation between Member States. However, the Recommendation adopted by the European Parliament and the Council in 2006 on key competences to be acquired by all students by the end of their compulsory education present clearly the social and civic competence as one of the eight key competences for lifelong learning, including personal, interpersonal and intercultural competences, indispensable to enable all individuals to live and work in diversified societies and resolve possible conflicts. "Full respect for human rights... and appreciation and understanding of differences between value systems of different religious or ethnic groups lay the foundations for a positive attitude".[4]

Academic research, a key dimension

Increasing work is also being done at academic level in particular by the religious sciences field to develop approaches and pedagogical instruments suitable to the school system and objectives. The work done, for instance, by the Religions and Education Research Unit of the Warwick University, headed by Prof. Robert Jackson, is worth mentioning. It is based on the theoretical "Interpretive approach" which considers diversity within and between religions and aims at developing in any student, skills of interpretation and a critical personal reflection of the material studied at a distance. In France, as a follow-up to the Debray report, the European Institute of Religious Sciences (IESR[5]) was set up in the religious sciences' department of the Ecole Pratique des Hautes Etudes in Paris. It aims at bringing together pedagogy and research where the teaching of the "religious facts" and the support to initial and in-service training of teachers are concerned. The EU financed network of academic experts (REDco)[6] also produced recommendations supporting a pluralistic approach to religious education within the broader framework of intercultural education, after three years of in-depth and also empirical analyses.

The subject is not only a field of interest for the policy and academic levels but also for the civil society at large. The Network of European Foundations (NEF) contributed very much to making the issue more widely understood and discussed through its major Initiative "Religion and Democracy" within which the education field was a key dimension studied. Its report on teaching about religions in European education systems[7] provides a mapping of approaches in place in Member States and analyses the trends and challenges confronting European education systems if teaching about religions is to contribute to intercultural and citizenship education (Pépin, 2009).

iBooks Author

Limits of existing approaches

Most existing national approaches to religious education have clear limits when it comes to ensure a solid pluralistic and intercultural teaching about religions and non religious beliefs as put forward in the European policy documents or in the most relevant academic researches. When the approach is positively pluralistic and non-confessional (whether subject-based or transdisciplinary), the problem lies in the weak position of the subject in the curriculum (lack of clarity, lack of time), the poor links with intercultural or civic education, and, above-all, the insufficient preparation of teachers (both in contents and pedagogy terms) to deal with this complex and sensitive matter. In a 2007 report assessing the situation of religious education in schools, Ofsted (the UK Office for Standards in Education, Children's Services and Skills) underlined the inadequacy of teacher training, stating that "only 36% of new teachers were judging that they have been well prepared to teach in multicultural schools" (Ofsted, 2007). This statement would certainly be also true for many other European countries. This inadequacy was re-affirmed three years later in a new report underlining that the situation had deteriorated, in particular at secondary school level (Ofsted, 2010). Despite progress in this area over the past 20 years in many countries, much remains to be done to strengthen intercultural and civic education in the curriculum and also in the school organisation and life.

When the approach is confessional (confessions being taught separately), the objective of educating all young people about the diversity of religions and other beliefs is a real difficulty, even if there has been some positive experiences in certain countries. One additional problem is that pupils who do not adhere to any religions, are excluded from almost any learning about religions and religious issues, in particular when knowledge about religions is weak in the core curriculum. Moreover, the confessional approach cannot be expanded ad infinitum to cover the increased diversity of religions now represented in European societies. This would be unmanageable for schools and for the state (financially) and it would be contrary to the objective of educating all pupils to intercultural and interreligious/inter-convictional understanding and dialogue. With an increasing number of grant-aided faith schools in certain countries (in particular England), we also see some worrying trends (increased selection, segregation and teaching of creationism). Confessional religious education will certainly continue to exist in many countries but it will have to seriously evolve to be more open to cultural and religious diversity. Otherwise, there will be

a clear contradiction between the pluralistic approach put forward in intercultural, civic and human rights education (which hopefully will be strengthened in all education systems) and the approach and contents of the religious education course. Such a contradiction will be increasingly difficult to justify by those States which are often supporting financially confessional religious education within the framework of the school system. Such a problem is already apparent in countries where the religious education course teaches creationism[8] in full contradiction with what is being taught in the science course.

The case of Spain is also meaningful of the kind of difficulties which may arise. The Catholic Church organises religious education in publicly-financed schools (26,5% of these schools are private, among which 70% are Catholics), based on the 1979 Agreement between the Spanish state and the Holy See. When the Government established in 2006 a new school subject on citizenship education as obligatory, some parents, supported by the Church, refused permission for their child to attend this course arguing that its content contravened their constitutional right as parents to give their children religious and moral education in accordance with their own convictions. "From the outset, the new subject had met with the opposition of the Conservative party and a greater part of the Catholic Church which considered it a means to weaken the teaching of religion." (Pépin, 2009). This example reflects the tensions which may exist between the will of a government to develop such subjects like civic or intercultural education and the conservative position of the Church and some political parties vis-à-vis the religious education course (of the majority religion).

Trends

The development of a non-confessional and pluralistic approach to religious education (e.g. England, Sweden, Denmark) or an approach aiming at promoting knowledge about the "religious facts" throughout the most relevant school subjects (France), are interesting trends, fully in line with the objective of providing an unbiased education to all pupils. In England, non- and pluri-confessional religious education is certainly the most developed in Europe both in terms of content, pedagogy and research, taking also into account non religious beliefs. Religious education syllabuses are defined at local level within the framework of pluralistic bodies (the SACRE - Standing Advisory Councils for Religious Education)[9]. These syllabuses must fit the non-statutory National Framework for Religious Education (QCA/DfES, 2004) which specifies that such syllabuses must contribute to the general objectives of the National Curriculum and in particular the promotion of "pupils' spiritual, moral, social and cultural development". The development of non confessional religious education is also a pattern in some Länder in Germany (e.g. Berlin, Bremen, Hamburg).

One can also note a certain "deconfessionalisation" of confessional education, in particular in some countries where the private/confessional publicly-funded education sector is important (it represents 75% of the pupils in the Netherlands and 20% in France). State-financed confessional schools have become more open to a culturally diverse population and parents' choice is less and less guided by the religious character of the school but more by its teaching reputation. In countries where religious education is of a non-confessional status, there are possibilities of closer links with parallel developments in intercultural and citizenship education. For instance, in England, the proposal of a common qualification at GCSE level between citizenship education and religious education have been made in the 2007 Curriculum Review on "Diversity and citizenship" commissioned by the Department for Education.

We see also various attempts and initiatives to meet the needs of minority religions and in particular the Muslim communities. For instance, in Spain, progress is made to ensure a better implementation of the 1992 agreements passed between the Spanish State and the Muslim communities, the Protestant churches, the Jewish communities, establishing the rights of children to receive an education in their own religion in state and grant-aided private schools. In Germany, in Bremen, work has been done to define an Islamic course for public schools. In

the particular case of Berlin, the Islamic federation has been authorized to develop Islamic religious education programmes, alongside those existing for Christian religions. Münster and Osnabruck universities have established teacher training programmes for Islamic religious education teachers. In Nord-Rhein Westphalia, a region where there is an important Muslim population, the subject "Teaching of Islam" has been introduced. In Austria, the Islamic Religious Community is recognised alongside the other religions. In the Netherlands, there are some 40 coranic state-funded schools (being however the target of criticisms). In 1997, the Islamic University of Rotterdam was created supporting the training of imams, of Islamic teachers).

Key conditions for substantial changes towards intercultural teaching about religions

Teaching about religions and non religious beliefs in public schools within the broader framework of intercultural, civic and human rights education is the only approach which can obtain a broad consensus, benefit a maximum of pupils (85% of them being in state-financed schools in Europe) and, on the longer-term contribute significantly to the society cohesion. The approach will however only be effective if such intercultural and civic education is a well-established and coherent dimension of the school curricula and a key dimension of teachers' initial and in-service training.

In its report on teaching about religions in European school systems (Pépin, 2009), the Network of European Foundations (NEF) proposes a European Reference Framework on the conditions for high-quality intercultural teaching about religions and other convictions in state education. This framework, which is proposed as a flexible tool, is in line with European positions (in particular Council of Europe, OSCE) on the matter. The key conditions put forward concern the definition of teaching about relig-

ions, its status in the curriculum and the essential issue of teacher training. It is worth introducing it here as such, not as a concluding element but rather as an "open door" to stimulate further reflection and discussion, and exchange of good practices between countries at all levels, on a matter that will continue to be a concern and a challenge for most education systems in the decade ahead. The challenge which most European countries have to face in the years ahead if they want to achieve greater cohesion and peace in their societies and at European and world level is the challenge of unity in diversity. As Mahatma Ghandi put it "The ability to reach unity in diversity will be the beauty and test of our civilisation".

Extract from the NEF Report on "Teaching about religions in European School Systems"

Towards a European Reference Framework on the conditions for high-quality intercultural teaching about religions and other beliefs in state education

The proposed European Reference Framework should be seen as a flexible and evolving tool available to the different players concerned in support of their ideas, both domestic and European. It does not seek to impose any particular model: starting points and approaches differ from one country to another and are deeply rooted in the traditions and history of each country. Education remains the responsibility of each member state.

I. Definition (at compulsory education level)

The aim should be teaching about religions and other beliefs and not religious instruction.

Teaching about religions should be neutral and unbiased, non-confessional, and based on an objective and well-documented presentation of the facts.

It should be pluralist, inclusive of the diversity of religions and other beliefs, defined in cooperation with all confessions and other relevant parties.

It should draw on the best research work, in particular in the science of religions.

II. Status in the curriculum

Teaching about religions and other beliefs (either as a separate subject or integrated into others) should take place within the framework of the objectives and programmes of intercultural, citizenship and human-rights education.

It should be provided to all students.

It should have clear objectives, particularly with respect to the knowledge to be acquired and the attitudes and aptitudes to be developed.

It should enjoy sufficient time in the curriculum.

III. Teacher-training

High-quality initial and in-service training on content and teaching methods.

Adequate teaching materials (content should be pluri-confessional and embrace other beliefs).

A clear ethical approach that allows teachers to carry out their teaching in an objective, well-documented and non-partisan way.

IV. **Resources**

Possible access to external contributors who are both qualified and neutral.

Access to the best sources of information, adapted to this kind of teaching; cooperation in particular with departments focusing on science of religions.

Access to information from the European Wergeland Centre on education in intercultural understanding.

Availability in all languages of the Toledo Guiding Principles (OSCE) on teaching about religions and beliefs in public schools.

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Endnotes

1. Former (1992-2001) Director of the EU information network on education in Europe (EURYDICE), author of "The History of European Cooperation in Education and Training" published by the European Commission in 2006 and of "Teaching about religions in European school systems" drafted for the Network of European Foundations (NEF) and published by the Alliance Magazine (UK). The present article is mainly based on the analysis and main findings of this latter report which is accessible in English and French at www.nefic.org.

2. PISA/OECD data referred to in the European Commission Green Paper on "Migration and Mobility: challenges and opportunities for European education systems". COM(2008) 423 final.

3. Ex: Council of Europe Reference book for schools "Religious diversity and Intercultural Education", Council of Europe, 2007.

4. The EU Reference Framework on the key competences for lifelong learning (Official Journal of the EU, 30 December 2006).

5. Web site: http://www.iesr.ephe.sorbonne.fr

6. REDCo ('Religion in Education. A contribution to Dialogue or a factor of Conflict in transforming societies of European countries') is an EU project bringing together researchers working on religious education in Europe, financed under the seventh Research Framework Programme. www.redco.uni-hamburg.de.

7. This report is available in English and French on the NEF website: www.nefic.org

8. For further reading on the issue of creationism in education, see the Council of Europe report prepared by Guy Lengagne for the Committee on Culture, Science and Education, Doc. 11297, June 2007.

9. The SACREs have a pluri-denominational composition consisting of 4 main representative groups: Christian and other religions; the Church of England; teacher organisations and local authorities. A SACRE can also include humanists and members of minority religions (Pépin, 2009).