11. Introduction

Negotiating with Religion from a Legal Perspective

Myriam Hunter-Henin

TO BE PUBLISHED IN FRANCOIS GUESNET ET AL (ed), Negotiating with Religion, ASHGATE, FARNHAM, 2015

In a human rights era, European States are increasingly under pressure to have due regard to individual claims to religious expression and manifestation at school. Simultaneously, States struggle to formulate a coherent approach to religion which is both faithful to their national traditions and constitutional national frameworks and respectful of the growing diversity in religious practices and in attitudes towards religion within their societies. Recent trends reveal a tightening of the legal discourse in relation to religion. On the one hand, religion often appears to be incompatible with common duties and is now consequently invoked as a basis for positive rights to derogation/exemption and accommodation in the workplace [1] or in educational settings.[2] On the other hand, responses by national authorities have become more

[1] See for example, ECtHR 15 January 2013 *Eweida and others v the United Kingdom,* App. nos. 48420/10, 59842/10, 51671/10 and 36516/10.See also, Maleiha Malik, this volume.]

[2] See for example, the request by a Canadian student in York to be exempted from contact with female co-students: James Bradshaw, "Religious Accommodation or 'Accessory to Sexism'? York Student's Case Stirs Debate", *The Globe and Mail,* January 8, 2014, accessed April 25, 2014, http://www.theglobeandmail.com/news/national/education/religious-accommodation-or-accessory-to-sexism-york-students-case-stirs-debate/article16246401/.

ideologically laden: national identities and fundamental constitutional values are often opposed to religious claims.

In this climate of conflicting values, this section will analyse whether a less confrontational approach can and should be adopted in religious freedom cases. With a focus on education, it will address the ambiguities, tensions and assumptions behind the negotiation processes in relation to religion at school. Negotiation carries different connotations: often associated with a search for compromise, it may seem at odds with the absolute commitments made by believers towards their faith. Construed as justification for accommodating religious requests against general legal norms, it points to conflicting tensions between the neutrality of the State and its legal system on the one hand and respect for individual religious freedoms on the other. As a matter of principle, 'negotiation with religion' may therefore be questioned for its incompatibility with both religious and legal duties. Should negotiation with religion - as we will demonstrate - be justified in principle, questions remain as to the shape it should take, particularly when it conflicts with other fundamental rights.

This section was born out of a workshop held on 12th June 2012 at UCL Laws as part of a UCL 'negotiation with religion' series.[3] The sessions considered issues surrounding religious symbols and clothing at school (Myriam Hunter-Henin with Patrick Weil and Maleiha Malik as discussants); religious education (Ian Leigh with Peter Cumper and Frank Cranmer as discussants); religion and staff (Lucy

---

[3] *Negotiating Religion: Inquiries into the History and Present of Religious Accommodation*, accessed April 25, 2014.http://www.ucl.ac.uk/european-nstitute/events/religion; http://www.ucl.ac.uk/laws/events/docs/2012_religion_workshop_programme_v02.pdf

Vickers with Colm O'Cinneide and Ronan McCrea as discussants) and religious schools (Julian Rivers with Julia Ipgrave and Javier García Oliva as discussants). In all of those four sessions, beyond the specificities in each area, crucial questions as to the legitimacy of negotiating with religion at school and the modalities it may take were addressed. Fundamental questions as to the very use of negotiation techniques to resolve legal issues surrounding religious freedoms at schools were implicitly raised.

Limits to What Can Be Negotiated

For children, the school 'is the place where they learn about the world, about the place they will occupy in it, about powers and inequality'.[4] In an open society,[5] schools should thus both respect pupils' individual convictions and enable them to develop an understanding and tolerance of others. This sense of sharing hardly seems compatible with requests to opt out from courses or situations on the basis that they might expose pupils to beliefs other than their own. In that sense, 'negotiating with religion' in a school context cannot be about managing fragmented identities. Integralist parents[6] – whether of religious or secular obedience – will by

[4] Michael DA Freeman, "The Human Rights of Children", in *Current Legal Problems,* ed. Colm O'Cinneide and George Letsas, vol. 63 (Oxford: Oxford University Press, 2010), 6.

[5] See John Eekelaar, *Family law and Personal Life* (Oxford: Oxford University Press, 2006) who draws on Karl Popper's notion of 'open society' in order to offer a grounding for the legal regulation of our personal lives and their religious dimensions.

[6] Integralist citizens have been defined as citizens who "regard their obligation to obey God as totalizing: that is, they will take the scope of their obligation to obey God to extend to whatever they do, wherever they are, and in whatever institutional setting they find themselves. A fortiori, they'll take their obligation to obey God to extend to the political realm". Christopher Eberle, *Religious Conviction in Liberal Politics* (New York: Cambridge University Press, 2002), 145

definition object to a pluralistic environment in which either the secular approach to life or a religious outlook is implicitly presented as merely one possible perspective on the world. But if parents were allowed to object to classes on those grounds, it would be tantamount to entitling them to refuse that their children be exposed to any other views but theirs. Allegedly parental rights under article 2 Protocol I[7] of the European Convention on Human Rights would then trump all the other interests at stake, namely children's rights to an open future[8] and the State's interest in making sure that public education provides a tolerant environment where children of all creeds learn to interact.[9] Negotiating with religion should not therefore be equated to granting rights of exemption.

But what could then be satisfactory alternatives to allowing individual derogations and exemptions? In relation to religious education (RE) courses, one may wonder whether the exemption mechanism provided by the right to opt out of RE classes could not be replaced by a different approach to RE itself which would ensure that the content and the delivery of the syllabus is more inclusive of minority religions. This crucial question was raised by Ian Leigh,[10] in a paper entitled *Law's*

[7] Article 2 protocol I of the European Convention on Human Rights entitles parents to have their children educated in accordance with their religious beliefs or philosophical convictions.

[8] Joel Feinberg, "The Child's Right to an Open Future", in *Whose Child? Children's Rights, Parental Authority and State Power,* ed. William Aiken and Hugh La Follette. (Totowa, N.J.: Littlefield, Adams, 1980), 124.

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

[10] Ian Leigh's paper draws on his chapter, Ian Leigh, "Objective, Critical and Pluralistic? Religious Education and Human Rights in the European Public Sphere", in *Law. State and Religion in the New*

Negotiation with Religious Education in European Human Rights. Leigh first rejects the temptation to dispense with the abovementioned dilemma by removing religion from school altogether. According to civic liberalism thinkers,[11] the common good should take priority over the accommodation of diversity. Leigh argues that even from a liberal perspective, RE courses should be retained: 'Arguably, some minimum of religious education is necessary to fulfil one commonly-stated liberal goal for education – training for citizenship – since religion has played an important historical part in shaping present-day culture and is an important aspect of contemporary society'. If RE classes are to be retained, the question as to their content cannot be avoided. Drawing on the *Toledo Guiding Principles on Teaching about Religion and Beliefs in Public Schools*[12] and on case-law from Canada and North America and the jurisprudence of the European Court Human Rights (ECtHR), Leigh contends that RE classes should never amount to religious indoctrination. Their aim should be to distil knowledge and not to instil a particular religious belief. The prospect of a more neutral and academic RE syllabus leads us back to our initial question: would a more inclusive RE syllabus not be a more suitable way to accommodate diversity than

---

Europe: Debates and Dilemmas, ed. Camil Ungureanu and Lorenzo Zucca. (Cambridge: Cambridge University Press, 2012), 192.

[11] E.g., Meira Levinson, *The Demands of Liberal Education* (Oxford: Oxford University Press, 1999), esp. chap. 5; Stephen Macedo, *Diversity and Distrust; Civic Education in a Multicultural Democracy*. (Cambridge, MA: Harvard University Press 2000).

[12] Office of Democratic Institutions and Human Rights (OSCE), *Toledo Guiding Principles on Teaching about Religion and Beliefs in Public Schools*, (Warsaw 2007). Accessed April 25, 2014. http://www.osce.org/odhir/29154

individual rights to opt out? More fundamentally, is there not a contradiction between these two mechanisms? As Leigh puts it:

> If the purpose of educating pupils about a number of religions is so that they are aware about key beliefs that different groups within their society hold and are able to assess their cultural and historical importance, it is questionable whether parents or pupils should be able, by opting out, to avoid learning about religions other than their own.[13]

The European Court of Human Rights case-law does not offer a straightforward answer to this question. Although the issue has been raised in Strasbourg, the Court has never had to answer the question directly, having found that the relevant RE courses were insufficiently objective and neutral not to warrant an opt-out mechanism.[14] How is one to assess the inclusive nature of the school environment? The challemge of devising courses inclusive for all has been underlined.[15] Difficulties might also be raised in relation to the teaching environment. Should the content of the courses be unproblematic, pupils may nevertheless object to the modes of delivery of classes. The obligatory presence of the crucifix in Italian state school classrooms was thus challenged by two atheist pupils and their mother in the *Lautsi* case.[16] The

---

[13] Ian Leigh, "Law's Negotiation with Religious Education in European Human Rights" (paper presented at the Fourth Negotiating with Religion Workshop convened by Myriam Hunter-Henin, *Legal Frameworks: Schools and Religious Freedom,* UCL, Laws, June 12, 2012). See supra fn 3.

[14] See ECtHR 29 June 2007 *Folgerø and others v. Norway,* Appl. no. 15472/02.

[15] Peter Cumper, "Religious Education in Europe in the Twenty-First Century", in *Law, Religious Freedoms and Education in Europe*, ed. Myriam Hunter-Henin. (Farnham: Ashgate, 2011), 219.

[16] ECtHR 18 March 2011 *Lautsi and others v. Italy,* App. no. 30814/06 [Grand Chamber]. On *Lautsi*, see, in this volume, Cécile Laborde, Saladin Meckled-Garcia and Myriam Hunter-Henin (Chapter 12).

applicants claimed that this endorsement of the majority religion by the State violated their right to freedom from religion protected under article 9 of the European Convention on Human rights and the mother's right to have her children educated in accordance with her own convictions, under article 2 Protocol I of the European Convention respectively. In Canada, a fundamentalist student from York University requested an exemption from classroom teaching because the mixed gender composition of the class seminars allegedly offended his religious beliefs.[17] Is it for the State to prove that the symbol displayed is neutral; that the seating arrangement in the classroom is respectful of every student's particular beliefs or is it up to the claimant to prove that the alleged offending practice stops him/her from meaningful participation in class? Should exclusion/inclusion be negotiated for each contested school practice or should it be construed more broadly against the general school environment? Should certain requests be dismissed without any negotiation because they are raised against non-negotiable values such as that of equality?

If negotiating with religion in a school context will rarely square with crude rights to opt out, neither will it easily accept shared principles and beliefs at face value. Negotiating with religion at school will thus encourage enquiries about the scope and meanings of deeply-felt national values or school ethos. The search for a common good does not preclude all investigation, analysis or negotiation with these broader values. In fact, without such analysis, there is a risk that these national values be turned into empty political slogans. In France for example, Myriam Hunter-Henin argues, a renewed reflection on the concept of *laïcité* would be called for.[18] At school,

[17]See fn 2..

[18] See also, Cécile Laborde, *Critical Republicanism. The Hijab Controversy and Political Philosophy* (Oxford: OUP, 2008).

it is more the fear of ongoing tensions locally and of pressures on young girls to adopt certain religious practices (namely the wearing of the headscarf)[19] than the attachment to the concept of *laïcité* that led to the banning of all ostentatious religious signs in French state primary and secondary schools.[20] In the *Lautsi* case,[21] the challenge to the mandatory presence of crucifixes in Italian state schools led to a vigorous and interesting debate on the meaning of secularism in Italy and its relationships with the dominant religion. However, Hunter-Henin argues, [22] this does not mean than negotiating with religion is a tool designed to systematically deconstruct common values. It is best conceived as a balancing exercise between individual claims and those common values.

Negotiation with religion appears at different levels: rule formulation (through legislation and regulations) and rule enforcement (through judicial decisions and interpretations by school authorities). Whereas judges will be called upon in the context of litigation to question the proportionate enforcement of rules and policies, legislators or local authorities will be in charge of weighing competing values and interests at the earlier stage of policy and law making. The compromise reached by the latter does not take away the need for careful balancing on the ground. Too often judges – of national courts or the European Court of Human Rights – have been arguably too cautious. But this need for a proper balancing exercise at the

[19] See below chapter 12.

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

[21] See abovefn 16. .

[22] See below chapter 12.

enforcement stage should not be an invitation for judges to reassess the general equilibrium reached at broader level. Each level of negotiation should arguably be kept in its own separate remit.

Levels of Negotiation

Whatever the position established by the applicable legal framework, negotiation could (and should) take place at the stage of enforcement. A more stringent test of proportionality than the one currently imposed by the European Court of Human Rights[23] could thus at the very least be carried out. Negotiation in the sense of a balancing exercise between competing claims should not therefore be avoided. The outcome of this form of negotiation would not depend on any assessment of the validity of the belief itself but would rely on the evaluation of the concrete interferences caused to the individual pupil or teacher claimant in the case. Individual choices would thus be taken into account in a more fluid way and not be ascribed fixed meanings. In *Begum*[24], a secondary school pupil unsuccessfully challenged her school uniform polic which had been drawn up in consultation with religious local communities. As Maleiha Malik puts it regarding the House of Lords decision in *Begum*:

The House of Lords' decision gives greater weight to the group aspect of religious freedom rather than treating Shabina Begum's choice of the '*jilbab*' as a

[23] E.g., ECtHR 30 June 2009 *Aktas; Bayrak. Gamaleddyn; Ghazal; J. Singh; R. Singh v. France* , App. nos. 43563/08; 14308/08; 18527/08; 29134/08; 25463/08 and 27651/08. for a more detailed analysis, see chapter below 12.

[24] *R (Begum) v Governors of Denbigh High School* [2006] UKHL 15.

more fluid individual choice that is open to change and transformation. This approach narrows rather than expands the public space available for individual women such as *Shabina Begum* to negotiate between a range of choices.[25]

Lucy Vickers[26]' analysis also reveals that the compromise reached in the legislative framework applicable in England and Wales is not enough to protect individual teachers' rights. A spirit of compromise for example can be seen in the relative moderation of the existing school framework in England and Wales – the School Standards and Framework Act 1998 (SSFA) –: although faith schools can discriminate against their staff, the extent to which they can do this depends on their funding and governance structure. Voluntary aided schools can discriminate, although voluntary controlled and foundation schools can only do so for up to one fifth of their teaching staff. However the current system is not one of equilibrium because the balance was tilted in favour of religious voices who are backed by government support. Moreover, the protection of teachers' religious freedom is lower than that of other workers because of the lack of a proportionality test under the SSFA. A criterion of proportionality, suggests Lucy Vickers,

'would enable each case to be considered rather than determining in advance that discrimination against the teacher is always acceptable' (…) it 'would entail considering the facts and the circumstances of the individual case, such as whether there are other options available to teach or look for promotion elsewhere'.

[25] Maleiha Malik, "Religious Freedom and Multiculturalism: *R (Shabina Begum) v. Denbigh High School*", 19(2) *King's Law Journal* (2008):377.

[26] See chapter below 13.

It would also guarantee that the legal solutions under the SSFA comply with the EU Employment Equality directive 2000/78.

A spirit of compromise when devising legal solutions and policies may be a valuable tool for strengthening local harmony. However it does not necessarily guarantee fair outcomes for the individuals concerned. Negotiation techniques cannot of themselves ensure that all interests at stake will genuinely be taken into account. Unless the process of negotiation is reopened at the enforcement stage, the legal solutions will derive from compromises reached at a more general level, independently of a meaningful enquiry into the consequences of legal solutions for the individual in question. Judges should not therefore shy away from vigorous proportionality tests. In the *Bayrak* case[27] against France, the ECtHR could arguably have been much more attentive to individual needs. In *Bayrak*, the 2004 French law banning the display of ostentatious religious symbols in state primary and secondary schools had been enforced particularly harshly. After a meeting between the school authorities, the student and her family, the student had agreed to unveil if she could wear a black cap instead. The school authorities considered that the wearing of the cap was still religiously motivated and could not be allowed. Following the pupil's refusal to remove the cap, she was finally expelled. The decision to expel the pupil despite the substitution of a cap was said by the ECtHR to fall within the State's margin of appreciation.[28] The French State's argument whereby the legislative ban on religious symbols could otherwise be easily avoided was held to be reasonable.[29]

[27] See above note 23.

[28] Para. 2(10).

[29] Ibid.

Finally the rather heavy sanction of expulsion was considered to be proportionate since the girl could enrol for distant learning.[30] The ECtHR is not to decide for a particular form of Church/State arrangement across Europe[31] but it is expected to defend violations of minority rights. Whereas restraint to engage in the proper contours of the concept of *laïcité* was therefore arguably welcome in *Bayrak*, a more vigorous proportionality test would have been required to ensure an effective protection of pupils' individual rights.

Negotiation is of limited use if it is restricted to the level of policy formulation. Geared towards an ideal of moderation, negotiation at this policy level is bound to miss out on the richness and diversity of individual beliefs. In his paper, entitled *Not Much Faith in the System*, Julian Rivers explores how the Government's intervention in the debate on faith schools has pushed forward a tamed expression of religious diversity and encouraged increased regulation and juridification. On the one hand, observes Rivers, this general framework has constrained the options for negotiation, 'confining religions to a pre-determined relevance and an unwillingness to trust lower-level and informal of processes of negotiating the complex tensions at play'.[32] On the other hand, the increased regulation and juridification that it has created is starting to have a life on its own: 'there is an interplay between the regulatory aims of the State, which uses law as one tool, and the relatively

[30] Para. 2(11).

[31] See Rex Adhar and Ian Leigh, "Post-Secularism and the European Court of Human Rights: Or How God Never Really Went Away", 75(6) *Modern Law Review* (2012): 1064.

[32] Julian Rivers, "Not Much Faith in the System", (paper presented at the Fourth Negotiating with Religion Workshop convened by Myriam Hunter-Henin), fn 3.

autonomous logic of a legal system imbued with commitments to equality and human rights'.

The chapters of this section will examine whether this autonomous logic of law is gradually conducive to opening up more meaningful negotiation at the enforcement stage. A related issue is the scope that this negotiation should take and the voices that should be heard. Just as the spirit of compromise and the negotiations at play at the policy formulation phase can never dismiss the need for a balancing of these solutions with the local and individual factors which are at stake at the implementation phase, a negotiating process at the level of enforcement cannot re-open the compromises reached at broader level. The scope and the actors of each level of negotiation are and should remain separate.

Actors of Negotiation

At the enforcement stage, negotiation will occur before the courts. Actors of negotiation will therefore be the individual claimants and the local school authorities. If genuine negotiation presupposes the opportunity for both parties to fully assess each other's needs and obtain mutually advantageous courses of action as a result, how can genuine negotiation ever take place between these actors? On the one hand, local school authorities will be ill-equipped to appreciate the meaning for the individual of a particular religious practice and the intensity of the individual commitment to it. On the other hand, the individual concerned may have but little power to appreciate and alleviate the constraints under which the negotiation processes take place. In order that someone is able to negotiate, they need to know the extent to which they are empowered to negotiate and the extent to which the other parties are empowered to negotiate; they need to know what they can negotiate with

as well as what the other parties can negotiate with.[33] In its full sense of open-ended discussion of each side's beliefs and ideas, the negotiation that can take place at this stage is limited and should in any case be resisted. The attempts by the judiciary to venture into these ambitious forms of negotiation have not been convincing. Courts are ill-equipped to fully assess the meaning of religious commitments. Nor are they the best placed to revisit compromises democratically reached at policy level. Courts have at times tried to ascertain what beliefs and practices qualify as 'religious' in order to restrict the protection to those beliefs and practices which were truly religious. In *Playfoot,*[34] the High Court thus held that the practice of wearing a purity ring (as testimony to the claimant's commitment to chastity before marriage) was not intimately linked to the belief because the claimant was under no obligation by reason of her faith to wear it. Rather than providing for a denser exchange, this negotiation with religious concepts led to a unilateral assessment by the courts of individual actions and beliefs. Unsurprisingly, the so-called negotiation then became the projection of the judiciary's own system of beliefs onto the individual practice. Consequently, most of individual religious practices which do not conform to the norm will be dismissed. Recent case-law reassuringly indicates that judges will no longer question the religious dimension of the practice at stake, as long as it is genuinely and cogently felt by the individual as conveying a religious significance.[35]

---

[33] Partha Dasgupta, "The Economics of the Environment", *90 Proceedings of the British Academy (1996)*: 165.

[34] High Court 22 June 2007 *Lydia Playfoot (a minor) v. Governing Body of Millais School,* [2007] EWHC 1698 (Admin).

[35] E.g. *R. Secretary of State for Education and Employment and Others ex parte Williamson* [2005] UKHL 15. For an analysis of the decision, see Frank Cranmer, "Beating People is Wrong: *Campbell*

Keeping discussions of religious scholastics outside of the courtroom and Parliament does not however imply that all negotiations should be resisted in respect of religious freedom at school nor that the meaning, importance and implications of a particular religious practice for the individual concerned should not be explored. However it should be limited to the assessment of the impact for the particular individual concerned of the alleged infringement.

Conclusion:

All of the papers presented in the June 2012 workshop at UCL thus welcome some negotiation in the legal frameworks and solutions surrounding issues of religion at school. However, all four papers also emphasized that core features need to be included for that negotiation to lead to fair outcomes. Two aspects were identified as essential components: one relates to the voices that are allowed to have their say in the negotiation process; the other relates to the attention given to the circumstances of individual cases in the implementation of legal solutions. These two questions refer to the form that the negotiations should take, in particular they consider who should take part and at what level. Underlying these issues and intertwined with them are more theoretical issues as to what is being negotiated and why negotiation in law and religion issues at school should be promoted at all. In light of recent developments, the two chapters of this section specifically address all these layers of questions and thus further our understanding of the concept of negotiation in the context of the relationship of religion, law and society.

---

and Cosans, Williamson and their Aftermath", in *Law, Religious Freedoms and Education in Europe*, ed. Myriam Hunter-Henin, 283.