

CHILDREN'S RELIGIOUS FREEDOM IN STATE SCHOOLS:

EXEMPTIONS, PARTICIPATION AND EDUCATION

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ABSTRACT

This chapter focuses on children's rights to religious freedom raised against state policies in state schools. It analyses the distinction usually drawn between religious education (RE) courses and others. Most legal systems will allow non-denominational RE courses in state schools provided they are accompanied with rights to opt-out. By contrast, purely "secular" courses will usually be mandatory. I will argue that, assuming that rights to opt out legitimately accompany RE courses, they should also attach to secular courses on ethics and morality. On the contrary, religious and moral implications of scientific theories, such as evolutionary theories, should not I will argue give rise to exemption rights. In a second part, the chapter considers religious symbol cases. I will argue that whether symbols are state endorsed or worn by pupils, courts should resist the temptation to ascribe unilateral meanings to symbols but carry out instead a contextual assessment of their impact.

Keywords:

religious freedom; state schools; religious education courses; rights to opt out; evolutionary theories; ethics courses; religious symbols; exemption rights; contextual assessment

Religious freedom – the right to hold, manifest and change one's religious beliefs- is a cornerstone of democracy, proclaimed and protected in many international provisions.¹ It has

been described as the “First Freedom” (McConnell 2000) and as “self-evidently good” (Finnis 1980: 85-86) but is also the most embattled of freedoms – one which has been fiercely opposed on grounds of neutrality, social cohesion, and rights of subordinated persons in religious communities to autonomy and equality.ⁱⁱ Controversies over the meaning and scope of state neutrality, personal autonomy and the extent to which feelings of alienation/identity are to bear on legal outcomes underlie issues relating to religious freedom, making any solutions more complex to find. The complexity increases when religious freedom claims are raised in a school context. Nowhere has state neutrality, democracy, autonomy, and identity been discussed more vehemently than in the field of education. State schools emblematically represent the chosen national model of Church/State relationships and often raise difficult constitutional issues of permissible state entanglement with religion (Hunter-Henin 2011). Moreover, at the interaction of religion and education lies a nexus of potentially conflicting rights such as rights of parents to ensure that their children are educated in accordance with their convictions and rights of children to develop their own beliefs, as well as interests of the State in fostering social cohesion and in forming good citizens (Adhar & Leigh: 243).

This chapter focuses on children’s rights to religious freedom, raised against state policies in state schools, from a mainly UK (and specifically English) Law perspective, but with references to US and European case-law – from other European jurisdictions (especially France) as well as from the jurisprudence of the European Court of Human Rights (ECtHR). I will leave aside the issue of possible clashes between parents’ and children’s rights to religious freedoms (Dwyer). Such clashes are more prominent in cases where parents wish to opt their children out of state school education in favour of private religious schools,ⁱⁱⁱ argue over the type of (religious) education to be given to their children^{iv} or wish their children to leave the school system altogether.^v In state schools, parents’ claims made on behalf of their children are assumed to match their children’s views.^{vi} Such a presumption could naturally be contested but I will leave this aspect aside and concentrate instead on the balancing exercise between the children’s/parents’ religious freedom claim and competing state interests. Whilst such balancing is common in all religious freedom claims, the fact that in a state school context children are involved has (and in my view should have) a bearing. Children’s religious freedom claims in a school context present the particularity of potentially affecting children’s right to education.^{vii}

Religion will mainly feature in state schools within the syllabus or through symbols. Whilst the presence of religious symbols tends to be dealt with relatively straightforwardly

under the relevant general constitutional principles, religious requests aimed at the syllabus will often involve potentially more problematic derogations and exemptions. After addressing in a first part the preliminary question as to whether children should be exposed to religion at all in state schools, I examine in a second part instances of children objecting to teaching endorsed by their school on the basis that it conflicts with their own religious convictions, “the exemption course cases.” In a third and final part, I analyse instances of children wishing to express their religious views by wearing symbols or clothing in a way that departs from school uniform or other policies: “the religious symbol cases.” Currently exemption course cases are split between courses on religion (RE courses) (from which dispensation is allowed, indeed required) and others. I will argue that a more convincing dividing line would be between courses on ethics, religion and morality and others. As for religious symbol cases, they tend, in practice, to be more easily accommodated by schools but children’s requests will often be turned down by courts when they clash with social cohesion interests. I will argue in favour of a more nuanced approach and warn against abstract assumptions about the meaning of religious symbols.

PART I THE PRESENCE OF RELIGION IN STATE SCHOOLS

Should religion feature at all in state schools? Children’s religious exercise –like adults’– enhances their autonomy as well as their sense of identity and belonging. The wearing of religious garments for example is a way for children to assert and test their sense of identity and group membership. However, justifications based on autonomy and identity are more open to challenge in relation to children than in respect of adults (Quennerstedt). On one reading, concerns for the welfare of children, the risk of pressures exercised upon them, could support minimizing their exposure to religion. The risk of indoctrination of children, both by the State and the children’s communities of origin and families, would call – the argument goes– for liberal state education to steer away from religion altogether. Yet the unavoidable inculcation of values through education immediately raises questions as to the neutrality of a “neutral” non-religious education (Gutmann 1999 and 2002; McConnell 2002), just as the religious values imbued into secular majority norms raise questions as to the “a-religious” nature of such a neutral education (Ferrari). In the US context, the courts have thus declared: “the First Amendment was never intended to insulate our public institutions from any mention of God,

the Bible or religion. When such insulation occurs, another religion, such as secular humanism, is effectively established.”^{viii}

In most States, constitutional restrictions on religious manifestations in state schools will thus not apply to pupils but only to the State and, sometimes, by extension, to school staff employed by the State. Whereas school teachers can arguably see their religious autonomy curtailed to preserve state neutrality^{ix} and avoid any indoctrination effect on pupils,^x children are normally free – in principle – to express their religious beliefs at school. One notable exception is France where pupils have, under the 2004 Law,^{xi} been forbidden to wear ostentatious religious symbols on state school premises. The 2004 French Law relies on constitutional Church/State arrangements, under an extensive and closed conception of the principle of secularism, known in France as “*laïcité*” (Willaime). Undoubtedly, the French position is inherently hostile to religion, especially as a far more tolerant approach to religion in state schools would also have been compatible with *laïcité*, even in a French context.^{xii} The 2004 stance strongly encourages pupils to think of themselves as a-religious beings with religion relegated to extracurricular activities, just like any other hobby. Until recently however,^{xiii} such restrictive view of religion was less a reflection of the role of religion in the public sphere as a whole than a consequence of the special nature of the state school context. The school, emanation of the State (Rollin), treats children as citizens.^{xiv} This initial specificity of schools corresponds to the French conception of education. The French portray the school as a place of intellectual endeavours, detached from outside influences. Its essence is not to be a microcosm of the world but an intellectual haven, away from the world’s tensions and problems (Williams). The naked sphere created by the 2004 law resonates with this abstract view of education and could therefore be, from a children’s right perspective, defended as enhancing children’s education.

Despite blatantly denying the rights of religious pupils to express their religious faith at school, the 2004 law also arguably relies on grounds of autonomy. First – the argument goes – the law would allow pupils to weigh different viewpoints and make a more informed and autonomous choice about their religious beliefs in due course. Secondly, following reports of pressures on some young Muslim girls to wear the Islamic scarf, the 2004 Law allegedly had an emancipatory effect (Weil). However, arguments based on autonomy do not offer a reliable justification for the law. Evidence of coerced consent would need to be available in each individual case. Restriction of a fundamental right should only be justified in light of actual not potential coercion.^{xv} Moreover the 2004 Law suggests that critical thinking can only occur

outside of religious influences,^{xvi} a suggestion likely to be alienating for religious pupils. From a children rights' perspective, the French 2004 law can therefore be criticised as abstract notions of education and freedom are in effect allowed to trump actual concrete rights of schoolchildren to an inclusive education and to religious expression. By contrast, most other legal systems will usually respect children's requests to manifest their religion at school. As children develop their own sense of identity, a school environment in which children can feel free and safe to express their emerging beliefs and practice religion would seem more in-fitting with a tolerant and supportive education. But to what extent exactly should children's claims to religious freedoms be accommodated? The question remains as to whether state restriction upon individual religious freedom ought to be applied more strictly to state school children than to adults. Critics have warned that greater resistance to religious expression in state schools may only signal undue suspicions towards religion and an undue patronising treatment of children.

PART II CHILDREN'S EXEMPTION RIGHTS FROM COURSES

Presence of religion; absence of the child from courses on religion

Where a school provides religious education classes or acts of worship, pupils may wish to be exempt from attending. Most legal systems have granted pupils (or pupils' parents) a right to opt-out in these instances. Unlike the French, the US constitutional model of secularism does not preclude teaching *about* religion in state schools,^{xvii} as long as such teaching pursues a secular purpose^{xviii} and does not endorse^{xix} religion. Teaching about religion in US public schools would therefore be compatible with the non-establishment clause under the First Amendment (Greenawalt 2009). On the other hand, religious instruction or religious activities such as Bible readings^{xx} or prayers^{xxi} will not be permitted. Whereas, in England,^{xxii} state schools will provide Religious Education (RE) classes and are also meant to organise a daily act of worship (Cumper 1998), religious activities may not be held in US public schools unless they are organised unofficially (Underwood). When public schools do provide courses on religion, the US Supreme Court as well as the ECtHR require that they be taught objectively, failing which the course would amount to state indoctrination of children (Leigh). Yet an objectively taught course on RE might still be held to be unconstitutional or contrary to the European Convention if it is mandatory. If the contested course is not religious in nature or

purpose, one might wonder why its mandatory nature would violate pupils' freedom of conscience.^{xxiii}

Similarly, the ECtHR in *Folgerø v Norway*^{xxiv} was adamant (albeit by a narrow margin of 9 to 8) that full rights to opt out had to attach to RE courses, at least when the religious education syllabi contained quantitative imbalances between religions. In compliance with these requirements, parents may, in England and Wales, ask to have their children withdrawn from RE^{xxv} or collective worship^{xxvi} and pupils themselves, once they reach the sixth-form, that is the final two years of schooling, may exercise the right to opt out independently.^{xxvii} Rights to opt out may seem particularly necessary in England since the daily act of worship is to be mainly of a Christian character.^{xxviii} Predominance of the majority religion might indeed be accused of alienating pupils of minority religious faith but it seems that, however balanced, courses or activities on religion, just as in the US, will never be neutral enough to justify the abolition of rights to opt out under the European Convention of Human Rights (ECHR) framework. It is then the presumed inherent lack of neutrality of courses on religion which justifies rights to opt out. By contrast, derogation requests from "purely secular" courses will be less successful.

Religious pupils and courses other than RE courses

Unlike for RE courses, mandating certain other courses for all students is consistent with ECHR requirements. The ECtHR has held that absence of an opt out from mandatory ethics,^{xxix} sex education^{xxx} or mixed swimming courses^{xxxi} did not violate children's rights to religious freedoms (under article 9 ECHR) or their parents' rights (under article 9 ECHR and article 2 Protocol 1). This difference of treatment between RE courses and others might seem paradoxical. Courses on religion are arguably more essential than many other courses (Cumper 2011). Ignorance about religion would be a serious impediment to proper understanding of history, art and literature. From a pastoral care perspective, courses on religion support pupils' on-going process of self-definition (Miedema). Socially, they enhance citizens' tolerance and improve inter-faith relationships (Jackson). Consequently, many have argued that state school children would benefit from more classes about religion (Greenawalt 2005; Wexler 2002).

Clearly, then, rights to be exempt from courses on religion cannot be explained in terms of their being less important. Rather, exemptions rest on pupils' (and parents') rights to freedom of conscience. RE courses might be seen to undermine religious faith, relegating it to

one option amongst many. Conversely, they might be perceived as giving too much importance to religion; some pupils and parents – whether religious or atheist– might believe attending RE courses infringes their freedom of conscience. Such concern for pupils’ and parents’ religious sensitivities has sparked controversies. For some, the social goal of forming citizens should receive priority over concerns for individual religious convictions (Macedo). For others, accommodation of children’s religious convictions at school would on the contrary be necessary to protect minority rights (Kylimcka) and promote multicultural inclusion in education (Connell).

My aim here is not to repeat this important debate on democracy and religion but to point to possible inconsistencies in the implementation of derogation rights. Assuming that rights to opt out legitimately accompany RE courses, should similar rights not also attach to other courses? Where these “purely secular” courses teach ethics and morality or take for granted that students will engage in behaviour, such as sexual relationships outside of marriage, to which some religious persons might object, it is not clear why pupils’ and parents’ freedom of conscience should suddenly be brushed aside. The distinction between RE courses and ethics courses rests on a debatable confusion between secularity and neutrality. Such distinction is not only contradictory – as it goes back on the secular nature attributed to RE courses in the first place, it is also hard to square with liberalism itself, and notably the underlying requisite that the State should not take side on moral issues (Dworkin). If a distinction is to be drawn between courses, I would therefore argue that a more convincing dividing line would be between ethic-related subjects and others. Naturally, all subjects, whether directly related to morality and ethics questions or not, are never completely neutral. However, a line can be drawn.

Take, for example, biology classes. From a neutrality perspective, one might say Darwinian theories on evolution are but one outlook on the world and that respect for religious beliefs in God’s creation requires according rights to opt out from biology classes as much as from ethics classes. However, such reasoning overlooks that evolutionary theories do not feature in biology classes as one conception on the world but as a scientific explanation of human beginnings. For sure, such scientific explanation might conflict with religious accounts in Genesis. Such potential conflicts between scientific explanations and religious convictions could even apply beyond the creationist debate. Indeed, any aspect of the science curriculum could conflict with someone’s religious views and be characterized by such person as “just one view” or “just a theory.” More fundamentally, the implicit strict divide between science and

religion is itself a partial view of the world. But this partiality of science does not invalidate Darwinian theories within the scientific framework. Teaching evolution in biology classes consists of teaching within such a scientific framework. It does not *per se* teach that the scientific framework is the only valid way of looking at the world.

Two questions then arise. One is whether Creationist theories or their spin-offs, intelligent design (ID) theories,^{xxxii} might have a place within this scientific framework. The other is whether the school system should grant rights to opt out to religious parents and pupils who object to the scientific framework itself. On the first point, Thomas Nagel (2008) put forward a powerful argument in support of including ID theories within biology classes. According to Nagel, exclusion of ID theories from science classes does not rely on scientific evidence but on the unproven opinion, shared by scientists, that supernatural intervention is impossible. Nagel makes a valid point but, in my view, he shifts the question at stake. Unproven assumptions about the lack of supernatural intervention reveal the lack of neutrality of the scientific framework but they tell us nothing about the scientific credentials of ID theories. The fact that ID theories cannot be labelled as “non-scientific” (Nagel 2012) does not imply that they can be labelled as scientific theories either. Nagel’s objection is illuminating as to the scientific framework itself but does not help devising the content of science programmes. Requiring scientific proof of the impossibility of a given theory, as Nagel suggests, is too high a burden for science and a too broad-encompassing selection criterion for devising science syllabi. Naturally, until proven otherwise, ID theories might have scientific validity but without elements pointing in that direction, this possibility cannot justify their inclusion in the science school syllabus. Otherwise, biology classes might just as well include any possible views of the world. Admittedly, ID theories are not *any* view but views supported by a large body of religious scholars; notwithstanding their religious, historical and sociological strong backing, they still lack positive scientific evidence of their credibility and have therefore according to me no place at all in biology classes. Since this justification relies on scientific premise (the need for positive scientific evidence), it will not be acceptable to pupils and parents who adopt a different framework.

The second point concerns whether parents and pupils should be allowed to opt out from biology classes or other scientific subjects if they see school imposition of the scientific frame of mind as violating their freedom of conscience. Three sets of interrelated interests push against such rights of exemption: a state interest in forming engaged citizens; individuals’ interest in an exposure to diversity and children’s pedagogical interests. The State has a

legitimate and weighty interest in requiring pupils to learn core academic subjects—namely, to ensure they develop the knowledge and skills necessary to full participation in democratic society and to enjoyment of educational, professional, and social opportunities (Feinberg). These courses are not value-free, but non-neutrality might be justified. Neutrality is not the defining feature of the liberal State. The State has thus no duty to ensure equal weight and representation for each system of beliefs in the school syllabus (should such even-handedness be possible). The State is free to privilege courses, which promote the above stated aims of democratic participation and social opportunities, even if it undermines certain ways of life. From the perspective of pupils and their parents, it follows that there is no right on their part to have their views reflected in the school syllabus whether positively or negatively (through rights of opt out). If rights of exemption were granted so extensively, rights to religious freedom would in effect allow pupils and their parents to expunge from the syllabus views they find offensive.^{xxxiii} In a liberal State, citizens might reasonably be expected to accept exposure to beliefs and conceptions with which they disagree (Ackerman). In our multicultural societies, all citizens, whatever their creeds, will come across views and manifestations they object to. The core of liberal democracy is that all citizens need to accept this underlying diversity in order to construct fair terms of social cooperation (Rawls). Moreover, and more importantly for our present purposes, the pedagogical interests of children in receiving sound science training justify conferring lesser weight to religious beliefs at school than in other contexts. The crux of the argument therefore is not that science is superior to religion, but that children have an educational interest in receiving science classes, in order to preserve their educational, professional and social opportunities (Feinberg). The three interrelated sets of interests identified above to justify mandatory secular courses in state schools, namely a state interest in forming engaged citizens; individuals' interest in an exposure to diversity and children's pedagogical interests arguably apply equally to private schools and home schooling. However too great a degree of state control in the context of private and home teaching might undermine the very rationale for the existence of private and home schooling: the recognition that religious parents and religious communities should enjoy a sphere of autonomy. Leaving however this broader and complex debate aside, the demonstration above has focused on exemption requests in state schools.

Unlike the abovementioned requests for exemption from courses, religious freedom claims relating to religious symbols seem to raise fewer concerns. Requests to wear particular religious symbols in derogation of school or state policies would not hinder children's

participation in school activities but, at most, only alter the way they take part. Nevertheless, some requests to wear religious symbol have clashed with state interests and interfered with children's participation in educational activities.

PART III STATE SCHOOL CHILDREN AND RELIGIOUS SYMBOLS

Accommodating religious symbol requests will usually be less burdensome for schools. They need not arrange alternative activities, modify assessment, or alter syllabi. Religious symbol cases are also less likely to raise constitutional objections. Display of majority religious symbols in state schools has given rise to constitutional challenges by atheist pupils (and their parents), but on the ground that this constituted state proselytizing, a concern to which religious symbols worn by a few pupils should rarely give rise.

Requests not to be exposed to state-endorsed religious symbols

In *Lautsi v. Italy*,^{xxxiv} the Grand Chamber of the ECtHR held that the mandatory presence of crucifixes on the classroom walls of Italian state schools did not infringe convention rights and, in particular, did not violate children's religious freedom rights (which include rights to freedom from religion) under article 9 ECHR. By contrast, the Second Chamber^{xxxv} had held in November 2009 that the crucifix was incompatible with the state's duty of neutrality in the exercise of public services, particularly in the field of education, and therefore violated Article 2 of the First Protocol (the rights of parents to ensure that state education is in accordance their religious and philosophical convictions), taken in conjunction with Article 9. According to the Chamber's reasoning, the presence of the crucifix could amount to state indoctrination. Given the impressionable age of the children, it could have a coercive impact (Mawhinney). It would also appear contrary to the neutrality of the liberal State (Temperman) and the respect owed to minority religious communities and believers in multicultural societies (Mancini & Rosenfeld).

To its credit, the Grand Chamber showed greater restraint (Weiler). Its emphasis on the State's margin of appreciation signals that unless complainants establish concrete violations of convention rights, the Court will not interfere with state practice. Such caution is in my view

welcome. Otherwise, the ECtHR would indirectly be imposing a separatist model of Church/State relationships and hereby encroach on matters within Member States' margin of appreciation (Evans). The Grand Chamber's decision in *Lautsi* can therefore rely on constitutional considerations of States' sovereignty. The Grand Chamber *Lautsi* decision can also be justified in substantive terms. It might be too crude to conclude that any and all religious symbols in state schools – even symbols of the majority faith– necessarily generate an expressive harm on minority religion members and on citizens without any religion (Eisgruber & Sager). The inherent multiplicity and complexity of meanings carried by symbols should lead to a wider and more complex assessment of the effects of symbols on a given audience.^{xxxvi} The overall attitude of the particular school towards religion and towards pupils with non-majority beliefs should feature in the assessment of the impact the crucifix might have (Contra Kyritsis and Tsakyrakis). In *Lautsi*, the Grand Chamber observed that in the school in question: “Islamic headscarves were permitted, the commencement and end of Ramadan was often marked in school and Jewish pupils were entitled to sit examinations on days other than Saturdays” (paras 74 and 39). One might therefore conclude that the school's overall benevolent attitude towards all religions balanced out the emphasis given to Catholicism and Christianity through the display of crucifixes in classroom walls. Admittedly, such contextual analysis will be of no comfort for those pupils who, like the claimants, consider the presence of the crucifix offensive and violating their freedom of conscience. And if mere discussion of religion is enough to justify rights to opt out from neutral RE courses, it seems inconsistent to suggest pupils may be forced to study under the cross.^{xxxvii}

By definition, symbols have open-ended and ambiguous meanings. One way to resolve this inherent ambiguity of meaning would be to adopt a subjective test whereby the courts would defer to the claimant's sincerely-held perceptions of the symbol's message. However, such test would be tantamount to leaving to the claimant not only the issue of whether the contested symbol interferes with his/her convictions^{xxxviii} but also the issue of whether the interference is justified. In my view, the issue of justification – which entails the balancing of competing interests – is best left to the State and the courts. A naked space is no more neutral than one displaying majority religious symbols. Only contextual concrete evaluations of rights' violations can therefore determine whether one is more justified than the other against a particular religious freedom claim and such assessment is best carried out democratically through the deliberative process of judicial reasoning rather than left for the aggrieved to decide unilaterally. Judges cannot discredit the wishes of the majority simply because they are those of the majority.^{xxxix} This does not preclude the State or national courts interpreting relevant

constitutional national provisions to embrace a strict conception of state neutrality and hold that religious symbols should never feature in state school classrooms. However, failing such national constitutional rulings, the ECtHR was correct to adopt a cautious and contextual approach to the issue and to resist enforcing a strict model of neutrality across Europe.^{xl} Likewise, courts should resist the temptation to ascribe unilateral meanings to religious symbols worn by pupils.

Requests to wear religious symbols

In the leading English case of *Begum*,^{xli} a secondary school girl challenged the decision by the head teacher and governors of Denbigh High School to exclude her for wearing religious attire, on the ground that it violated her right to religious freedom under article 9 ECHR. Under school policy, three uniform options were available to students. The least revealing was the *shalwar kameeze*, consisting of wide trousers underneath a tunic. The school selected that as an option, following extensive consultation with local religious communities, because it could be worn by Muslim, Hindu and Sikh girls alike and therefore minimized religious differentiation within the school. Miss Begum requested the right to wear a *jilhab* instead— a long and loose-fit coat garment which covers the entire body but leaves the hands and face visible. She claimed that the *shalwat kameez* did not comply with the requirements of Islam as it did not effectively conceal the shape of her body. The school denied her request. The House of Lords (now Supreme Court) ruled in favour of the school. First, it noted with approbation the extensive consultation with religious local communities which had preceded the drafting of the school uniform policy.^{xlii} Secondly, it downplayed the pupil's religious freedom claim by pointing to inconsistencies in her behaviour --she had for two years agreed to abide by the school uniform rules without any complaints—and noted the possibility that she had been coerced to change her view,^{xliii} as her brother had recently converted to fundamentalist Islamist ideas.^{xliv} In addition, the Court expressed concern that allowing her to wear the *jilhab* might trigger pressure on her peers also to adopt a stricter form of dress. In the end, therefore, the House of Lords held the interference with her right to religious freedom to be proportionate and justified. From a children's right perspective, the *Begum* decision is deficient because the court ignored the student's point of view.^{xlv} More generally, the lack of evidence to support the suggestions of coercion or proselytism leaves the impression that the court will systematically dismiss pupils' individual religious beliefs when they clash with school policies that are well accepted by the local community and the majority of students.

I suggest, like Freeman (2011) and Malik (2008), that pupils' religious freedom requests carry more weight in these instances and that only empirically robust objections might justify the interference with their rights. Whilst abstract notions of social cohesion should not be enough to outweigh pupils' religious freedom requests, concrete concerns for pupils' educational rights and opportunities might still legitimately trump respect for their beliefs. For example, when a pupil requests to wear a full *burqa* or *niqab* – a full-covering garment, which covers the body as well as the face– the school may validly raise concerns about the resulting diminished quality of the education which the veiled student would receive.^{xlvi} Teachers check, through their students' facial expressions, whether pupils follow class discussions. Wearing a face-covering garment could arguably prevent the teacher from spotting any of these clues. An underlying issue in these debates relates to whether the onus is on the school to make efforts to integrate the religious pupils or on the religious pupil to strive to participate in school life. In *Begum*, the school pupil raised a challenge against the school's decision to exclude her. In response, the school argued that their decision was the result of Miss Begum's own intransigent decision to exclude herself despite a carefully crafted and well-balanced policy. Similarly in the hypothetical *burqa* case above, one could argue either that the student is retreating from class participation by veiling herself so completely or that the school is pushing the student away from school altogether by denying her request. Unless constitutional principles impede any accommodation efforts, the ECtHR now seems to require the search for a compromise between the school and the individual pupil concerned. In *Osmanoğlu & Kocabaş v. Switzerland* for example,^{xlvii} the ECtHR held that compulsory mixed swimming classes did not infringe any convention rights but not before having approvingly noted that the school authorities had sought to accommodate the student's beliefs by allowing her to wear a *burkini*– a swimsuit which covers the entire body except for the face. Arguably, it is because the school had accommodated prior religious clothing requests that the ECtHR held that the subsequent denial of the course exemption request was legitimate and proportionate. This reasoning also avoided dealing head-on with the issue of the underlying conflict between religious freedom and gender equality rights.^{xlviii}

CONCLUSION

As in all religious freedom cases, legal solutions pertaining to state school children's religious freedoms vary depending on the underlying constitutional legal framework. Most legal systems

will not rule out children's religious expression at school in principle. Whether children's religious freedom claims manifest themselves negatively – through an exemption request– or positively, through the wearing of religious clothing, school authorities will generally acknowledge the conflict with children's (and their parents') convictions. Such benevolent starting point seems less obviously appropriate for course exemption requests directed at “purely secular” courses. This chapter has argued that the current distinction between courses on religion and others is not satisfactory. A more convincing solution would be either to deny any exemption from courses, even RE courses, which do not have a religious purpose or nature or draw a different distinction. Should exemption rights be granted from some courses, a more convincing distinction would be between courses dealing with morality, ethics, and religion and other courses, as it would match liberalism's premise that the State should not take side on moral issues as well as bolster children's educational opportunities. Undeniably, this participatory interpretation of children's education rights is itself a moral position but one which fits with liberalism's emphasis on engaged citizens and with a forward-looking construction of children's welfare as a right to an open future. In children's religious freedom cases involving the presence of religious symbols at school, legal solutions, albeit generally welcoming towards religious symbols worn by students, often revolve on abstract conceptions of the meanings and effects of particular symbols. By contrast, this chapter has argued that a more contextual and nuanced approach should be adopted. More broadly, whereas the law currently tends to confuse notions of neutrality and secularity and construe religious claims as private issues of conscience, my line of argumentation puts more emphasis on the value of inclusive participation and of religious freedoms as a positive contribution to such participation. Religious freedoms should not only be a matter of conscience, of individual identity, but also a positive social good that fosters richer and more inclusive interactions.

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- ⁱ Article 18 of the Universal Declaration of Human Rights (GA Res 217A (III), U.N. Doc. A/810 at 71 (1948) provides that everyone has the right to freedom of thought, conscience and religion. See also article 18(1) of the International Covenant on Civil and Political Rights (ICCPR); Article 9(1) European Convention on Human Rights (ECHR); article 10 of the Charter of Fundamental Rights of the European Union (the EU Charter). The United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief– GA Res 36155 UN, GAOR, 36th Sess Supp No51, at 171, U.N. Doc A/36/55 (1981) also grants individuals the freedom of thought, conscience and religion. In the US, the right to religious belief is based on the Free Exercise Clause of the First Amendment of the Constitution (and the US Supreme Court decision in *Cantwell v Connecticut* 310 US 296, 304 (1940).
- ⁱⁱ These conflicting interests will feature through the qualifications provided to the right to religious freedom. See article 29 of the Universal declaration; Article 18(3) of the ICCPR; Article 9(2) ECHR. The US SC has identified a number of implied limitations to religious practice “for the protection of society” *Cantwell v Connecticut* 310 US 296, 304 (1940).
- ⁱⁱⁱ *Pierce v Society of Sisters* 268 US 510 (1925); In the UK, state schools may also have a religious denomination (Hunter-Henin 2018; Rivers).
- ^{iv} *Re G (Education: Religious Upbringing)* [2012] EWCA Civ 1233; [2002] 3 FCR 524.
- ^v *Wisconsin v Yoder* 406 US 205, 220 (1972).
- ^{vi} See however, *infra*, the independent rights to opt out granted to pupils in England and Wales once they reach the last two years of schooling.
- ^{vii} See, for example, article 2 Protocol I of the ECHR; Article 26 of the Universal Declaration of Human Rights; articles 13 and 14 ICCPR; article 1 of the 1960 UNESCO Convention against Discrimination in Education; the 1981; article 10 of the European Charter.
- ^{viii} *Crockett v Sorenson*, 568 F Supp 1422 (1983).
- ^{ix} ECtHR 26th November 2015 *Ebrahimian v France*, App. no 64846/11.^x Cf. underlying the risks of indoctrination, ECtHR 15 February 2011 *Dahlab v Switzerland*, App. no 42393/98.
- ^{xi} 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).
- ^{xii} Conseil d’Etat 27 November 1989 Avis, *RFDA* (1990), 1.
- ^{xiii} See, for example, Loi n. 2010-1192 interdisant la dissimulation du visage dans l’espace public of 11 October 2010, *JO* 12 October 2010 (known as the *burqa* ban). Adde, extending obligations of religious neutrality upon a mother taking part in a school visit, TA Montreuil 22 November 2011, *Droit Administratif* (2012), 163; for the extension of religious neutrality duties in the workplace, see Loi n. 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels, *JO* n°0184, 9 August 2016.
- ^{xiv} The reasoning explains that the 2004 Law does not apply to universities or to private schools.
- ^{xv} See, however, upholding the 2004 Law, ECtHR 30 June 2009 *Bayrak v. France*, App. no. 14308/08, but the decision mainly relies on the wide margin of appreciation granted to Member States in the interpretation of their constitutional Church/State arrangement principles.
- ^{xvi} Contra, arguing that a religious upbringing need not hamper critical and autonomous thought (Adhar).
- ^{xvii} The US Supreme Court explicitly stated that it is permissible to discuss religion in the classroom, *Abington Township v Schempp* 374 US 203 (1963).
- ^{xviii} Under the *Lemon* test, *Lemon v Kurzman* 403 US 602 (1971), which also requires the State to prove that the contested activity does not result in the advancement or restriction of religion and that the activity does not foster an excessive entanglement with religion.
- ^{xix} *Wallace v Jaffree* 472 US 38 (1985). For an illustration of the endorsement test, see *Tammy Kizmiller v Dover Area School District* 400F Supp 2nd 707 (MD Pa 2005).
- ^{xx} *Abington Township v Schempp* 374 US 203 (1963).
- ^{xxi} *Engel v Vitale* 370 US 421 (1962). The prohibition will extend to meditation or voluntary prayer as the purpose would still be to endorse religion by encouraging prayer, *Wallace v Jaffree* 472 US 38 (1985).
- ^{xxii} School Standards and Framework Act 1998 Sch 20, para 3.
- ^{xxiii} See taking that view, *Wiley v Franklin* 468 F Supp 133 (ED Tenn 1979).
- ^{xxiv} *op. cit.*
- ^{xxv} ECtHR 29 June 2007 *Folgerø and others v. Norway* Grand Chamber, App. no. 15472/02, § 89.
- ^{xxvi} Education Act 1996 Part V, Chapter 3, s 389 and School Standards and Framework Act 1998 s 71.
- ^{xxvii} School Standards and Framework Act 1998 s 71(1).
- ^{xxviii} School Standards and Framework Act 1998 s 71(1B), inserted by the Education and Inspections Act 2006.
- ^{xxix} *Ibid*, Sched 20, s.3.
- ^{xxx} ECtHR 6 October 2009 *Appel-Irrgang & Ors v Germany*, App. no. 45216/07.

^{xxx} ECtHR 13 September 2011 *Dojan v. Germany*, App. no. 319/08 and recently, ECtHR 18 January 2018 *A.R. & L.R. v. Switzerland*, App. No. 22338/15 (decisions on admissibility).

^{xxxii} ECtHR *Osmanoğlu & Kocabaş v. Switzerland* 10 January 2017, App. No. 29086/12.

^{xxxiii} Intelligent design theories are less obviously religious as they do not refer to the book of Genesis but, like Creationist theories, they explain the beginnings of the world by reference to supernatural intervention.

^{xxxiv} Identical arguments could be put forward to justify the mandatory nature of RE courses. However the fact that religion is the subject-matter of the course makes it more sensitive and could therefore justify maintaining exemptions from RE courses only.

^{xxxv} ECtHR 18 March 2011 *Lautsi and Others v Italy* Grand Chamber, App. no. 30814/06.

^{xxxvi} ECtHR 3 November 2009 *Lautsi and Others v Italy* Second Chamber, App. no. 30814/06.

^{xxxvii} For such a nuanced contextual interpretation, but outside the school context, see US SC *Lynch v Donnelly* 465 US 668 (1984) (government-sponsored display of nativity scene) and *County of Allegheny v ACLU* 492 US 573 (1989) (government-sponsored display of menorah).

^{xxxviii} I have argued above however that mandatory neutral RE courses could be compatible with liberalism.

^{xxxix} UNDELETE

^{xl} Grand Chamber judgment, *Lautsi*, op. cit., Concurring Opinion of Judge Bonello at para. 3.5 to 3.16.

^{xli} UNDELETE^{xli} The ECtHR has recognized the legitimacy of a diversity of ‘church–state’ relationships across Europe. See for example, ECtHR 9 July 2013 *Sindicatul “Păstorul cel bun” v. Romania* Grand Chamber, App. no. 2330/09, para. 38.

^{xlii} *R (Begum) v Governors of Denbigh High School* [2006] UKHL 15.

^{xliii} *ibid*, para 7.

^{xliiv} *ibid*, para 45.

^{xli} *ibid*, para 80.

^{xli} See however, Baroness Hale’s judgment, notably, para. 96.

^{xli} For such concerns, but in relation to a teaching-assistant, the English case *Azmir v Kirklees Metropolitan Borough Council* [2007] ICR 1154.

^{xli} op. cit.

^{xli} For an illustration of such conflict in a state school (with a religious Muslim ethos), see the English case *Al-Hirjah school case* [2017] EWCA Civ 1426.

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