

# Introduction

## Religious Freedoms in European Schools: Contrasts and Convergence

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This edited collection brings together chapters by sociologists, political scientists, historians and legal specialists who consider how contemporary cultural and religious diversity challenges and redefines national constitutional and legal frameworks and concepts and how these frameworks and concepts – spontaneously or under social pressure and/or prompting from the European Court of Human Rights – respond to this diversity in the highly sensitive and topical sphere of education.

### **The Scope of the Book**

#### *Law, Religious Freedoms and Education in Europe*

The approach adopted in the book is multidisciplinary and comparative because legal solutions are impossible to understand independently of the sociological, political and historical contexts in which and for which they are adopted. Moreover, the broader European context cannot be ignored. Human rights develop under the watch of judges from the European Court of Human Rights and positions taken in other countries may impact sociologically on the support afforded to given national positions. The contributions deal mainly with Western Europe: specifically England and Wales, Northern Ireland, France, Germany and Spain. If multicultural societies in Western Europe have all been faced with the challenges of accommodating minority religious communities,<sup>2</sup> the responses chosen to meet those challenges have varied greatly, with the most striking differences arising in the context of education.

However, a common trend has been the emergence of a human rights discourse in which law and religion issues are now being phrased in terms of ‘religious

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1 I would like to thank Frank Cranmer (Cardiff Law School), Dr Russell Sandberg (Cardiff Law School) and Prof. Martine Cohen (CNRS Paris) for their comments on earlier drafts of this chapter. Any errors remain mine.

2 Kymlicka 1995.

freedoms'.<sup>3</sup> Whatever their legitimate interest in upholding their particular traditions – systemic legal coherence, constitutional integrity and values – States must acknowledge the individual dimension of religion as a freedom belonging to each of us.<sup>4</sup> In England and Wales, particular protections used to be afforded on grounds of religion prior to the Human Rights era but these owed more to 'the tradition of religious tolerance and accommodation than to any sophisticated notion of religious liberty as a widespread positive right' (Hill Chapter 15, Sandberg Chapter 16).

Despite starkly diverging traditions and approaches, European countries unite around article 9 of the European Convention on Human Rights. Article 9 paragraph 1 proclaims religious freedom as a right belonging to each of us: 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.' Once litigants have proved that there has been an interference with the manifestation of their religion or belief under article 9(1), the onus is then on the State to demonstrate that the interference was justified under article 9(2). To that end, paragraph 2 promotes a case by case approach designed to assess whether or not the interference, proven to be prescribed by law and pursuing a legitimate aim, does on the facts of the case respond to a pressing social need and is proportionate to the aim pursued. McCrudden (2011) rightly states that the *Human Rights Act 1998* has produced 'a shift in British constitutional thinking, in which pragmatic empiricism has been supplemented, if not replaced, by a constitutional idealism that focuses much more on principles'. And yet, the emphasis that is placed on the justification stage under article 9(2) will lead inevitably and gradually to a balancing process which requires a careful weighing up of all the circumstances of a particular case and the exclusion of decisions based on principle.<sup>5</sup> All European States are therefore in that sense encouraged to move towards a more individualistic and more factually based approach. The same conclusion applies under the framework of the European Union, more specifically under the *EU directive 2000/78/EC* prohibiting discrimination at work on the ground, inter alia, of religion. More generally, it has been said that 'the overall picture in the European Union is one of *balance* between religious and secular influences which is struck in differing ways in the various Member States' (McCrea 2010).<sup>6</sup>

The principle of equality, emerging as a paramount principle in law and religion matters, has come to protect individual self-identity through judicial

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3 Bradney 2000.

4 Cf. underlying the importance of freedom of religion, ECtHR 20 September 1994 *Otto Preminger Institut v. Austria*, JCP 1995.I.3823; RTDH 1994, 441.

5 For a similar methodological evolution in the context of privacy, Fedtke, Hunter-Henin and O'Conneide 2005.

6 Emphasis added.

activism rather than economically disadvantaged groups through legislative redress (McCrudden Chapter 6). In turn, this individual focus, combined with the multiplicity of prohibited grounds of discrimination, has generated conflicts between the different grounds of non-discrimination as well as between freedom of religion under article 9 of the European Convention and non-discrimination claims, to be resolved by litigation. McCrudden (Chapter 6) concludes that ‘clashes of principle appear more likely to result in rules having to be introduced to attempt to resolve them, leading to greater inflexibility when the individual case is considered’. But these conflicts may also be read as an encouragement for a case by case analysis, in order to ascertain in each case the exact gravity of and justification for the alleged interferences. Overall, the general methodological trend seems, therefore, to be in favour of an individually and factually focused reasoning.

But changes in methodology are slow. English judges, for example, do not always carry out a proper assessment of the proportionality test required by European case law. Instead, they sometimes make a priori judgments about the extent to which schools should be allowed to discriminate rather than carrying out a careful examination of the merits of each case (Vickers Chapter 4, Sandberg Chapter 16); and one can occasionally read crude dismissive statements as to the existence of infringements under article 9(1) of the European Convention, again irrespective of the merits of the case (Hill Chapter 15, Sandberg Chapter 16). Similarly, the case law of German courts on issues of anti-discrimination law under the EU directive is still lacking in sophistication and nuance (Lock Chapter 17). Paragraph 23 of the *Directive 2000/78/EC*, under which discrimination is only allowed in ‘very limited circumstances’ would require more attention to the facts of each individual case than is currently displayed (Lock Chapter 17). From a comparative perspective, the observation is therefore one of slow and methodological convergence, by contrast to the harmonization endeavours at work in other legal fields.<sup>7</sup> The goal is not, therefore, to create a new and different model for Europe<sup>8</sup> nor to ascertain what model would be the best one for Europe,<sup>9</sup> but to make sure that each national model evolves in a way that is respectful of religious freedoms. This modest scope in comparative terms avoids numerous pitfalls. Instead of approximating national laws or bringing them closer together, promoting a ‘unique’ model for Europe may actually create new divergences and reinforce nationalistic reactions (Sefton-Green 2010). How could we identify the best model for Europe? It is assumed that the best national model would be one that most serves multiculturalism (Modood 2010). But if imposed as a paradigm for the whole of Europe, the most multiculturalism-friendly national model may (ironically) affect multiculturalism adversely since it may cause potential damage

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7 Sefton-Green 2010.

8 Beck and Giddens 2006.

9 Cf. presenting ‘moderate secularism’ as a model for multicultural European societies, Modood 2010.

in terms of a ‘welfare loss caused by legal rules that are less or not at all tailored to national and cultural preferences’ (Van Dam 2009, Sefton-Green 2010). Moreover, the quest for the ‘better’ national model for the relationship between law and religion may often be characterized by cultural insensitivity. As often seen in other contexts with ‘better law’ projects,<sup>10</sup> a particular standpoint (influenced by a single, often idealized, system or solution) tends to work as a filter for analysis of all national models. Unsurprisingly, the national system or rule used as a prism then turns out to be the winner because, inevitably, it will be the best one to fit the chosen mould of analysis. Possibly aware of these pitfalls, the European Court of Human Rights has shown at least a degree of deference to national traditions in matters of religion at school.

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Religious freedoms vary in scope and meaning according to the national context in which believers or non-believers wish to exercise their freedom of (or freedom *from*) religion, because of the margin of appreciation recognized by the European Court of Human Rights to member States in deciding on the best way to accommodate religious freedoms.<sup>11</sup> Tensions between a systemic approach, sensitive to States’ heritages and legal frameworks, and an individual approach, more attuned to individual rights and beliefs, are now at the heart of law and religion issues in Europe. Within this tension between state and individual reasoning an added complication (or enrichment) stems from claims of collective rights,<sup>12</sup> whereby groups seek respect for their own religious ethos even, at times, against more general frameworks or individual aspirations and beliefs. Furthermore, the emphasis placed by the European Court of Human Rights on individual rights cannot hide the fact that the human rights discourse is in itself a framework and that the fusion of human rights and religion may not be unanimously accepted. Might the role of religion not be somewhat restricted if it were thought to exist only within the framework laid down by human rights instruments? Depending on one’s point of view, might one not fear or welcome a dilution of religion which would no longer be protected for itself but as a human right amongst others?<sup>13</sup>

Alternatively, the human rights discourse may *itself* be seen as a form of religion or theology. Thus, as Edge (2001) puts it, ‘rather than international law being seen as a qualitatively different mode of thought which can be used to evaluate religious systems, it may be more accurate to see the interaction between international law and religious systems as a unique form of interfaith dialogue.’ Ruston (2004: 270) goes so far as to suggest that the concept of human rights can be traced, at least in part, to an *imago Dei* theology that goes back at least

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10 See for a criticism of the method in family law, Bradley 2004.

11 On the margin of appreciation, see Sweeney 2005.

12 On the notion of collective rights, Rivers 2001.

13 Evans 2000.

as far as Augustine of Hippo and which, he suggests, ‘... owes little to secular Enlightenment sources and everything to an enduring religious tradition shared by both Catholics and Protestants, even though not consistently practised by them’.

Within the human rights framework itself, the consecration of religion as a human right was questioned by some as an unnecessary step: for instance, would freedom of religion not already fall under the ambit of other human rights such as freedom of expression or privacy?<sup>14</sup> Despite these controversies and the general decline in religious practice – as opposed to religious beliefs (Davie 2002: 5) – it seems that the emergence of religious freedoms in a human rights framework has contributed to the growing importance of religious issues in the legal sphere across Europe. The question is no longer whether or not we should have religious freedoms but, rather, how we are to accommodate them. That said, however, in meeting these new challenges as to the ‘how’, previous controversies about the ‘why’ – the purpose and role of religion within legal frameworks – inevitably resurface. In addition to possible tensions generated by the relationships between ‘religious’ and ‘legal’ frameworks and by the different possible levels of perspective – individual, national, infranational or supranational – the concept of religious freedoms *itself* is often at the source of misunderstandings and potential conflicts.

The freedom recognized for schoolchildren under the right to religious freedoms may therefore give rise to different interpretations. In France, for example,<sup>15</sup> religious freedom may seem to blur the distinction which is drawn in a school context between freedom of conscience and freedom of thought:

Freedom of conscience along with its constituents freedom of religion and freedom of belief guarantees diversity of belief in society and the freedom to express those beliefs. Freedom of thought ensures the right to independently reexamine beliefs received from family, social groups and society as a whole. This way a person can freely adhere to these beliefs, adapt them or turn away from them to something else. Naturally, this is a conceptual distinction and clearly daily life produces constant disharmony between these two freedoms. But the perspective is not the same and the French view school as the perfect institution to teach future citizens to exploit their faculties of reason and to help them exercise freedom of thought.<sup>16</sup>

Behind those conceptual subtleties lie fundamental questions about the meaning of individual freedom of thought and conscience. In the name of individual freedom and in compliance with the distinction drawn above, the French have banned the ostentatious display of all religious symbols in state schools:<sup>17</sup> a move that most

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14 Nickel 2005.

15 For an illuminating analysis on the French position, see McGoldrick 2006: chapter 2.

16 Baubérot 2003: 461.

17 Loi no. 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

other Western countries would construe as an attempt at state indoctrination and the very opposite to freedom of thought and conscience.

If the meaning of the autonomy granted under the right to religious freedom is thus unclear, so is the holder of that right: are we acknowledging children's religious freedoms or parental beliefs? Under article 9 of the ECHR children are entitled to freedom of religion; but parents are also entitled to have their children educated according to their own beliefs under article 2 of Protocol 1.<sup>18</sup> In practice, children's rights tend to be merged into those of their parents.<sup>19</sup> This is slightly at odds with other areas where the entitlement of children as right bearers has been more willingly recognized.<sup>20</sup> Would it be realistic completely to separate the child's and the parents' perspectives? To attempt to ascertain whether a child's claim that his or her religious freedom had been infringed was truly motivated by the child's individual beliefs or by family opinion or pressure would be riddled with difficulties. Could a judge realistically embark on a systematic questioning of the reasons underlying a given religious commitment? Would the coincidence between family tradition and religious adherence strengthen the religious commitment or would it weaken it on the grounds that – allegedly – it had been embraced not by the child as an individual but as part of the family? The French position could be seen as protecting children's autonomy against possible parental and social pressure whereas the English approach could be seen as favouring family choices.<sup>21</sup>

More uncertain still are the meanings of 'religious' and 'religion' under the right to religious freedoms and right to freedom of religion. Are we referring to the way that individuals perceive their beliefs or to the way that religious communities define themselves and their members? Indirectly, albeit based on

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écoles, colleges, 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).

18 Article 2 of Protocol 1 of the ECHR reads as follows: 'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and 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 ECtHR *Valsamis v. Greece* (1996) 24 EHRR 294, Kilkelly 1999.

20 See in England and Wales, the *Gillick* case, *Gillick v. Western Norfolk and Wisbech AHA* [1986] AC 112 and the *Children Act 1989* and, in the context of the United Nations, the *United Nations Convention on the Rights of the Child*. Those landmark texts and decision mark a shift in the thinking about children. The idea that children have the capacity and more fundamentally the right to make decisions for themselves began to emerge. See for a reflection of the theoretical underpinnings of children's rights and a case in favour of children's rights, MDA Freeman: 1983 and 1997: chapters 1, 2 and 4.

21 *R (on the application of Begum) v. Head Teacher and Governors of Denbigh High School* [2007] AC 100 where Baroness Hale was the only member of the House of Lords to appreciate that the 14-year-old girl concerned might have a different opinion from her parents on dress. See Freeman 2010: 7.

racial discrimination, the decision of the UK Supreme Court in the *JFS* case<sup>22</sup> may be read as a victory for the individual perspective of religion over its collective dimension. In that case, a Jewish faith school had refused to admit a candidate on the ground that he was not halachically Jewish. Whatever the degree of the applicant's self-identification as Jewish and his involvement in the Jewish community, he was not regarded as Jewish because his mother's conversion to Judaism was not recognized as valid by the Office of the Chief Rabbi and, as a result, he did not meet the school's admission criteria. Although the UK Supreme Court did not directly arbitrate the conflict between these two conceptions of Jewishness but, strictly speaking, only ruled on the scope of the *Race Relation Act 1976*, the outcome gives precedence to the individual dimension. The race discrimination angle lent support to a more generous approach of Jewishness. As Cranmer (2010: 82) puts it 'if a child of Jewish parents (even if its mother, in the eyes of some Jews, has been improperly converted) practices Judaism as he or she understands it and self-identifies as Jewish, it is difficult to see how a claim by the child to be ethnically-Jewish can be lightly set aside – whatever the view the religious authorities may take about his or her Jewishness'. By rejecting the school's policy as constituting discrimination based on ethnicity, the Court indirectly gives weight to how individuals define their religious affiliation.<sup>23</sup> This is all the more striking given that, for the Orthodox Jewish faith, individual conscious affiliation is not a defining feature of Jewishness (McCrudden 2011).

The recognition of 'religious' freedoms also raises questions for the protection of non-religious believers. Does the recognition of 'religious' freedoms imply that one must always give a voice to religion? Can we ever have a true recognition of religion in French schools if all 'ostentatious' religious signs have to be left outside school premises and faith has to pass the impossible test of rationality? Or is this complete blank space the very condition of religious recognition in a *laïc* State? How much attention should be given to minority religious opinions? Can we ever have recognition of minority religion in the United Kingdom if mainstream views are implicitly given precedence? Or is priority to mainstream views a necessary condition for harmonious religious coexistence in a multicultural society? Can we respect individual religious freedom fully without losing sight of the meaning of

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22 *R (on the application of E) v. The Governing Body of JFS and the Admissions Appeal Panel of JFS and others* [2009] UKSC 15.

23 This subjective approach was also adopted in the case of *Williamson, R v. Secretary of State for Education and Employment and Ors ex parte Williamson and Ors* [2005] UKHL 15, paras 22 and 23 where Lord Nicholls of Birkenhead declared: '[I]t is not for the court to embark on an inquiry into the asserted belief and judge its "validity" by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual.'



‘religious’ and giving way to all sorts of personal whims?<sup>24</sup> Can we adequately guarantee freedom *from* religion in States where the majority is overwhelmingly religious? If the adjective ‘religious’ in religious freedoms is to include non-religious beliefs as explicitly prescribed by the European Court of Human Rights and not to be limited to beliefs held by the majority, how are we to define what beliefs are to be protected, what balance is to be reached between conflicting beliefs and, to go back to our starting point, what equilibrium is to be struck between individual belief (and identity) and national values (and identity)? These tensions and fundamental questions arise in other contexts such as the workplace (Vickers 2008) but are particularly acute in the sphere of education.

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For a variety of reasons, the problems linked to the accommodation of religious freedoms in Western Europe are more sensitive in the sphere of education than in other fields such as the workplace. Whereas the workplace engages adults, the activity of education is mainly addressed to children who are possibly more vulnerable to proselytism than are workers.<sup>25</sup> Schooling is vital – and compulsory – for children. It is the place ‘where they learn about the world, about the place they will occupy in it, about powers and inequality’.<sup>26</sup> If it is true that the workplace contributes to the common good as a factor for harmonious social relations and economic prosperity, the influence of education on individuals’ minds and a nation’s mentality are even more profound. State schools are both the bedrock of a nation’s values and the means by which it helps to form good citizens. In secular States such as France, schools are entrusted with the important mission of teaching the values of republicanism, individualism, equality and democracy.<sup>27</sup> But this national dimension of state school education is not unique to *laïc* States. Non-*laïc* States such as the United Kingdom and Germany also regard schools as vital places for the building of a cohesive society<sup>28</sup> and for the transmission of the nation’s cultural heritage – including its religious traditions.<sup>29</sup> Generally speaking, ‘education is the first building block to promote a genuinely plural and tolerant society’ (Zucca Chapter 1). Education, moreover, clearly belongs to the public sphere which includes the state education system. State schools represent

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24 See however ECtHR *X, Y and Z v. UK* (1982) 31 D&R 50, stating that only beliefs with some cogency, seriousness, cohesion and importance could fall within the ambit of article 9 of the European Convention.

25 ECtHR *Dahlab v. Switzerland*, Application no. 42393/93; *Asmi v. Kirklees Metropolitan Council* [2007] ICR 1154.

26 Freeman 2010: 6.

27 Corbett 1996.

28 The *Education and Inspections Act 2006* imposes a duty on governors of state schools in England to promote community cohesion in their conduct of their school (s.38).

29 Häußler 2001: 465.



emblematically the chosen national model of Church/State relationships – and that model is often the result of historical conflicts in which schools were the battleground. Consequently, any challenge to a given legal solution aimed at accommodating religious freedoms in school is often perceived as a direct threat to a nation's identity.

This collection will explore the challenges posed by religious freedoms in the sphere of education in Western Europe. The role of this introduction is first and foremost to present the main questions that have arisen before setting out the approaches adopted by the contributors. The question as to whether or not religious plurality is being accommodated within schools – or indeed whether or not it should be so accommodated – is widely debated in Western Europe and a number of perspectives and tensions may be identified: between national and religious identities; between separatist and cooperationist approaches between State and religion; between the public and private spheres; between integration, assimilation, segregation and equality.

## **The Themes of the Book**

### *National and Religious Identities*

Recognition of religious freedoms as a human right is justified because of the importance of religious beliefs for an individual's self-perception and self-construction. Religious beliefs 'define a person's very being – his sense of who he is, why he exists, and how he should relate to the world around him. A person's religious beliefs cannot meaningfully be separated from the person himself: they are who he is.'<sup>30</sup> National identities, proclaimed and protected through national constitutions or constitutional arrangements and conventions, are valued as a cement for cohesive societies.<sup>31</sup> Both national and individual religious identities generally mingle and the historical, political and legal background of a given country will certainly influence the way in which it individual citizens express and perceive their religious identity. But there will not always be harmony between the manifestations of national and religious individual identities, leaving conflicts to be arbitrated under a supranational human rights framework. Religious identities may also be national, with the State establishing one particular church as a national church. More complex still, the State may recognize a variety of national churches, as is the case in the United Kingdom with the Church of England, the Church of Wales and the Church of Scotland (see Sandberg and Buchanan Chapter 5)

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30 Conkle 1988: 1164–5.

31 See for example the debates on Britishness in the House of Lords, HL Deb, 19 June 2008, c. 1140–c. 1172 and the Library notes for debates [Online] available at <http://www.parliament.uk/documents/lords-library/ln2008-015.pdf>. [Accessed: 14 March 2011].

or a variety of federal entities.<sup>32</sup> There are further subtleties in the relationships between State and Church in those countries that have official churches. National churches need not always be ‘established by law’ and can have a high degree of autonomy, as is the case in Great Britain.<sup>33</sup> Moreover, religious identities within a single State can themselves become an element in different national allegiances – as in Northern Ireland where “‘Catholics” (...) describe the community that tends to Irish nationalism, and a greater identity with Ireland, whereas “‘Protestants” tend to Unionism, and a greater identity with Great Britain’ (McCrudden Chapter 6). Finally, beyond individual and state religious identities, groups and institutions may also seek to have their own religious identities and ethos recognized and protected. All of those different levels of identities are to be found in the school context.

*Group religious identities: religious schools*

One way of promoting religious identity in the education sector has been to encourage the emergence of schools which seek to enforce a religious ethos.

In the United Kingdom, ‘faith schools’ are a common feature of the state school system. But not all of them actually promote a strong religious ethos nor are they afforded the level of autonomy that one might suspect: only ‘voluntary aided schools with a religious character’ are granted a relatively high degree of autonomy, whereas foundation or voluntary controlled schools with a religious character mostly have to abide by the rules applicable to schools without a religious character (Sandberg and Buchanan Chapter 5). And the divide between these categories does not necessarily reflect a higher or lesser degree of religiosity in the schools in question, with the result that the recognition of a religious character of a given school tells us little about the legal framework applicable to that school or the strength of its religious ethos. Similarly, the general observation that French religious schools (which are necessarily private) lack a strong religious ethos is undeniably true of Catholic schools which represent 98 per cent of the private schools in France (Chélini-Pont Chapter 7) but can hide contrary minority trends. Thus, even if French private religious schools under state contract are to be very inclusive, one may detect a revival of religious identity in Jewish schools: ‘the Jewish sector differs from the general private one by its strong religious character’ albeit with a few Jewish schools opposing to this trend of religious radicalization a ‘cultural-secular’ option (Cohen Chapter 2).

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32 In Germany, the organization of schools thus falls under the competence of German states (*Länder*): Basic Law Art 70 (Lock Chapter 17). In Switzerland, the regulation of the relationship between the Church and the State is the responsibility of the Cantons: Federal Constitution Art 72.

33 Under *the Church of England Assembly (Powers) Act 1919*; *the Welsh Church Act 1914* and *the Church of Scotland Act 1921*. Strictly speaking, the latter did not confer independence on the Church of Scotland but only recognized its inherent existing independence. See Cross and Livingstone 1997. I am grateful to Frank Cranmer for pointing this out to me in an earlier draft.

Beyond the complexities of the religious ethos of schools and individual beliefs, States may themselves, as mentioned above, claim a religious identity, either explicitly through an established or official Church or, more implicitly, through the endorsement of religious practices and symbols which have become part of a nation's culture and history.

#### *State religious identities and individual freedom from religion*

How can a State claim its own religious identity and yet remain neutral and respectful towards all religious beliefs? The question was indirectly raised in the *Lautsi* case where Italy, albeit a secular State claiming no religious identity, allowed its Catholic heritage to be displayed in the form of crucifix in the classroom. The ECtHR first held in a chamber judgment that the presence of a crucifix in state classrooms was incompatible with pupils' freedom not to be subjected to religion,<sup>34</sup> before ruling on appeal, in Grand Chamber,<sup>35</sup> that the relevant Italian 'authorities (had) acted within the limits of the margin of appreciation left to the respondent State' (para. 76). The Grand Chamber did not deny the religious connotation of the crucifix nor the preponderant visibility it gave to Christianity (para. 71) but given the essentially passive nature of the symbol (para. 72) and the overall openness of Italian state schools towards all religions (para. 74), it considered that the decision to display crucifix was within the margin of appreciation granted to Member States. The same question was raised in Germany before the Federal Constitutional Court in 1995.<sup>36</sup> Having established that the cross was a religious symbol, the German Constitutional Court held that its presence in state schools amounted to a direct interference by the State with pupils' freedom from religion or from Christian religion. The main rationale for the German Constitutional Court's decision was the inescapability of the cross: school pupils were thus forced to study under the cross (Lock Chapter 17).

#### *Laïc States and individual freedom of religion*

In States such as France where national religious identity is hardly acknowledged, the thorny recurring issue will be whether or not the importance of religion for individuals (and groups) can nevertheless be sufficiently recognized and preserved. In France, citizens are defined in their common humanity and equality before the law (Zucca Chapter 1). Any differences in terms of gender, race, position, status or religion should be irrelevant before the law. Similarly, any membership of minority groups and any claims for minority rights will be discarded as threatening the equality accorded to *individuals*. There is a fear that minority rights would serve groups rather than individual members and, at a conceptual level, French

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34 ECtHR *Lautsi v. Italy* 3 November 2009, Application no. 30814/06.

35 ECtHR Grand Chamber *Lautsi v. Italy* 18 March 2011, Application no. 30814/06.

36 BverfGE 93,1.

identity will therefore ignore its underlying religious identities.<sup>37</sup> There is debate as to whether *laïcité*, at least in some of its most militant versions, operates as a hindrance to the integration of immigrants,<sup>38</sup> especially those of Muslim origins. One may at least wonder whether the abstract construction which derives from the concept of *laïcité* in France does not conveniently hide the difficulties that the population of Muslim origin often faces in fact. At school, might not the ban on all ostentatious religious symbols run the risk of erecting national secular and individual religious identities as conflicting entities, confronting individuals with impossible choices? Most probably it will; but empirical research would be needed to confirm that this is indeed the outcome of the law and to rebut the evidence that many pupils in French state schools actually welcome the opportunity given to them by the ban to escape other impossible choices between preferences expressed by their families, friends and society as a whole.<sup>39</sup> Beyond those controversies, the desire which lies at the very heart of the concepts of *laïcité* and formal equality to have a common destiny and to erase the inequalities which religion and social memberships may trigger should certainly not be scorned. Valuing diversity (which is the option favoured in the UK) is no certain guarantee of a peaceful and cohesive coexistence because it is always possible that socio-cultural and economic gaps between groups will make mutual increasingly impossible (Zucca Chapter 1). Moreover, one should be careful not to caricature national positions and exaggerate differences between them. The concept of *laïcité* for example is but one way of accommodating religious plurality and should not be seen as the negation of religion.<sup>40</sup>

Whatever the ‘model’, the consequences that it carries in the sector of education are unclear. Does the goal of a common destiny prescribe a national uniform syllabus, devoid of any religious content? Conversely, what does the recognition of ‘diversity’ mean at school? Can any type of symbol be allowed and any derogation from the national syllabus authorized, so long as they are inspired by religious motivations?

### *Separatist or Cooperationist Models*

#### *Laïcité and rationality*

Macklem (2000) argues that it is the fact that religious views are based on faith rather than reason that gives rise to the need to protect them. This argument would be particularly problematic in France in a school context, where rationality is unquestionably given priority. *Laïcité*, historically linked to the revolutionary

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37 This is at the antipode of the notion of consociational democracy, a political system where entitlements and responsibilities are given to (religious) communities rather than to individuals, as in Northern Ireland (McCrudden Chapter 6).

38 Freedman 2004.

39 Sage 2005.

40 I am grateful to Prof. Martine Cohen for underlining this point.

ideas of ‘*l’Esprit des Lumières*’ does not only summarize the ways in which France has chosen to deal with Church/State relationships, it also expresses a positive belief<sup>41</sup> with its own teaching and its own places of worship: town halls, official state buildings and state schools).<sup>42</sup> This positive dimension of *laïcité* distinguishes it from notions of secularism and mere neutrality which only seek to maintain a neutral position and minimize state interference into religious beliefs. The presentation of *laïcité* as an opinion may, however, be misleading because it may suggest that *laïcité* could have its own subject in the shape, for example, of a civic education class alongside religious education classes. But *laïcité* as an ideal goes much further. It implies the possibility of escaping all mention of religion as a social grounding, of avoiding the necessity to position oneself as a believer or non-believer and of thinking outside all reference to religion.<sup>43</sup> Following that logic, religion should not be taught in *laïc* state schools *at all*. Freedom of religion is taken into account in France insofar as pupils are granted one afternoon a week off school in order to attend religious instruction outside school premises should they wish to do so (Van den Kerchove Chapter 12). Moreover, French state secondary schools may allow the presence of chaplaincy on school premises if parents request it<sup>44</sup> (Chélini-Pont Chapter 7).

This is, however, but one (rigid) form of *laïcité*.<sup>45</sup> A more open version of the concept, whilst still advocating some separation between State and religion, could accommodate individual manifestations of religious beliefs at schools, either through clothing or chosen teaching of Religious Education. The accommodation of religious symbols worn by pupils and the organization of religious education classes does not necessarily entail State/Church cooperation. In that sense, neither necessarily conflict with the requirements of *laïcité* per se, as indeed illustrated by Italy, where the *laïque* nature of the Republic<sup>46</sup> is no obstacle to the presence of religious symbols and classes in Italian state schools or by earlier case law of the French *Conseil d’Etat*.<sup>47</sup> Even under the most radical forms of *laïcité* there is at least a tenable argument for teaching about religion where not to do so would deprive pupils of the tools and general cultural background that are needed for a sound understanding of social events, history and art. From that intellectual perspective, a revival of religion can be detected in French *laïc* schools (Van den

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41 Ronan 1991. Against this conception of *laïcité* as an opinion or belief in itself, Caye and Terré 2005: 34.

42 Cf. suggesting to establish a bank holiday dedicated to ‘Laïcité’ on 9 December, date of the 1905 Act on the separation of Church and State, Philippe Vitel MP from the party UMP (Var), Question to the Prime Minister no. 68744, *JO* 19 January 2010, 443.

43 Kintzler 2005: 54.

44 Art R 141–2 and R 141–4 of the Code of Education.

45 For the variations in the concept of *laïcité*, see Bouchard-Taylor 2008: chapter 7, 131–153; Baubérot and Milot 2011.

46 Based on Art. 7 of the Italian Constitution, amongst other constitutional provisions.

47 CE 27 November 1989 Avis, *RFDA* 1990, 1, where religious symbols worn by students were not per se seen as conflicting with the requirements of an ‘open *laïcité*’.

Kerchove Chapter 12; Debray 2002). To enter the perimeter of French *laïc* state schools, religion thus needs to wear the cloak of rationality; and rather than to be studied as a separate subject, as ‘religion’ it is to be examined within other core subjects as a ‘(religious) issue’ influencing history or art. This particular way of teaching about religion or, more accurately, about religious issues, is perceived as a guarantee of the objective presentation of religious matters. Indeed, teachers of French state schools, most of whom are civil servants, are not allowed to display their own beliefs; and if they were to discuss faith directly it would be seen as exposing them to too high a risk of subjectivity. The incorporation of religious issues into core subjects such as history or history of arts is, however, no reliable protection against subjectivity and biases. The content of history textbooks, for example, reveals a great imbalance in favour of Christianity. Other religions are largely ignored or only mentioned from the perspective of Christianity (Van den Kerchove Chapter 12). But even so, these trends represent a new perspective on religious issues in French state schools. In fact, one may detect a resurrection of religion in French schools.<sup>48</sup>

Interestingly, discussion of religion under the cloak of rationality echoes claims made in US schools – but the goal of presenting religion in that way is the opposite one of that sought in France. Unlike in France, the objective in the US is not to foster a greater awareness of religion as a social issue – a dimension that hardly anyone would contest in the US – but to present religious beliefs, and in particular beliefs about the creation of the world, as scientific theories (Barendt Chapter 13). Beyond the question of *how* one should discuss religion in the classroom, these claims of rationality question *what* religion actually is. The US Supreme Court offers interesting lessons for Europe. One of the key factors put forward by the Supreme Court is the educational purpose (or lack of purpose) of the proposed measure (Barendt Chapter 13). For example, according to the US constitutional case law, the proposed introduction of the Book of Genesis in a biology class would not fulfil such a purpose because its aim is not to broaden pupils’ minds and deepen their knowledge (an objective which could be claimed for the introduction of the Book of Genesis in religious education classes) but to promote religious views of the world by presenting them in competition with or in lieu of other accounts of the beginning of the Earth and humankind. Conversely, purely for educational purposes the teaching in history classes about religion in France could arguably be enhanced and improved without necessarily putting into jeopardy the French model of *laïcité*. By contrast to France, in most European States, religion will be the object of a separate subject at school.

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48 See evidence of this renewal in the research and publications undertaken and gathered by the IESR (Institut Européen en Science des Religions), [Online] available at: <http://www.iesr.ephe.sorbonne.fr/> [Accessed: 30 March 2011].

*Neutrality through opt-outs*

Religious education/instruction is in most European States a traditional part of the national school syllabus and debates surrounding religion do not focus on whether religion or not should be present in the syllabus or where it should feature but on how religious education/instruction classes should be taught in order to accommodate all beliefs. Respect for freedom of religion and freedom from religion is generally guaranteed by the optional nature of the course.<sup>49</sup> However, this general model has not been enforced without controversy and is regularly challenged as being insufficiently neutral and inclusive for our multicultural societies. The most acute debates have concerned the right of non-believers not to be subjected to religious instruction.<sup>50</sup>

In the UK, the pervasiveness of religion is reflected in the provisions relating to religious worship. All schools in England and Wales, whether of a religious character or not, must hold a daily act of worship.<sup>51</sup> Moreover, the presence of religion raises the question of which religion should be present. England and Wales prescribe a broadly Christian character both for the act of daily worship<sup>52</sup> and for the content of religious education classes.<sup>53</sup> Respect for minority beliefs is to be guaranteed mainly by the right to opt out. However, the efficacy of the opt-out system on the ground has been questioned, not least because little is done actually to inform pupils of its existence (Mawhinney et al. Chapter 11). Moreover, does not the premise of freedom of choice on which the opt-out system is based underplay the risk of peer pressure on pupils and their parents to conform to the norm (Cumper Chapter 10)? Finally, how much of a choice do parents have if little is offered in the way of a worthwhile alternative to those who choose to opt out (Cumper Chapter 10)? Should civic education be offered as an alternative? But would such a non-religious course be compatible with the duty of neutrality of the State towards religion? Could the introduction of such a course be suspected of promoting a kind of ‘state religion’? Many in Spain have argued that such a course, if compulsory, would affect children’s and parents’ right to freedom of religion even if a course on religious education were to be offered in parallel. Alternatively, could students who chose to follow religious instruction/education classes not legitimately complain that in doing so they were deprived of the possibility also to follow the course on civic education, as if one could not be both a citizen and a believer (García Oliva Chapter 9)? Would the way forward therefore be to change the content of religious education classes so as to make it more inclusive and therefore acceptable to all?

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49 See for example in England and Wales, *School Standards and Framework Act 1998*, s.71.

50 See ECtHR *Grzelak v. Poland*, Application no. 7710/02, 15 June 2010 (Cumper Chapter 10).

51 *School Standards and Framework Act 1998*, s.70.

52 Schedule 20 to *School Standards and Framework Act 1998*.

53 *School Standards and Framework Act 1998* and *Education Act 1996*, s.375(3).



*Neutrality through inclusiveness in religious education*

It is difficult to design a religious education syllabus which would be inclusive enough to justify the mandatory nature of the course.<sup>54</sup> The shift from religious instruction to religious education classes in many countries is already a step in the direction of inclusiveness (Cumper Chapter 10). In England and Wales, for example, legislation stresses that ‘religious education is the study *of* religion rather than the study *in* religion’ (Sandberg and Buchanan Chapter 5). But is there not a risk that in opening up the scope of religious education one may fail to convey the ‘heritage of the nation’<sup>55</sup> or dilute the religious component of a course<sup>56</sup> which many still see as an integral part of religious education classes?

It may be preferable for a teacher of history of religions to be atheist, or at least agnostic, rather than a believer. He or she will be more objective. However, a teacher appointed by the church in order to transmit its teachings and its mysteries of faith should logically be a believer and become an example or a model for his pupils with his own life. If this is not required, I understand nothing ...<sup>57</sup>

Must the religious or secular tradition of a given State be abandoned for the sake of inclusiveness? What, in other words, are the relationships that the public and private spheres should enjoy in this context?

*Public and Private Spheres**Teachers v. students*

The traditional French approach tends to assign religious practices to the private sphere<sup>58</sup> and, in an educational context, to private schools. But most of those private (and possibly religious) institutions are in fact closely monitored and supported by the State, in compliance with the framework set out in the *Loi Debré* 1959. French private Catholic schools are highly integrated into public education: ‘the choice is

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54 EctHR 29 June 2007 *Folgerø and others v. Norway*, Application no. 15472/02, condemning Norway for introducing a mandatory course on Christian Knowledge and Religious and Ethical Education whose content was judged to be insufficiently critical, objective and pluralistic (Zucca Chapter 1).

55 Which is the justification for the broadly Christian character of religious worship and religious education in England and Wales.

56 A denominational religious education course will however be taught in England and Wales in voluntary aided schools, known as faith schools, in accordance with the tenets of the religion or religious denomination specified in relation to the school (*School Standards and Framework Act 1998*, Schedule 19 para. 4) but parents can ask for their children to opt out and receive instead the non-denominational course provided in other schools (Sandberg and Buchanan Chapter 5).

57 Bejarano 2001, quoted by García Oliva: Chapter 9.

58 Laborde 2005: 318, more generally, Trigg 2007.

one of massive presence rather than a reduced denominational presence' (Chélini-Pont Chapter 7). As a result, both students and teachers attending or working in Catholic schools will also be part of the public system and as such will be allowed to refuse to take part in events displaying the school's religious ethos. In practice, therefore, the distinctive religious character of Catholic schools will constantly be challenged<sup>59</sup> despite the classification of those schools as being on the private side of the divide. The result is that the divide between the public and private *spheres* does not coincide perfectly with the divide between public and private *schools*.

Private schools can be heavily involved in the public sphere and be restricted by public duties, as the French example shows. Conversely, in States attached to the concept of neutral cooperation rather than of *laïcité* such as Germany, the public duty to remain religiously neutral will only concern teachers who owe the State a duty of loyalty<sup>60</sup> and its extension to *pupils* will be more problematic (Lock Chapter 17). Nor will the duty of loyalty owed by teachers equate to the duty of neutrality of the State itself towards religion. If the two duties were assimilated, teachers would lose their own fundamental rights to religious freedom: a dimension whose importance was underlined by the German Constitutional Court in the *Ludin* case<sup>61</sup> (Lock Chapter 17). At the other end of the spectrum, teachers in Northern Ireland will be trained either in Catholic or in Protestant teacher training colleges and will then teach either in Catholic or Protestant schools (McCrudden Chapter 6); the concept of a public sphere that transcends religious allegiances is simply non-existent in the non-secular and bipolarized Northern Irish system. In England and Wales more complex categories will apply, with the public/private law divide being completely blurred by finer distinctions between different types of schools: foundation schools, academies, voluntary aided schools, controlled schools and, more recently, free schools. Many of these will have a religious character despite being largely funded by the State (Vickers Chapter 4).

#### *A relative and problematic divide*

Overall, the division between the public and the private spheres never appears to be absolute<sup>62</sup> even in secular States such as France where a strict separation between the State and religion is proclaimed. The very principle of a divide between public (non-religious) and private (possibly religious) spheres may, generally speaking, appear too crude<sup>63</sup> and does not sit well with many systems of religious belief. The law may forbid the wearing of the Islamic veil in public spaces, precisely where an observant Muslim woman will feel that wearing it is

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59 Cf. Chélini-Pont: Chapter 7, pointing to the SUNDEP (teachers' unions) fighting against the involvement of teachers in any assemblies and events relating to the distinctive religious character of Catholic schools.

60 Article 33(5) of the Basic Law.

61 Bundesverwaltungsgericht, 2 C 21.01 (4 July 2002).

62 Oliver 1999.

63 Habermas 1991.

a religious requirement, and allow it in the private sphere, where the religious need to protect women's modesty<sup>64</sup> does not arise. From the point of view of religious institutions, the crucial challenge will be to reconcile State requirements flowing from the participation of religious institutions in public services with the preservation of their own religious ethos. Cooperation with or absorption into the state system does not entail giving up the religious ethos which characterizes a particular school: private schools under state contracts in France, for example, will have their 'specific character' recognized under the *Loi Debré*, while any foundation or voluntary school in England and Wales may be designated by the Secretary of State as having a religious character where he is satisfied that the school was established by a religious body or for religious purposes<sup>65</sup> (Sandberg and Buchanan Chapter 5). But this participation in the public sector may carry with it special duties such as, in England and Wales,<sup>66</sup> the duty to promote community cohesion<sup>67</sup> and, more recently,<sup>68</sup> the duty to promote equality (Vickers Chapter 4).

In most jurisdictions,<sup>69</sup> state involvement will preclude religious schools from implementing their religious ethos in a discriminatory way: tolerance towards other believers and non-believers will have to be secured even where this might undermine the core beliefs of the religion to which the school adheres. So is individual religious freedom being enforced at the cost of groups' and schools' religious ethos or is the dilution of religiosity in religious schools a consequence of the secularization of society as a whole (Cohen Chapter 2) rather than an effect of a human rights or discrimination law discourse? The exact equilibrium to be reached between the regard to be granted to a school's ethos and the respect to be given to individual freedom of religion may vary within the state school system itself, depending on the type of school concerned. In England and Wales, voluntary controlled and foundation schools and voluntary aided schools with a religious character are allowed to discriminate in the appointment and management of their staff and the latter schools to a greater extent than the former. Yet the distinction between voluntary controlled and voluntary aided schools relates to questions of funding and governance and may not be necessarily be significant in terms of the religious ethos of the school (Vickers Chapter 4, Sandberg Chapter 16). So should the distinction really carry any weight when deciding the extent to which schools may be allowed to discriminate against their staff on grounds of religion?

More generally, the tension between a group religious ethos and individual religious freedoms feeds into wider debates on integration. How can we reconcile

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64 Surah XXIV, verse 31.

65 *School Standards and Framework Act 1998*, s.69(3).

66 More generally, see *Associated Society of Locomotive Engineers and Firemen (ASLEF) v. United Kingdom* (2007) 45 EHRR 793.

67 *Education and Inspections Act 2006*, s.38.

68 Under section 149 of the *Equality Act 2010* (in force since April 2011).

69 There is no legal prohibition of religious discrimination in schools admissions in Northern Ireland and state schools in Northern Ireland are almost exclusively Protestant.

integration into the nation as a whole with integration within given (religious) communities?

### **Integration, Assimilation, Segregation and Equality**

In Western European countries, 'Integration is foremost a value per se, insofar as it rests on the fundamentally democratic notion that, in spite of divergence of their beliefs and their experience and their allegiances, people who have respect for what is right and in particular for human rights can live in harmony.'<sup>70</sup> All Western European countries in search of harmonious social cohesion therefore have to ensure that the recognition of difference (in the name of the diversity of religious beliefs) does not erect an impossible hurdle in the way of more global thinking where believers (of all creeds) and non-believers alike can be seen as united. The concept of religious freedom offers the key to reconciling diversity within unity and unity within diversity. Even if each and every one of us is the bearer of an individual right to freedom of religion and even if the contours of that right essentially rely on the bearer's own evaluation of his or her beliefs<sup>71</sup> – thus leading to a myriad of potential interpretations of what areas religious freedoms may cover – unity is nevertheless provided by the overall human rights framework.

However helpful it may be, the concept of religious freedoms tells us little about how to accommodate the religious freedoms of groups versus the religious freedoms of individuals (and vice versa). How inclusive do religious schools therefore need to be in order to respect individual rights to freedom of religion? National responses vary.

#### *Integration and autonomy of religious schools*

The autonomy granted to religious groups is more limited in *laïc* States than it is in neutral States or States with an established or official religion. In France, religious schools under state contracts will not be allowed to invoke their specific religious character in order to derogate from the general syllabus nor may they impose discriminatory entry requirements on pupils or make religious teaching and practices at school mandatory (Cohen Chapter 2). Far from being 'islands of exclusivity',<sup>72</sup> the majority of (Catholic) private religious schools in France welcome pupils from varied religious backgrounds who often switch back and forth between the state and the private school systems. This integration of private schools into the state educational system, however, only applies to schools that have opted for a partnership with the State (under a 'state contract'). Even then,

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70 Schnapper 1994.

71 The State should not ascertain whether particular religious beliefs or the means to express such beliefs are legitimate, ECtHR *Hasan and Chaush v. Bulgaria*, Application no. 30985/9634 (2002) EHRR 55.

72 Expression used by Esau 1993.

the proximity between the state and private sector may vary in practice given the lack of effective control by state authorities of the implementation of the terms of this state contract. For example, despite being under state contract, French Jewish schools close to the Orthodox or Ultra-Orthodox communities have refused admission to non-Jewish children, including children born to non-Jewish mothers who have not undergone a conversion regarded as valid under Orthodox religious law (Cohen Chapter 2). When the *JFS (Jewish Free School)* in England tried to do the same, the practice was held to be illegal.<sup>73</sup> The UK Supreme Court considered that the requirement that candidates be Jewish by reason of descent from a Jewish mother – because it excluded children of non-Jewish mothers who had not been validly converted<sup>74</sup> – amounted in effect to a discrimination on grounds of *race* and was therefore illegal. The *JFS* case illustrates that a practice which may not be clearly discriminatory on the ground of religion may well come under attack as constituting race discrimination. For different reasons, French courts would no doubt also hold such selective admission criteria to be illegal (as violating the duty of schools under state contract to open admission) were there to be a challenge in court. But in the absence of litigation, the practice prospers. The irony is thus that French private schools under state contract which are legally bound to a wide admission policy may in fact in some instances be more selective than English schools with a religious character which are lawfully allowed to restrict entry based on religion or belief provided that, principally, the school is oversubscribed.<sup>75</sup> However, in the vast majority of cases, the religious ethos of the ‘faith school’ will be far more present in English schools than in French private religious schools.<sup>76</sup>

More generally, faith schools in Britain have been at times accused of exacerbating social divides (on the issue see Jackson 2003). But these debates have to be put into a broader context:

The crucial issue is the *quality* of education provided by the State. If you only have a right to do something mediocre, then you may just as well waive it in order to have a better education provided by the private sector. Regrettably, the poor quality of state provided education entrenches class differences based upon economic means (Zucca Chapter 1).

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73 See note 22 *supra*.

74 This ethnic test could be overcome by non-Jewish mothers converting to Judaism in a manner recognized by the Orthodox branch but this possibility only confirmed the ethnic discrimination in the eyes of the majority of the Supreme Court. Such a conversion was indeed seen as a significant burden which was only applicable to those who were not born with the requisite ethnic origins.

75 *Schools Admission Code* for 2007, paras 2.41–3. See Sandberg and Buchanan: Chapter 5.

76 See Chélini-Pont Chapter 7.

From that perspective, British faith schools, the vast majority of which belong to the state sector, may on the contrary be seen as alleviating class differences by providing high-quality education regardless of economic means.

*Integration, parents' autonomy and protection of children*

Another frequent argument put forward in support of faith schools is parental autonomy. The creation of religious schools may to some extent be seen as a consecration of parental choices in education. For Catholics in Northern Ireland, the creation of separate Catholic schools represented a haven of self-determination (McCrudden Chapter 6). Within the context of multi-faith schools, rights to opt out of classes with a religious content are further manifestations of a certain deference to parental views in education. In most jurisdictions, freedom of choice is – at least formally<sup>77</sup> – granted to parents. The same is, however, not usually true in respect of the main protagonists: young pupils.<sup>78</sup> Invariably, their freedom of religion seems to be merged into the educational choices made for them by their parents. But what if a particular child wished to manifest his religious belief in a way that his parents disapproved of or vice versa, if parents wanted to impose their religious convictions against their children's wishes? If children's human rights are to be taken seriously and children's right to religious freedoms given any substance, parental educational rights should not, logically, be allowed systematically to trump their children's views and legal frameworks should give scope for the expression of such views. In England and Wales, pupils – whatever their age – cannot as of right withdraw themselves from religious education classes (Cumper Chapter 10); curiously, the right of withdrawal granted to sixth-formers is limited to the obligation to attend acts of daily worship.<sup>79</sup> In the *Williamson* case,<sup>80</sup> the parents' religious belief that corporal punishment was to be used on their children whilst at school was not seen as fundamental enough to justify trumping the statutory ban<sup>81</sup> against corporal punishment imposed on all school teachers. Although one may suspect that the children concerned might not have been very fond of the form of punishment claimed by their parents, the issue was not examined as one of conflict between parental choices and children's views.<sup>82</sup> Only Baroness Hale of Richmond described the case as being as much about the rights of the

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77 For the limits and constraints surrounding this choice, see page 21 *supra*.

78 The UN Convention on the Rights of the Child proclaims that children have a right to education (Art 28), freedom of expression (Art 13), thought, conscience and religion (Art 14). The Convention has been largely ratified but has not usually been incorporated into national laws nor has been made fully binding on national courts. The Children's Rights Bill was moved to the House of Lords in an attempt to make the Convention part of English Law but was abandoned.

79 *Schools Standards and Framework Act 1998*, s.71A.

80 *R v. Secretary of State for Education and Employment and Ors ex parte Williamson and Ors* [2005] UKHL 15.

81 *Education Act 1996*, s.548.

82 On this, see Dwyer 1998, Narisetti 2009, Lees and Howarth 2009.

child as the rights of parents: ‘this is, and always has been, a case about children, their rights and the rights of their parents and teachers. Yet there has been no one here ... to speak on behalf of the children. The battle has been fought on ground selected by the adults’.<sup>83</sup> However, the interests of children in general to be protected against violence came into play under article 9(2) of the European Convention in order to assess whether the infringements made against the parents’ freedom of religion were justified. Nevertheless, the recognition of children’s rights as being part of the equation was no reason for dismissing their parents’ rights to religious freedoms. So long as parents genuinely and strongly believe that corporal punishment is a tenet of their faith, judges will be reluctant to question the religious nature of their belief and deny them protection under article 9 paragraph 1 of the European Convention on Human Rights (Cranmer Chapter 14). However, as reflected in this case, the broader scope of what may constitute a religious belief for the purposes of article 9 paragraph 1 does not necessarily mean that religious beliefs will be afforded greater protection in practice. Indeed, recognition of a particular belief as warranting protection leaves open the question as to whether or not its particular manifestation can legitimately be restricted under article 9 paragraph 2. The outcome will therefore normally depend on the particular facts of each case, unless additional filters are introduced under paragraph 1. Under the ‘specific situation rule’, even if the practices in question are found to constitute a manifestation of religious belief, claims will fail under article 9 paragraph 1 where claimants have voluntarily accepted the restrictions on their exercise and other means are available for them to practise their beliefs without undue any hardship or inconvenience. Mark Hill (Chapter 15) analyses and criticizes the rather crude application of this rule by English judges:<sup>84</sup> ‘it is somewhat regrettable that the courts have sought artificially to limit the universal application of such rights (to religious freedoms) rather than systematically developing an exposition of the qualifications to those rights.’

### **The Structure of and Contributions to the Book**

This overall methodological tension between conceptual debates and *in concreto* analysis is reflected in the structure adopted for this book – which leads us from a study of key concepts (Part I) to an analysis of case studies (Parts III and IV) via an examination of national models (Part II).

In the first part of this collection, the tensions and interactions between the key concepts of integration, *laïcité*, identity and discrimination are approached from a theoretical (Zucca), sociological (Cohen for France and Jewish schools and Jamal and Panjwani for England and Muslim Schools) and legal (Vickers) perspective.

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<sup>83</sup> *Williamson* 2 FLR 374, 395.

<sup>84</sup> For example see *R (on the application of Begum) v. Headteacher and Governors of Denbigh High School* [2006] UKHL 15, [2006] 2 WLR 719.



**Lorenzo Zucca** studies the concepts of integration and accommodation in a school context and finally rejects both in order to propose his own model of the ‘classroom as a tolerance lab’. Under that model, inclusiveness and solidarity would reign, both in respect of the content of the syllabus – with the introduction of a compulsory course in civic and religious education in the broadest possible sense – and in respect of the school system itself – with an emphasis being placed on funding good quality, inclusive state schools rather than faith or private schools.

**Martine Cohen** analyses the shift towards an increased religiosity in Jewish private schools in France as an attempt to stress Jewish identity in an increasingly secular society. However, she suggests that there need not be a binary opposition between a strong national secular identity and a strong (Jewish) religious minority. Pluralist religious schools, she concludes, could also emerge and may also be welcome, provided they are not limited to the better off and better educated families.

**Arif Jamal and Farid Panjwani** focus on Muslim religious identities in a school context. They show that for different reasons, in both Muslim and Western countries the teaching of Muslim tenets has become an object of study alongside other subjects of the syllabus such as science and history: ‘the enchanted history and beliefs of religion became scrutinized and interpreted by the standards of disenchanting historical and empirical methods’. This objectification of religion in the classroom matches a similar tendency in the courtroom where judges – though often reluctantly – sometimes seek to define a religious tradition against so called objective criteria. Jamal and Panjwani argue that such an approach is flawed for two reasons. First, it violates the subjectivity of the experience of the believer, contrary to the subjective basis that should legally underpin the individual right to religious freedom. Secondly, it fails to reflect the diversity of meanings and traditions that exist amongst Muslims.

**Lucy Vickers’** analysis of the relevant legal framework relating to religious discrimination in English schools reveals the conceptual and practical difficulties that the implementation of potentially contradictory texts and directions are likely to raise. Vickers’ focus is on teachers in faith schools. Vickers argues that the discrimination that is presently allowed in voluntary aided schools to affect all staff beyond those involved in the teaching of religious education and regardless of the actual degree of religious ethos observed by the particular school may not be compatible with the *Employment Equality Directive 2000/78* under which exceptions must be proven to be legitimate and proportionate. She also wonders whether the recent extension, under the *Equality Act 2010*, of the public sector equality duty to religion and belief will improve matters. Given the uncertainties of what religious beliefs may be covered under the new duty and the ambiguities of what equality would entail in practice, the best way forward, she argues, would be for schools to view their new duty to promote equality as part of the well-established duty to promote social cohesion.

These key concepts of integration, *laïcité*, identity and discrimination cannot be read and understood fully outside of the social, historical, political and

constitutional contexts of national systems which are the focus of the second part of this book.

National models reveal a broad range of options between the complex and overall broadly Christian model in England and Wales (Sandberg and Buchanan), the highly segregationist and bipolar – Catholic and Protestant – structure in Northern Ireland (McCrudden), the separationist and *laïc* French system (Chélini-Pont) and the neutral secularity of Germany (de Wall) and Spain (García Oliva). All reveal that the interplay of religion and education is deeply embedded in historical and political national contexts.

**Russell Sandberg and Anna Buchanan** present and analyse (theoretically and empirically) the English and Welsh model. They reveal discrepancies between schools labelled as being without a religious character but yet subject to the obligation to organize a daily act of worship and schools officially recognized as having a religious character and yet lacking sufficient autonomy to uphold their religious ethos. Beyond these contradictions, fundamental questions are raised as to the role, reality and meanings of daily worship in school practice, as to the place of minority religions vis-à-vis Christianity, and as to the place of Welsh law on religion vis-à-vis United Kingdom statutes. The increasing powers of the Welsh Assembly could, they suggest, be an opportunity to develop a law on religion in schools more in tune with twenty-first century society.

**Christopher McCrudden's** analysis of religion and education patterns in Northern Ireland reveals the bicomunalism that underpins the Northern Irish model, described as a 'highly segregated, denominational and non-secular education system' – itself the product of a consociational approach to democracy involving the sharing of power between segments of society joined together by a common citizenship but divided by ethnicity, language, religion or other factors. Despite an unmet need for places in mixed-religion schools, the scope for change is, he suggests, still limited: the impact of legislation on discrimination remains restricted in scope and the political context highly relevant.

**Blandine Chélini-Pont's** analysis of the French system reveals that the dichotomy between a *laïc* state school system devoid of all religious manifestations and a private and religious school system is not a fair characterization of the French model. Indeed, the dichotomy undermines the high degree of involvement of Catholic private schools in French public education. She suggests that this high numerical presence of Catholic schools in a secularized public education system has led to a secularization of the Catholic school system itself, both as regards its teachers and its pupils. The challenge that French Catholic schools now face, she concludes, is to maintain their openness and non-denominational nature without losing all of their distinctive religious character.

**Heinrich de Wall** analyses the meaning and consequences for the school context of the German notion of state religious neutrality. Unlike the French concept of *laïcité*, religious neutrality does not require the absence of religion in the public sphere but merely demands that the State abstain from showing a preference or dislike for a particular religion or for religion in general. De Wall

examines the consequences of the concept in respect of religious instruction classes in German state schools. Provision of religious instruction in state schools complies with the concept of neutrality so long as it does not confer any advantageous or disadvantageous status on any particular religious group. Mindful of the need to respect state neutrality whilst at the same time respecting the rights of religious groups to self-determination, the German system has opted for a denominational form of religious instruction in which religious communities are highly involved. De Wall argues that this system is not only respectful of religious groups (which are thereby associated as crucial actors in the public sphere) but – thanks to a right to opt out granted to parents and, from the age of 14, to pupils themselves – is also respectful of parents' and pupils' rights to religious freedom. However, he concludes that the real challenge for the German model will come from the current demands of Muslim pupils and parents for Islamic religious instruction classes in state schools. It is only if those demands are accommodated and current institutional hurdles overcome (notably the lack of an umbrella Muslim organization able to speak out for German Muslims and decide on the issues surrounding religious instruction classes) that the German denominational model of religious instruction will have a future in a religiously pluralist German society.

**Javier García Oliva's** analysis of the Spanish model reveals that the cooperationist approach of Spain towards Church/State relationships hides a high involvement by church authorities in religion at school: religious education is denominational and teachers of religious instruction classes are proposed by the relevant church authorities. These features, García Oliva concedes, may be at times difficult to reconcile with the demands of equality: to what extent, for example, should Catholic Church authorities be allowed to dismiss or penalize teachers of Catholic religion whose conduct has been deemed not to be compatible with the tenets of the Catholic faith? Conversely, to what extent should the requirements of equality interfere with the right of churches to have their own identity and autonomy respected? So far as pupils are concerned, how can one ensure equality between pupils who study religious instruction and those who opt out and yet also ensure that religious instruction is treated like any of the other subjects in the school syllabus (as required under the agreement between Spain and the Holy See)? However delicate this conciliation may be, García Oliva concludes, the denominational nature of the course on religious instruction need not disappear and the involvement of church authorities be abolished. Denominational teaching of religion can be inclusive and involvement of church authorities, within limits, welcome and justified. On the whole, however, because of the controversial nature of denominational religious teaching and the problems related to finding a suitable alternative subject, the author expresses a preference for a compulsory subject of non-denominational religious education.

Unsurprisingly, the oppositions revealed in Part I and Part II in the understandings of key concepts and national traditions amongst countries of Western Europe are reflected in the judicial or legislative solutions given in different jurisdictions to particular issues regarding religion at school. However, common features are

also to be noted, not least because of the convergent effect of the decisions of the European Court of Human Rights. Two particular areas of vivid dispute are considered: teaching content (Part III) and religious symbols (Part IV).

Religion at school in most jurisdictions is a subject as such. Unsurprisingly, many of the debates in our multi-faith European societies focus on the way in which the subject, whether described as ‘religious education’ or ‘religious instruction’, should be taught (Cumper, for an analysis of European case law and Mawhinney et al. for an empirical study). But religion can also influence the syllabus of public schools in separatist systems (Van den Kerchove for France and Barendt for the US) or have repercussions beyond teaching content on other issues such as discipline (Cranmer).

**Peter Cumper’s** chapter offers a study of the challenges presented by the provision of religious education in multi-faith and secular European societies. If, as he argues, the provision of religious education itself has a lot to offer, notably as a way of ‘helping to build bridges between people of different faiths in religiously diverse societies’, the question of how it should be provided remains controversial. In a European context where, Cumper argues, States are reminded by the European Court of Human Rights to be mindful of pupils from minority faiths, the very feasibility of the opt-out model may be questioned as inevitably subjecting those pupils to the risk of stigmatization. He concludes that the crucial question in the coming years may be more about the content (and as a consequence about proper funding) of religious educational classes. In crude terms, the options for the future lie between a mainly confessional and Christian syllabus or a more comparative curriculum inspired by a broad range of religions and beliefs.

**Alison Mawhinney, Ulrike Niens, Norman Richardson and Yuko Chiba** analyse the implications of the right to opt out from religious education classes for minority-belief pupils in Northern Ireland. They reveal that opt-out provisions are not the best way to address religious diversity in schools. Even when properly implemented – which would require better information for families and good quality alternatives for opted-out pupils – opt-out provisions do not fully meet minority-belief families’ expectations. Opted-out pupils, especially those of a younger age, may feel a sense of marginalization and exclusion. Moreover, and more fundamentally, opt-out mechanisms fail positively to recognize and value the beliefs of minority families. Rather than to allow pupils to ‘exclude themselves’ from religious classes of ‘essentially Christian’ content, a better option, Mawhinney et al. argue, would be to redesign the Northern Irish religious education syllabus in a more inclusive way.

**Anna Van den Kerchove’s** analysis reveals that religion is no longer a taboo topic in French *laïc* schools. Now recognized as an integral part of society, religious issues appear in most recent history textbooks used in French secondary schools. Teachers, though still forbidden to display their own beliefs, may thus engage in discussion on religious matters. But this trend in favour of a revival of religion mainly benefits Christianity. More is now being said about religion (or

rather about religious issues) in French state schools, she concludes; but more should also be said and could be better said about non-Christian beliefs.

**Eric Barendt's** chapter on teaching evolution, creationism and intelligent design in US schools raises questions which are of particular relevance for European debates. The key justification that emerges from US constitutional case law in respect of the presence of religion in state schools is the educational purpose it can fulfil. Religious views which are presented in order to 'inform students and promote their understanding of minorities' would thus comply with such a purpose and be held to be constitutional whereas measures which seek to promote religious views of the world would not. The analysis of the US experience, he concludes, has a lot to tell us about the interplay of religion, education and the law.

**Frank Cranmer's** analysis of the *Williamson* case, its prelude and its aftermath, provides clues as to how English courts approach religious questions at school. In *Williamson*, the claimants argued that corporal punishment was an essential element of their Evangelical Christian faith and that they should as a consequence be allowed to delegate to teachers the right physically to discipline their children. The importance of the decision, Cranmer tells us, goes far beyond this simple question. The value of the decision lies in the tension it reveals between the extreme reluctance of courts to judge the validity of a particular belief on the one hand and, on the other, the need to assess whether or not a particular manifestation of that belief is sufficiently fundamental as to merit protection. *Williamson*, he concludes, is thus a perfect illustration of and justification for the case-by-case approach of common law judges.

Beyond how religion is to be taught at school, the most high-profile cases have dealt with how (if at all) religion is to be seen at school, hence a final part on religious symbols.

The *Human Rights Act 1998* and the new law prohibiting discrimination on grounds of religion or belief have been described as the two pillars of twenty-first century religion law in Britain.<sup>85</sup> The first two chapters confirm the statement in relation to religious symbols worn in English and Welsh schools by pupils (Hill, in respect of the influence of the human rights era) and by staff (Sandberg, with a focus on anti-discrimination law). The third and final chapter addresses legal issues raised by religious symbols in German state schools (Lock). Interestingly, a human rights discourse in Germany on these matters has developed through a national rather than a European impetus.

**Mark Hill's** analysis reveals how English courts have adapted to the methodological shift triggered by article 9 of the European Convention on Human Rights which turned religious freedom into a positive individual right. English courts, he observes, tend to adopt a broad approach to what may amount to religious beliefs under article 9 paragraph 1 of the Convention and yet often conclude that those beliefs have not been interfered with. As illustrated in the case of *Begum* (and others that followed), the House of Lords held that the school's

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85 Sandberg 2011: 115.

refusal to allow Miss Begum to wear the *jilbab* did not interfere with her right to religious freedom under article 9(1). Their reasoning was based on the notion of the ‘specific situation’, where a person voluntarily submits to a particular system of rules. That reasoning, Hill suggests, is flawed. A school pupil does not voluntarily accept a school uniform policy and there is no contractual relationship between school and pupil. A far more satisfactory approach, he concludes, would be to abandon the ‘specific situation’ rule and develop reliable criteria for legitimate qualifications to religious freedoms under article 9(2).

**Russell Sandberg’s** chapter on religious symbols worn by staff in British schools studies the respective usefulness of article 9 of the ECHR and anti-discrimination law. Given the broad (and he suggests unfortunate) construction by English courts of the ‘specific situation’ rule, claims under article 9 are unlikely to succeed. Teachers and other staff, he observes, will typically have agreed to restrictions of their religious freedom under their contract of employment and will be barred from subsequently claiming that this restriction interferes with their article 9 right. Consequently, Sandberg concludes that school employees would be better advised to rely upon discrimination law, under which more scope is given by English judges to the consideration of the merits of individual cases. However, employees who wish to wear symbols which manifest a belief only held by a few individuals may find that their claims fall outside the scope of anti-discrimination protection. Sandberg is highly critical of this exclusion of those minority beliefs. A far better approach, he suggests, would be to abandon distinctions according to beliefs and decide all of those claims on the grounds of justification. That would allow courts to reach more nuanced decisions, reflecting the context in which the claimant operated.

**Tobias Lock’s** contribution focuses on a few high profile and very instructive German constitutional cases relating to religious symbols in German state schools. Lock’s analysis reveals the criteria for distinguishing between the treatment of static religious symbols such as a cross affixed to the wall of a classroom and manifestations of religion at school through prayers or religious education. Whereas the former are of a compelling nature because pupils cannot escape from them and are thus forced to ‘study under the cross’, the latter can accommodate diverging views through opt-out rights. There are also convincing reasons, Lock argues, for distinguishing between static religious symbols such as crosses in the classroom and portable religious symbols such as Muslim veils worn by teachers or pupils. Whereas the former is a direct result of the action of the State, bound by a duty of neutrality, the latter involves another crucial dimension: the religious freedom of the teacher or pupil concerned. Finally, religious symbols worn by teachers may be seen in a different light from religious symbols worn by pupils: because of the duty of loyalty owed by teachers to the State, a ban on religious symbols worn by teachers will be held constitutional, always provided it has a clear and precise legislative basis. The duty of neutrality of the State in matters of religion is not, Lock concludes, akin to the concept of *laïcité* and yet, in respect of teachers at least, the situation in many German *Länder* may be very similar. However, Lock



suggests that in Germany similar bans would be more problematic in respect of pupils. Moreover, anti-discrimination law may in time provide successful grounds for challenge by teachers banned from wearing religious symbols.

## Conclusion

The chapters in this collection were assembled with a view to assisting the reader in reflecting critically on the extent and meanings that are given to religious freedoms at school across Europe. All the contributions reveal that the concept of religious freedom is of growing importance in European schools. One may legitimately fear that 'heavy or exclusive focus on the facilitation of religious freedom (may) tend to underplay the complexity of broader issues raised by the relationship between religion and the law. In particular, such an approach can fail to acknowledge sufficiently that more religious freedom for some can come at the cost of less freedom for others.'<sup>86</sup> However, the present chapters suggest that the growing importance of the concept of religious freedoms in Europe is tied to a growing balancing process between conflicting rights and viewpoints. The concept of religious freedom is thus a counterforce to potentially monolithic assimilationist state models of integration, a factor towards increased diversity within individual and collective religious identities and an impetus for a methodological shift in judicial reasoning. The accommodation of collective religious freedom – and in particular the right of 'faith schools' in England and Wales – to promote their religious ethos must be balanced in each case against the freedom of religion (or freedom from religion) of staff. Moreover, the State's duty to religious neutrality or schools' commitment to community cohesion should only justify infringements to individual religious freedom of pupils and staff that are legitimate and proportionate. Finally, the religious freedoms of parents (and their ensuing right to educate their children according to their own religious beliefs) can come into conflict with the religious freedoms of children themselves, as illustrated by the *Williamson* case.<sup>87</sup> Of course, this balancing process between state duties and individual freedoms, between conflicting collective and individual freedoms or between clashing individual religious beliefs always take place in a given national model of State/Church relationship. Indeed, the concept of religious freedoms has not so far undermined the historical and subtle compromises that the respective European States have achieved with the Church or the Churches in the sphere of education: from the *laïc* French model to the religious and segregated approach in Northern Ireland, via the denominational but neutral option adopted in Germany and Spain and the complex system in England and Wales which combines a non-denominational but broadly Christian model of non-religious state schools with

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86 McCrea 2010: 1.

87 Note 23 *supra*.



state ‘faith schools’, no model is per se seen as contrary to the demands of religious freedoms, as the recent Grand Chamber decision in the *Lautsi* case<sup>88</sup> shows.

Viewed together, these contributions highlight how the relationships between individual religious freedoms and collective and state identities or between religious freedom and other human rights are the object of an ongoing social experiment and underline the difficulties and risks involved in seeking to identify the best solution or best model for Europe.

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88 Note 35 *supra*.

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