

RELIGION IN THE PUBLIC SPHERE:

PUBLIC SCHOOLS AND RELIGIOUS SYMBOLISM – A COMPARATIVE ANALYSIS

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June 2007

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RELIGION IN THE PUBLIC SPHERE: PUBLIC SCHOOLS AND RELIGIOUS SYMBOLISM – A COMPARATIVE ANALYSIS

CHAPTER 1 INTRODUCTION

*For the hand that rocks the cradle
Is the hand that rules the world.
William Ross Wallace*

The proper place of religion in public education is a highly contested issue. It has a long history comprised of the narratives of legal and social battles fought in different countries.¹ The secularization of societies, the recent phenomenon of the so-called “deprivatization of religion,”² the challenges posed by the religious pluralization of societies, and the end of the state imposed atheism in the former socialist countries—all these processes have opened new fronts of conflict. These controversies are evidence of the significance of the issue in contemporary society

¹ For example s.93 of the Canadian Constitution Act 1867 guaranteeing Catholic and Protestant denominational rights to have separate or dissentient school was a fundamental element of the “Confederation compromise.” These constitutional privileges of the two confessions have been challenged in litigation, abolished in some provinces, and in the remaining three provinces prominent legal scholars urge for their abolition. In the UK the passing of 1902 Education Act, integrating denominational schools into the state system sparked a lot of debate which continue today.

² See THE LAW OF RELIGIOUS IDENTITY: MODELS FOR POST-COMMUNISM, ed. by András Sajó and Shlomo Avineri. The Hague : Kluwer Law International, 1998.

and it is likely that it will remain so in the future since it is “in the schools that the question of religion crystallizes.”³

In education the stakes are very high. Parents have a interest to educate their children in accordance with their moral and religious convictions; the state has an interest in educating a good citizens, religious communities and institutions have an interest in assuring the continuation of their communal identity through the next generation, children have the strongest interest of all—education may exert a powerful influence on the way children relate to the outside world and on their sense of self; it may determine the possible life-choices among which they will later choose.

Several issues bring to light the contested relationship between religion and public education – should the state provide religious education, what type of religious education – confessional or education about religion; how should the state treat students whose parents object on the basis of their religious or philosophical convictions that their children receive such instruction? Should the state exempt students from certain courses or prescribed readings if they are against the religious convictions of their parents? Can local school authorities remove from the curriculum certain teaching materials because they offend the religious convictions of the majority of the population? Can the state teach creationism or intelligent design alongside with evolution? How should the state regulate religious symbolic speech within the public school domain.

This thesis will attempt to provide new insights into the issue of religion in the public square through a comparative analysis of the constitutional law regulating religious symbolism - religious texts, rituals, religious attire, and symbols of faith in public schools. These all represent symbols which may be an expression of the

³Gerhard Robbers, *Religion in Public Schools*, The Strasbourg Conference, received papers, (visited 20 April 20,

religious identity of an individual, a communication of the ideas and values of a religious community, signifiers of the moral values and tradition of society at large. By their very nature symbols are subject to different interpretations, which may change depending on who is the communicator of the symbolic speech and who is the receiver of the communication, what is the overall context in which the symbolic expression is positioned, as well as what is the position of the symbolic expression in time, its novelty, or long lasting use being a factor. Symbolic expression besides being subject to malleable interpretations is also uniquely invested with emotional charge, because symbols can be powerful bearers of identity and world views and conflicts over the place of such symbols in public schools may create deep rifts in societies.

The question the paper is going to address is “What is the legal framework regulating religious symbolism in public schools that would maximize religious liberty and equality, and place the dignity of the child as its focal point?” It will also attempt to answer the question whether public schools represent a unique domain in which regulations of religious symbols should differ from that in the rest of the public sphere. The proposition that would be tested through an analysis of the jurisprudence of the selected countries is whether the approach that would maximize religious liberty and equality is the pluralist approach which should be based on minimal state sponsored religious speech by the school authorities and maximum private religious speech by students. The more the state stands back and creates a space in which the religious speech of students may be expressed the more it moves towards the ideal of equal respect for the religious freedom of students, inclusion of all students in the school community and at the same time teaching tolerance and respect towards people of different convictions and cultures.

2007), <<http://www.strasbourgconference.org/papers/Religion%20in%20Public%20Schools.pdf>>, p.1.

The central proposition of this paper will consist of a comparative analysis of the constitutional jurisprudence on religious symbolism in public schools in six jurisdictions – the United States, Canada, The United Kingdom, Germany, France and South Africa. These countries were selected because of their unity and plurality in terms political, legal, and sociological characteristics which make the comparative analysis theoretically and practically viable.⁴

On the one hand, all of these countries are liberal democracies and the paper starts from the premise that countries functioning on the principles of such a political order may best meet the demands of liberty and equality in the sphere of public education. Secondly, all of these countries are pluralistic in terms of religious or secular world views of their populations. In all of these countries there is a traditional Christian majority, together with significant religious minorities, and a large number of persons who hold atheist or agnostic views.⁵ Religious pluralism is an important factor, since it is only in religiously diverse societies that the role of the legal framework regulating religious symbolism in public schools becomes significant, since in such societies they have to balance between conflicting rights and interests.⁶

⁴ For a theory of law as jurisprudence and the possibilities of comparative law see Catherine Valcke, *Comparative Law As Comparative Jurisprudence—The Comparability Of Legal Systems*. <papers.ssrn.com/sol3/papers.cfm?abstract_id=385861>.

⁵ According to the CIA, the religious affiliation of the population is as follows: Canada - Roman Catholic 42.6%, Protestant 23.3%, other Christian 4.4%, Muslim 1.9%, other and unspecified 11.8%, none 16%; France - Roman Catholic 83%-88%, Protestant 2%, Jewish 1%, Muslim 5%-10%, unaffiliated 4%; Germany - Protestant 34%, Roman Catholic 34%, Muslim 3.7%, unaffiliated or other 28.3%; South Africa - Zion Christian 11.1%, Pentecostal/Charismatic 8.2%, Catholic 7.1%, Methodist 6.8%, Dutch Reformed 6.7%, Anglican 3.8%, Muslim 1.5%, other Christian 36%, other 2.3%, unspecified 1.4%, none 15.1%; United Kingdom - Christian (Anglican, Roman Catholic, Presbyterian, Methodist) 71.6%, Muslim 2.7%, Hindu 1%, other 1.6%, unspecified or none 23.1%; United States - Protestant 52%, Roman Catholic 24%, Mormon 2%, Jewish 1%, Muslim 1%, other 10%, none 10%. CIA, *The World Factbook*, Field Listings, Religions, <<https://www.cia.gov/cia/publications/factbook/fields/2122.html>>.

⁶ For example in some rural communities in Canada, where all of the citizens belong to one and the same religion the issue of the presence of religious symbols in schools has neither been debated nor litigated, since no controversy has arisen at all. Of course, even in religiously homogenous societies the question remains as to the religious freedom of children and their right of “an open future” and adoption of views different from that of the national community.

On the other hand, although all of the countries protect the right to freedom of religion, freedom of speech and equality before the law they have different constitutional regulation of the relationship between the state and religious institutions. For example, the French principle of *laïcité* is different from the US Establishment Clause, and both of these are significantly more separationist than in the constitutional provisions in the rest of the chosen countries. Similarly, the status of the Anglican Church is unique and leads to distinctive characteristics of the constitutional regime in the UK. The legal solutions these countries adopt to address the identified problems cannot be comprehended without placing them in the larger historical, cultural, and political context in which the relationship between religion and state has developed and exists at present. The historical narratives of the relationship between religion and public education and the different conceptions of the social, communitarian, or individual aspects of religion all account for salient differences in the subjects of comparison.

Context is also very important for answering the question as to what extent these factors are explanatory and to what extent they have normative power.⁷ The answer to this question is necessary in order to determine whether it is possible to construe a legal framework regulating religious symbolism in public education that arguably best protects religious freedom, equality, and the interests of children. This framework, based on the underlying unity of the core constitutional principles of these different legal systems, would work as an outer limit constraining the range of possible approaches accommodating contextual differences in the countries.

The paper will proceed with an examination of the constitutional jurisprudence on school prayer, religious attire and displays of religious symbols in the selected

countries and in the last chapter it will synthesize the conclusion reached with respect to the elaboration of the pluralist approach and will apply it to Bulgaria in order to ascertain whether it can function in the Bulgarian normative framework. Bulgaria is a country in which the question of religious symbolism in schools has only recently emerged as a forefront issue and the author hopes that this thesis will contribute to the development of the optimal legal approach in that country.

⁷ According to Montesquieu, “They [laws] should be adapted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit another.” Montesquieu, *THE SPIRIT OF THE LAWS*, translated by Thomas Nugent, <<http://www.constitution.org/cm/sol.txt>>.

CHAPTER 2

RELIGIOUS EXERCISES IN STATE SCHOOLS

No one will ever convince me that a moment of voluntary prayer will harm a child or threaten a school or State.⁸

President Ronald Reagan

I recall very little about the fifth grade, but to this day I remember awakening every Thursday with a dull, aching pain in the pit of my stomach. On Thursdays, the Bible teacher came to class. When she arrived, I left the room.⁹

I. INTRODUCTION

Religious exercises in state schools have proven to be very contentious in the countries discussed below. All of the countries share a history in which the practice of daily Christian prayer and bible reading was widespread and largely unquestioned¹⁰ Now the situation is no longer the same, but the law is far from settled. This chapter will try to address the constitutional issues arising from conflicts between the religious freedom rights of the students, the state's interests in providing moral and patriotic education of its future citizens, and parental rights over the religious upbringing of their children.

⁸ Ronald Reagan, Remarks at a White House Ceremony in Observance of National Day of Prayer, May 6, 1982, <<http://www.reagan.utexas.edu/archives/speeches/1982/50682c.htm>>.

⁹ Walter Dellinger, *School Prayer and Football*, Findlaw Commentary, <http://writ.lp.findlaw.com/commentary/20000501_dellinger.html>.

¹⁰ South Africa represents a special case with the history of the apartheid educational system, and the new system under the 1997 Constitution.

1. Definitions

Religious exercises

The term “religious exercise” is used here to signify the active affirmation of a religious teaching or the existence of a supreme being, such as a recitation and reading of prayers, whether sectarian or non-denominational, reading from the scriptures, or from other religious texts.¹¹ In the different countries the legal terms differ but they refer to essentially the same practices.

In the US, the religious exercises that first attracted constitutional scrutiny were school prayer and bible reading. Another type of exercise consists of “moments of silence” observed usually before or at the outset of class, which may be used for silent prayer or meditation. School prayer is the term used in Germany, as well. In Canada the statutes regulate “religious exercises.” In South Africa similar practices are referred to as religious observances, and in the UK – collective worship.

State schools

The term “state school” here refers to schools which are financed completely or almost entirely by the state, operated by the government or a publicly elected school board, and are tuition free. In the US and South Africa they are called public schools. In Germany they are state schools, which may be non-denominational, denominational, and inter-denominational. In Canada the term public school is usually

¹¹ Exposure to religious symbols displays would be the subject of a separate discussion in Charter Four since it does not mandate students to profess or deny any religious belief. For the distinction between “active” religious exercises and “passive” symbols see *Clever v. Cherry Hill Township Bd. of Educ.*, 838 F. Supp. 929, 937 (D. N.J. 1993). Participation in a religious observance like saying of prayers or reading from sacred texts are arguably more intrusive to those who do not share the religious belief they express, then exposing students to religious symbols, like garments peculiar to a particular religion, or some religious symbol or text displayed in a classroom. Religious observance at schools, although different from religious worship is close to a performance of a religious ritual, unlike the use of religious symbols. A separate examination of the two is also warranted because of the fact that religious exercises and religious symbols are usually regulated separately. What is more while the former comprise a narrow group of practices, the latter may encompass a wide variety of instances where religious symbols become or may become an issue, and the list of such instances is an open one.

used to denote a state school which is not a separate school. Separate schools are also state schools, but they are denominational, and are operated by separate school boards that have been formed by a particular religious group, typically one that is in the minority in the locale of the school, and typically having either Roman Catholic or Protestant orientation. The chapter will deal with public schools only. In the UK state schools are the so-called “maintained schools” which are either community, foundation or voluntary schools, and the last two types may or may not be of religious character.¹² Only religious exercises at non-religious state schools will be examined.

II. USA

The approach adopted by the US Supreme Court on the issue of school prayer in class or at school-sponsored events may be characterized as a separationist, underpinned by an understanding of state neutrality that results in forbidding any religious expression at schools when this expression may be attributed to the government, thus sending an unconstitutional message of endorsement.

A central aspect of the US Supreme Court’s approach in these cases is its analysis of the element of coercion, although in the Court’s view coercion is not necessary for finding a violation of the Establishment Clause. None of the cases discussed involved a regulation officially mandating student participation in the religious exercises, although the Court recognized that at least where religious exercises occurred within the framework of the ordinary curriculum, mandatory attendance requirements added a measure of state coercion to the practices. Even where this was the case, however, participation was voluntary in that students could

¹² On the other hand, certain independent schools in the UK are usually called “public schools”- a term “derived from their charitable origins prior to state education” but these are in fact schools that would be called private in other countries since they are not financed and run by the state. (See Gabbittas

be exempted, or in the case of extracurricular activities—they were not obliged to attend them. Nevertheless the Court consistently found that peer pressure to conform operated as a powerfully coercive mechanism with respect to children of school age. Another problem with the exemption procedures was that a child would be required to declare her belief or disbelief in order to exercise her constitutional right of free exercise, and such a condition was impermissible. On the other hand the approach has been criticized for treating secular beliefs preferentially and discriminating against religious ones.¹³

Another approach has been used in cases, which concern religious expression in extracurricular voluntary activities, such as student clubs or newspapers. The Court's approach seems to conform to the equal treatment theory and is more pluralist in nature. Noticeably however, these cases have been examined as ones involving the free speech rights of students, not their free exercise rights. Although these cases do not concern the issue of religious exercises per se, nevertheless a brief examination of them would provide a better understanding of the Court's approach to school prayer.

1. Government Composed Prayers and Engel v. Vitale, (1962)¹⁴

The Supreme Court examined the issue of school prayer for the first time in 1962 when a group of parents challenged the constitutionality of a New York State statute directing a School District use a non-denominational prayer in public schools that had been composed by the state Board of Regents.¹⁵ The lower court upheld the

Educational Consultants, <<http://www.gabbittas.co.uk/index.aspx?p=1219>>; Education Act, Part VII, Chapter I, Art. 463.

¹³ See e.g., Ron Paul, *infra* note 337

¹⁴ 370 U.S. 421.

¹⁵ Before the 1960's morning prayers were a very widespread religious practice in public schools, a practice which dated before the Civil War. See Inke Muehlhoff, *Freedom of Religion in Public Schools in Germany and in the United States*. GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW. 405, 459 (2000). For a history of daily exercises at schools see *Abington School Dist. v. Schempp* 374 U.S. 203, 267 (1963).

statute and the regulation on the ground that pupils were not required to participate if they objected. The Supreme Court, however, held that the practice violated the Establishment Clause.

Justice Black, writing for the majority, stated that the Establishment Clause “must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.”¹⁶

He drew on historical arguments about the meaning of the Establishment Clause. According to him, the Framers had realized that “union of government and religion tends to destroy government and to degrade religion.”¹⁷ Firstly, he argued that a close relationship between a particular religion and government resulted in antagonism of religious dissenters towards the government. Secondly, a lot of people had less respect for religion when it relied on government.¹⁸ Thirdly, government establishment threatened the freedom of conscience of religious dissenters.¹⁹ Since New York's state prayer program its nature was purely religious and was found to officially establish “the religious beliefs embodied in the Regents' prayer”²⁰, it was held to violate the Establishment Clause.

Although Justice Black commented that when the government power and prestige were behind a particular religion there was clear pressure on minority religious groups to conform, that was not the ground on which he found a violation. He argued that “the Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the

¹⁶ *Id.* at 425.

¹⁷ *Id.* at 431.

¹⁸ *Id.* at 431. For a critique of Justice Black's reliance on the writings of Madison and Roger Williams for his arguments see Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, CALIFORNIA LAW REVIEW 637, 689 (May 2002).

enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.”²¹

Justice Black rejected the argument that such an application of the Establishment Clause amounts to hostility towards religion. He argued that it was not for the government to write or sanction prayers but for the people themselves and their religious leaders.²²

In his lone dissent, Justice Stewart focused on the absence of direct coercion. For him the prayer at issue was similar to other instances of reference to God by the government, which had obtained a cultural and ceremonial meaning. According to him the majority by its decision denied those who wished to pray “the opportunity of sharing in the spiritual heritage of our Nation.”²³ His argument was similar to the arguments advanced by the German Constitutional Court, which held that in the case where there is no direct coercion on dissenters to ban the prayer would violate the free exercise rights of the rest of the pupils.

It should be noted that despite all the scholarly and political criticism the Supreme Court has received on its case law on religion in public schools, there are not many arguments against this decision.

2. Bible Reading and Abington School Dist. v. Schempp, (1963)²⁴

In that case the Supreme Court also held that Bible reading as a daily religious exercise was unconstitutional.²⁵ Justice Clark argued that the Establishment Clause

¹⁹ “Governmentally established religions and religious persecutions go hand in hand.” (*Engel, supra* note 14, at 341.)

²⁰ *Id.* at 430.

²¹ *Id.* at 430.

²² *Id.* at 436.

²³ *Id.* at 445.

²⁴ 374 U.S. 203.

required that the government observe a principle of neutrality towards religion—“neither aiding nor opposing religion”.²⁶ He articulated a two-part test that a piece of legislation should pass to withstand a challenge under the Establishment Clause: “there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.”²⁷ He reiterated the distinction drawn in *Engel* between the Establishment and the Free Exercise Clauses—namely that coercion was a necessary element for finding a violation only under the latter one. Applying the test the Court found that the principle purpose of the statutes was religious and therefore violated the Establishment Clause.

The Court again rejected the argument that neutrality so interpreted resulted in hostility towards religion or an establishment of a “religion of secularism.” Further the Court did not accept the argument, that such an interpretation violated the free exercise rights of the majority of the pupils who would wish to have such a religious exercise. The Court stated that “while the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs.”²⁸ The Court, citing *West Virginia Board of Education v. Barnette*, (1943)²⁹ emphasized that it was precisely to lift certain principles above the reach of the political process that the Bill of rights was created, thus freedom of worship was not subject to a majority vote.

Justice Brennan in his concurring opinion argued that non-sectarian prayers, an attempt for finding a compromise acceptable for all denominations or religions,

²⁵ In *Schempp* the Court had to examine the constitutionality of two state statutes. One was a Pennsylvania statute requiring reading several verses from the Bible without comment at the beginning of each day. Pupils could be exempted from reading or attending such readings upon a written request by their parents. The second statute was from Maryland. It did not require but authorized schools boards to adopt regulations for every day religious exercise –Bible reading and/or recitation of the Lord’s Prayer.

²⁶ *Schempp*, *supra* note 24, at 225.

²⁷ *Id.* at 223.

²⁸ *Id.* at 226.

cannot work. They would always offend the religious beliefs of many true believers.³⁰ Indeed, it may be argued that such watered down prayer version would most probably be objectionable to everybody—religious and non-religious students. For the former this may be trivialization of religion, for the latter it will still be a religious practice they would not share.

Justice Brennan's analysis of coercion is worthy of noting. He argued, that the excuse procedure was a violation of the Free Exercise Clause and his argument was very similar to the one advanced by the Hesse Court of Appeals in the German *School Prayer* case. According to Justice Brennan:

The answer is that the excusal procedure itself necessarily operates in such a way as to infringe the rights of free exercise of those children who wish to be excused...by the same token the State could not constitutionally require a student to profess publicly his disbelief as the prerequisite to the exercise of his constitutional right of abstention.³¹

He also emphasized the psychological effects of such a procedure on young children. He noted that children would be very reluctant to avail themselves of the exemption procedure, for fear of being stigmatized as atheists or non-conformists and that "such reluctance to seek exemption seems all the more likely in view of the fact that children are disinclined at this age to step out of line or to flout "peer-group norms."³²

²⁹ 319 U.S. 624, 638.

³⁰ It has been suggested that a tentative solution to these problems may lie in the fashioning of a "common core" of theology tolerable to all creeds but preferential to none. But as one commentator has recently observed, "[h]istory is not encouraging to" those who hope to fashion a "common denominator of religion detached from its manifestation in any organized church." ...Thus, the notion of a "common core" litany or supplication offends many deeply devout worshippers who do not find clearly sectarian practices objectionable. Father Gustave Weigel has recently expressed a widely shared view: "The moral code held by each separate religious community can reductively be unified, but the consistent particular believer wants no such reduction." And, as the American Council on Education warned several years ago, "The notion of a common core suggests a watering down of the several faiths to the point where common essentials appear. This might easily lead to a new sect - a public school sect - which would take its place alongside the existing faiths and compete with them." (*Schemmp, supra* note 24, at 286-287).

³¹ *Id.* at 289.

³² *Id.* at 290.

Justice Stewart did not agree with Brennan's analysis of coercion. He argued that the case could not be decided because there was no sufficient evidence to show absence or presence of coercion and it was wrong for the Court to assume that that "school boards so lack the qualities of inventiveness and good will as to make impossible the achievement of that goal," namely a system of religious exercises during school hours that would meet the constitutional standard.³³

According to Justice Stewart the argument that parents who wished to have their children exposed to religious influence could do so outside the school was severely flawed because of the way the public school system structures a child's life. That is why such an interpretation of the principle of neutrality, according to him, lead to an "establishment of a religion of secularism, or at the least, as government support of the beliefs of those who think that religious exercises should be conducted only in private."³⁴

Similarly to the German Constitutional Court he argued that what is required by the state is a refusal to "weight the scales of private choice." These cases, according to him, should be viewed as an "attempt by the State to accommodate those differences which the existence in our society of a variety of religious beliefs makes inevitable."³⁵

As Wuerth notes, the positing of freedom of private religious choice from government interference as the fundament of a theory of the religious clauses has been advocated by a number of scholars, Laycock and McConnell being the most prominent ones.³⁶ Such an interpretation argues that "if the government excludes religious groups from public programs and fora, it creates incentives for such groups

³³ *Id.* at 319.

³⁴ *Id.* at 313.

³⁵ *Id.* at 317.

to secularize; through these incentives, the government distorts private religious decision-making and thus violates the Constitution.”³⁷ There are however, substantial differences in the way Laycock and McConnell develop this approach.

Laycock’s theory comes closer to the US Supreme Court’s case law on religious exercises at state schools. Central for his analysis is the distinction between private speech and speech attributable to the government. While he argues for the full protection of private religious speech in public forums, government on the other hand should remain silent on religious matters.³⁸

McConnell argues that government influence on private religious choices would be non-existent if public places and public institutions “exactly mirrored the culture as a whole...the religious life of the people would be precisely the way it would be if the government were absent from the cultural sphere.”³⁹ As stated such an approach applied to religious exercises at state schools would lead to unacceptable results. Firstly, if the religious exercises should “mirror” exactly the religious make-up of American society as a whole or the student body at a particular school, this would lead to preferential treatment of majoritarian religions. Secondly, McConnell himself concedes, that “particular care should be taken where impressionable children are involved.”⁴⁰ No matter what care is taken, if such exercises are held during curricula activities, coercion as interpreted by the Supreme Court remains a problem. Finally, at one time events, such as graduation ceremonies it is not possible in practice to implement such an approach, since there is limited number of student speakers and

³⁶ Ingrid Brunk Wuerth, *Private Religious Choice In German And American Constitutional Law: Government Funding And Government Religious Speech*, VAND. J. TRANSNAT’L L. 1127, 1137 (1998)

³⁷ *Id.*

³⁸ Douglas G. Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES, 313, 348-52 (1996).

³⁹ Michael W. McConnell, *Religious Freedom at A Crossroads*, UCLR, 115, 193 (1992).

⁴⁰ *Id.*

the event is non-repetitive for individual students, so that there is no possibility for a pluralism of religious and secular views to be reflected.

On the other hand, if equal weight is given to all religions and the approach is on an opt-in, instead of an opt-out base, then McConnell's theory is consistent with pluralism approach adopted in South Africa, Canada, and to a lesser extent the UK, discussed below.

3. *"Moments of Silence" and Wallace v. Jaffree, (1985)* ⁴¹

At first blush a provision for a moment of silence at the start of the school day could not be seen as either an endorsement of religion by the state or as an abridgement of the free exercise rights of any of the students. If some of them wish to engage in silent prayer, there is no coercion of other students to do so. The Supreme Court however held unconstitutional an Alabama statute authorizing public schools to begin each day with "silent meditation or voluntary prayer". The original statute from 1978 read only "silent meditation," but the words "or voluntary prayer" were added in 1981. Applying the Lemon test⁴² the Court held that the statute violated the Establishment Clause because it lacked a secular purpose. The Court stated that the purpose need not be solely secular,⁴³ however from the legislative history it was clear that the Alabama statute had none.⁴⁴

⁴¹ 472 U.S. 38.

⁴² "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion...finally, the statute must not foster 'an excessive government entanglement with religion.'" See *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).

⁴³ *Id.* at 56.

⁴⁴ "The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday. The 1978 statute already protected that right, containing nothing that prevented any student from engaging in voluntary prayer during a silent minute of meditation." See *Wallace*, supra note 41, at 59.

In her concurring opinion Justice O'Connor also noted that the Court by its decision was not interpreting the First Amendment as prohibiting pupils' voluntary student prayer at public schools. Statutes of other states authorizing "moments of silence" were in conformity with the Constitution. The Alabama statute, however, had "intentionally crossed the line between creating a quiet moment during which those so inclined may pray, and affirmatively endorsing the particular religious practice of prayer."⁴⁵

O'Connor criticized the "neutrality principle" and argued that the solution of the opposition between the Free Exercise and Establishment clauses was in "identifying workable limits to the government's license to promote the free exercise of religion."⁴⁶ In examination of the purpose and effect of the statute she applied the endorsement test,⁴⁷ which allowed government to take religion into account in legislation as long as it did not convey a message that "that religion or a particular religious belief is favored or preferred" since "such an endorsement infringes the religious liberty of the nonadherent."⁴⁸

In his dissenting opinion Justice Burger argued that absent any coercion the state was simply providing an opportunity for pupils to exercise their rights. It provided accommodation of "purely private, voluntary religious choices of the individual pupils" without infringing upon the rights of students with no religious views.⁴⁹

⁴⁵ *Id* at 70.

⁴⁶ *Id.*

⁴⁷ "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." (*Lynch v. Donnelly*, 465 U.S. 668, 688 (1984).)

⁴⁸ *Id* at 70.

⁴⁹ *Id* at 114.

Statutory provisions providing for “moments of silence” exist in several states.⁵⁰ Where the statute’s language does not explicitly mention prayer, as one way in which moments of silence may be used by students it is undoubtedly in compliance with the Court’s holding.⁵¹ Statutes that mention “prayer” as a possible alternative are not necessarily in violation of the Establishment Clause. As Justice O’Connor stated in her concurring opinion, “even if a statute specifies that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives.”⁵² In *Brown v. Gilmore*⁵³ the 4th Circuit Court of Appeals upheld the a Virginia statute that provided for “minute of silence” so that “each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice.”⁵⁴ The court of appeals held that in contrast to case in *Wallace* the legislature had a genuine secular purpose, and if it had a religious one it was a permissible accommodation. The Supreme Court denied certiorari.

Finally, prior legislative history is also important and should not signal that the intention behind the statute was one of endorsing prayer. The courts will look for the genuine purpose behind the statute. Justice Ginsburg has suggested however, that legislators can “purge the past,”⁵⁵ meaning that although at a certain point in time the

⁵⁰ For a listing of state laws providing for “moments of silence” with summery of the relevant case law, as of 2003 see: *State Laws Regarding Moment of Silence in Public Schools*. LIBERTY COUNSEL. <www.lc.org/OldResources/moment_of_silence_pledge_of_allegiance_state_listing_061702.pdf>.

⁵¹ For example such a statute has been passed in Minnesota, stating that “a moment of silence may be observed” (Minn. Stat. § 121A.10. Moment of Silence) or in North Carolina where the statutes authorizes school boards to provide for a moment of silence which “shall be totally and completely unstructured and free of guidance or influence of any kind from any sources” (N.C. Gen. Stat. § 115C-47. Powers and Duties Generally.)

⁵² *Id* at 74.

⁵³ No. 002132P - 07/24/01.

⁵⁴ Va. Code Ann. § 22.1-203

⁵⁵ See Official Transcript of Proceedings Before the Supreme Court of the United States at 40, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (No. 99-62), cited in Kelly J. Coghlan, *Those Dangerous Student Prayers*, 32 (4) ST. MARY’S L. J. 809, 842 (2001).

[Justice Ginsburg] Question: So you can never purge the past [?] If you put even a policy that looks like it has nothing to do with religion-----

legislature tried to endorse prayer, subsequent policies that are genuinely neutral will be upheld.

A large number of states do not have “moment of silence statutes.” To “remedy that” a bill has been introduced in the Senate and the House of Representatives that would condition federal funding to public schools on the requirement that they provide at the beginning of each school day a moment for silent reflection. It stipulates that the period “shall not be conducted as a religious service or exercise” but “shall not be construed as prohibiting or restricting constitutionally protected prayer.”⁵⁶ If enacted, courts will have to look at the legislative purpose of the bill. I would argue that although the purpose stated by the sponsors of the bill is a secular one, the real purpose is to encourage prayer, which is evident by the bill text itself. Therefore such a bill most probably would be unconstitutional according to the Supreme Court doctrine.⁵⁷

The cases mentioned above set the rules for religious exercises during classes, and the rules are pretty clear—they are forbidden under the Establishment Clause of the

Mr. Griffin: I think you can purge the past. I would never say that, and Chief-----
excuse me, Justice Ginsburg, I would never say that.

⁵⁶ H.R.1202. Title: To provide for a period of quiet reflection at the opening of certain schools on every school day. Sponsor: Rep Scott, David [GA-13] Cosponsors: 62 (introduced 3/11/2003) Cosponsors: 62; S.591 Title: A bill to provide for a period of quiet reflection at the opening of certain schools on every school day. Sponsor: Sen Miller, Zell [GA] (introduced 3/11/2003)

⁵⁷ For example, in *Tammy Kitzmiller v. Dover Area School Dist.* 400 F.Supp.2d 707 (M.D.Pa. 2005), the court held unconstitutional a resolution adopted by the Board of Education of Dover, Pennsylvania that directed that students should be made aware of “gaps” in Darwin’s evolution theory and should be exposed other theories such a intelligent design. The resolution was adopted against the background of two Supreme Court decisions: *Epperson v. State of Arkansas*, 303 US 97 (1968), which held that an Arkansas’ statute prohibiting the teaching of evolution violated the Establishment Clause because its purpose was to prohibited the teaching of a scientific theory that is in contradiction with the religious beliefs of some of the state’s citizens (*Id.* at 108), and *Edwards v. Aguillard* 482 U.S. 578 (1987), which held that a Louisiana statute requiring that the teaching of evolution should be balanced by teaching in creation science is unconstitutional since it has no valid secular reason and violated the Establishment Clause. In *Kitzmiller* the judge examined the purpose of the School Board resolution, noted that the book proposed for instruction of intelligent design was edited shortly after the Supreme Court decision in *Edwards* and “creation science” was replaced by “intelligent design” and held that although the stated purpose of the resolution was a secular one, the court was required to look “distinguish a sham secular purpose from a sincere one” (*Aguillard*, at 586-87) and found that the real purpose was “to promote religion in the public school classroom, in violation of the Establishment Clause.” (*Kitzmiller* at 763).

US Constitution. A second issue that the Court had to address was the constitutionality of such exercise during extracurricular activities, such as graduation ceremonies and football matches.

4. Graduation Prayers and Lee v. Weisman, (1992)⁵⁸

The issue before the Court was the constitutionality of a school policy in Rhode Island, which permitted principals of middle and high schools to invite clergy to deliver invocations and benedictions at schools' graduation ceremonies. The Court held by five votes to four that the policy was a violation of the Establishment Clause.

Justice Kennedy, who delivered the opinion of the Court, argued that it was not for the government to promote and endorse religious worship, this was a "responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission."⁵⁹ The school authorities in the present case were clearly involved in the religious observance. The school principal decided that benediction should be given, chose the clergy member, and gave him instructions as to the content of the prayer.

Even though graduation was an extracurricular event, the Court found that policy was coercive towards dissenters. Justice Kennedy emphasized that school children are of such an age, when the pressure from peers to conform is very strong, especially regarding social conventions.⁶⁰ He rejected as very formalistic the argument that the fact that students had the option of not attending the religious exercises eliminated any coercion. Because of the great importance of the graduation event for students and an absence from the ceremony "would require forfeiture of

⁵⁸ 505 U.S. 577.

⁵⁹ *Id* at 589.

⁶⁰ That distinguished the present case from *Marsh v. Chambers*, (1983) 463 U.S. 783 in which legislative prayer was held constitutional.

those intangible benefits which have motivated the student through youth and all her high school years.”⁶¹ On the other hand, Justice Scalia in his dissent gave a very narrow interpretation of what constitutes coercion. According to him the concept should not be expanded “beyond acts backed by threat of penalty.”⁶²

Arguably, such a narrow interpretation of coercion may be the one to apply in cases involving adults, but it is not the proper one with respect to children, precisely because of the physiological pressure to conform that they experience. It may be argued however that graduation ceremonies of high school seniors present a borderline case, since from that day on children are supposedly passing into adulthood.⁶³ Nevertheless, the thrust of the Court’s coercion argument was not that dissenting student would not want to stand out as different, but that if they wished not to listen to the prayer that would have to forgo the ceremony.

As to the argument that the de minimis character of the prayer minimized the intrusion of religiosity, Justice Kennedy rightly argued that, to argue so would be “an affront to the rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority.”⁶⁴

The rational behind the establishment Clause given by Justice Blackman built upon *Engel v. Vitale*. He argued that “When the government puts its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs. A government cannot be premised on the belief that all persons

⁶¹ *Id.* at 595.

⁶² The concurring opinions of Justices Blackman and Souter emphasized that coercion was not necessary for a violation of the Establishment Clause. While Justice Blackman argued that although not necessary the element of coercion was sufficient for finding a violation of the Establishment Clause since when government was exerting pressure for participation in a religious exercise, it was clear that it was endorsing religion. Justice Souter made the argument that if the Establishment Clause sought to prevent coercion only, then it was redundant because coercion is prohibited under the Free Exercise Clause.

⁶³ In the present case Debora Weisman was attending a middle school graduation ceremony, but the school policy applied to both middle and high school graduations.

⁶⁴ *Id.* at 594.

are created equal when it asserts that God prefers some.”⁶⁵ Thus he came close in his reasoning to Justice O’Connor’s Endorsement test. He defended the relationship between the Establishment Clause and political equality in the following way:

When the government arrogates to itself a role in religious affairs, it abandons its obligation as guarantor of democracy. Democracy requires the nourishment of dialog and dissent, while religious faith puts its trust in an ultimate divine authority above all human deliberation. When the government appropriates religious truth, it "transforms rational debate into theological decree." [citation omitted]. Those who disagree no longer are questioning the policy judgment of the elected but the rules of a higher authority who is beyond reproach.⁶⁶

Justice Souter’s interpretation of neutrality as a “principle against favoritism and endorsement... ensuring that religious belief is irrelevant to every citizen’s standing in the political community,” also emphasized the implications of the Establishment Clause for political equality.⁶⁷

In contrast to the South African and Canadian approaches Justice Souter cautioned against the role of the state in promoting religious diversity and pluralism by holding of religious exercises based on difference faiths. He warned that such a policy would force the state to make decisions of how many religions it should sponsor, and how frequently, which decisions are “wholly inappropriate.” He quoted Madison, in support of the proposition that as time passes it is very likely that government’s choices would become severely biased in favor of the majority religion.⁶⁸

The Court also argued that its interpretation of neutrality did not deprive the graduating students to pray, before or after the ceremony.⁶⁹ This position was criticized by Justice Scalia as diminishing religion by relegating such observance to

⁶⁵ *Id* at 607.

⁶⁶ *Id.* at 608.

⁶⁷ *Id* at 627.

⁶⁸ *Id* at 505.

⁶⁹ *Id* at 629.

the private sphere.⁷⁰ Such an objection has been made by a number of scholars as well.⁷¹

It should be noted that both in *Wallace v. Jeffery* and in *Lee v. Weisman* the dissent argued that the line of reasoning of the majority would lead to similar constitutional problems with the Pledge of Allegiance in public schools. In *Wallace* it was observed that Congress expressly amended the Pledge to insert the words "one nation under God"—not a secular purpose.⁷² Scalia noted in *Weisman* that were the finding of coercion true in *Weisman*, then requiring students to stand for the Pledge of Allegiance would also be constitutionally objectionable, since

The government can, of course, no more coerce political orthodoxy than religious orthodoxy. Moreover, since the Pledge of Allegiance has been revised since *Barnette*⁷³ to include the phrase "under God," recital of the Pledge would appear to raise the same Establishment Clause issue as the invocation and benediction....In *Barnette*, we held that a public school student could not be compelled to recite the Pledge; we did not even hint that she could not be compelled to observe respectful silence - indeed, even to stand in respectful silence - when those who wished to recite it did so. Logically, that ought to be the next project for the Court's bulldozer."⁷⁴

5. The Pledge of Allegiance - Elk Grove Unified School Dist. v. Newdow (2004)

Recently the 9th Circuit Court did just that—it held that the Act that amended the wording of the Pledge and the recitation of the Pledge of Allegiance in public schools violates the Establishment Clause. In *Newdow III* (*Newdow v. U.S. Congress*,

⁷⁰ *Id* at 643.

⁷¹ Daniel O. Conkle, Franklin Gamwell, Frederick Mark Gedicks have all criticized the Supreme Court for privatizing religion and banishing it from public life unless it can be coached in the rhetoric of "secular individualism."

⁷² The Pledge of Allegiance after it was amended by congress in 1954 reads "I pledge allegiance to the flag of the United States of America, and to The Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all."

⁷³ 319 U.S. 624, 642 (1943).

⁷⁴ *Id.* at 640. For a person who has spent her first 7 school years in public school during the communist regime in Bulgaria, I have to confess that I find it highly problematic and intuitively objectionable to have the state enforce political allegiance upon young children each and every day through an institutionalized recital, albeit with the possibility of exemption. My memories are still fresh when all

2003 WL 554742 (9th Cir. February 28, 2003))⁷⁵ the court held that the statement that the United States is a nation “under God” is a “profession of religious belief namely, a belief in monotheism” and it fails the coercion test under Lee.⁷⁶ According to the majority the school board’s policy mandating the recital of the pledge was unconstitutional. It rejected the argument that “tendency of the Pledge to establish a religion or to interfere with its free exercise is de minimis is or is an instance of a “ceremonial deism” and therefore not unconstitutional.”⁷⁷

The overwhelming public reaction was highly critical of the decision.⁷⁸ When the Supreme Court granted certiorari most constitutional scholars predicted that the court would find a way to uphold the constitutionality of the Pledge of Allegiance, despite the fact the a principled adherence to the jurisprudential doctrine of the Establishment Clause of the Court would lead to the opposite finding. As some scholars pointed out, the rulings of the Court pointed firmly at one direction, while some of the Court’s dicta suggested that the justices are unlikely to declare the Pledge unconstitutional.⁷⁹ The Supreme Court avoided the problem by holding that the

of the class in my school had to stand up - army style, and salute the teacher with the hand raised up to the side of the forehead.

⁷⁵ This was the second ruling of the Court. In *Newdow I*, the first ruling the court declared both the statute codifying the pledge as well as the school board policy as unconstitutional, but later revised its decision

⁷⁶ *Newdow v. U.S. Congress*, 2003 WL 554742 (9th Cir. February 28, 2003) at 2807.

⁷⁷ *Id* at 2615-2618. Previously, the Seventh Circuit Court of Appeal held that the recitation of the Pledge in public schools was constitutional, as long as students had the right to opt out, in the case of *Sherman v. Community Consol. Sch. Dist. 21 of Wheeling Township*, 980 F.2d. 437 (7th Circuit 1992).

⁷⁸ Tobias Barrington Wolff, *What the Recent Pledge of Allegiance Decision Really Means*, Jul. 02, 2002, <http://writ.news.findlaw.com/commentary/20020702_wolff.html>.

⁷⁹ Douglas Laycock, *Theology Scholarships, The Pledge Of Allegiance, And Religious Liberty: Avoiding The Extremes But Missing The Liberty*, 118 (1) HARVARD LAW REVIEW 155, 158 (2004). See for example, *Lynch v Donnelly*, 456 U.S.668, 716 (1984) (Justice Brennan, dissenting), “I would suggest that such practices as the designation of “In God We Trust” as our national motto, or the references to God contained in the Pledge of Allegiance to the flag can best be understood, in Dean Rostow’s apt phrase, as a form a “ceremonial deism,” protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content;” *Wallace v. Jaffree* 472 U.S. 38, 78 (1985) , (Justice O’Connor, concurring), “In my view, the words “under God” in the Pledge, as codified at 36 U.S.C. 172, serve as an acknowledgment of religion with “the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future;”” *Engel v. Vitale*, 370 U.S. 421, 446 (1962), (Justice Black, ft 21), “There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially

plaintiff had no standing to sue on behalf of his school age daughter, since he did not have the legal custodial rights. However, three of the justices concurred in the opinion, but reached the merits of the case and argued for different reasons that the recitation of the pledge is constitutional.

For Justice Rehnquist, the recital of the Pledge of Allegiance with the words “under God” is not a “religious exercise” but a patriotic one and the phrase is “but a simple recognition of the fact [that] ‘From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God.’”⁸⁰ He admitted that the phrase may signify different things to those recite the Pledge: “that God has guided the destiny of the United States, for example, or that the United States exists under God’s authority” but argued that this is of secondary importance.⁸¹

Surely the words added to the original Pledge does not transform it into a prayer or a religious exercise like the ones that Court have found unconstitutional when they are performed under the sponsorship or direction of the state in public schools. Nevertheless, it is hard to argue that the meanings that Justice Rehnquist alluded to are not religious affirmations. Moreover, in contrast to the “generic prayers” in the Pledge the religious affirmation is related to the patriotic one, and thus it is even harder to sustain under O’Connor’s endorsement test. When belief in God is tied to allegiance to the nation, it is particularly problematic to claim that the practice

encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.”

⁸⁰ *Elk Grove Unified School Dist. v. Newdow* 542 U.S. 1 (2004), Justice Rehnquist concurring.

⁸¹ *Id.*

does not send a message that some students do not have an equal standing in the political community.⁸²

Nevertheless, Justice O'Connor also upheld the Pledge. She indicated four factors for assessing whether a given state practice would pass the endorsement test or not. The first factor she points out is that of "History and Ubiquity." According to Justice O'Connor:

"novel or uncommon references to religion can more easily be perceived as government endorsements because the reasonable observer cannot be presumed to be fully familiar with their origins. As a result, in examining whether a given practice constitutes an instance of ceremonial deism, its "history and ubiquity" will be of great importance."⁸³

She asserts that the fifty years during which the words "under God" were present in the Pledge is considerable time for a young nation such as the American one, although she was ready to find the Pledge constitutional even in 1985,⁸⁴ so how much time does it take for a practice to subsist in order to be viewed as "historical" is a very relative judgment. Furthermore, Justice O'Connor admits that a long standing unconstitutional practice does not become constitutional because the state has engaged in it steadily over the years, but emphasizes that "the history of a given practice is all the more relevant when the practice has been employed pervasively without engendering significant controversy."⁸⁵ It should be noted however the teacher led recitation of the Pledge of Allegiance with and without the words "under God" has been subject to much litigation and controversy.⁸⁶

⁸² See Laycock, *supra* note 79, at 229. Laycock powerfully observes, "Students who cannot in good conscience affirm that the nation is "under God" cannot recite the officially prescribed pledge of their allegiance to the nation. They might not recite the Pledge at all, or they might drop out for two words in the middle. Either way, the message of exclusion is unmistakable. What kind of citizen cannot even recite in good faith the Pledge of Allegiance?" (*Id.*)

⁸³ *Elk Grove*, *supra* note 80, Justice O'Connor concurring

⁸⁴ See *supra* note 79.

⁸⁵ *Id.*

⁸⁶ For a history of the litigation and controversy related to the Pledge of Allegiance at public schools see Gunn T. Jeremy, *Religious Freedom and Laïcité: A Comparison of the United States and France*,

Furthermore, the ubiquity of the practice is the result of its appeal to the majority of the Americans. However, it is curious how majoritarian support for a government practice should be the decisive factor when constitutional freedoms are at stake. The fact that millions of American school children recite it at the beginning of each day is another evidence of the ubiquity of the Pledge. But one should not forget that it is precisely because of the state prescription of the Pledge as daily patriotic exercise that it is being recited. It is not as if all school children out of their own patriotic zeal spontaneously decide to start each school day with a recitation of the Pledge.

The second factor identified is “Absence of worship or prayer.” O’Connor similarly to the Chief justice found that the Pledge cannot be equated to a prayer or any other religious exercise or worship. However, this does not detract, as was argued above from its significance as a religious affirmation. If the words ‘under God’ had no religious significance at all, even they clearly the purpose behind their addition to the Pledge was for the furtherance of religion, it is hard to explain why so many American were horrified and insulted by the Appeals Court decision about these two words. If they have been so watered down, then how would one explain the strong resistance to their removal, the proposition that an Amendment should be passed so that no federal court would have the possibility to review its constitutionality?

The third factor that Justice O’Connor specifies is the “Absence of reference to particular religion.”⁸⁷ If there is a reference to a particular religion, then this practice cannot be equated with “ceremonial deism.” O’Connor noted that the Pledge contains no such reference, and while it may be true that it excludes non-theistic religions such as Buddhism, the Pledge comes closest to the impossible – making a reference to every religious belief adhered to by every citizen of the nation. This

BYU L. REV. 419 (2004); Chraless J. Russo, *The Supreme Court and the Pledge of Allegiance: Does God Still have a Place in American Schools?*, BYU EDUC. & L. J. 301(2004).

reminds very much of arguments made by Justice Scalia, to the effect that the government can constitutionally pay symbolic homage to the Creator, while all those that belong to non-theistic religions and to none at all have their rights protected under the Free Exercise Clause. This factor of Justice O'Connor is in tension with cases in which the Court has held that problems of endorsement are not solved if the state endorses not one but two religions at the same time, since under the current Establishment Clause jurisprudence the state should favor neither a specific religion, nor religion over non-religion.⁸⁸

The final prong of the test used to assess whether the Pledge is an instance of constitutionally unobjectionable “ceremonial deism” is the “Minimal religious content.” The importance of the brevity of the religious reference, according to O'Connor lies in the fact that:

First, it tends to confirm that the reference is being used to acknowledge religion or to solemnize an event rather than to endorse religion in any way. Second, it makes it easier for those participants who wish to “opt out” of language they find offensive to do so without having to reject the ceremony entirely. And third, it tends to limit the ability of government to express a preference for one religious sect over another.⁸⁹

O'Connor adds that for the above reasons were she to apply the “coercion test” she would reach the same conclusion. It is not clear however, how it would be easier for children to opt out of the statement that they disagree with if it short rather than long. One may argue that it is much easier for a high school student to remain respectfully silent during a prayer given at commencement – which is a one time event, and occurring at a time when the student is mature enough and enters into adulthood, than it would be for small children to do it each and every day in the classroom.⁹⁰ This is what Justice Thomas forcefully pointed out in his opinion.

⁸⁷ *Elk Grove*, supra note 80, Justice O'Connor concurring.

⁸⁸ See *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 , 615 (1989).

⁸⁹ *Elk Grove*, supra note 80, Justice O'Connor concurring.

⁹⁰ See also Jesse H. Choper, *One Nation Under God: Is the Pledge of Allegiance constitutional?*, 24 March 2004, <http://www.berkeley.edu/news/media/releases/2004/03/24_choper.shtml>, “When

According to him if *Lee v. Weisman* stands as good law, which position he does not accept, then teacher led recitation of the Pledge of Allegiance with the words “one nation under God” is unconstitutional.

Furthermore, although the fact that government speech does not refer to any one religion in particular, as pointed out by O’Connor, generality may be more significant in situations where the school decides to have displays of symbols of different religions for educational purposes. In such cases, I would also argue this would be an important factor in assessing the constitutionality of such displays. However, in the case of the Pledge, children are not exposed to the religious symbols of different faiths, but they are asked to actively affirm a religious belief in God and the significance of religion for the unity of the national. This is much more intrusive than exposure to passive symbols. Children are not taught that many Americans believe in God, but that the nation is “united under God” –so firstly a Supreme Being does exist and secondly it is significantly related to what it is to be an American.

The Pledge with the added phrase “under God” is also unconstitutional under the *Lemon* test, since it was adopted for a religious purpose, and it is enough to read the President’s letter to citizens to see that this purpose has not changed much over the years:

As citizens recite the Pledge of Allegiance, we help define our Nation. In one sentence, we affirm our form of government, our belief in human dignity, our unity as a people, and our reliance on God. . . .When we pledge allegiance to One nation under God, our citizens participate in an important American tradition of humbly seeking the wisdom and blessing of Divine Providence.⁹¹

After the Supreme Court ruling, the plaintiff refiled his suit, together with custodial parents as plaintiffs to avoid standing problems and United States District

teachers lead the Pledge and the vast majority of students participate, most youngsters find it easier to go along than to remain silent or leave the room. Following the attacks of September 11, students may feel a special reluctance to shun this quintessential patriotic exercise, even if its words conflict with their religious precepts.”

Court Eastern District of California ruled that a school district's policy requiring classroom recitation of the Pledge of Allegiance violates the First Amendment's Establishment Clause.⁹² The court made the important and correct distinction between recitation of the Pledge in other context by adults and teacher-led recitation in public schools, where impressionable children are a captive audience. While the former may be constitutionally unobjectionable, the specifics of the school as a domain render the latter unconstitutional.

It should be noted that in Canada, in a number of provinces there are statutory provisions or school board regulations providing for singing of "God Save the Queen" and later "O Canada"⁹³ which surely have religious connotations.⁹⁴ Such provisions have not been challenged so far, and it is unlikely that they would be found in violation of the Charter. A ceremonial and historical function is likely to be attributed to such exercise in Canada, and in this context the references in the Charter's preamble to the Supremacy of God would be a strong argument that the reference in the hymn are not constitutionally objectionable.

In *Newdow III* the US Court of Appeals also made a distinction that may be applicable to the Canadian anthem. According to the court the Pledge differs from the anthem in that:

⁹¹ Laycock, *supra* note 79 at 225.

⁹² *Newdow v. U.S. Congress*, 05-17 (E.D. Cal. Sept. 14, 2005), <http://www.becketfund.org/files/21d2e.pdf>.

⁹³ The official lyrics of "O Canada", the national anthem since 1980, read:

O Canada! Our home and native land!
True patriot love in all thy sons command.
With glowing hearts we see thee rise,
The True North strong and free!
From far and wide,
O Canada, we stand on guard for thee.
God keep our land glorious and free!
O Canada, we stand on guard for thee.
O Canada, we stand on guard for thee.

⁹⁴ For example in Ontario public schools are mandated to include "O'Canada" in the daily opening exercises. < <http://www.edu.gov.on.ca/eng/document/resource/ecu93105.pdf> >.

its reference to God, in textual and historical context, is not merely a reflection of the author's profession of faith. It is, by design, an affirmation by the person reciting it. The Pledge differs from the Declaration and the anthem in that "I pledge" is a performative statement. To pledge allegiance to something is to alter one's moral relationship to it, and not merely to repeat the words of an historical document or anthem.⁹⁵

Furthermore, in contrast to the history of the US Pledge, the final version that became the official hymn has a much less poignant reference to God than the older popular versions.⁹⁶

6. Prayer at Football Games: Santa Fe Independent School District v. Doe (2000)⁹⁷

The Court examined the constitutionality of a school board policy, which allowed students through elections to determine whether "invocations" should be delivered at football games, and who shall deliver them. The policy also directed that the prayers should be non-sectarian and non- proselytizing. The Court held that the policy violated the Establishment Clause.

The Court relied on its holding in *Lee v. Weisman*. It rejected the argument that the school district policy was merely providing opportunity for the expression of private speech in a limited public forum. According to the Court, the delivery of the speech being "on school property, at school-sponsored events, over the school's public address system, by a speaker representing the student body, under the supervision of

⁹⁵ *Newdow III*, *supra* note 92, at 2811.

⁹⁶ For example one of the version was :

O Canada! Our fathers' land of old
Thy brow is crown'd with leaves of red and gold.
Beneath the shade of the Holy Cross
Thy children own their birth
No stains thy glorious annals gloss
Since valour shield thy hearth.
Almighty God! On thee we call

Defend our rights, fend this nation's thrall,
Defend our rights, fend this nation's thrall.

⁹⁷ 530 U.S. 290 (2000).

school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer--is not properly characterized as "private" speech." The school district moreover had not opened the ceremony for use by the students in general, but had permitted one and the same student for the entire season to give "the invocation, which is subject to particular regulations that confine the content and topic of the student's message."⁹⁸

The Court emphasized again that by submitting to a vote the question of whether to have a prayer at the event the school district was unconstitutionally subjecting the religious views of minority students "at the mercy of the majority." The election process ensured that minority candidates will never prevail and their voices will not be heard. This argument is one feature of the American approach which clearly sets it apart from the approach of the German Constitutional Court discussed below.

It found that school district had not managed to separate itself from the religious content of the speech. The text of the policy as well as the past practice in the school showed that it was sponsoring the religious message. Thus the policy was both a perceived and an actual endorsement of religion.⁹⁹

Here again the Court gave an expansive interpretation of what constitutes coercion. Even though the event was extracurricular it was mandatory for the players, band members and cheerleaders and besides "to assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the

⁹⁸ *Id.* at 291.

⁹⁹ The Court stated that while choosing whether invocation should be held and who the speaker would be speaker are choice made by the students "the District's decision to hold the constitutionally problematic election is clearly "a choice attributable to the State." (*Id.* at 292).

extracurricular event that is American high school football is "formalistic in the extreme."¹⁰⁰

7. Subsequent Circuit Courts Decisions¹⁰¹

The Supreme Court holdings have been recently applied in several appeals courts' decisions. In *Cole v. Oroville Union High School*¹⁰² the issue before the Court of Appeals for the 9th Circuit was "whether the District officials infringed the students' freedom of speech by refusing to allow them to give a sectarian speech or prayer as part of the Oroville graduation ceremony."¹⁰³ The Court held there was no free speech violation even if it was assumed that the graduation ceremony was a public or limited public forum because the school district's decision was necessary to avoid violating the Establishment Clause¹⁰⁴ under the principles applied in *Santa Fe Independent School District v. Doe*, and *Lee v. Weisman*.¹⁰⁵ The Supreme Court denied certiorari and let the decision stand.

The school district planned and had extensive control over the all aspects of the ceremony. The policy required that the principal review the content of the students' speeches and invocations at the ceremony. Cole was chosen by a students' vote to deliver an "invocation" at the ceremony and Niemeyer was the co-valedictorian. The Principle advised them that their messages should be non-denominational and inclusive of all faiths. After reviewing their drafts the principle

¹⁰⁰ *Id.* at 311.

¹⁰¹ For a review of other recent circuit courts decision see Lynne A Rafalowski, *Can Public Schools Really Permit Religious Speech Without Promoting Religion? The Struggle To Accommodate But Not Establish Religion In Chandler v. James*, VILL. L. REV. 556-557 (2000).

¹⁰² 228 F.3d 1092, 1096, 1101 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1228 (U.S. Mar. 5, 2001).

¹⁰³ *Id.* at para 6.

¹⁰⁴ The Court cited *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995) ("There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech.")

¹⁰⁵ *Id.* at 7.

advised them to delete all sectarian references, and refused to allow them to deliver proselytizing sectarian speeches.

The Court relying on *Santa Fe* found that the speech by Cole was not private speech, because of the school district authorized the invocation and similarly to *Santa Fe* by using the term “invocation” it “to reflect an impermissible state purpose to encourage a religious message.” As for the speech by the valedictorian, the court concluded that although there was no majority vote procedure precluding the expression of minority views, school district’s involvement in the event and its control over student speech that this message made it “apparent Niemeyer’s speech would have borne the imprint of the District.”¹⁰⁶

Coghlan has argued that it is difficult to reconcile the decision of the Court of Appeals with the holding of the Supreme Court in *Santa Fe*.¹⁰⁷ According to him:

One must conclude that under Oroville Union’s peculiar policy, the graduation ceremony constituted a closed forum in which speakers could express only government’s words, causing every student speaker to become a mere government surrogate mouthing only government’s thoughts and views. Even so, the school district seemed to single out only faith-based speech for censorship.¹⁰⁸

He contends that such an act would represent unconstitutional view-point discrimination. However, it may be argued that restricting proselytizing speech at school events is necessary because other students are coerced to listen and that is an infringement of their free exercise rights. Private proselytizing speech is constitutionally unobjectionable, when those it is addressed to are free to listen or not, but in a setting in which exit is not a freely exercisable option, such speech has to be restricted.¹⁰⁹

¹⁰⁶ *Id* at 9.

¹⁰⁷ Kelly J. Coghlan, *Those Dangerous Student Prayers*, 32 (4) ST. MARY’S L. J. 809, 842 (2001).

¹⁰⁸ *Id.*

¹⁰⁹ In *Cole*, the speeches that students wanted to deliver were of the following nature: “Cole and Niemeyer attended the June 5 graduation and Niemeyer attempted to deliver his unedited speech, but the principal refused to allow him to do so. Niemeyer’s final proposed speech included a statement that he was going to refer to God and Jesus repeatedly, and if anyone was offended, they could leave the

The issue of whether prayers or religious speech by students is always impermissible at public school events was dealt with by the 11th Circuit Court of Appeals.¹¹⁰ In *Chandler I*¹¹¹ the court vacated a district court's injunction forbidding Alabama DeKalb County school from authoring "all prayer or other devotional speech in situations which are not purely private, such as aloud in the classroom, over the public address system, or as part of the program at school-related assemblies and sporting events, or at a graduation ceremony" and requiring school officials to prevent students or other private individuals from engaging "in such public or vocal prayer or other devotional speech or Bible reading."¹¹²

In *Chandler I* the court argued that it was not private parties' religious speech that was violating the Constitution, but the state sponsorship or command of religious expression. According to the Court it was "the *State's decision to create an exclusively religious medium* which violates the Establishment Clause; *not* the private parties' religious speech." Allowing private religious speech was not a violation of the Constitution. What the Establishment Clause prohibited was the state's "*requirement* that the speech be religious, i.e., invocations, benedictions, or prayers."¹¹³

graduation. Niemeyer's proposed speech was a religious sermon which advised the audience that "we are all God's children, through Jesus Christ [sic] death, when we accept his free love and saving grace in our lives, " and requested that the audience accept that "God created us" and that man's plans "will not fully succeed unless we pattern our lives after Jesus' example." Finally, Niemeyer's speech called upon the audience to "accept God's love and grace " and "yield to God our lives." Cole's proposed invocation referred repeatedly to the heavenly father and Father God, and concluded "We ask all these things in the precious holy name of Jesus Christ, Amen." (*Id.* at 12570).

¹¹⁰ After the Supreme Court issued its decision in *Santa Fe* in 2000, it vacated the Court of Appeals decision in *Chandler I* and remanded the case to the court for further consideration in light of the *Santa Fe* decision. The Court of Appeals reaffirmed the decision it reached in *Chandler I*

¹¹¹ *Chandler v. James*, 180 F.3d 1254 (11th Cir.1999).

¹¹² *Chandler I*, *supra* note 111. The District Court also held that the Alabama Statute under which the school had issued its policy was unconstitutional both facially and as applied. This decision of the District Court was not appealed to the Court of Appeals. The Alabama statute read:

On public school, other public, or other property, non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benedictions, shall be permitted during compulsory or non-compulsory school-related student assemblies, school-related student sporting events, school-related graduation or commencement ceremonies, and other school-related student events. (Ala.Code § 16-1-20.3(b) (1995).

¹¹³ *Id.*

The court held that the principle of neutrality did not require suppression of student-initiated religious speech. Such suppression resulted not in neutrality but hostility towards religion. As long as students-initiated speech was “without oversight, without supervision, subject only to the same reasonable time, place, and manner restrictions as all other student speech in school” and was not proselytizing, which speech was inherently coercive, there was no violation of the Establishment Clause in the public school context.¹¹⁴ The last condition stated by the Court made its decision consistent with the decision in *Cole*. It can be argued that precisely because the speech at issue there was proselytizing and the event was a public school sponsored event the school was required to impose restrictions.

A policy permitting student religious expression under such terms “signifies neither state approval nor disapproval of that speech. The speech is not the State's- either by attribution or by adoption.”¹¹⁵ Further the court argued that unconstitutional coercion of the listener occurred only when the state was commanding the speech. According to the Court absent an endorsement of the religious message by the state, the problem of coercion is absent as well. However, I would argue that, if the state is not commanding the speech, but is commanding presence when the speech is delivered, as in compulsory student assemblies, for instance, then the problem of coercion remains.¹¹⁶ Ramsey rejects this argument and claims that “coercion implies a

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *The opposite conclusion was also reached by the Ninth Circuit Court of Appeals in the case of Doe v. Madison Sch. Dist. No. 321, 147 F.3d 832, 836 & n.6 (9th Cir. 1998). In fact in the case the court did not discuss the problem of coercion from this aspect. The school district had a graduation policy which stated that at minimum four student speakers are invited to speak on graduation and are selected according to academic class standing. Student speakers decided themselves on the content of their*

degree of power and control. If the school refrains from exercising any power or control to direct the content of the speech in any way, it cannot be said that it is coercing anyone.”¹¹⁷ According to him it may be argued that the student speaker is “taking advantage of a captive audience to proselytize or lead a group prayer, and therefore he is coercing the audience by their silent participation, but this is not the *government* coercion with which the Establishment Clause is concerned.”¹¹⁸ So he seems to acknowledge that students of different convictions may be coerced to listen to a proselytizing speech, but it is not the state that is coercing but the speaker and therefore there is no violation of the Constitution. However, graduation ceremony is organized by the school, and the Supreme Court in *Lee* recognized that not attending graduation or listening to the prayer at issue is not really a true choice. And it is disingenuous to argue that the state may adopt a “don’t ask don’t tell policy” and allow the school event to be used for proselytizing by a selected speaker, when

speech and could choose to deliver "an address, poem, reading, song, musical presentation, prayer, or any other pronouncement." The school could in no way "censor" the speech but only give advice as to appropriate content, which students were free to reject. The policy was challenged on its face by a graduating student and the court held that it was constitutional. It argued that although one of the elements in Lee was present - the pressure to attend the ceremony and conform with peers, the other element - school control over the religious message was absent, and therefore the case was distinguishable from Lee. The court emphasized the features of the school policy that led it to find that it is in conformity with the Establishment Clause:

First, students -- not clergy -- deliver the presentations. Second, these student-speakers are selected by academic performance, a purely neutral and secular criterion. Third, once chosen, these individual students have autonomy over content; the school does not require the recitation of a prayer, but rather leaves it up to the student whether to deliver "an address, poem, reading, song, musical presentation, prayer, or any other pronouncement." The significance of these features can- not be overstated (*Id.* at para. 2).

¹¹⁷ Chris Ramsey, *The Devout Valedictorian and Lee v. Weisman: Where the Court Should Go Next*, Education and Law Policy Forum, Electronic Journal, (2005), <<http://educationlawconsortium.org/forum/2005/papers/ramsey.pdf>>.

¹¹⁸ *Id.*

nobody disagreeing with the message is free to leave or to voice another point of view.

The court in *Chandler* explained that its opinion was in line with the Supreme Court's holding in *Santa Fe* and affirmed its decision in *Chandler II*.¹¹⁹ It argued that its decision was not inconsistent but complementary to *Santa Fe*, because “*Santa Fe* condemns school *sponsorship* of student prayer [and] *Chandler* condemns school *censorship* of student prayer.”

The court noted that in *Santa Fe* the Supreme Court stated although the event at issue was school sponsored and school related “not every message delivered under such circumstances is the government's own.”¹²⁰ The Supreme Court holding banned only “state-sponsored, coercive prayer” while it affirmed that private religious speech was protected under the Free Exercise and Free Speech clauses.¹²¹ The Court of Appeals stated that *Santa Fe* did not clarify the conditions under which religious speech would be considered private and that in its *Chandler I* decision it sought to supply them.¹²²

Another 11th Circuit Court decision issued after *Santa Fe* is *Adler v. Duval County School Board*.¹²³ The court held facially constitutional a school board policy that permitted unrestricted, student messages at the opening or closing of graduation ceremonies. According to the Court the case was distinguishable from *Santa Fe*. Firstly, the court argued that critical for the holding in *Santa Fe* was that the school retained control over the content of the student message, while in *Duval* the school did not prescribe any requirements as to the contents, and could in way censor it and

¹¹⁹ *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000).

¹²⁰ *Santa Fe*, *supra* note 97, at 302.

¹²¹ *Chandler II*, *supra* note 119.

¹²² *Id.*

¹²³ No. 982709MA4 - 05/23/01. The Court issued its first decision in 1999 and then upon remand from the Supreme Court it reaffirmed it in light of the *Santa Fe*.

the student was completely free to say whatever she desired. That is way, the court argued that “[n]o reasonable person attending a graduation could view that wholly unregulated message as one imposed by the state.”¹²⁴ Secondly, while the text of the policy in *Santa Fe* expressed a preference for religious messages, the text in *Duval* was completely neutral. Thus, “[w]hatever majoritarian pressures are attendant to a student-led prayer *pursuant to a direct student plebiscite on prayer* are not facially presented by the Duval County policy.”¹²⁵

The dissent however, argued that a look at the contextual evidence of the policy revealed that its purpose was religious-- Policy Memo was entitled "Graduation Prayers," and in the preamble it stated that the issue was "whether or not student initiated and led prayers are acceptable" and that "[t]he purpose of this memorandum is to give you some guidelines on this issue.”¹²⁶ The dissent also argued that the majoritarian elections procedure run into the same constitutional problems as those identified in *Santa Fe*.

8. Federal Guidelines on Constitutionally Protected Prayer in Public Elementary and Secondary Schools

The federal government, under Section 9524 of the No Child Left Behind Act of 2001, has issued guidance directed to public elementary and secondary schools on the legal rules governing prayer at schools. Similarly to the policy document issued by the South African Minister of education, local school districts are not obliged to comply with them. However, sec. 9524 also stipulates that in order to receive federal

¹²⁴ *Id.*

¹²⁵ *Id.*

funds under the Act a local educational agency has to certify in writing to the respective state educational agency that it has no policy which “prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary schools and secondary schools, as detailed in the guidance required under this subsection.”¹²⁷ The State agency then reports to the Secretary of State. Thus if a LEA does not comply with the requirements the Secretary may withhold federal money till it is in compliance.¹²⁸

According to the guidelines students may pray during non-instructional time “subject to the same rules designed to prevent material disruption of the educational program that are applied to other privately initiated expressive activities.”¹²⁹ This is line with the Supreme Court’s holding in *Santa Fe* that “nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday.”¹³⁰

When a school provides for a “moment of silence” the school employees should neither encourage nor discourage students from using such periods from praying. In this way the guidance tries to avoid the constitutional problems identified in *Wallace v. Jeffrey*.

The government’s approach to religious speech at extracurricular activities is underpinned by the equal treatment theory. The guidance stipulates identical requirements regarding prayer or other religious speech at students’ assemblies,

¹²⁶ *Id.* The dissent also relied on the evidence from the beoard meeting at which the policy memo was discussed.

¹²⁷ No Child Left Behind Act of 2001, Sec 9524

¹²⁸ The message was not lost on the schools. An official with the North Carolina Department of Public Instruction said before CNN that, “when [they] sent them a letter and said, ‘We’re going to freeze your money if you don’t get it in,’ I think expectation was that they would respond.” See *Schools Must Prove Prayer Policy to Feds*. CNN. Tuesday, May 13, 2003.
<http://www.cnn.com/2003/EDUCATION/05/13/school.prayer.ap/>

¹²⁹ *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*. February 7, 2003.
http://www.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html#return15

extracurricular activities, such as football games, and graduation ceremonies. Student speakers should not be selected on a basis that “either favors or disfavors religious speech.” The criteria used for selection should be “genuinely neutral and evenhanded.” When students themselves have primary control over what is being said, then the speech is private, not attributable to the state, and therefore school authorities may not restrict it because of its religious or anti-religious content.¹³¹ The guidance also advises school authorities to use disclaimers stating that the speech represents the student’s views alone and is not that of the school. Such disclaimers clearly have the purpose to avoid a perception of endorsement. If on the other hand, school authorities retain primary control over speech, the speech may not have religious or anti-religious content. I would argue however, that speech with religious or anti-religious content, should be excluded at events where the forum is restricted to one-speaker only and when it is not possible to have a frequent rotation of different speakers, no matter in what way the speaker is chosen.

What follows from the guidelines is that school authorities may not restrict even proselytizing speech, as long as it is private and not attributable to the state. However, circuit courts of appeal have rightfully ruled that proselytizing speech at school events runs afoul of the Establishment Clause since it is “inherently coercive.” In *Cole v. Oroville Union High Sch. Dist* the Court held that school officials could restrict proselytizing speech on graduation. The Court noted that “Cole’s sectarian invocation would have caused a more serious Establishment Clause violation than in *Santa Fe* because there the invocation was required to be “nonsectarian and

¹³⁰ *Santa Fe*, *supra* note 97.

¹³¹ It seems the guidelines as well as circuit court decisions in favor of student-initiated prayer or religious speech were possibly influenced by Justice Souter’s statement in footnote 8 in *Lee v. Weisman* where he said that “If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State.”

nonproselytizing."¹³² Soon after the Federal Guidelines were issued the Court held again in *Lassonde v. Pleasanton Unified*,¹³³ that school officials had to prevent students from delivering proselytizing speech at graduation relying on *Cole*.¹³⁴ It held that even if the school managed to disentangle itself from the speech it still remained coercive under *Lee*. The Court expressly stated that even the use of disclaimers would not save a school policy permitting proselytizing speech.¹³⁵

The guidance does not specify what the “genuinely neutral and evenhanded” criteria for selection of a student speaker might be. Coghlan suggests that such criteria might be “volunteering students selected by lot; students selected based on holding a position or achieving an honor resulting from particular skills or abilities such as captain of the football team; students selected due to high class ranking or grade point average.”¹³⁶ These selection criteria seem to avoid the unconstitutional problems created by the majoritarian vote in *Santa Fe*.

The guidance also has a section on religious expression and prayer in class assignments. Hutton has emphasized that the issue of religious presentations in class is far from settled by the courts.¹³⁷ He noted that courts have been particularly concerned about oral presentations of religious character before young

¹³² *Cole*, *supra* note 102, at 12581.

¹³³ No. 0117226p - 02/19/2003.

¹³⁴ The student stated that he intended for the speech to “express[] [his] desire for [his] fellow graduates to develop a personal relationship with God through faith in Christ in order to better their lives.” The school advised him that “references to God as they related to [his] own beliefs were permissible, but that proselytizing comments were not” Some of the passages that he was required to leave out were „I urge you to seek out the Lord, and let Him guide you. Through His power, you can stand tall in the face of darkness, and survive the trends of “modern society” and „“For the wages of sin is death; but the gift of God is eternal life through Jesus Christ our Lord.” Have you accepted the gift, or will you pay the ultimate price?” (*Id.* at 2335).

¹³⁵ “... permitting a proselytizing speech at a public school’s graduation ceremony would amount to coerced participation in a religious practice. Regardless of any offered disclaimer, a reasonable dissenter still could feel that there is no choice but to participate in the proselytizing in order to attend high school graduation. Although a disclaimer arguably distances school officials from “sponsoring” the speech, it does not change the fact that proselytizing amounts to a religious practice that the school district may not coerce other students to participate in, even while looking the other way.” (*Id.* at 2341).

¹³⁶ See Coghlan, *supra* note, 107 at 842.

“impressionable” students referring to *DeNooyer v. Livonia Public Sch.*, (1992).¹³⁸

The 3rd Circuit Court of Appeal also held in *C.H. v. Oliva*¹³⁹ that a teacher may restrict oral religious presentation in a classroom of very young children.¹⁴⁰

Before summarizing the US approach it is necessary to briefly mention a second line of cases that deal with religious expression at school as protected under the Free Speech Clause. In these cases the Court’s approach was underpinned by the equal treatment theory of religious freedom. The principle applied was that when government created a public forum and when it gave its facilities for use for student expression, then religious expression should not be excluded. In *Widmar v. Vincent*,¹⁴¹ the Court held that religious student groups have the right to meet on campus like any other student group. In *Board of Education of Westside Community Schools v. Mergens*¹⁴², the Court ruled that A Christian Club could use the student facilities like any other student club and upheld the Constitutionality of the Equal Access Act. In *Rosenberger v. University of Virginia*,¹⁴³ the Court held that a Christian student newspaper was entitled university funding on an equal basis with other student publications. Finally in *Good News Club v. Milford Central School*¹⁴⁴ the Court that the club, a private Christian religious organization for children could not be forbidden to use the school premises after hours, when they had been open as a limited public forum.

¹³⁷ Hutton, Thomas. *Sins of Omission: Federal Prayer Guidance May Cause Headaches for Schools*. <www.nsba.org/site/docs/11200/11121.doc>.

¹³⁸ 799 F. Supp. 744 (E.D. Mich. 1992).

¹³⁹ No. 992308P - 10/22/99 and No. 985061 - 08/28/00.

¹⁴⁰ Hutton also notes that, “as a practical matter, teachers and schools sometimes prefer to require nonreligious schoolwork out of concern that the line between “ordinary academic standards” and religious content is sometimes less clear than the Guidance suggests and that students and parents may dispute low grades, claiming the grade is based on the religious views” and that “the Guidance’s example of a student writing a prayer to fulfill a poetry assignment seems a particularly ambitious stretch to bring class assignments into the purview of guidance over “prayer.”” (See Hutton, *supra* note 137, at 5).

¹⁴¹ 454 U.S. 263 (1981).

¹⁴² 496 U.S. 226 (1990).

¹⁴³ 515 U.S. 819 (1995).

In conclusion I would argue that although the Supreme Court jurisprudence on the Establishment Clause has been severely criticized, at least in respect to religious exercises at state schools, the rules are not that blurred and they do justice to individual and collective religious freedom.

The most difficult question is related to student initiated prayer at graduation ceremonies. Appellate courts have reached conflicting decisions. School authorities face a difficult dilemma when they deal with the issue of student graduation speeches. On the one hand, if they review and approve the speech before it is delivered, this control over the message may lead to the conclusion they endorse the speech and make it their own and therefore any religious message would be attributed to the school and run afoul of the Establishment Clause. Furthermore, such a prior review and approval would be restricting the students' free speech rights.

On the other hand, if the students are given complete freedom as to the content of the speech and the student speakers are elected by the majority of the senior class, then it is very likely that the religious message would always be in conformity with the majoritarian religion and it may happen that the students deliver a proselytizing speech which students of minority faith would be forced to listen in order to attend their graduation.¹⁴⁵

Arguably the best way in which school authorities may proceed is to have a policy for selecting speakers without a majority vote, and to adopt policies or guidelines well in advance that suggest various things that will urge sensitivity - the speech delivered should not be proselytizing, the speaker should speak for herself and

¹⁴⁴ 533 U.S. 98 (2001).

¹⁴⁵ If the school authorities permit religious invocation and denominational prayers by students on graduation, it would be highly unlikely, that a Muslim for example, will be selected who would give thanks to Allah and refer repeatedly to Mohhamed and this would be the student's speech for this graduation class. I think it is also an unlikely scenario that a speech like Niemeyer's in *Cole* could be followed by a similar speech by such a Muslim student. If this speech is troublesome when given by a

not behalf of the audience.¹⁴⁶ Such a restriction is justifiable, considering the fact that the event is organized by the school, the graduating students are a captive audience, and the forum has not been opened for indiscriminate use by all students present.¹⁴⁷ It is hard to argue that graduation ceremonies are really public forums,¹⁴⁸ although the Supreme Court noted that “granting only one student access to the stage at a time does not, of course, necessarily preclude a finding that a school has created a limited public forum.”¹⁴⁹

Even if student speakers are selected by class rank, it seems offensive to the principle of religious freedom and equality for the school to impose the following rule: those of the graduation class with the highest GPA may have an automatic right

person from another religion, then it is hard to defend the same speech when it conforms to the majoritarian view.

¹⁴⁶ Benjamin Dowling-Sendor, *Revisiting Graduation Prayer: A Recent Decision Points up the Need for Supreme Court resolution of This Controversial Issue*, AMERICAN SCHOOL BOARD (Nov. 1999), <<http://www.asbj.com/199911/1199schoolaw.html>>.

¹⁴⁷ As the court noted in *ACLU v. Black Horse Pike Regional Board of Education*, 84 F.3d 1471 (3d Cir. 1996), “High school graduation ceremonies have not been regarded, either by law or tradition, as public fora where a multiplicity of views on any given topic, secular or religious, can be expressed and exchanged.” In this case for example, the court noted that the policy of the school authorities permitting student initiated prayer “was not intended to broaden the rights of students to speak at graduation, nor to convert the graduation ceremony into a public forum.” That is why when there was a request by one student to have representatives of the ACLU speak about safe sex at the graduation, the school principal understandably refused, because such a speech was not appropriate for the occasion. The incident pointed out, according to the court the degree of control the school authorities exercised over speech at the graduation ceremony.

¹⁴⁸ As Gedicks argues, “Indeed, one would think that content and viewpoint based regulation of speech is precisely what one needs to plan and implement effective public school curricula and activities.” See Frederick Mark Gedicks, *The Ironic State of Religious Liberty In America*. 46 MERCER L. REV. 1157, 1165 (1995). See also *Jane Doe v. Santa Fe Independent School District*, 168 F.3d 806 (5th Cir. 1999). In this case the school district requirement that student-led and student-initiated graduation prayer should not be sectarian or proselytizing was taken out from the policy on graduation ceremonies. The court engaged in an analysis of the nature of the forum in graduation ceremonies and concluded that it is neither a traditional nor a limited public forum. The court examined government intent and found that the school district “attempts to evade the requirements of the Establishment Clause by running for the protective cover of a designated public forum.” That is why the court decided to “examine closely the relationship between the objective nature of the venue and its compatibility with expressive activity.” According to the court, “Neither its character nor its history makes the subject graduation ceremony in general or the invocation and benediction portions in particular appropriate fora for such public discourse. For obvious reasons, graduation ceremonies in particular, the invocation and benediction portions of graduation ceremonies ---- are not the place for exchanges of dueling presentations on topics of public concern...., a graduation ceremony comprises but a single activity which is singular in purpose, the diametric opposite of a debate or other venue for the exchange of competing viewpoints.” The court also noted the limited number of speakers.

¹⁴⁹ *Santa Fe*, *supra* note 97, at 304.

to preach to and proselytize the entire the radiating class – students who wish to avoid that can forego their graduation ceremony.¹⁵⁰

Students can also pray individually or collectively during their free time at school, or before or after the school day. Student religious groups may use the student facilities for group activities on an equal basis with other groups. That is why according to Gedicks, insistence that prayer become “an official school-sponsored part of graduation ceremonies or classroom activities” makes him, as a member of a minority religious group, suspicious that the reason behind this is to treat orthodox Christianity preferentially, while all other religions are “merely tolerated as minorities.”¹⁵¹

III. CANADA

In their interpretation of what constitutes coercion of objecting students the Canadian courts have adopted an approach similar to the one applied by the US Supreme Court. On the other hand, their interpretation of state neutrality is based on a more pluralist-accommodationist vision of the relationship between church and state.

The issue of school prayer has been addressed only by provincial courts. However, the Supreme Court has suggested its approval of these courts’ holdings.

Sopinka and Major JJ referred to these cases in *Adler v. Ontario*.¹⁵² They cited them

¹⁵⁰ The court in *ACLU v. Black Horse Pike Regional Board of Education*, 84 F.3d 1471 (3d Cir. 1996) found problematic the majoritarian method of decision as to whether there should be a prayer, moment of silence, or none of the above at the graduation summary and noted that the school policy “allowed the 128 seniors who wanted verbal prayer at their graduation to impose their will upon 140 of their fellow classmates who did not.” One should note, that in a scenario where the student speaker is selected according to ‘neutral criteria’ such as class rank and has complete freedom as to what type of speech to deliver, the school policy may end up allowing one student who wishes to have a prayer or a proselytizing speech at graduation impose her will on the rest of her classmate who object to that.

¹⁵¹ See Frederick Mark Gedicks, *The Ironic State of Religious Liberty In America*. 46 MERCER L. REV. 1157, 1166 (1995).

¹⁵² [1996] 3 S.C.R.

as evidence of the secular nature of the public school system: “This secular nature is itself mandated by s. 2(a) of the Charter as held by several courts in this country.”¹⁵³

1 .Zylberberg v. Sudbury Board of Education (1988)¹⁵⁴

This is the principle case dealing with school prayer in Canada. It reveals an approach to the issue that comes very close the American one, with its interpretation of the principles of non-coercion and non-discrimination of religious minorities. In some aspects however, especially in respect of the principle of pluralism and accommodation it is closer the one developed in South Africa.

In *Zylberberg* the complainants challenged the constitutionality of provisions of the Ontario Education Act which required that each school day be opened or closed with readings from the Christian Scriptures or other religious sources, as well as the recitation of a prayer such as the Lord's Prayer. The statute provided for exemptions from these religious exercises should the parents of a minor pupil or an adult so request.¹⁵⁵ The complainants were parents of pupils who alleged that these provisions

¹⁵³ *Id.* at 50.

¹⁵⁴ *Zylberberg v. Sudbury (City) Board of Education* (1988), 65 O.R. (2d) 641, 34 C.R.R. 1, 52 D.L.R. (4th) 577, 29 O.A.C. 23 (C.A.).

¹⁵⁵ The relevant provisions of the *Education Act*, R.S.O. 1980 read:

50 (2) No pupil in a public school shall be required to read or study in or from a religious book, or to join in an exercise of devotion or religion, objected to by his parent or guardian, or by the pupil, where he is an adult

10(1) Subject to the approval of the Lieutenant Governor in Council, the Minister may make regulations in respect of schools or classes established under this Act, or any predecessor of this Act, and with respect to all other schools supported in whole or in part by public money,... governing the provision of religious exercises and religious education in public and secondary schools and providing for the exemption of pupils from participating in such exercises and education and of a teacher from teaching, and a public school board or a secondary school board from providing, religious education in any school or class

In pursuance of s. (10) 1 the following regulation was issued – O. Reg. 262/80:

28(1) A public school shall be opened or closed each school day with religious exercises consisting of the reading of the Scriptures or other suitable readings and the repeating of the Lord's Prayer or other suitable prayers.

(2) The readings and prayers that form part of the religious exercises referred to in subsection (1) shall be chosen from a list of selections approved for such purpose by the board that operates the school where the board approves such a list and, where the board does not approve such a list, the principal of the school shall select the readings and prayers after notifying the board of his intention to do so, but his selection is subject to revision by the board at any time.

were an unjustified limitation on their right to freedom of conscience and religion guaranteed by s.2 (a) of the Charter.

The Divisional Court held that the provisions did not violate the parents' rights to freedom of religion. According to O'Leary, J., even if it was assumed that they did this was a justified infringement under s.1 because "the inculcation of morality was a proper educational object and that morality and religion were intertwined . . . if this resulted in any infringement of minority religious beliefs it was not substantial."¹⁵⁶ A concurring opinion stated that there was no infringement of the Charter right since students were not compelled to participate but had the right to opt out.

The Ontario Court of Appeal reversed the decision. It held that the regulation violated the Charter on its face because it made possible for the school board to prescribe Christian religious exercises—reading of scriptures from the Christian Bible and the recitation of the Lord's Prayer, which is a Christian prayer and thus “impose Christian observances upon non-Christian pupils and religious observances on nonbelievers.”¹⁵⁷

It rejected the argument that the opt-out provisions saved the statute from Charter being challenged. The majority held that the challenged provisions constituted an unjustified infringement on the right to freedom of religion of students and parents

(3) The religious exercises under subsection (1) may include the singing of one or more hymns.

(10) No pupil shall be required to take part in any religious exercises or be subject to any instruction in religious education where his parent or, where the pupil is an adult, the pupil applies to the principal of the school that the pupil attends for exemption of the pupil therefrom.

(11) In public schools without suitable waiting rooms or other similar accommodation, if the parent of a pupil or, where the pupil is an adult, the pupil applies to the principal of the school for the exemption of the pupil from attendance while religious exercises are being held or religious education given, such request shall be granted.

(12) Where a parent of a pupil, or a pupil who is an adult, objects to the pupil's taking part in religious exercises or being subject to instruction in religious education, but requests that the pupil remain in the classroom during the time devoted to religious exercises or instruction in religious education, the principal of the school that pupil attends shall permit the pupil to do so, if he maintains decorous behavior.

¹⁵⁶Zylberberg, *supra* note 154, at 12.

who were members of minority religious groups. The Court was concerned with the effect the regulation had both on minority religious groups as a whole and on the individual students.

The Court referred extensively to the elaboration of the right of freedom of religion by the Supreme Court of Canada in *R. v. Big M Drug Mart Ltd.*¹⁵⁷ The majority emphasized three aspects of this right in relation to the issues mentioned above. One is “the absence of coercion or restraint” which includes “indirect forms of control which determine or limit alternative courses of conduct available to others.”¹⁵⁸ A second aspect is that, “the practices of a majoritarian religion cannot be imposed on religious minorities. The minorities should not be subject to the ‘tyranny of the majority’.”¹⁵⁹ The third aspect of the right is that the Charter gives equal protection to non-believers and to their right to abstain from participation in any religious practices.

According to the Court, “while the majoritarian view may be that s.28 confers freedom of choice on the minority, the reality is that it imposes on the minority a compulsion to conform to the religious practices of the majority.”¹⁶⁰ The Court emphasized that, the three appellants chose not to seek exemption from religious exercise because of their concern of differentiating their children from other pupils “the peer pressure and classroom norms to which children are acutely sensitive, in our opinion are real and pervasive and operate to compel members of religious minorities to conform to majority religious practices.”¹⁶¹

¹⁵⁷ *Id.* at 35.

¹⁵⁸ *R. v. Big M Drug Mart Ltd.*, (1985) 1 S.C.R. 295.

¹⁵⁹ *Id.* at 28.

¹⁶⁰ *Id.*

¹⁶¹ *Zylberberg*, *supra* note 154, at 38.

¹⁶² *Id.*

The majority held that the legislative provisions constituted a "denigration of minorities freedom of religion ... which is not 'unsubstantial or trivial.'"¹⁶³. The Court made reference to s. 29 of the Charter and held that the legislation did not accommodate the multicultural nature of the Canadian society.

The Court examined the effect of the provisions had on pupils who did not wish to participate in the prayer readings. According to the Court they compelled "students and parents to make a religious statement"¹⁶⁴ The Court was concerned with the way the feelings of young children would be affected by that. According to the Court, "the exemption provision imposes a penalty on pupils from religious minorities who utilize it by stigmatizing them as non-conformist and setting them apart from their fellow students who are members of the dominant religion."¹⁶⁵

The Court also found the legislation lacking justification under s.1 because it had a purely religious, not a secular purpose. The argument is the same as the one used by the US Supreme Court to invalidate statute in *Wallace v. Jeffery*.¹⁶⁶

For the purposes of comparative analysis it is important to examine the reference the Court of Appeal made to two US Supreme Court cases on prayer in public schools--*Engel v. Vitale*¹⁶⁷, and *Abington School District v. Schempp*.¹⁶⁸ The Court stated that the absence of Establishment Clause in the Canadian Charter did not in any way limit the protection to freedom of religion afforded by s.2 (a). The Court also cited the concurring opinion of Justice Brennan in *Schempp* to support its holding in the present case and stated that, "Like Brennan, J., we are also of the opinion that

¹⁶³ *Id.* at 43.

¹⁶⁴ *Id.* at 39.

¹⁶⁵ *Id.* at 40.

¹⁶⁶ 472 U.S. 38.

¹⁶⁷ 370 U.S. 421, (1962).

¹⁶⁸ 374 U.S. 203, (1963).

the exemption procedure has the chilling effect of discouraging the free exercise of the freedom of conscience and religion”¹⁶⁹

Two questions remain unclear—whether all religious exercises even if they are not predominantly Christian in nature would violate the Charter, and whether an opt in approach instead of an opt out approach to participation in such religious exercises would be found consistent with the Charter rights.

These questions are raised by the dissenting opinion of Lacourcière, J.A. He argued that “the heart of the s. 2(a) challenge to s. 28 of regulation 262 comes from those who would demand the abolition of *all* religious exercises in schools”¹⁷⁰ and that “the issue as yet undecided is whether any religiously - motivated state action is unconstitutional, absent any element of compulsion or coercion.”¹⁷¹ His answer is in the negative, arguing that both the Constitution Act, 1867 and the Charter envisage a “bridge’ between church and state in the realm of public education rather than the “wall of separation” relation developed by American jurisprudence. The majority of the Ontario Appeal Court however, stated the preamble could not detract from the rights guaranteed by s. 2(a).¹⁷²

The dissent’s reliance on the s. 93 provisions in the Constitution Act, 1867 is misplaced. Section 93 was not applicable in this case, since the case did not concern separate schools. As for the Preamble’s reference to the Supremacy of God, courts have made a minimal use of it as an interpretative guide. A number of scholars of

¹⁶⁹ Zylberberg *supra* note 154, at 49.

¹⁷⁰ *Id.* at 79.

¹⁷¹ *Id.* at 86.

¹⁷² “It is a basic principle in the construction of statutes that a preamble is rarely referred to and, even then, is usually employed only to clarify operative provisions which are ambiguous. The same rule, in our view, extends to constitutional instruments. There is no ambiguity in the meaning of s. 2(a) of the Charter or doubt about its application in this case. Whatever meaning may be ascribed to the reference in the preamble to the “supremacy of God”, it cannot detract from the freedom of conscience and religion guaranteed by s. 2(a) which is, it should be noted, a “rule of law” also recognized by the preamble.” (Zylberberg, *supra* note 154, at 44).

Canadian Charter jurisprudence also argue that this reference cannot be used to restrict in any way s. 2(a) rights.¹⁷³

Although the Supreme Court has placed emphasis to the “rule of law” principle in the preamble, the “Supremacy of God” reference has not enjoyed such treatment. In *R. v. Morgentaler*, (1988) the Court mentioned the preamble to say that notwithstanding this reference the values behind the Charter were those that made Canada “a free and democratic society.”¹⁷⁴ In *R. v. Sharpe* (1999)¹⁷⁵ the British Columbia court of Appeal stated that contrary to the claim of counsel for the Crown that the words referring to the Supremacy of God in the preamble should be treated as a cornerstone of the Charter, they “have become a dead letter.”¹⁷⁶

On the other hand in the recent case of *Chamberlain v. Surrey School District No. 36*, (2002) one of the dissenting judges noted that the Preamble referred to the supremacy of God in support of his position that in the Canadian context “secular” does not mean “non-religious” but grounded on the principle of pluralism.¹⁷⁷ Berger also argues that the Supreme Court’s case law reflect a vision of secularism that is

¹⁷³ “This reference [to the supremacy of god] seems to have been more honored in the breach than the observance. According to a recent article by Brown, ‘courts and academics have treated the Preamble, especially in its reference to ‘the supremacy of God,’ as an embarrassment to be ignored.’” See, William F. Foster & William J. Smith. *Religion and Education in Canada: Part II -- An Alternative Framework for the Debate*. EDUCATION AND LAW JOURNAL1, 23 (2001-2002).

¹⁷⁴ “Certainly, it would be my view that conscientious beliefs which are not religiously motivated are equally protected by freedom of conscience in s. 2(a). In so saying I am not unmindful of the fact that the *Charter* opens with an affirmation that “Canada is founded upon principles that recognize the supremacy of God” But I am also mindful that the values entrenched in the *Charter* are those which characterize a free and democratic society.” See *R. v. Morgentaler*, (1988) 1 S.C.R. 30, at 249.

¹⁷⁵ *R. v. Sharpe* (1999), 69 B.C.L.R. (3d) 234 (B.C. C.A.), reversed 2001 SCC 2 (S.C.C.)

¹⁷⁶ “I accept that the law of this country is rooted in its religious heritage. But I know of no case on the Charter in which any court of this country has relied on the words Mr. Staley [counsel for the Crown] invokes. They have become a dead letter and while I might have wished the contrary, this Court has no authority to breathe life into them for the purpose of interpreting the various provisions of the Charter” (*Id.* at 78.)

¹⁷⁷ *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86, at 137.

grounded in pluralism, subject to certain limitations, the most significant of which is the protection of human dignity.¹⁷⁸

That is why Smith and Foster rightly argue that the Court's decision does not rule out a "rainbow approach" towards religious exercise in schools.¹⁷⁹ Such an answer to the first question posed above may be supported by the Supreme Court's dicta regarding the practice adopted by the Toronto Board of Education¹⁸⁰ which suggests that religious exercises that are not sectarian might withstand *Charter* scrutiny provided there is no element of compulsion. The Court stated that:

The experience of the Toronto Board of Education convincingly demonstrates that there are less intrusive ways of imparting educational and moral values than those provided in s. 28. The Toronto experience . . . shows that it is not necessary to give primacy to the Christian religion in school opening exercises and that they can be more appropriately founded upon the multicultural traditions of our society. In saying this we are not to be taken as passing a constitutional judgment on the opening exercises used in Toronto public schools. They were not in issue before us and we express no opinion as to whether they might give rise to *Charter* scrutiny.¹⁸¹

Thus a multicultural approach promoting pluralism could be found to respect the values and principles behind the Charter rights. However, the practical objective of such an approach might be difficult to achieve. The book of multi-faith readings has been withdrawn by the Toronto Board of Education because of objections voiced by parents. Some parents "did not want their children exposed to the prayers of other religions, while others did not want their own religion's prayers being used by nonbelievers."¹⁸²

¹⁷⁸ Benjamin Berger, *The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State*, CANADIAN JOURNAL OF LAW AND SOCIETY 39, 56 (2002).

¹⁷⁹ See Smith and Foster, *supra* note 173, at 47.

¹⁸⁰ The religious exercises at the Toronto schools consisted of the singing of "O Canada", the reading of one or more selections from a book with "readings and prayers from a number of sources including Bahaism, Buddhism, Christianity, Confucianism, Hinduism, Islam, Jainism, Judaism, People of Native Ancestry, Secular Humanism, Sikhism, and Zoroastrianism, followed by a moment of silent meditation and sometimes by comments by the teacher or principal, on the origins of the selections used." (Zylberberg, *supra* note 154, at 23-24.)

¹⁸¹ *Id.* at 63.

¹⁸² Morgan-Cole, Trudy J. LIBERTY ONLINE, May-June 2000, (visited Jan. 9, 2004), < <http://www.libertymagazine.org/article/articleview/208/1/35/> >.

Smith and Foster answer the second question by arguing that the Court's opinion suggests that if students have the possibility to opt in religious activities if they so wish, instead of seeking exemption, the element of state compulsion would be absent.¹⁸³ In support of their opinion they cite other scholars who argue that under the opt-in approach it is not the state but the parents of the student who force him or her to participate in religious exercises and make a religious statement. Thus they conclude that the state does not violate s.2(a), because it is "merely facilitating the practice of religion."¹⁸⁴

In their evaluation of provincial legislation regarding religious exercises they conclude that religious exercises in public schools are permissible "provided that such provision does not discriminate in favor of particular religions nor against others" but point out that in view of the Ontario case law providing for students to opt out would not be sufficient accommodation for those not wishing to participate.¹⁸⁵ An opt in approach would be to have religious exercises upon request from parents for the children of those parents. If other children desire they could join freely.

The current regulations in Ontario provide for religious exercises which include "God Save the Queen" and may include readings that "impart moral, social or spiritual values and are representative of Ontario's multicultural society."¹⁸⁶ These

¹⁸³ Foster and Smith, *supra* note 173, at 44.

¹⁸⁴ *Id.*

¹⁸⁵ William F Foster. & William J. Smith. *Balancing Rights and Values: the Place of Religion in Quebec Schools*. Montréal, McGill University, Office of Research on Educational Policy, at 35.

¹⁸⁶ Education Act. R.R.O. 1990, REGULATION 298. Amended to O. Reg. 209/03.

Operation of Schools - General

Opening or Closing Exercises

4. (1) This section applies with respect to opening and closing exercises in public elementary schools and in public secondary schools. O. Reg. 436/00, s. 1.

(2) The opening or closing exercises may include the singing of *God Save the Queen* and may also include the following types of readings that impart social, moral or spiritual values and that are representative of Ontario's multicultural society:

1. Scriptural writings including prayers.

2. Secular writings. O. Reg. 436/00, s. 1.

(3) The opening or closing exercises may include a period of silence. O. Reg. 436/00, s. 1.

might be scriptures and prayers or secular writings. Exemptions for students are provided following the opt-out approach.

2. Manitoba Assn. for Rights and Liberties v. Manitoba (1992)

The issue of school prayer came also before the Manitoba Queen's bench. The plaintiffs in the case of *Manitoba Assn. for Rights and Liberties v. Manitoba*¹⁸⁷ challenged several sections of the Public Schools Act, R.S.M. 1987, c. P250 which provided for conducting of religious exercises in public schools.¹⁸⁸ They argued that the provisions were an unjustified infringement on their right to freedom of religion under the Charter. The government argued that these provisions of the Public School Act were shielded from Charter review by s.22 of the Manitoba Act, 1870.¹⁸⁹

The Court, however, held that the government had abolished the denominational rights that existed in 1890 by the *Public Schools Act, 1890* which

(4) In the following circumstances, a pupil is not required to participate in the opening or closing exercises described in this section:

1. In the case of a pupil who is less than 18 years old, if the pupil's parent or guardian applies to the principal of the school for an exemption from the exercises.
2. In the case of a pupil who is at least 18 years old, if the pupil applies to the principal for an exemption from the exercises. O. Reg. 436/00, s. 1.

¹⁸⁷ [1992] 5 W.W.R. 749, 94 D.L.R. (4th) 678, 82 Man. R. (2d) 39.

¹⁸⁸ The relevant provisions read:

84 (2) Any religious exercise conducted in schools shall be conducted according to the regulations of the advisory board established under The Education Administration Act.

84 (3) Religious exercises shall be held at such times during the school day as the school board may establish but in no case shall the school time devoted to religious exercises exceed the maximum provided by the regulations made by the advisory board.

84 (4) Where the parent or guardian of a pupil under the age of majority notifies the teacher that he does not wish the pupil to attend religious exercises, the pupil shall not attend and if a pupil over the age of majority does not wish to attend he shall be free not to attend.

84 (5) Subject to subsection (6) and the regulations made by the advisory board, religious exercises shall be held in every school.

¹⁸⁹ Manitoba Act, 1870, Statutes of Canada 1870, c. 3, p. 20-27. <<http://www.nlc-bnc.ca/2/18/h18-2170.836.3-e.html>> Section 22 reads:

22. In and for the Province, the said Legislature may exclusively make Laws in relation to Education, subject and according to the following provisions:—

(1) Nothing in any such Law shall prejudicially affect any right or privilege with respect to Denominational Schools which any class of persons have by Law or practice in the Province at the Union

replaced the denominational school system with a non-sectarian one.¹⁹⁰ The justice sitting on the Manitoba Queen's Bench stated:

I am satisfied that denominational schools, as they were intended to be and as some have existed despite the wants and machinations of the majority, would not be subject to this kind of application, but I am not dealing with a denominational system -- I am dealing with a secular one introduced in spite of constitutional guarantees. That system has no protection under the provisions of s. 22 and is therefore subject to the provisions of the Charter.¹⁹¹

The court found upon the basis of the evidence presented that the religious exercises held in the Manitoba public schools were of the Christian religions—they were “pre-approved readings or prayers, mostly from the Scriptures.”¹⁹² The court held that this resulted in preferring one religion to others and this was in violation of s. 2(a) of the *Charter* adopting the reasoning of the Ontario Court of Appeal in *Zylberberg*.

Despite the ruling of the Court the legislation that was found in violation of the Charter has not been amended. The regulations of the Advisory Board issued under the *Education Administration Act* at present provide for religious exercises in public schools and the exercise consists of “a Scripture reading, a prayer, and, whenever possible, a hymn, all of which may be chosen from the recommended Scripture selections, prayers, and hymns.”¹⁹³ Although these regulations were not challenged directly since the provisions of the Education Acts created the framework within which the Advisory Board issued the regulations, they too should be of no force.

¹⁹⁰ The Public School Act, 1890 was challenged under s. 93 of the Constitution Act, 1876. The case went up to the Privy Council -- *Winnipeg (City) v. Barrett*, [1892] A.C. 445, 5 Cart. B.N.A. 32 (P.C.), which found for the government and held that the act was constitutional. See discussion of the “Manitoba School Question” in Bezeau, Lawrence M. *Establishing Education in the Provinces* EDUCATIONAL ADMINISTRATION FOR CANADIAN TEACHERS. 3rd ed., 2002. , Publications of the New Brunswick Centre for Educational Administration. <<http://www.unb.ca/education/bezeau/eact/eactcvp.html>>.

¹⁹¹ *Id.* at 17.

¹⁹² *Id.* at 4.

¹⁹³ The Education Administration Act. (C.C.S.M. c. E10). Religious Exercises in Schools Regulation. Regulation 554/88. art.2.

In their analysis of provincial legislation, Smith and Foster argue that the present legal regime for religious exercises in the public schools of Manitoba provides for an opt-in approach, since the only provision that was not struck down by the Court was 84(8)¹⁹⁴ regarding parents' petition.¹⁹⁵ Thus if there is the necessary number of parents required by the statute petitioning the school board for holding of religious exercises, then such shall be held for the children of those parents. Such a regulation would arguably be in conformity with the Charter, however, in practice those parents of minority faiths who are very few in number and cannot satisfy this requirement would not have the opportunity afforded to the more represented faiths. To avoid placing the children of minority faiths in an unequal position ideally every parent should be able to petition the school board or the requisite number should be set very low, however this might practically be impossible to implement. One would wonder in this case whether it is not best for parents who wish to do so to simply have a prayer with their children at home before they leave for school.

3. Human Rights Commission v. Board of Education of Saskatoon (1999)

The issue of school prayer in Saskatchewan has also been hotly debated. In 1999 a Board of Inquiry of the Saskatchewan Human Rights Commission directed the Saskatchewan Board of Education to stop using Bible readings and the Lord's prayer

¹⁹⁴ The provision reads: 84(8) If a petition asking for religious exercises, signed by the parents or guardians of 75% of the pupils in the case of a school having fewer than 80 pupils or by the parents or guardians of at least 60 pupils in the case of a school having an enrolment of 80 or more pupils, is presented to the school board, religious exercises shall be conducted for the children of those parents or guardians in that school year.

¹⁹⁵ William J. Smith & William F. Foster. *Religion and Education in Canada: Part III - An Analysis of Provincial Legislation*. EDUCATION AND LAW JOURNAL, 2001-2002, at 242.

as an opening religious exercise in the schools under its jurisdiction.¹⁹⁶ Halverson, the head of the Commission, recommended that, “the board of education shed its image as a backwater of religious tolerance” and “develop a multicultural religious proposal” without including any prayers or readings from “any form of bible.”¹⁹⁷

The school board argued that the right to prayer in public schools was protected by s. 93 of Constitutional Act, 1876.¹⁹⁸ Halverson, held in his decision that the board of education could not rely on the 1901 statute.¹⁹⁹ He argued that the statute provided that the school board could “direct” the school to open with the Lord’s Prayer, while the board “delegated its responsibility to the discretion of teachers by a policy statement using these weasel words” – “encourage” and “support”.²⁰⁰ Furthermore there was evidence presented by parents that the recital of the Lord’s Prayer was not held by all schools only at the opening of the school day.²⁰¹

Although the Saskatoon Board maintained that since the decision was not coming from a court it was not of much significance and insisted on a constitutionally

¹⁹⁶ Fancy, Sask. Human Rights Commission v. Board of Education of Saskatoon (Prayer in Schools Case), [1999] 35 C.H.R.R. D/9 (Sask. Board of Inquiry, Halvorson, J.)

¹⁹⁷ CBA Canada. Saskatchewan News Hour Transcript. (visited Jan 20, 2004), <<http://sask.cbc.ca/tv/transcripts/jul99/27.shtml>>.

¹⁹⁸ The Saskatchewan Act, 1905: Statutes of Canada 1905, c. 42, p. 201-215. <<http://www.nlc-bnc.ca/2/18/h18-2215.823.5-e.html>>.

17. Section 93 of the *Constitution Act, 1867*, shall apply to the said province, with the substitution for paragraph (1) of the said section 93, of the following paragraph:—

“(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the North-west Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances.”

¹⁹⁹ The relevant provisions of the School Ordinance, N.W.T.O. 1901, c. 29 read:

137. No religious instruction except as hereinafter provided shall be permitted in the school of any district from the opening of such school until one half hour previous to its closing in the afternoon after which time any such instruction permitted or desired by the board may be given.

(2) It shall however be permissible for the board of any district to direct that the school be opened by the recitation of the Lord's Prayer.

138. Any child shall have the privilege of leaving the school room at any time at which religious instruction is commenced as provided for in the next preceding section or of remaining without taking part in any religious instruction that may be given if the parents or guardians so desire.

200 Morgan-Cole, *supra* note 182.

²⁰¹ Susan Joanis, *Human Rights Law in B.C.: Religious Discrimination*, Prepared by the Canadian Human Rights Reporter for the British Columbia Human Rights Commission, March 2001, <<http://www.cdn-hr-reporter.ca/religion.htm>>.

provided right to prayer in schools²⁰², it did amend its regulations. In the new regulations the board stated that school opening exercises shall be based on two principles, namely that “no activity will be done for the purpose of indoctrination; no religious belief is given primacy.”²⁰³ The school board limited the possible options for the type of exercises to education instructions that reflect the educational values developed by the board; opportunities for personal reflections, or the singing of “O Canada.”²⁰⁴ It should be noted that in enumerating the educational values it promoted the board stated that it “acknowledges the spiritual nature of mankind and recognizes the supremacy of a Spiritual Being.” Nevertheless the board stated that it “will not mandate compulsory practices with a spiritual dimension.”²⁰⁵ The board also directed that school celebrations may not involve a reading from a holy book or a prayer, a measure that at least one Circuit court in the US has found unconstitutional.

Halverson clearly accepted the argument of the school board that it had a constitutional right to require or “direct” the recitation of the Lord’s Prayer, and that this right was shielded from a challenge under the Saskatchewan Human Rights Code and under the Canadian Charter. The opposite position is argued by Bauman and Schneiderman.²⁰⁶ They maintain that “the provision for the use of the Lord's Prayer in Saskatchewan public schools is not part of the constitutionally-entrenched scheme for religious instruction.”²⁰⁷

Since the *Saskatchewan Act*, protects rights to “religious instruction” in public schools as provided for by the *School Ordinance*, 1905 they claim that the “religious

²⁰² CBA Canada, *supra* note 197.

²⁰³ Policy 1030. Reg./Admin. Proc. x.

<http://www.sbe.saskatoon.sk.ca/POLICIES/Section_1000_Foundatins_And_Philisophlic_Commitments/1030_School_Opening%20Exercises.pdf>.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Richard W Bauman and David Schneiderman, *The Constitutional Context of Religious Practices In Saskatchewan Public Schools: God Was In the Details*, 63 SASKATCHEWAN LAW REVIEW 265 (1996).

²⁰⁷ *Id.* at 278.

instruction” did not include the recitation of the Lord’s Prayer. Their arguments are based on an examination of the legislative history of the *School Ordinance* of 1905, and especially the speeches and debates accompanying the discussion on the proposed Autonomy Bills, which would create Saskatchewan and Alberta. They conclude that what was meant by “religious instruction” was only the half-hour period of instruction at the end of the school day available at all schools.

Their first argument concerns the nature of the prayer and the purpose ascribed to it by the legislators:

The Lord's Prayer was not expressly identified with any particular religious denomination. Instead, the Lord's Prayer was just one feature of an attempt to standardize education in both public and separate schools. Indeed, by providing that a school board may direct the use of the Lord's Prayer at the beginning of the school day, the intention of the legislators was to separate it from any religious instruction that, if prescribed, had to take place at the very end of the day.²⁰⁸

Their second argument is based on the fact that there was no exemption provision for students (or their parents) allowing them to request exemption from reciting of the Lord’s Prayer. Such an exemption was provided only for religious instruction. They regard this as evidence that the legislative intent was that religious exercises shall not be part of religious instruction. They claim that, if the intention had been to treat the Lord's Prayer itself as a form of religious instruction, it would have been sensible for the framers of the Saskatchewan Act to provide students with a statutory ground of exemption from this form of observance as well.”²⁰⁹ In his discussion on preserved rights in Saskatchewan Bezeau also only mentions the rights to religious instruction, as provided for in the *School Ordinance* and does not mention Prayer recitation as a preserved right.²¹⁰

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Bezeau, *supra* note 190.

Contemporary statutes also do not regard religious exercises as part of religious instruction. Usually they are dealt with under separate provisions. Nevertheless, it can be argued that religious exercise was part of the larger legal scheme and should also be regarded as constitutionally protected.

The reasoning in *Zylberberg* was followed also in the case of *Russow v. British Columbia*.²¹¹ A group of parents challenged the provisions of the School Act, R.S.B.C. 1979 requiring that public schools be opened by a reading from the scriptures and a recitation of the Lord's Prayer. The Court adopted the reasoning of the Ontario court of Appeals in *Zylberberg*, and severed the challenged provisions from the act, as violating s. 2(a) of the *Charter*. Currently the Act does not provide for religious exercises.²¹²

In the rest of the provinces in which education statutes provide for religious exercises the approach is to have opt out provisions. The exception is Newfoundland, where religious exercises are provided following a petition by parents. That approach, as was noted, best conforms to the holding in *Zylberberg*.

It is important also to note that statutes like that of Alberta or New Brunswick, which provide for exemptions only upon parental request, regardless of the age of the student do not respect Art. 12 (1) of the Convention of the Rights of the Child, to which Canada is a party. Not giving the right to a student even of majority age to exempt herself from religious exercise does not respect the views of the child in accordance with her age and maturity.

²¹¹ 1989 CarswellBC 25. 35 B.C.L.R. (2d) 29, [1989] 4 W.W.R. 186, 62 D.L.R. (4th) 98, 44 C.R.R. 377.

²¹² The Act states:

76(1) All schools and Provincial schools must be conducted on strictly secular and non-sectarian principles.

(2) The highest morality must be inculcated, but no religious dogma or creed is to be taught in a school or Provincial school

IV. SOUTH AFRICA

The South African approach reflected in the Government Policy on Religion and Education can be characterized as one dedicated to religious pluralism. It aims to ensure that no religion is given any preferential treatment by the state and also that student participation is truly voluntary. Thus while it strives to avoid the problem of indirect coercion similarly to the US and Canadian Court, at the same times the approach is more accommodationist, and such an approach is also constitutionally mandated. The South African approach is the one that puts the most emphasis of accommodating religious pluralism.²¹³

The South African Constitution expressly allows for the conduct of religious observances at state or state-aided institutions. The relevant provision is the one guaranteeing freedom of religion and section 2 of it reads:

- (2) Religious observances may be conducted at state or state-aided institutions, provided that –
 - (a) those observances follow rules made by the appropriate public authorities;
 - (b) they are conducted on an equitable basis; and
 - (c) attendance at them is free and voluntary²¹⁴

Since the 1994 Interim Constitution contained the same provision (sec. 14 (2)), the interpretation given to it by the South African Constitutional Court may be considered authoritative for the present constitution as well. In the case of *In re*

²¹³ Such an emphasis may also be regarded as a reaction to the Apartheid education policy—the Christian National Education, which one of the tools used by the regime to enforce segregation and subordination of the African population. The Christian religion was given a preferential treatment, state schools had to have a Christian ethos, religious courses put a strong emphasis on Christianity largely ignoring other world religions. See Isaac M. Ntshoe, *The Impact of Political Violence on Education in South Africa: Past, Present and Future*, CURRENT ISSUES IN COMPARATIVE EDUCATION, 1999. <<http://www.tc.columbia.edu/cice/articles/in121.pdf>>, Kristin Henrard, *Post Apartheid South Africa's Democratic Transformation Process: Redress of the Past, Reconciliation and 'Unity in Diversity*. THE GLOBAL REVIEW OF ETHNOPOLITICS Vol. 1, no. 3, March 2002, 18-38. <http://www.ethnopolitics.org/archive/volume_1/issue_3/henrard.pdf>.

²¹⁴ Constitution of South Africa, 1997.

*Gauteng School Education Bill of 1995*²¹⁵ the issue was the constitutionality of several clauses of the Education Bill passed by the Gauteng provincial legislature. The Court affirmed in the dicta the voluntary aspect of religious observances in public schools.

One of the challenges was that the Act provided for the right of private schools to insist that students attend religious observances, while the public schools had no such right, which allegedly was discriminatory. The act stated that learners at public schools had the right not to attend religious practices and the right not to be discouraged in any way by the any school employee to choose not to attend such practices.

The Court held that there was no constitutional ground suggested on which to extend to public schools the right of private schools in respect of student attendance of religious practices. The Court further stated that, “in any event, the submission that public schools must be allowed to insist that a learner be compelled to attend religious classes and religious practices at the school might also conflict with section 14(2) of the Constitution, which expressly provides that such attendance must be free and voluntary.”²¹⁶

The Court interpreted s. 14 (2) in the case of *S v Lawrence*.²¹⁷ The issue in the case was the constitutionality of several provisions of the Liquor Act 27 of 1989. Although there was disagreement among the justices on the issue, both the majority and minority opinions agreed on their interpretation of s. 14 (2). Justice Chaskalson writing for the majority emphasized that even voluntary school prayer might be coercive and this was why the constitution expressly guarded against that: “In the

²¹⁵ *In re Gauteng School Education Bill of 1995* (CCT39/95) 1996 (4) BCLR 537; 1996 (3) SA 165; [1996] ZACC 4 (4 April 1996).

²¹⁶ *Id.* at 20.

context of a school community and the pervasive peer pressure that is often present in such communities, voluntary school prayer could also amount to the coercion of pupils to participate in the prayers of the favored religion.”²¹⁸

When discussing the constitutional requirement of equity, he expressed doubt whether the constitution required that the school provide for prayers for pupils of each denomination present at the school. He suggested that the requirement meant the following:

...education authorities to allow schools to offer the prayers that may be most appropriate for a particular school, to have that decision taken in an equitable manner applicable to all schools, and to oblige them to do so in a way which does not give rise to indirect coercion of the “non-believers.”²¹⁹

The above dictum of Justice Chaskalson on the requirement of equity was stated in a rather tentative manner and cannot be regarded as a firmly taken position. It is not a very clear interpretation either. The words “most appropriate” give a very large discretion on school authorities while the requirement of equity seems to be absent. Chaskalson instead writes that education authorities should make treat schools in an equitable manner in their regulation, but the constitutional requirement of equity refers to something else, namely the conduct of the religious observances. Finally, Chaskalson adds nothing to the interpretation of equity by saying that schools should be obliged to guard against coercion of “non-believers,” because that obligation is covered by the requirement for voluntary attendance.

In her occurring opinion Justice O’Regan also examines s. 14 (2). She states that s. 14 (2) allows for endorsement of religious practices at public institutions, in contrast to the First Amendment jurisprudence in the US. However in her discussion

²¹⁷ *S v Lawrence* (CCT38/96) 1997 (10) BCLR 1348; 1997 (4) SA 1176; [1997] ZACC 11 (6 October 1997).

²¹⁸ *Id.* at 103.

²¹⁹ *Id.*

of the constitutional requirements attached to this endorsement she refers to US Supreme Court cases.

The requirement of voluntariness, she states, protects both non-believers and adherents to a faith different from the one being observed and it is “an explicit recognition of the deep personal commitment that participation in religious ceremonies reflects and a recognition that freedom of religion requires that the state may never require such attendance to be compulsory.”²²⁰ She also cautions that the constitution guards against indirect coercion as well and quotes from the opinion of Justice Black in *Engel v. Vitale*, where he states that, “[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.”²²¹

While she cautions against indirect coercion, she does not say how this may be avoided. It might be argued that a requirement that a parent or student makes an official request to be exempted would not be in conformity with s. 14 (2).

O’Regan’s discussion of the constitutional requirement of equity is more persuasive. She argues that this requirement should add something more to the requirement of voluntariness, at least that “state act even-handedly in relation to different religions.”²²² She then quotes Justice Brennan’s statement in *Larson v Valente*²²³ on the relationship between the Free Exercise Clause of the First Amendment and the equal treatment of all religions. According to O’Regan, the requirement of even-handedness with respect to different religions does not demand

²²⁰ *Id.* at 120.

²²¹ 370 U.S. 421, 431.

²²² *S v. Lawrence*, *supra* note 217, at 122.

²²³ 456 U.S. 228 (1982).

that the state adopt a “commitment to a scrupulous secularism, or a commitment to complete neutrality.”²²⁴

She notes that the equity requirement may lead to different policies depending on the context in which they are to be implemented. At local schools, she suggests, that “religious observances held should reflect, if possible, the religious beliefs of that particular community or group,” while at national level they “should not favor one religion to the exclusion of others.”²²⁵ The last proposition is very similar to the one advocated by Smith and Foster in their analysis of religious exercises at public schools in Canada.

In a commentary on the South African Constitution, Smith has argued that where exemptions are provided for pupils not wishing to attend religious observances, the rules regulating the exemption procedure “must not be must not be so unattractive as to constitute a disincentive to the exercise of that right.”²²⁶ What he stresses on is the need for providing an equitable alternative occupation for the pupil for the duration of the school prayer. He argues that, “leaving the abstaining children alone in their classroom, for example, or even under the supervision of an adult who was not charged with providing an alternative, constructive way of passing the time, should not pass constitutional muster.”²²⁷

There are no court cases so far dealing with direct challenges of legislative acts or administrative regulations governing religious exercises at public schools. In the case of *Wittmann v Deutscher Schulverein, Pretoria & Ors* (1998)²²⁸ the issue was whether a private (independent) school could constitutionally compel attendance at

²²⁴ *S v. Lawrence*, *supra* note 217, at 122.

²²⁵ *Id.*

²²⁶ Smith, *Freedom of Religion* in CHASKALSON ET AL CONSTITUTIONAL LAW OF SOUTH AFRICA (Revision Service 5, 1999) 19-10.

²²⁷ *Id.*

²²⁸ ICHRL 77 (4 May 1998).

religious education and morning prayer. Van Dijkhorst J held that the school regulations were constitutional since this was a private school, it was not a state – aided institution nor an organ of the state and therefore Sec 14(2) of the interim Constitution did not apply.²²⁹ The dictum of Van Dijkhorst concerning public schools however, has been rightly subjected to much scholarly criticism. He argued that even public schools can demand attendance at religious education classes and devotional exercises since when parents enroll their children at the school they agree with the school regulations and by that waive the rights of their children to be excused from attendance. Firstly as Smith has noted, if this were true that state schools could simply ignore the provisions of Sec 14 (2) by amending its school rules.²³⁰ Secondly, the whole theory of the waiver of rights is highly untenable. As Kriel notes, the distinction between waiving a constitutional right, such as freedom of religion and an ancillary right—the right to abstain when others exercise their right to participate in religious observances, is artificial and the right to abstain itself has been explicitly recognized as a constitutional right by virtue of 14(2) of the Interim Constitution of 1994 , and in 15 (2) of the current Constitution of South Africa from 1996.²³¹

However, a number of churches and religious organizations have criticized the recently enacted government policy on religion in education.²³² These organizations

²²⁹ The South African Constitution provides in Art. 29 (3) the right of anyone to establish independent schools which should not discriminate on the basis of race, should be registered with the state and have standards comparable to those in public schools. The Constitution also provides in Art. 29(4) that the state may provide subsidies to independent schools. Such subsidies are provided to independent schools on a sliding scale basis – the lower the schools fees the independent school charges the greater the state subsidy it receives. Those independent school that have highest fees do not receive any subsidies. (National NORMS and STANDARDS for SCHOOL FUNDING in terms of the South African Schools Act, 1996 (Act No. 84, 1996) Department of Education Pretoria October 1998, Art. 151, <http://www.polity.org.za/attachment.php?aa_id=4374>).

²³⁰ Smith, *Freedom of Religion* in Chaskalson Et Al CONSTITUTIONAL LAW OF SOUTH AFRICA (Revision Service 5, 1999)19-20.

²³¹ Ross Kriel, *Education*, in CHASKALSON ET AL., CONSTITUTIONAL LAW OF SOUTH AFRICA (Revision Service 5, 1999) 38-21.

²³² The final draft of the policy that was edited to a large extent in order to accommodate the demands of various religious groups which attacked the previous drafts for being manifestly anti-Christian and anti-Muslim. As the Education Department Director commented , “the policy has been dramatically

argue in their publications that it is unconstitutional on different grounds and state their intention to take the issue to the Constitutional Court.²³³ Before examining their arguments, a brief overview of the key provisions of the policy regarding religious practices is necessary.

The National Policy on Religion in Education was officially published by the Minister of Education on 12 September 2003. Schools may make available their facilities for the conduct of religious observances, which are to be based on a “free and voluntary association,” and the facilities have to be offered on an equitable basis. The policy describes the various types of practices that fall under the category of “religious observances”: voluntary religious services on school facilities, observances during voluntary gatherings at school breaks, on-going observances such as “dress, prayer times and diets, which must be respected and accommodated in a manner agreed upon by the school and the relevant faith authorities.”²³⁴

The policy states that when religious observances are organized as part of the school day, as at school assemblies, they must “accommodate and reflect the multireligious nature of the country in an appropriate manner.”²³⁵ Religious uniformity may not be imposed during school assemblies on a religiously diverse student body, and when a pupil is excused from being present during a religious component of the school assembly “equitable arrangements” should be made for him and her. The policy offers the following list of “equitable means of acknowledging the multi-religious nature of the school community,” which list is not exhaustive:

toned down, taking into account the objections from religious groups.” See 1. *Answers to questions on Religion in Education - the ACDP meets Education Department Director-General Thami Mseleku*. (visited Feb. 13, 2004) <<http://www.acdppta.org.za/Press/ParlNews12Sep03no2.htm>>.

²³³ See Philip Rosenthal, *Same Problems in Religion in Education Policy Announced Today*, Port Elizabeth Church Net, (visited Feb 14, 2004).

<<http://www.pechurchnet.co.za/post/issues/education/ed20030909.htm>>.

²³⁴ *National Policy on Religion in Education*, (visited Feb. 14, 2004),

<http://www.pechurchnet.co.za/post/issues/education/religion_in_education_sept_03.pdf>.

²³⁵ *Id* at 61.

- . The separation of learners according to religion, where the observance takes place outside of the context of a school assembly, and with equitably supported opportunities for observance by all faiths, and appropriate use of the time for those holding secular or humanist beliefs;
- . Rotation of opportunities for observance, in proportion to the representation of different religions in the school;
- . Selected readings from various texts emanating from different religions;
- . The use of a universal prayer; or
- . A period of silence.²³⁶

One of the arguments alleging the unconstitutionality of the policy is that the Minister of Education has no power to “to set-up or establish policy that may dictate, promote or restrict religious beliefs, instruction and practices at schools” through this policy.²³⁷ The legal basis of the argument is that under the Constitution and the South African Schools Act, 1996²³⁸ it is the school governing bodies that should be making the regulations regarding religious observances at public schools.

Nowhere is it stated in the policy that it overrides the power of the school governing bodies to issue regulations in respect of religious observance. The policy claims that it “do[es] not impose any narrow prescriptions or ideological views regarding the relationship between religion and education” but that it provides a framework within which the respective authorities may develop their approaches to the issue.²³⁹ The Director of the Education Department also stated that, “as the policy document is just that - a policy, it does not prescribe to schools how to implement the guidelines, merely acting as a framework for schools with a diversity of religions.”²⁴⁰ Nevertheless, the interpretation of the requirements of equity and voluntaries given by

²³⁶ *Id* at 62.

²³⁷ Rob Mc Cafferty, *Analysis of Policy: Religion and Education*. United Christian Action. <<http://www.christian.action.org.za>>; see also Rassie Malherbe, *The Constitutionality of Government Policy Relating to the Conduct of Religious Observances In Public Schools*. (visited Feb. 13, 2004) <<http://pestalozzi.org/legislation/LegalAnalysisMalherbe.htm>>.

²³⁸ The respective provision of the *South African Schools Act*, 1996 reads:

Freedom of conscience and religion at public schools

7. Subject to the Constitution and any applicable provincial law, religious observances may be conducted at a public school under rules issued by the governing body if such observances are conducted on an equitable basis and attendance at them by learners and members of staff is free and voluntary.

²³⁹ National Policy, *supra* note 234, Minister’s Foreword.

²⁴⁰ Minister of Education, Press Release, 12 September 2003, <<http://www.acdptta.org.za/Press/ParlNews12Sep03no2.htm>>.

the policy serves as a constraint on the public bodies if they follow it. This, however, is not a constitutional problem, because the policy is not legally binding on the school governing authorities.

The part of the policy that has been attacked the most by religious groups is the one that states that multi-faith observances may be held during school assemblies. Objections have been voiced by religious groups and political parties that multi-faith religious observances are offensive to true believers and they are an infringement to their right to freedom of religion.²⁴¹ These objections, similarly to ones against the Ontario multi-faith book of readings in Canada, demonstrate the difficulties accompanying an accommodationist approach based on the principle of pluralism.

I would argue that multi-faith observances as described in the policy are not an infringement on the right to freedom of religion of “true believers.” When such observances are included in a school assembly, or when there is a “neutral prayer” or a “moment of silence,” pupils who do not wish to participate have the right to be exempted. This holds true both for “true believers” and non-believers.

This argument leaves unanswered the question of the constitutionality of the exemption procedures and their compliance with the constitutional requirement of voluntariness, interpreted as an absence of not only direct, but also indirect coercion. The policy provides that “equitable arrangements must be made” for pupils not wishing to attend.²⁴² The *Policy* also emphasizes that the respective school authorities have to pay due attention to “peer pressure” and to make arrangements to mitigate “its

²⁴¹ For example, African Christian Democratic Party MP Cheryllyn Dudley asked the Minister of Education the following question in parliament : Are you aware that limiting religious observances in schools to being multi-faith, you are prohibiting a large majority of people from exercising their right to practise their faith?" (visited Feb. 14, 2004), <http://www.acdppta.org.za/Press/MultiFaithSchools15May03.htm>.

²⁴² ²⁴² National Policy, *supra* note 234, at 63.

negative influence on the willingness of children to be identified as ‘different.’”²⁴³ Thus so far, as the Policy guidelines are concerned, they comply with the constitutional requirement of voluntariness as has been interpreted by the Constitutional Court. The difficulty lies with their practical implementation.

Another ground on which the policy has been attacked is that it does not provide for single-faith observances during school assemblies. According to Malherbe, “the notion still exists that single-faith observances in assembly would violate individual rights.”²⁴⁴ The simple fact is that as long as the conditions of section 15(2) are complied with, single-faith observances are not regarded by the Constitution to be discriminatory.”²⁴⁵

This argument, however, is untenable. The constitution mentions neither single nor multi-faith observances. What it does is to place requirements for the conduct of “religious observances.” The respective governing bodies have the authority to decide that compliance with these requirements in the case of religious observances during school assemblies necessitates holding multi-faith observances. There is no constitutional right to have single-faith observance during school assemblies.

What is more, single faith observances *are allowed* outside regular school hours. It can be argued that it is exactly in order to meet the requirements of equity and voluntariness, that they are to be held outside the school hours, and that such observance are organized for members of all faith present in the student body.²⁴⁶

²⁴³ *Id.* at 62.

²⁴⁴ Malherbe, *supra* note 237, at 63.

²⁴⁵ *Id.*

²⁴⁶ This requirement for holding parallel single faith observance for pupils from different faiths has been opposed as being very difficult to organize in practice. It has been argued that for many schools only the options of multi-faith observance, neutral prayers or moments of silence would be the only ones feasible. (See Rosenthal *supra* note 14). Still that would not make the policy unconstitutional.

It has also been argued that such a policy does not correspond to Constitutional Court' interpretation of the requirement of equity in *S v Lawrence*; *S v Negal*; *S v Solberg* (1997). The reference is to Justice Chaskalson's dicta that equity may be interpreted not to require that school authorities provide for religious observances for all denominations represented in the student body. This opinion by Justice Chaskalson was already criticized for its tentativeness and lack of guidance. Even if it is assumed that this is an authoritative interpretation of the equity requirement, the fact that school authorities go beyond the minimum in order to achieve a better compliance with the requirement cannot be held against them and cannot be used as a ground for the alleged unconstitutionality of the policy.

On the other hand, if school governing bodies choose not to follow the policy and do not provide for single faith religious observance for all represented denominations, but only for one or several, then these regulations may be challenged before the Constitutional Court. Then the Court would have to decide the issue. I would argue that if it follows the reasoning of Justice O'Regan regarding the equity requirement, the principle guidance of the Policy regarding single faith observance would be held as constitutionally required.

In view of the problematic nature of exemptions from religious exercises at school assemblies, and the objections raised to multi-faith religious exercises, the best approach seems to be to provide for moments of silence during school assemblies and for voluntary religious observance for all represented faiths, including providing of "quiet rooms" for personal reflection or prayer.

V. UK

1. Legal Framework

The absence of a written constitutional framework securing the right to freedom of religion or a right to education in the UK warrants an examination of statutory provisions for their compliance with international instruments guaranteeing freedom of religion, the rights to education, and children's' rights to which it is a party. Furthermore administrative decisions regarding its application must be in conformity with the Human Rights Act 1998.

School Standards and Framework Act 1998

In the UK there is a statutory obligation for public schools to provide for "collective worship."²⁴⁷ According to the *School Standards and Framework Act 1998* any pupil at a community, foundation or voluntary school ²⁴⁸ should participate in a

²⁴⁷ Between 1870, when almost all school were Church schools and 1944 there was no statutory requirement for collective worship, although the practice of schools was to have the Lord's Prayer or Bible readings. The statutory requirements were only that the Prayer shall not be denominational. In the 60's and 70's there was widespread criticism in the educational establishment of the collective worship requirement. Recognition of the religious pluralism of society and the secularization of education lead to proposals for reform vesting authority in the schools to hold such assemblies as they so fit. The emphasis was more on shared values than on religion. However, the government did not want reforms, and the requirement was reintroduced in the Education Reform Act, 1988. in this Act the requirement for worship of a "wholly or mainly of a broadly Christian character" was introduced for the first time. (Fiona Wood, *The Value of Collective Worship as Viewed By Teachers and Students in Secondary Schools*. (Visited Feb 2, 2004) <http://www.farmington.ac.uk/documents/new_reports/TT13.html>.

²⁴⁸ These schools are all "maintained schools," that is financed by the state. Chapter 31 (7) of the *School Standards and Framework Act 1998* defines as "a community, foundation or voluntary school or a community or foundation special school." The following is a short description of the specifics of these three types of state schools: (*Types of Schools in the UK*. AXCIS Education Recruitment. (visited Feb. 2, 2004), <www.axcis.co.uk/html/types_of_schools.html>.

"Community Schools. State schools in England and Wales which are wholly owned and maintained by local education authorities. The LEA is the admissions authority and has main responsibility for deciding arrangements for admitting pupils.

Foundation Schools. State schools funded and run by the LEA, which pays for any building work, while the school retains control over admissions, staff employment and land and buildings. Most former grant-maintained schools opted to become foundation schools. These schools have more freedom than community schools to manage their school and decide on their own admissions. Some may have a foundation (generally religious) which appoints some of the governing body. The governing body is the admissions authority.

daily act of “collective worship”.²⁴⁹ This requirement has been sharply criticized by professional organizations of educators, other non-government organizations, and politicians alike.²⁵⁰ Widespread noncompliance by schools with the statutory requirements has been reported. The Office for Standards in Education expressed serious doubt “whether schools in a broadly secular society can or should bring their pupils together in order to engage in worship” and has noted that “for LEA and grant maintained schools... the notion of worship, and indeed that of prayer, can be problematic at both an institutional and a personal level.”²⁵¹ Still the government has been adamant on keeping the requirement.²⁵²

There is no statutory definition of an act of collective worship. The Department of Education Circular 1/94²⁵³ has clarified that the word worship should

Voluntary Schools. Schools in England and Wales which are provided by voluntary bodies, mainly churches or church-related organizations. Financed and maintained by local education authorities, but the assets are held and administered by trustees. This category includes voluntary aided schools, voluntary controlled schools and special agreement schools.”

²⁴⁹ s 70 (1), School Standards And Framework Act 1998. Chapter 31. Part II New Framework For Maintained Schools. Chapter Vi Religious Education And Worship. Religious Worship

²⁵⁰ In his speech in the House of Commons on the 6th anniversary of the 1944 Education Act delivered on 21 April, 2004, the Chief Inspector of Schools criticized the compulsory nature of collective worship and the appropriateness of the requirement for its Christian character in contemporary British Society. He asked, “How many people in this country, apart from school children, are required to attend daily worship?”

<http://education.guardian.co.uk/ofsted/story/0,7348,1200090,00.html>

²⁵¹ A Review of Secondary Schools in England. Office for Standards in Education. The Stationery Office,

Prepared 22 June 1998

<http://www.official-documents.co.uk/cgi-bin/htm_hl?DB=off-docsl&STEMMER=en&WORDS=collect+worship+&COLOUR=Red&STYLE=s&URL=http://www.archive.official-documents.co.uk/document/ofsted/seced/chap-4.htm#muscat_highlighter_first_match>.

²⁵² Answering a question as to whether the government will make a statement regarding its policy on collective worship at schools, the Secretary of State replied that, “The Government have no current plans to remove the statutory requirement for a daily act of collective worship in schools as the law already allows much flexibility over the organization, timing and content of worship.” Commons Hansard Written Answers text for Thursday 7 Feb 2002. <http://www.publications.parliament.uk/cgi-bin/ukparl_hl?DB=ukparl&STEMMER=en&WORDS=collect+worship+&COLOUR=Red&STYLE=s&URL=/pa/cm200102/cmhansrd/vo020207/text/20207w02.htm#20207w02.html_spnew10>.

²⁵³ Although the circular was written as a policy guideline clarifying the Education Reform Act, 1988, it still remains the current policy of the government, as was stated in the Commons Written Answers (23 Oct 2002) http://www.publications.parliament.uk/cgi-bin/ukparl_hl?DB=ukparl&STEMMER=en&WORDS=school+act+collect+worship+&COLOUR=Red&STYLE=s&URL=/pa/cm200102/cmhansrd/vo021023/text/21023w20.htm#21023w20.html_spnew1

be understood in its “natural and ordinary meaning.”²⁵⁴ It states further that an act of worship “should be concerned with reverence or veneration paid to a divine being or power” and should “elicit a response from pupils, even though on a particular occasion, some of the pupils may not feel able actively to identify with the act of worship.”²⁵⁵

Regarding the aims of collective worship, the education department has issued a model policy for schools in which it states that collective worship is to provide opportunity for pupils to “worship God; reflect on values that are of a broadly Christian nature and on their own beliefs, develop a community spirit, a common ethos and shared values; consider spiritual and moral issues; respond to the worship offered.”²⁵⁶ The Act has exemption provisions that will be analyzed below.

The ordinary meaning of worship signifies that religious interpretation is intended, although many schools have tried to interpret it in a more secular way by referring to the original of the word “worthship.” They have focused on common values and experiences, but it has been noted by government inspectors that such a policy does not meet the statutory requirement.²⁵⁷

The reference to a divine being further emphasizes religiosity. Critics have argued that such worship is “inappropriate in an educational context and is more suited to a worshipping community.”²⁵⁸ Clearly, such an act would be contrary to the

²⁵⁴ *Circular number 1/94*, Religious Education and Collective Worship, para. 57

²⁵⁵ *Id.*

²⁵⁶ Collective worship policy. Last Updated: 26 November 2003.

<<http://www.teachernet.gov.uk/management/atoz/index.cfm?component=topic&id=262&part=1>>.

²⁵⁷ “In a letter to Hertfordshire’s Director of Education in July 1995, Her Majesty’s Chief Inspector of Schools wrote that whilst many schools wish to promote and celebrate broadly agreed values, ‘... we believe that it is unhelpful to classify such activity as worship if it has no focus on the existence of God.’” (See Wood, *supra* note 247.)

²⁵⁸ Tim Burgess, *Collective Worship*. The Farmington Institute for Christian Studies. (visited Feb. 4 13). <http://www.farmington.ac.uk/documents/new_reports/TT44.html> p. 5

convictions of atheists and non-theists. The British Humanist Association has argued that the requirement for daily worship discriminates in favor of religion.²⁵⁹

Thus one argument for the incompatibility of the Act with the ECHR would be that the requirement for daily worship is a violation of Art. 9 and of Art. 14 in conjunction with Art. 9 because it is an unjustified infringement of the right to freedom of conscience of pupils holding atheist views. I would argue that given Strasbourg's case law and the exemptions provisions of the Act this argument will not hold.²⁶⁰

In community schools and foundation schools that do not have a religious character, the worship must be "wholly or mainly of a broadly Christian character" which means that it should reflect "the broad traditions of Christian belief without being distinctive of any particular Christian denomination."²⁶¹ While it is required that the majority of the acts of worship over a term be of a Christian character, not every single act need be of such character. Considerations have also to be paid to the relevant family background of the pupils. The government *Circular number 1/94* clarifies that an act of worship that is of a broadly Christian character may contain non-Christian elements, but should contain "elements which relate specifically to the traditions"²⁶² of Christian belief and which accord a special status to Jesus Christ."²⁶³

²⁵⁹ *A Better Way Forward –BHA Policy on Religion and Schools*. British Humanist Association. (BHA) Sep. 2003, <www.humanism.org.uk>.

²⁶⁰ As of the time of this writing the European Court of Human Rights is expected to announce its decision on *Folgero and Others v. Norway* (Application no. 15472/02), and this decision may throw additional light on the position of the court with respect to exemptions from religious education which is also relevant to the statutory requirement of collective worship in the UK.

²⁶¹ Schedule 20, para 3 (2), (3).

²⁶² A reply to a request for clarification on this clause from the government states that the "elements which relate specifically to the traditions of Christian belief" are the distinctive elements of Christianity" and that, "the element of Christianity which distinguishes it from other faiths is the status accorded to Jesus Christ, which is why this is mentioned in that part of the Circular." (See John M Hull, *Collective Worship: The Search For Spirituality*, Future Progress in Religious Education: The Templeton London Lectures at the RSA, London, RSA, 1995, <<http://www.johnmhull.biz/COLLECTIVE%20WORSHIP.htm>>).

²⁶³ *Circular number 1/94*, *supra* note 254, at para. 63

This definition has been described by one Diocesan Board of Education as one that “manages to offend just anybody” including Christians themselves “who believe the status of Jesus is not just special but unique.”²⁶⁴ Undoubtedly it conflicts even more with non-Christian faiths. It has been pointed out that it is in conflict with the central belief in Islam – the oneness of Allah and that “... the Department has effectively excluded from acts of collective worship all Muslim teachers and over 300,000 Muslim pupils in schools in England.”²⁶⁵ Therefore it may be argued that the regulation discriminates against members of minority faiths.

The *Act* provides for exemptions from this requirement. If a parent of a pupil requests that the pupil does not attend religious worship at the school, he or she shall be excused from attendance.²⁶⁶ The government policy directs that, “the parental right to withdraw a child from attending collective worship should be freely exercisable and a school must give effect to any such request. Parents are not obliged to state their reasons for seeking withdrawal.”²⁶⁷

This opt out seems problematic on several counts. First, students themselves, even those who have attained the age of majority, or are otherwise sufficiently mature to make such a decision on their own, have no right to exempt themselves from attending collective worship.²⁶⁸

Further the *Act* obliges school authorities to give reasonable opportunities to pupils to attend religious worship on days designated by the religious body to which the parent belongs upon the request of the parent.²⁶⁹ The school authorities *may* make

²⁶⁴ Burgess, *supra* note 258, at 7.

²⁶⁵ Wood, *supra* note 247, at 12.

²⁶⁶ s 71 (1) (b), School Standards and Framework Act 1998.

²⁶⁷ Circular, *supra* note 254, at 85

²⁶⁸ See Art. 14 and Art. 12 of the Convention on the Rights of the Child and the discussion *infra*.

²⁶⁹ s. 71 (5) (b), School Standards and Framework Act 1998.

available school facilities for such worship, but the related expenditures shall not be born by the school authorities.²⁷⁰

The exemption provisions for individual pupils have been criticized on the ground that they fail to save the statute from imposing religion on non-believers and the Christian religion on adherents of other faiths, thus infringing on their right to freedom of religion. Critics argue that because of the effects of peer pressure, parents are reluctant to exempt their children, since they do not wish to mark them as “different and dissenting.”

A second reason why parents use the exemption as a last resort is that since collective worship is usually held during school assemblies, exempted students “might besides miss opportunities for spiritual, moral, social and cultural development, and information given out at the school assembly.”²⁷¹ Moreover, allegedly there have been cases where pupils who have been exempted from collective worship have been “penalized” for that by “being precluded from attending non-religious aspects of assembly (such as the reading of school notices), or by being required to sweep the school yard.”²⁷²

The last practice is a violation of the *Act* itself, since if the parental choice is to be freely exercised school authorities should not attach “penalties” to its exercise for whatever one’s views about the arguable coercion flowing from peer pressure and the effects of non-participation, imposing requirements that could easily be construed to be punitive clearly results in coercion of the pupil to conform. Therefore in such cases the *Act* as applied can be challenged successfully under the Human Rights 1998 for violation of the right to freedom of conscience and religion, and the duty of the state

²⁷⁰ S.71 (6), *School Standards and Framework Act* 1998

²⁷¹ BHA, *supra* note 259, at 35.

²⁷² The National Secular Society’s Response to the Government Green Paper on Education ‘Schools, Building on Success’ 31 May 2001, at 28.

to respect parent's conviction in the education of their children. The Human Rights Act would apply to schools as public bodies.

The more controversial problem is the indirect coercion resulting from peer pressure. It has to be analyzed in view of the case-law of the European Court of Human Rights. Although the conformity of provisions exempting pupils from religious education or religious observance at school with the Convention has not yet been directly addressed by the Court, there are several cases in which the Court gives pertinent guidance.

In the case of *Kjeldsen, Busk Madsen and Pedersen v. Denmark* (1976), the Court held that Art. 2 (P1-2) "enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire State education program,"²⁷³ not only with respect to religious instruction. The duty of the state under second sentence of Art. 2 is (P1-2) "broad in its extent as it applies not only to the content of education and the manner of its provision but also to the performance of all the "functions" assumed by the State."²⁷⁴ Therefore Art. 2 (P1-2) is applicable also to the required practice of collective worship. The Court also noted that Art. 2 (P1-2) must be read also in the light of Art. 8, 9 and 10.

The Court noted that the second sentence of Art. 2 (P1-2) "does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind."²⁷⁵ Nevertheless the State must not "pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded."²⁷⁶

²⁷³ *Kjeldsen, Busk Madsen and Pedersen v. Denmark* (1976), para. 52.

²⁷⁴ *Efstathiou v. Greece* (1996), para. 28.

²⁷⁵ *Kjeldsen, Busk Madsen and Pedersen v. Denmark* (1976), para.35.

²⁷⁶ *Id.*

On its face the Court's requirement seems a fair one. However it is unrealistic to claim that it is possible to impart knowledge, especially about substantive moral issues without at the same time indoctrinating. As Stanley Fish has forcefully argued, "The choice is never between indoctrination and free enquiry but between different forms of indoctrination issuing from different authorities."²⁷⁷

In the case of *Efstathiou v. Greece* (1996), the Court held that the imposition of a penalty of a two-day suspension from school on the child of a Jehovah Witness parent, for not attending a school parade was not in violation of art. 9, nor Art. 2 (P1-2). When the Court examined the complaint both under art. 9 and Art. 2 (P1-2) it noted that the applicant's daughter had been granted exemption from attending religious instruction and the Orthodox Mass. It can be inferred from the overall reasoning of the Court that it considered the state to have fulfilled the core of its obligations under the two articles.

In *Angeleni v. Sweden* (1983) the Commission examined the complaint of a Swedish national, who did not have the right under the applicable Swedish law to exempt her child from religious instruction, since such exemption were available by law only to persons of a different faith, but not to atheists. When the Commission examined the complaint under Art. 9, it did not pronounce on the question of the compatibility of the Swedish Education Law with the Convention, but only as it was applied to the applicant's daughter. One of the arguments on which the Commission found the application as manifestly ill-founded was that in fact the applicant's daughter had been exempted to a large extent from attending religious instruction.²⁷⁸

²⁷⁷ STANLEY FISH, *Vicki Frost Object.* in *THE TROUBLE WITH PRINCIPLES* 158 (Harvard University Press: 1999).

²⁷⁸ *Angeleni v. Sweden* (1983), para 3.

Finally in *C.J. and J.J. and E.J. v. Poland* (1996)²⁷⁹ the Commission rejected the claim of Polish parents that their right to freedom of religion had been violated, by the requirement to fill out a form indicating whether their child will attend voluntary religious instruction or an alternate course in ethics. The applicants argued that this requirement forced them to make a public statement about their religious belief contrary to Art. 9, but the Commission found that there was no interference.

This supports the conclusion that the exemption provisions will be considered as rendering the *School Standards and Framework Act* 1998 in conformity with the Convention. So far neither the Commission nor the Court have been willing to go deeper and examine whether opt out provisions from religious education violate Art.9 because of indirect coercion resulting from peer pressure on dissenting students or because in order to make use of the exemption the students might be compelled to declare their religious beliefs, the latter being the main reason why the lower court in the German School prayer case declared the practice unconstitutional.²⁸⁰

Exemptions provisions with respect to collective worship may also be examined in light of the Committee's General Comment No. 22 on article 18: "[A]rticle 18.4 permits public school instruction in subjects such as the general history

²⁷⁹ Application No. 23380/94

²⁸⁰ In the case of *Saniewski v. Poland* (2001) (Decision as to the Admissibility of Application no. 40319/98), the applicant attended a state secondary school and his school report listed the courses that he had followed during the relevant year and the respective grades for these courses. The slot reserved for "religion/ethics" contained no grade, but was left blank. Under a ministerial ordinance state schools are to provide for "participation in religious instruction on a voluntary basis, a course on ethics being organized on the same voluntary basis for those pupils who do not wish to attend such instruction." Marks for "religious instruction/ethics" are to be included in the official school reports, but they should contain no data that may disclose whether the student attended instruction in a particular religion or in ethics "in order to eliminate any possible opportunities for intolerance." The applicant complained that the absence of a grade for the course in religion obliged him to make a public statement about his belief, arguing that as an atheist in Poland "his chances of obtaining a place at university or a good job are seriously diminished thereby." The Court remarkably noted that it leaves *open* "the question whether Article 9 of the Convention guarantees a right to remain silent as to one's religious beliefs." Since in the view of the Court the applicant had not substantiated the claim that he will be prejudiced by the absence of grade for the religious class in his school report, and since other course such as music were also without a grade, and therefore it could not be known whether the applicant was without mark

of religions and ethics if it is given in a neutral and objective way", and "public education that includes instruction in a particular religion or belief is inconsistent with article 18, paragraph 4 unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents or guardians."²⁸¹ The issue of exemptions came before the Committee in a individual communication against Norway in which parents challenged the compliance of the partial exemption provisions from instruction in the compulsory subject of "Christian Knowledge and Religious and Ethical Education"²⁸² with Art.18 of the ICCPR. Since the Committee accepted that the instruction was not neutral in value and the main emphasis was on Christianity, it reasoned that the system of exemptions was of primary importance.²⁸³ The system of exemptions provided for automatic exemption upon parental request was only with respect to the overtly religious parts of the course, while for the other parts exemption was available on the basis of a written notification from parents, which had to explain that "on the basis of their own religion or philosophy of life" they perceive those parts "as being the practice of another religion or adherence to another philosophy of life."²⁸⁴ The Committee found that this system did not conform to Art.18 para. 4 of the Covenant, since it imposed considerable burdens on parents wishing to exercise their right to exemption, noting that "scheme does not ensure that education of religious knowledge and religious practice are separated in a way that makes the exemption scheme practicable."²⁸⁵ This case, however, does not give a clear guidance as to the compatibility of the exemption provision with respect to

because he did not wish to attend such classes or because there were not offered during that school year, the Court rejected the application as manifestly ill-founded.

²⁸¹ Human Rights Committee, General Comment 22, Article 18 (Forty-eighth session, 1993).

Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994).

²⁸² Communication No 1155/2003 : Norway. 23/11/2004. CCPR/C/82/D/1155/2003.

²⁸³ *Id.* at 14.3.

²⁸⁴ *Id.* at 14.4.

²⁸⁵ *Id.* at 14.6.

collective worship in the UK, because in contrast to the Norway case, here parents need not state any reason as to why they request exemption. The UN Committee did not examine the issue of whether peer pressure was making exemptions impracticable and did not squarely address the issue of indirect coercion, although it was raised by the authors of the communication. Moreover, it may be inferred from the last observation quoted above, that the Committee might be likely to consider a system of full exemption, where no reasons for exemption are required as a “practicable” exemption scheme.

For a long time a very important problem with the exemption provision in the UK has been that the right to excuse a pupil from attending an act of collective worship could be asserted solely in parents. Even students who had attained the age of majority could not excuse themselves without parental request. The Court in Strasbourg has noted that the two sentences of Art. 2 (P1-2) should be read in light of Art. 9, “which proclaims the right of everyone, including parents and *children* [emphasis added] ... to freedom of thought, conscience and religion.” Therefore it can be successfully argued that the Convention requires at least students of majority age to be able to have the right of exemption. This argument can be based also under Art. 9 alone.

In this respect the Act was also not in conformity with Art. 12 (1) of the Convention of the Rights of the Child, which states that, “states Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.” Under this legislation the views of pupils are not given weight at all.²⁸⁶ Under Art. 14 the state has the duty

²⁸⁶ The UN Committee on the Rights of the Child has recommended that:

to respect the rights of the child to freedom of thought, conscience and religion, and parental rights and duties to “provide direction to the child in the exercise of his or her right in *a manner consistent with the evolving capacities of the child* [emphasis added].” The National Secular Society of Scotland has argued that children of the age of 13 or 14 should be given the right to decide whether to attend collective worship or not.²⁸⁷

Research among children from community schools in England and Wales has shown that while at the elementary level students tends to unquestioningly accept the practice of daily collective worship where God is dominant figure from the ages of about 10 they start to question the practice.²⁸⁸ Gill argues that the fact that collective worship at elementary levels is performed more as a devotional exercise while at the secondary level it is more and more secular also reflects the changing attitudes of students.²⁸⁹

“Greater priority should be given to incorporating the general principles of the Convention, especially the provisions of its articles 3 (best interests of the child) and article 12 (child’s right to make their views known and to have these views given due weight) in the legislative and administrative measures and in policies undertaken to implement the rights of the child.” (Committee on the Rights of the Child Consideration of Reports Submitted by States Parties Under Article 44 Of The Convention. Periodic reports of States parties due in 1998 United Kingdom of Great Britain and Northern Ireland. Distr. GENERAL. CRC/C/83/Add.3, 25 February 2002

²⁸⁷ The National Secular Society of Scotland has argued that it is not logical that children of 8-13 years undertake ceremonies of confirmation which fact “presupposes a capacity of children of that age to understand the concepts and make an informed decision” and still the right to withdrawal from school worship is vested not in them but in their parents. *See National Secular Society—Response to the Consultation on Religious Worship in Scotland*, <<http://www.secularism.org.uk/newspress/letter12afeb03t.htm>>.

²⁸⁸ Jeannette Gill, *The Act of Collective Worship: Pupils’ Perspectives*, 26 (2) BRITISH JOURNAL OF RELIGIOUS EDUCATION 186, 188 (2004).

²⁸⁹ *Id.*

The findings of the research reveal a developing opposition of students to the practice and by the time they are to leave school they widely reject it. The reasons for this opposition students give summarized from their responses to the researcher are several. Students draw a distinction between RE education courses which present material for discussion and collective worship where the material is presented to inculcate or express belief and they “reject any pressure for belief and commitment.”²⁹⁰ Students also have expressed doubts about the veracity of “accounts relating to creation, miracles and resurrection, and are unable to perceive any relevance in these events” and find it difficult to relate these events to their lives; they begin to doubt the “efficacy of prayer”; in multi-faith schools students question the appropriateness and possibility of a common collective worship because of the presence of members of different religious traditions at school; students give an account of what they perceive to be “irreconcilable parallel claims from a variety of religious and non-religious belief systems” which leads them to reject any pressure to the installation of a single truth.²⁹¹ Another reason given by students is their emerging conviction that religious commitment and practice is “not only *personal* but *private*” and therefore the task of the family and the religious community not the school to provide the direction and environment necessary for acts of worship.²⁹² Therefore if due weight is given to the views of children at secondary schools the compulsory nature of collective worship may not be maintained, at least not without adequate opt out rights that can be asserted by mature students themselves.

²⁹⁰ *Id* at 187.

²⁹¹ *Id.* at 188-190.

²⁹² *Id.* at 191. Gills give two major features of contemporary liberal society as the primary factors influencing students’ change of attitude towards collective worship: “The first is the growing awareness of a division between the private and the public domains which is accompanied by a strong sense of individual rights...This is absorbed by children while still in the primary school, who then begin to assert their independence from adult authority in the matter of religion, which they regard as private. The second is the concept of education which adopts an approach which is objective and rational in areas of significant controversy.” (*Id.* at 192).

At long last, at the end of 2006 an amendment was enacted to the Education and Inspection Bill. When it comes into force in September, 2007, it will vest the right to withdraw from collective worship in students age 16 or above themselves and not in their parents.²⁹³ The amendment was proposed by Liberal Democrat Baroness Walmsley, who argued that „There is no justification for forcing young people to take part in a religious service with which they do not agree. Freedom of worship, or non-worship in this case, is a basic part of our rights as citizens of a free country.”²⁹⁴ The amendment was adopted over the objections of some like the Bishop of Portsmouth. In his opinion the amendment was unnecessary since:

By freely choosing to study in a school sixth form, pupils with the support of their parents are deciding to submit themselves to the rules and regulations of the school in question and of schools in general. It is therefore arguable that, while those of compulsory school age should be able to be withdrawn from collective worship, that right should not be available to sixth-formers.²⁹⁵

The argument is, however, totally unpersuasive, since it would allow the state to impose as a condition on children who wish to continue studying after the age of 16 to surrender their right to freedom of religion.

A third issue that has been raised is that the Act discriminates against parents and students from minority faiths. The Act provides that the state shall cover the expenses for worship of students from the Christian faith, of students that are a group large enough to obtain a determination by the local standing advisory council on religious education (SACRE), but stipulates that if the school makes available its premises for holding of alternative worship, the expenses have to be born by the pupils' parents.

²⁹³ <http://www.teachernet.gov.uk/educationandinspectionsacttimeline/>

²⁹⁴ *School Worship Rule To Be Relaxed*. BBC NEWS, 19 July 2006, <http://news.bbc.co.uk/2/hi/uk_news/education/5194456.stm>.

²⁹⁵ House of Lords Debates, Tuesday, 17 October 2006, <<http://www.theyworkforyou.com/lords/?id=2006-10-17b.651.0&s=BBC>>

Article 14 of the ECHR forbids discrimination only with regard to those rights and freedoms which are included in the Convention. From the Court's reasoning in the *Belgium Linguistics Case* it follows that states are not obliged to establish or subsidize an educational institution of a particular kind or level.²⁹⁶ As Cumper has argued:

Since the United Kingdom is not obliged to subsidize privately funded alternatives to state education, it seems unlikely that the British Government is under a positive legal obligation to provide a state funded act of worship, for every child who has been withdrawn from a Christian school assembly.²⁹⁷

Moreover, the UK has made the following reservation to its ratification of the Protocol: "the principle affirmed in the second sentence of Article 2 is accepted ... only in so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure". Therefore the government can successfully argue that providing subsidies for alternative worship to all pupils requesting so would be an "unreasonable public expenditure and would hinder "efficient instruction and training." By virtue of this reservation it may be concluded that the UK is not violating its obligations under the ECHR by not shouldering the expenses for collective worship for all of the students in state schools. apply.

Another procedure—the so called "determination procedure" is available to head teachers of the above schools through which they can apply to the SACRE exempt the school or a specified group of pupils from the Christian character of the worship. The head teacher, having regard to the family backgrounds of the pupils, may apply for a determination that this requirement shall not apply. The council either

²⁹⁶ Peter Cumper, *School Worship: Praying For Guidance*, 1 EUROPEAN HUMAN RIGHTS LAW REVIEW 45, 51 (1998).

²⁹⁷ *Id.*

accepts or rejects the application in a written form.²⁹⁸ If the requirement is lifted, then the collective worship need not be of any Christian character or distinctive of any particular denomination, but *may* be distinctive of a particular faith.²⁹⁹ Parents have the right to exempt their children from these alternative worships as well.

This procedure for “determination” can affect the rights of large enough groups of pupils belonging to a minority faith. Only in such cases is it likely that the head teacher will apply for lifting the requirement for Christian character of the worship. The parents of pupils of a minority faith whose number is not substantial, or of pupils holding atheist conviction would have as a resource only the exemption procedures described in the preceding paragraphs.

In the case of a voluntary school or a foundation school with a religious character, the collective worship is in accordance with the provisions of the school’s trust deed or with its religious character. Who makes the arrangements for the act of worship depends on the type of school. If the school does not have a religious character³⁰⁰ then the arrangements are made by the head teacher after consultations with the governing body. If the school has a religious character,³⁰¹ the arrangements are made by the governing body after consultations with the head teacher.³⁰²

In the House of Lords, Lord Peston has voiced the opinion that if the government truly respects parental choice and believes that parents ought to have the right to establish religious schools, then it would logically follow that “other parents ought to have the right to have purely secular schools” and that this “right should not simply be met by opting-out procedures, but by not having the religious element in

²⁹⁸ S. 349, *School Standards and Framework Act 1998*.

²⁹⁹ Schedule 20, para. 4, *School Standards and Framework Act 1998*.

³⁰⁰ E.g., a community school or a foundation school with no religious character.

³⁰¹ E.g., a foundation school with a religious character or a voluntary school. The Secretary of State may designate foundation, voluntary aided and voluntary controlled schools as schools with a religious character. (s. 69 (3), *School Standards and Framework Act 1998*.)

the school.”³⁰³ Thus he argued that if parents within a school wanted that school to be wholly secular they should be able to have it that way.

Again here it follows from the *Belgium Linguistics case* that the state is under no obligation to establish any type of school, be it secular or religious. And in light of the cases referred to above, the existing exemption procedures would most likely be deemed as a sufficient guarantee of the right of parental choice. Thus it can be concluded with the new amendment that comes into force in September 2007 UK is in compliance with the international human rights instruments.³⁰⁴ However, a more rigorous interpretation of the right to freedom of religion, equality, and non-discrimination would be inconsistent with the current regulatory scheme in the UK.

VI. GERMANY

The approach adopted by the German Constitutional court may be described as cooperationist or accommodationist. Arguably it better accommodates the public, communal aspect of religious freedom. However, it treats preferentially majority religions.

1. *School Prayer Case (1979)*³⁰⁵

The Constitutional Court addressed the issue of whether prayers held outside religious instruction classes at compulsory state schools when a pupil's parent objects to it are constitutional. The decision dealt with two lower court cases. The first case

³⁰² Schedule 20, para 2 (4), *School Standards and Framework Act 1998*.

³⁰³ Lords Hansard. June 17, 2002.

³⁰⁴ <http://www.publications.parliament.uk/pa/ld200102/ldhansrd/vo020617/text/20617-12.htm>

³⁰⁵ While this amendment passed, another one which would have replaced the requirement of daily collective worship with a requirement to hold assemblies that will further pupils "spiritual, moral, social and cultural education" was not accepted, although it would have made the assemblies more inclusive and avoid all the problems both legal and practical related to the current practice.

³⁰⁵ 52 BVerfGE 223, translated in DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY*, Durham : Duke University Press, 1989, at 461-446.

concerned the practice of a daily recitation of a voluntary inter-denominational Christian prayer at an interdenominational school in the state of Hesse. The Hesse Constitutional court held that the practice was unconstitutional if a pupil or parent objected to it. Similarly to the Ontario Court of Appeals, it held that when a pupil had to excuse himself he would be forced to proclaim his religious convictions and that was contrary to the provision of Article 136(3) of the Weimar Constitution. Since the way pupils could excuse themselves was unacceptable their freedom not to believe and not to practice religion, protected by Art. 4, were violated.³⁰⁶

The second case concerned the practice of holding prayers at a public interdenominational school in Aachen. The Federal Administrative Court held that the “negative freedom of confession” of some pupils could not be construed in such a way as to prevent others from exercising their “positive religious freedom.”³⁰⁷

The Federal Constitutional Court reversed the first decision and upheld the second. The Court relied on the *Interdenominational School Case* (1975)³⁰⁸ in resolving the more general issue of whether religious references are ever permitted in (compulsory) interdenominational schools outside classes in religious instruction, which are required by Art. 7(3) of the Basic Law.³⁰⁹

In that case the Court examined the complaint of parents against the state of Baden-Württemberg who were forced to send their children to Christian interdenominational schools, the only type available, against their wishes for a religion-free education of their children. The Court’s analysis presented the conflict as one between competing rights of individuals—the negative freedom of parents like the

³⁰⁶ See Muehlhoff, *supra* note 15, at 469.

³⁰⁷ Kommers, *supra* note 305, at 462

³⁰⁸ 41 BVerfGE 29.

³⁰⁹ 52 BVerfGE 223, Kommers, *supra* note 305, at 463. There is a minor exception to this requirement that relates to a specific tradition of non-confessional teaching that the Basic Law allowed Bremen to preserve. See Basic Law art. 141 (Bremen Clause).

complainants on the one hand, and the positive freedom of other parents who wished to have a Christian education for their children. The Court held that neither right could be exercised free of any limitation, since in pluralistic society it was impossible to “to take into consideration the wishes of all parents in the ideological organization of compulsory state schools.”³¹⁰ The solution had to be a compromise and it was up to democratic political process, the state legislature to achieve it, on the one hand guided by Art. 7, which permitted religious influence in schools, and on the other hand by Art. 4, which prohibited coercion in religious and ideological matters in schools “*as far as possible* [emphasis added].”

The Court concluded that as long as schools were not of a missionary nature, did not demand adherence to the Christian faith, and were “open to other religious or ideological ideas,”³¹¹ they were not forbidden under the Basic law to include religious references outside religion classes, against the wishes of a minority of parents. Based on this holding the court reasoned in the present case, that prayers were not “fundamentally and constitutionally objectionable.”³¹²

The Court acknowledged that by permitting school prayer, which although nondenominational in character was in essences a religious exercise,³¹³ and conducting it as a school event, the state was encouraging a religious element in the school that exceeded the “religious references flowing from the recognition of the formative factor of Christianity upon culture and education” discussed in the *Interdenominational Case* and that.³¹⁴ Nevertheless using the same arguments the Court upheld the practice.

³¹⁰ 52 BVerfGE 223, Kommers, *supra* note 305, at 469.

³¹¹ *Id.* at 465.

³¹² *Id.*

³¹³ 52 BVerfGE 223, at 47-48.

³¹⁴ 52 BVerfGE 223, at 52.

On the one hand there was the positive freedom of the majority who wish to express their religious beliefs. The state was free under Art. 7 to provide a forum for that expression. On the other hand, the state had to balance this positive freedom with the negative freedom of other pupils not wishing to participate in school prayer. The Court rejected the view of the Hesse Constitutional Court that the negative confessional freedom of students not to disclose their belief was violated and since it absolute it could always trump the positive religious freedom of students wishing to pray, since the latter was not absolute. The federal Constitutional Court held that a balance had to be achieved between these rights, and surely just as positive confessional freedom may affect the rights of other so can the negative confessional freedom. According to the Court, the state achieved that balance when the voluntariness of prayer was guaranteed.³¹⁵

The Court addressed the issue of the vulnerability of young children and the pressure upon to them conform. It acknowledged the possibility that when a pupil stays out of the classroom while the prayer is held, or remains silent and seated inside, he or she may be placed in the unbearable position of an outsider and be the object of discrimination. However, the Court held that such a situation was not very likely to occur, and did not warrant a prohibition of prayer in all cases in which a pupil objected.

The Court reasoned that the position objecting pupils would be placed in would be similar to that in which they would find themselves if they did not wish to attend religion instruction classes, and the latter were constitutionally permitted. The court considered that the danger that a pupil would be placed in the “unbearable position of an outsider” was most likely when there was a single pupil objecting, but

³¹⁵ Although the Hesse court based its reasoning on the right to remain silent on one’s beliefs, arguably the negative religious freedom under Art. 4 is broader and would also encompass the right not to be

in practice the religious affiliation of pupils was so diverse that non-participation in religious classes was a common enough phenomenon.³¹⁶

Thus the Court considered that where more pupils did not participate they would not represent such a vulnerable minority. On the other hand, the more pupils object to prayer the more the argument that the state has achieved a fair balancing of rights seems unconvincing. The Court's argument may be contrasted with Justice Brennan's concurring opinion in *Schempp* where, commenting on *Engel*, he stated that: "Nor did it matter that few children had complained of the practice, for the measure of the seriousness of a breach of the Establishment Clause has never been thought to be the number of people who complain of it."³¹⁷

The Court did not rule out the possibility that in individual cases prayer would have to be prohibited to protect the negative freedom of the individual. In such cases the student may be emotionally weak, or the teacher may not have fulfilled his role properly.³¹⁸ According to the Court the teacher had an important role in teaching tolerance in students towards those with convictions different from their own and in creating a climate in which praying students accept and do not ostracizing those not wishing to join in the religious exercise.³¹⁹ Due regard had to be paid to all the factual circumstances of the case.

2. Conclusion

A discussion of the merits of the different approaches inevitably touches on broad theoretical questions about the proper relationship between religion and state in education and beyond, which exceed the scope of the present chapter. In each of the

forced in a conduct contrary to one's beliefs.

³¹⁶ Case cited in Muehlhoff, *supra* note 15, at 486.

³¹⁷ *Schempp*, *supra* note 24, at 264.

³¹⁸ *Id.*

countries discussed courts have held to similar principles underlying their interpretation of the constitutionality of religious exercises in public schools. The interpretations of these principles however differ. The question of why they differ is relevant to a discussion of whether a single broad normative framework could work in all of these countries. Academics have also challenged some of the very principles developed by the courts. These challenges will be examined here only as they bear on the narrow issue of religious exercises in state schools.

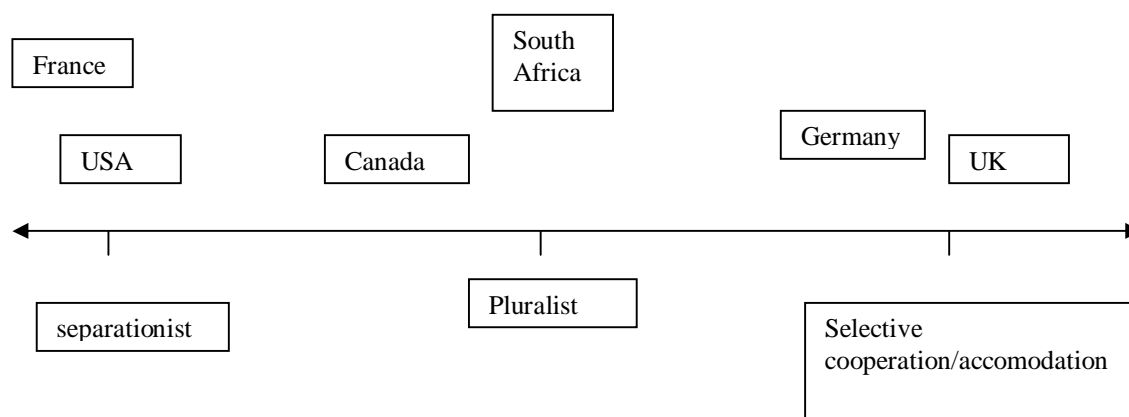
VII. OVERVIEW OF ISSUES AND APPROACHES

Courts and legislators in all of the countries had to deal with similar issues: what constitutes coercion of dissenting students, when are students of religious minorities treated unequally or discriminated against; how are the rights of both religious and non-religious students to be respected; and with whom shall the right to be exempted from attendance of religious observes be vested—parents or students?

An examination of how these issues have been dealt with by the legal regimes of the respective countries reveals both contrasts and similarities. The approach of the France and the USA are unquestionably the most separationist. Canada is close to the USA in its treatment of single-faith religious exercises in curriculum activities. On the other hand there are indications that multi-faith exercises would be permissible, which brings to the Canadian approach closer to the pluralism that is fully endorsed in South Africa. The UK by mandating collective worship of a predominantly Christian character is at the other end of the spectrum, although efforts are made to accommodate religious minorities as well. The German approach while requiring school prayer is nevertheless closer to the UK approach in that the indirect coercion on dissenting students is not viewed as problematic in principle and because of a lack

³¹⁹ 52 BVerfGE 223 at 74.

of an attempt to have religious exercises that would not be only acceptable to the different Christian denominations.



VIII. COERCION

The rule that religious observances at state schools must be voluntary is accepted everywhere. This rule is based on the principle of freedom from coercion to conform to religious belief contrary to one's personal creed. It can be argued that it is accepted that the element of coercion exists when the state is acting. What constitutes coercion has been interpreted similarly by the US Supreme Court and the Canadian courts. As was noted, the Ontario Court of appeal explicitly referred to US cases interpreting the principle. According to Moon, Canadian courts have gone to extremes in guarding against coercion:

...the Canadian courts have taken such a broad view of religious coercion that any form of state support for the practices or beliefs of a particular religion, or for religious over non-religious belief systems, might be viewed as coercive and therefore contrary to s.2(a). In a variety of judgments the courts have held that state preference

for the practices of a particular faith puts pressure on non-adherents to conform to the favored religion.³²⁰

Moon's argument may hold when the interpretation of coercion in other contexts is examined. *Freitag v. Penetanguishene*(1999)³²¹ the Ontario Court of Appeals found unconstitutional the practice of the town council meeting to have the mayor open each session by asking councilors to rise and recite the Lord's Prayer. Those who did not wish to participate did not rise. In contrast, even the separationist US Supreme Court has not ruled out ceremonial prayer where adults are involved. Thus, in *Marsh v. Chambers*, (1983)³²², the the Nebraska legislature's practice of having a chaplain give a prayer at the opening of its sessions. With respect to prayer in settings involving governmental bodies and adults, then, Canada has been more worried about potential coercion than the US. Thus, while it may be argued that in other contexts the Canadian courts have given a more expansive interpretation of coercion than in the school prayer cases, the position of the Canadian courts in the school cases is actually very close to that of the US Supreme Court. The South African Supreme Court also put an emphasis on the danger of indirect coercion, referring to the US case law. In contrast, the issue of coercion resulting from peer pressure has been ignored in the UK approach, especially regarding students who are not religious, and minority faith students who are not of such a large number to be warrant an application for determination.

The German Court has placed a higher threshold on what may be considered as impermissible coercion. The argument that dissenting students would be required to make a religious statement accepted by the Canadian courts was lost on the German Constitutional Court. Since it found that the burden on the dissenting students in the

³²⁰ Richard Moon, *Liberty, Neutrality, and Inclusion: Religious Freedom Under The Canadian Charter Of Rights And Freedoms*, 41 BRANDEIS LAW JOURNAL 563, 563-564, (Spring 2003).

³²¹ C29042

case was not “unbearable,” that is it did not reach an impermissible measure of coercion, it concluded that the proper balancing of the competing rights of religiously minded students and dissenting students had been achieved. The Court’s reasoning that the greater the number of students that exempts themselves, the less coercion exists to participate in the prayer may be true in respect of the psychological effect of the practice on children, but on the other hand it seems to defeat the Court’s support of a decision on the issue in which the norm is based on the preferences of the majority while the minority only has an opt out possibility from it is as the most appropriate method for balancing of the competing rights.

It has been argued that as far as psychological evidence is available it supports the conclusion of the dissent in *Lee* and the German Court in the *School Prayer Case*.

Beatty argues that:

Indeed it is hard to imagine an act of coercion that could be less offensive. Deborah Weisman was neither forced to be an active participant in a religious ceremony to which she objected nor was she inhibited from adhering to any principle or tenet of her own religious or ethical point of view. The burden she was compelled to endure does seem, in the context of her own life experience, negligible, even trivial.³²³

The feelings experienced by such students have also been characterized as the natural price that one has to pay for being tolerant in a pluralist society. However, why would only students of minority faiths be required to show such tolerance? Reid J. in his dissenting reasons in the Divisional Court decision in *Zylberberg*, approved by the Court of Appeal, persuasively argued against a minimization or trivialization of the feelings of objecting students. He stated that,

It may be difficult for members of a majoritarian religious group, as I am, to appreciate the feelings of members of what, in our society, are minority religions. It may be difficult for religious people to appreciate the feelings of agnostics and

³²² 463 U.S. 783.

³²³ David M. Beatty, *Revelations: Religious Rights in a Comparative Perspective*. International Association of Constitutional Law - 5th World Congress - *Constitutionalism, Universalism & Democracy* - Rotterdam 12-16 July 1999. (visited November 20, 2003) <<http://www.eur.nl/frg/iac/papers/beatty.doc>>, at 15.

atheists. Yet nevertheless those feelings exist. No one has suggested that the feelings expressed by applicants are not real, or that they do not run deep.³²⁴

If school sponsored generic prayers were not really that objectionable to students or parents belonging to religious minorities it is hard to explain the why the leaders of one of the religious minorities in the US – the Jewish community (the non-Orthodox Jews), has been so dedicated to advocating a complete separation of church and state in the public school, out of concerns with psychological coercion as well as with assimilation of the community due to subtle pressures to conform to the mainstream. In a letter to the American Jewish Congress a Jewish leader characterized the Supreme Court decision in *Engel* and *Schempp* as “equal in importance [for the Jewish community] to the desegregation decision.”³²⁵

Even a scholar like McConnell who advocates “a reorientation of constitutional law: away from the false neutrality of the secular state, toward a genuine equality of rights,” argues against a reinstatement of civil religion through generic school prayers.³²⁶ One reason is that such a practice would trivialize and denigrate religion. Moreover, even if the prayer is general and abstract, it will inevitably be unacceptable for some children.³²⁷

As Feldman points out, very important for the result of a coercion analysis is the perspective from which coercion is judged—from that of the “reasonable person or observer” or the “reasonable religious dissenter or outsider.”³²⁸ He argued that the

³²⁴ Zylbeberg, *supra* note 154, at 37.

³²⁵ Quoted by Ivers, Gregg, *American Jews and the Equal Treatment Principle*, in EQUAL TREATMENT OF RELIGION IN A PLURALIST SOCIETY 158, 166 (Stephen V. Monsma and J. Christoph Soper ed., 1998). In his article Ivers explains why the Jewish community leaders lobby for a separationist interpretation of the Establishment Clause as the one that would best protect the religion freedom and political equality of the Jewish minority in the US.

³²⁶ Michael W. McConnell, *Equal Treatment and Religious Discrimination*, in STEPHEN V. MONSMA and J. CHRISTOPHER SOPER eds., EQUAL TREATMENT OF RELIGION IN A PLURALIST SOCIETY, , 30, 34 (William B. Eerdmans Publishing Co., 1998).

³²⁷ *Id.* It should be noted that in his article McConnell argues against “officially sponsored, vocal classroom prayer” specifically, he does not discuss graduation prayer or moment of silence.

³²⁸ Stephen M. Feldman, *Religious Minorities And The First Amendment: The History, The Doctrine, And The Future*, 6 U. PA. J. CONST. L. 222, 268, (2003).

first standard “would incorporate the values and interests of the dominant or mainstream religion” and this would be to the disadvantage of religious minorities. Therefore it may be argued that the US and Canadian approach afford more protection to religious minorities and the rights of dissenters in their analysis of coercion than the German Constitutional Court does.

On the other hand, this interpretation need not completely trump the rights of religiously minded students. Other less coercive alternatives have been suggested in the United States, Canada, South Africa and the UK. Such alternatives are holding religious observances for the children of parents who have requested them, or making available the school facilities to groups of students wishing to have religious exercises.

The US approach has also been criticized for being categorical, and imposing bright-line rules which do not take into consideration the contextual circumstances.³²⁹ The German approach has been described as context based and pragmatic and better serving to protect competing rights. In the context of the school prayer issue it may be argued that such a conclusion is not entirely warranted.

Some decisions of the US Court have been pretty narrow and fact based, as in *Lee*, and lower courts have argued that different conditions warrant different holdings.³³⁰ In fact, if the Supreme Court cases were as “categorical” and “bright-line” in nature as the critics claim, lower courts would not have come to such different results on cases with very similar factual backgrounds.

Localized and context specific solutions are achieved better by Canadian provincial legislation that would provide for religious exercises for pupils whose

³²⁹ See Beatty, *supra* note 323. Steven Smith cited in Wuerth, *supra* note 36, at 1197.

³³⁰ See *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), cert. denied, 505 U.S. 1215(1993), *ACLU of New Jersey v. Black Horse Pike Regional Board of Education* 84 F.3d 1471 (3d Cir. 1996).

parents have so requested, provided older students are authorized to take that decision by themselves. The South African approach also can provide for locally tuned accommodation, making available school facilities to local religious groups. It should be noted that in the US, the Supreme Court has also held that where school facilities are used to provide a limited public forum a religious club cannot be excluded and should be granted the same access to use it.³³¹ The rationale here, however is not providing accommodation for religious groups, but protecting their free speech and religious freedom rights.

IX. EQUALITY, NON-DISCRIMINATION AND RELIGIOUS MINORITIES

The South African Court has interpreted the constitutional requirement of equity as “even handedness towards all religions” and the government policy is a good attempt to achieve that. In the US the Supreme Court has warned against the dangers of the majority imposing its religious views on the minority. The frequent use of the endorsement test has been viewed as evidence that the establishment clause jurisprudence have been transformed from one protecting individual religious liberty to one protecting the political rights of religious minorities.³³² Such a transformation has also been attributed to the Canadian jurisprudence:

it seems fairly clear that the prohibition on state preference in the Canadian cases rests on more than the protection of autonomous judgment or individual liberty in spiritual matters. In these cases the courts seek to ensure that all individuals are fully included within the political community, and treated by the state with equal respect, whatever their religious beliefs and practices³³³

These trends in the American and Canadian jurisprudence have been much criticized. However, upholding the political equality of minorities does not detract, on the contrary is a necessary element of the right to freedom of religion. Seeking to fully

³³¹ *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

³³² Feldman *supra* note 18.

include all individuals within the political community and treating them with equal respect is not necessarily in tension with religious freedom. As will be later argued with respect to symbolic displays in Chapter 4, an inclusive approach to all students within the school community is particularly important for children in schools. Equal respect for the worth and dignity of each child also necessitates respect for his/her religious beliefs and practices and imposes a duty on the state to find a solution through which to reasonably accommodate and acknowledge the religious beliefs or world views of all students be it in with respect to devotional exercises, religious attire or symbolic displays. Equal respect in this sense would require substitutive not formal equality and student dress codes are a glaring example.

As was already noted, the UK's approach is fair or at least acceptable to religious minorities that constitute a large enough group in a given school. But this ignores two problems. First, the Christian majority is obviously favored since it has the state to provide for its religious worship, while minority religious groups have to provide the needed funds themselves. Second, the needs of smaller groups are likely to be ignored altogether. Thus, although UK legislation tries to achieve some accommodation for minority religions, it is at best partial accommodation, and it obviously does not constitute "even-handedness."

The German approach in the *School Payer* case, similarly to the *Interdenominational School* case accepts that the majority may to define the practice and it may be in conformity with their religious convictions, however, the Court in both cases has determined that the Basic law puts clear limits on that practice in order to balance majority rights with those of religious minorities or non religious people. This may be contrasted with the US Supreme Court decision in *Santa Fe* which ruled

³³³ Moon, *supra* note 320, at 564.

out a majoritarian approach to the question as to whether school prayer can part of school sponsored events. Ideally the German approach is one that should lead to mutual toleration and consensus. In reality however, such an approach, undermines the principles of equality and non-discrimination, because it is may be skewed towards the mainstream religion. While in South Africa or in some Canadian provinces there is a good faith attempt to have religious exercises that would be in conformity with the pluralist make up of society (although multi-faith readings have problems of their own), in the German case although non sectarian the prayer was based on the Christian faith – the attempt was to have a prayer not objectionable to the different Christian denominations, and this may often be the result if the decision on whether to have a prayer and what the prayer should be is taken by a majoritarian process. If all students in the school have a right to equal respect of their religious convictions by the state, the question is why only Christian prayer should be the norm and all others would only have the right to exemption.

Wuerth has argued that ironically such an approach would work better in the US where religious minorities are more likely to have political power, than in Germany.³³⁴ She observes that since the electoral control in Germany is at the state level, not at a local level, “[it is] unlikely that non-mainstream religious majorities, including Christian ones, will exercise significant control over the schools.”³³⁵

In Canada and South Africa, where pluralism is elevated to a constitutional value, the practice of multi-faith religious observances has been proposed in order to observe the principle of non-discrimination and even-handed treatment of religions. As was already mentioned this approach has faced objections from true believers.

³³⁴ Wuerth, *supra* note 36, at 1204.

³³⁵ *Id.*

Moreover, as the US Supreme Court has warned, structuring such observances would make it necessary for the state to engage in assessing which religions to include, how often, etc., and subtle pressures for the dominance of prevailing religious would be almost unavoidable. The UK statute is an example of this tendency: although “collective worship” need not be solely Christian, it must be of a predominantly Christian character. Such multi-faith readings would be more appropriate for educational purposes, such as in a course *about* religion, where they are presented for the purpose of familiarizing students with the sacred texts of different religions and for the purpose of moral reflection, but not for the purpose of a devotional exercise.³³⁶

X. NEUTRALITY

The principle of state neutrality towards religion is common to all of the countries examined. This is one of the concepts whose interpretation has been subject to great debate. A detailed examination of the different interpretations of neutrality and how they compare in the context of education will follow after an analysis of the other substantive issues. Regarding the narrow issue of religious exercises at state schools, the US interpretation of neutrality come close to the principles of non-endorsement and equality. The Canadian approach is similar. However, neutrality has an additional dimension within it—the principle of

³³⁶ A pertinent example where the school went beyond educational instruction is the case of *Eklund v. Byron Union Sch. Dist.*, No. C 02-3004 PJH, United States District Court for The Northern District of California, 2003 U.S. Dist. LEXIS 27152, December 5, 2003, Decided, December 5, 2003, Filed, Affirmed by *Eklund v. Byron Union Sch. Dist.*, 154 Fed. Appx. 648, 2005 U.S. App. LEXIS 25155 (2005). The teacher in a history course had seven graders play the role of Muslims, recite Muslim prayers and wear Muslim religious signs, engage in activities that would correspond to the Five Pillars of Islam, etc. The Ninth Circuit Court of Appeals, however, upheld the decision of the district court which held that there was no violation of the Establishment Clause. The court reasoned that was no coercion under *Lee* because students were not coerced into a religious activity since the students were not required to practice the Five Pillars of Islam as devout Muslims do – but just playing analogous activities.

pluralism—which may lead to more accommodationist results, such as upholding multi-faith religious exercises under certain conditions. The pluralistic visions of neutrality are also characteristic for the South African Approach together with the principles of equality. In Germany the principle of neutrality will require proportionality and mutual toleration, which calls for balancing of the competing rights at stake.

Both Canadian and the US Supreme Court have argued that their interpretation of state neutrality towards religion does not result in hostility towards religion or establishment of “secularism.” Justice O’Connor has also stated government had to take religion into account in legislation as long as it did not convey a message that gave preference to religion in general or one religion over others, hence the principle that religious speech in school is permissible as long as it is not attributable to the state.

Dissenting judges, scholars and politicians³³⁷ have argued that despite statements to the contrary the practical results of such an interpretation leads to banishment of religion from public life and relegating it to the private sphere, and in effect religion is marginalized by the hostile state. In the US constitutional amendments are proposed regularly (though without much chance of success) that would elevate to a constitutional status the right of students to voluntary prayer in

³³⁷ Introducing a bill in the US House of Representatives, Ron Paul stated that, “Over the past five decades, rulings of the United States Supreme Court have served to infringe upon the rights of Americans to enjoy freedom of speech relating to religious matters. Such infringements include the outlawing of prayer in schools and of the display of the Ten Commandments in public places. These rulings have not reflected a neutrality toward religious denominations but a hostility toward religious thought. They have served to undermine the foundation of not only our moral code but our system of law and justice.” (108th CONGRESS. 1st Session H. R. 1547 To restore first amendment protections of religion and religious speech. IN THE HOUSE OF REPRESENTATIVES, April 1, 2003. Mr. PAUL introduced the following bill; which was referred to the Committee on the Judiciary <<http://thomas.loc.gov/cgi-bin/query/z?c108:H.R.1547>:>).

public schools.³³⁸ The arguments given to justify the amendments are a continuing if ineffectual complaint against the Supreme Court's case law and its interpretation of neutrality:

There can be little doubt that no student should be forced to pray in a certain fashion or be forced to pray at all. At the same time, a student should not be prohibited from praying, just because he/she is attending a public school. This straightforward principle is lost on the liberal courts and high-minded bureaucrats who have systematically eroded the right to voluntary school prayer, and it is now necessary to correct the situation through a constitutional amendment.³³⁹

The argument is that the courts' vision of neutrality as equality necessarily leads to the exclusion of religious consideration from the public sphere, but the result is seen not as neutrality, but as a victory of secular individualism. A prohibition of all school prayers at public school events is an example of such an extreme privatization of religion. However, so far such a prohibition has not been required or upheld.

This vision of neutrality also brings the issue of the purpose behind the statute. If the requirement is that there should be no religious purpose, surely that signals hostility towards religion and its effective exclusion from public life. The position of the US Supreme Court is that to be valid, legislation must have a genuinely secular purpose, but that need not be solely secular. One justification for that is that laws enacted only to serve the substantive views of the religious majority would be oppressive to both religious minorities and non-believers. Another rationale for keeping the secular purpose requirement is that since religious justifications can be found for any action that the state desires to take, "discarding the requirement would

³³⁸ The proposed amendments state that state cannot forbid students from participation in voluntary prayer, individually or collectively. See H.J.RES.7, Title: Proposing an amendment to the Constitution of the United States relating to voluntary school prayer. Sponsor: Rep Emerson, Jo Ann [MO-8] (introduced 1/7/2003); H.J.RES.68.Title: Proposing an amendment to the Constitution of the United States relating to school prayer. Sponsor: Rep Murtha, John P. [PA-12] (introduced 9/17/2003);H.J.RES.46.Title: Proposing an amendment to the Constitution of the United States restoring religious freedom. Sponsor: Rep Istook, Ernest J., Jr. [OK-5] Cosponsors: 100 introduced 4/9/2003)

³³⁹ Voluntary school prayer -- Hon. Jo Ann Emerson (Extensions of Remarks - January 08, 2003) <<http://thomas.loc.gov/cgi-bin/query/D?r108:3:/temp/~r108nXruS5::>>.

eventually devastate many constitutional protections that have nothing to do with religion.”³⁴⁰ On the other hand objections have been raised suggesting that an excessive secular purpose requirement can actually favor dominant religious beliefs.

Moon, for example, has warned that

if religious values are admitted into public debate only if they have a secular analogue (and can be understood in non-religious terms) then the religious values and practices of Christianity which have shaped the secular outlook of Western society will have easier access to the public sphere than will minority religious views.³⁴¹

While the requirement of secular purpose plays a significant role in the US and Canada, in Germany the court did not expressly allude to any such requirement though some notion of secularity is no doubt implicit in the court’s notion of neutrality. Moreover, the question was discussed not only from the aspect as to whether the prayer as government speech violates neutrality of the state, but also whether the state has achieved the proper balance and reconciliation between the conflicting rights of private individuals. The argument was not that much relying on the regulatory powers of the state – that prayer was necessary for the moral education of children, for example, and therefore provided the opt out possibilities it was justified under Art. 7, but rather that the state was making space for the religious exercise of the rights of the majority of schoolchildren and their parents in a space that is controlled by it.

The emphasis in Germany is much more on the outcome of the legislation and its effects on the rights holders than on the legislative purpose, which has played an important role when courts in the US have examined the constitutionality of state or state-sponsored religious speech in public schools.³⁴² The US Supreme Court

³⁴⁰ Andrew Koppelman, *Secular Purpose*, 88 Virginia Law Review 87, 88 (2002).

³⁴¹ Moon, *supra* note 320, at 572.

³⁴² See *Stone v. Graham* (1980); *Wallace v. Jaffree* (1985); *Edwards v. Aguillard* 482 U.S. 578 (1987); *Tammy Kitzmiller v. Dover Area School Dist.* 400 F.Supp.2d 707 (M.D.Pa. 2005); *ACLU of Kentucky v. McCreary County, Kentucky*, 2003 FED App. 0447P (6th Cir.).

however noted in *McCreary* that the legislative purpose is related to the outcome, that is the primary effect of the legislation, since:

By showing a purpose to favor religion, the government “sends the ... message to ... nonadherents ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members...’”³⁴³

In conclusion, I would argue that a pluralist framework would best serve the principles of freedom of conscience and religion and equality and non-discrimination in the context of religious exercises at state schools. Lying between a separatist and a purely accommodationist approach such a framework should be inclusive of all students, regardless of their religious affiliation or lack of thereof, should not treat preferentially particular religions or worldviews and should avoid coercion by providing authentic space for all students to engage in voluntary religious observances without imposing them on others.

Granting equal access to the school premises for voluntary observances of the different religious groups is a possibility that fulfills these requirements. Empty rooms may be made available on an equitable basis for the conduct of religious services, for the conduct of religious exercises for those students whose parents or they themselves have requested that such observances be held and where the prayer is not composed and lead by the school teachers but by religious leaders chosen by the representatives of the respective religious community. Access to such rooms should also be available to accommodate individual students who may wish to pray during the school day. In all of these cases the initiative for the religious exercises and their organization comes from the parents and the students while the state is neither requiring nor encouraging

³⁴³ *ACLU of Kentucky v. McCreary County, Kentucky*, 2003 FED App. 0447P (6th Cir.) and then *McCreary County v. American Civil Liberties Union of Ky.* (03-1693) 354 F.3d 438, Affirmed (2005) at 2733.

or discouraging but simply accommodating by providing space for genuine private religious expression, without treating any one religion preferentially.

When school authorities have the initiative and do the organization they can comply with the requirements of the pluralist approach by providing for a moment of silence at the beginning or end of school activities. In this way coercion is avoided and all students can engage in moral reflection or a silent prayer as their conscience dictates. Another possibility for school authorities is to have brief reading from different religious and secular texts, which however are used for education purposes to provide for moral reflection and for familiarization with different cultures, religious, and philosophies. In such cases however, the reading should be done by the teachers and students should not be required to recite but merely encouraged to reflect upon them in order not to transform the exercises into imposition of religious rituals. When the readings are conducted in such a way the problem of indirect coercion accompanying opt out procedures is minimized.

CHAPTER 3

RELIGIOUS DRESS ITEMS AT PUBLIC SCHOOLS

“A symbol is a visible sign of an invisible reality.”³⁴⁴

XI. INTRODUCTION

The chapter will examine the constitutional issues related to the wearing of religious dress items at public schools. Some of the main problems that the chapter will attempt to address are those concerning the requirements of the neutrality of the state regarding religious symbolism at school which, as will be argued, are different for dress items worn by students, and for such items worn by teachers or symbols placed at school premises; the conflicts among the rights of parents to educate their children according to their religious beliefs, the rights of students to be free from religious coercion, the rights of teachers to free exercise of religion and non-discrimination in employment; the importance of the age of students for the constitutional analysis; the meaning of free choice and coercion in the context of religious symbols; the relevance of the perceived political and social symbolism of some religious symbols; and the importance of public order as a ground for imposing restrictions on the right to freedom of religion, among others.

³⁴⁴Michael Foord, *Of Truth and Symbols*, (visited 10 Dec 2004) <<http://www.voidspace.org.uk/voidspace/symbols.shtml>>.

1. Definitions

As will be discussed further on, one of the problematic aspects of the regulation of religious symbols at school lies precisely in the lack of consensus of what constitutes a religious symbol. While the question of whether a given object represents a religious symbol or a symbol having both secular and religious meanings, or an object which although originally religious has been secularized through time, is most controversial with respect to displays of religious objects and symbolic messages by the state, the meaning of religious dress items has also been questioned. Both religious and political meanings have been imbued in dress items and this has significance for whether religious freedom rights or freedom of expression rights are involved in the constitutional analyses.

At the outset, it is useful to provide a few brief descriptions of dress items that will frequently be the subject of discussion in what follows. Islamic headscarves or *hijabs* are used to cover the head, particularly the hair of the woman. Headscarves vary in design and color; how much of the head they cover vary with the different cultural traditions. The *burqa* or *niqab* is more restrictive covering - it is a piece of cloth that covers the face – it may cover the whole face or have a slit for the eyes and is usually black in color. The *abaya* and *jilbab* are long loose robes covering the entire body. The *abaya* is usually black and is worn over normal clothes while the *jilbab* may have various colors and is itself a dress.³⁴⁵ The Jewish *yarmulke* or *kippah* is a cloth cap traditionally worn by Jewish men. Recently, as a result of the advancement of the principle of equality between the sexes some women also wear kippahs, a practice not

³⁴⁵See among others: *Islamic Clothing for Women*, (visited May 20, 2005), <<http://www.desertstore.com/pages/abaya-jilbab.html>>; *Hijab*, Wikipedia, <<http://en.wikipedia.org/wiki/Hijab>>.

shared by Orthodox Judaism.³⁴⁶ Sikhs wear turbans covering their long hair (*Kesh*), which together with a ceremonial dagger (*kirpan*), are two of the symbols of the Sikh religion. A rosary is a string of beads that is used for prayer by Roman Catholics.

XII. FRANCE

This section will examine the legal framework regulating the wearing of religious dress items and other symbols at public schools in France. The laws pertaining to students will be examined separately from those pertaining to teachers because of the different issues involved.

The practice of wearing religious symbols by students at state schools is regulated by the French law on secularity and conspicuous religious symbols in schools, an amendment to the French Code of Education, adopted on 15 March 2004. The law forbids the wearing of ostentatious religious signs in public primary and secondary schools.³⁴⁷ The law was the response of the legislature to a number of controversial issues that became known as the “L’Affaire du foulard islamique” (the headscarf affair). The section will start with a brief chronology of the events preceding the adoption of the law and a description of the social and political context in which the headscarf affair emerged and escalated. An analysis of the constitutionality of the new law and its compatibility with international instruments to which France is a party, with particular emphasis on the European Convention on Human Rights will follow. The analysis will attempt to demonstrate that the law is in

³⁴⁶ Yarmulke, Wikipedia, (visited May 20, 2005), <<http://en.wikipedia.org/wiki/Yarmulke>>.

³⁴⁷ LOI n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics, (visited 16 Feb, 2005), <<http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MENX0400001L>>. The law provides for a reevaluation after it has been in effect for one year but as of the time of this writing no formal evaluation has taken place.

conformity neither with the French Constitution nor with the ECHR and other international instruments to which France is a party.

1. Regulations of Students' Religious Dress

1.1 Background

The controversy began in 1989 when three Muslim girls were suspended from a public school in Crail by the principal because they refused to take off their headscarves at school.³⁴⁸ When the media started to publicize the event the initial public reaction was in favor of the girls' right to religious freedom. Danielle Mitterrand, wife of the socialist President Mitterrand, as well as Lionel Jospin, the Minister of Education spoke about of tolerance and accommodation.³⁴⁹ Generally, in the first several weeks after the incident the political spectrum on the left and the different Islamic groups supported the girls' right to manifest their religion, while the groups on the right and the feminist groups did not assert vocally their opinions.³⁵⁰

³⁴⁸ For more details of the event, the issues preceding it and the local social and political context see Elaine R. Thomas, *Competing Visions of Citizenship and Integration in France's Headscarves Affair*, 8 (2) JOURNAL OF EUROPEAN AREA STUDIES 168-174 (2000).

³⁴⁹ Danielle Mitterrand declared: "So today two hundred years after the Revolution, secularity could not accommodate all the religions, all expressions in France, it is that there would be a retreat. If the veil is the expression of a religion, we must accept the traditions whatever they are." (See Elisabeth Chikha, *The Veil, La Chronologie*, (visited 17 Feb 2005), <<http://www.unc.edu/depts/europe/conferences/Veil2000/chronologie.pdf>>.) However, although Jospin declared that schools are not for excision, the government position as a whole was not supporting fully the religious rights of the girls. As Rocard noted during the National Assembly discussion on the issue the government's position was not "pro-foulard" and that "everyone was against 'the wearing of the headscarf,' debate being only about 'the means that must lead to its disappearance from our schools.' Some thought students should be forced to remove the scarves." (See Elaine R. Thomas, *supra* note 348, at 182).

³⁵⁰ Leora Auslander, *Bavarian Crucifixes and French Headscarves: Religious Signs and the Postmodern European State*, 12 (3) CULTURAL DYNAMICS 183, 289 (2000).

However, soon the media started to portray the issue as a threat to French secularity and to link the religious symbol of the headscarf to Islamic fundamentalism.³⁵¹

Finally Jospin referred the issue to the Conseil d'État asking for its opinion on the question of the compatibility of the practice of wearing of religious signs by students with the constitutional principle of *laïcité*. The Conseil d'État stated in its opinion that the wearing of religious signs was not in itself incompatible with the principle of *laïcité* which protected the rights of students to express and manifest their religious beliefs inside the public schools, but heads of schools could restrict these rights when several factual conditions were met, namely when the wearing of the signs:

... which by their nature, by the conditions under which they would be carried individually or collectively, or by their ostentatious or claiming character, would constitute an act of pressure, of provocation, of proselytism or propaganda, would undermine the dignity or to the freedom of the pupil or other members of the educational community, their health or their safety would compromise, the course of the activities of teaching and the educational role of the teachers would disturb, finally would disturb the order in the establishment or the normal operation of the public utility.³⁵²

Two weeks after the decision was announced Jospin, issued a government circular whose aim was to provide guidance to the members of the educational establishments as to the practical implementation of the principles announced by the Conseil d'État.³⁵³ The circular had a binding force for all government officials under his authority. While following the opinion of the Conseil d'État, Jospin added that the intention to proselytize on the part of students wearing religious signs or their parents

³⁵¹ For a discussion of the media representation of the issue and the different connotations of the changing terms used for the headscarf *see Id.* at 290.

³⁵² Arrêt du Conseil d'État sur les signes religieux à l'école, Assemblée générale (Section de l'intérieur) No. 346893 (Nov. 27, 1989), <<http://www.reseautoltaire.net/imprimer10183.html>>. It should be noted that the two girls at the Crail school besides insisting on wearing headscarves were also interrupting classes for prayer, missing gym classes and verbally attacking Muslim girls who did not veil. (See Laura Barnett, *Freedom of Religion and religious Symbols in the Public Sphere*, Library of Parliament, Canada, 13 October 2004, <<http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/PRB-e/PRB0441-e.pdf>>, at 27).

was a critical factor in the assessment of whether the religious signs were permissible or not. According to Beller, the emphasis on attention rather than outcome “seems plausible only in the context of the state's interest in preventing the non-French parents from impeding the acquisition of French culture by the headscarf-wearing student, rather than the state's interest in the education of her classmates.”³⁵⁴ However, this emphasis may also have been a result from a more pragmatic approach, a desire to facilitate the school officials in their implementation of the Conseil d'État's decision—arguably it is more difficult to ascertain “the outcome... whether anyone at the school actually felt preached to.”³⁵⁵ If the latter was the only test available, then this “anyone” becomes problematic—is it any student, any teacher, a certain number of students complaining, or “a reasonable observer”?

A number of cases followed in which the judicial division of the Conseil d'État confirmed its advisory opinion in concrete cases. In the overwhelming majority of cases the Conseil ruled in favored of the girls' right to religious expression and manifestation.³⁵⁶ General prohibitions on the wearing of headscarves were stricken down.³⁵⁷ In the few cases in which the Conseil upheld the restriction on religious dress it found that the local situation had met the factual preconditions for the ban set in the 1989 decision. Thus in the *Aoukili* case Conseil upheld the decision for exclusion of two girls who refused to remove their headscarves during physical education lessons, and whose father was distributing leaflets in front of the school, on

³⁵³ **La circulaire du 12 décembre 1989 (circulaire Jospin):** Circulaire relative au port d'insignes religieux à l'école se référant à l'avis du Conseil d'Etat, (visited at March 1, 2005), <<http://islamlaicite.org/article133.html>>.

³⁵⁴ Elisa T. Beller, *The Headscarf Affair: The Conseil D'état on the Role of Religion and Culture In French Society*, 39 TEX. INT'L L.J. 581, 616 (2004).

³⁵⁵ *Id.*

³⁵⁶ In forty-one out of forty nine the Counsel found against school officials who had impermissibly banned students from wearing headscarves. (See Gunn, *supra* note 86, at 457.)

³⁵⁷ See e.g. Conseil d'Etat, 2 novembre 1992, M. Kherouaa et Mme Kachour, M. Balo et Mme Kizic; Conseil d'Etat, 14 mars 1994, Yilmaz.

the ground that the normal functioning of the courses was hindered and that there was a disruption of the school's order.³⁵⁸

A second government circular was issued in 1994, by the François Bayrou, Minister of Education at that time, which was much more restrictive than the first one in that it declared that certain religious signs were so ostentatious that “their significance is precisely to separate certain pupils from the common rules of life of the school” and are by themselves “elements of proselytism” and therefore should not be allowed at public schools in contrast to more discreet signs which were acceptable.³⁵⁹ The Conseil d'État in the *Association Sysiphe* case held that the government circulars could only point out to specific rights, had only an interpretative value and could not question the position of the Conseil d'État.³⁶⁰ Thus the Council once again affirmed that any general outright prohibition of the headscarves would be incompatible with the right to religious expression as interpreted by the Council.

By the beginning of 2003 conflicts about the headscarves continued but the media attention had subsided.³⁶¹ However, politicians soon started to raise the issue again expressing dissatisfaction with the current state of the law and speaking in favor of a legislative intervention.³⁶² Their criticism of the jurisprudence of the Conseil d'État and the arguments voiced in favor of an outright prohibition of headscarves in public schools will be examined in the analysis of the new law below. In May 2003

³⁵⁸ Conseil d'Etat, 10 mars 1995, M. et Mme Aoukili, *See also* Conseil d'Etat, 27 novembre 1996, M. et Mme Wissaadane et M. et Mme Hossein Chedouane.

³⁵⁹ La réaffirmation de l'idéal laïque : la circulaire du 20 septembre 1994 relative au port de signes ostentatoires dans les établissements scolaires, (visited March 11, 2005), <http://www.ladocumentationfrancaise.fr/revues/dp/plus8033/8033_circubayrouB.shtml>. At that time there was a campaign to enact a law banning all ostentatious symbols manifesting adherence to a religious, political or philosophical creed in all education establishments, led by Cheniere, the former Creil headteacher who had initiated the controversy. However, a legislative measure was at that time rejected, (*See* Sebastin Poulter, *Muslim Headscarves in School: Contrasting Legal Approaches in England and France*, 17 (1) OXFORD JOURNAL OF LEGAL STUDIES, 43, 60 (1997)).

³⁶⁰ Conseil d'Etat, 4 / 1 SSR, 1995-07-10, 162718, Publié au Recueil Lebon.

³⁶¹ *See* Gunn, *supra* note 86, at 457.

³⁶² *Id.* at 458-468.

the National Assembly established a parliamentary commission to study the question of the wearing of religious signs at public schools.³⁶³ In the height of the rekindled debate President Chirac issued a decree with which he too created a commission³⁶⁴ charged with analyzing the application of the principle of *laïcité* in the Republic. The commission, known as the Stasi Commission after the name of its chairman, Bernard Stasi, the Ombudsman of France, issued a report which after a discussion of the history and the development of the principle of *laïcité*, its judicial elaboration and the contemporary challenges it faced, concluded with several recommendations, one of which was that a new law should be adopted forbidding students to wear “conspicuous” religious and political dress at public schools.³⁶⁵

Soon after the Stasi Commission presented its report, the President in a televised speech announced that he would accept its recommendation on the adoption of such a law, while all other recommendations he ignored³⁶⁶ to the regret of a number of the Commission members.³⁶⁷ Shortly after his speech, the new law forbidding students to wear conspicuous religious symbols at public schools was passed with overwhelming majorities by the National Assembly³⁶⁸ and the Senate and was signed into law by the President. Soon after the publication of the law, the current Minister of

³⁶³ The commission issued a report divided into several thematic sections. See Rapport de la Mission d’information de l’Assemblée nationale française sur la question du port des signes religieux à l’école, <<http://www.voltairenet.org/rubrique693.html>>. (Hereinafter the “NA Report”).

³⁶⁴ Commission chargée de mener une réflexion sur l’application du principe de laïcité dans la République, Decret No. 2003-607 of July 3, 2003, J.O., July 4, 2003, at 11319.

³⁶⁵ Commission de réflexion sur l’application du principe de laïcité dans la république, rapport au président de la république, Remis le 11 décembre 2003, p. 58. (Commission on Reflection on the Application of the Principle of Secularity in the Republic, Report to The President of The Republic. (Hereinafter “Stasi Commission”), <<http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf>>.

³⁶⁶ *Un Code de la laïcité*, Discours de Jacques Chirac relatif au respect du principe de la laïcité dans la République, (A Code of Secularity, Speech of Jacques Chirac relating to the respect of the principle of secularity in the Republic), (visited March 12, 2005), <<http://www.reseautoltaire.net/article11805.html>>.

³⁶⁷ See for example Patrick Weil, *A Nation In Diversity: France, Muslims And The Headscarf*, (visited 16 March 2005), <<http://opendemocracy.net/debates/article-5-57-1811.jsp>>, (“But my single, strong regret as a result of this commission process does not relate to the headscarf issue as such: it is that the

Education, François Fillon, issued a circular as to the implementation of the law.³⁶⁹ The circular specifies that the law applies to religious signs that openly proclaim a membership in a particular religion giving the example of the Islamic veil, the kippah, and a cross of an “obviously excessive size” and that the law does not question to right of students to wear discreet religious signs.³⁷⁰

When the association of the Union française pour la cohésion nationale (French Union for National Cohesion) challenged the ministerial circular before the Conseil d’État alleging that the circular violated the right to freedom of religion and belief of French students it had no success.³⁷¹ The Conseil d’État held that the Minister had not exceeded his powers and had specified the interpretation of the law of March 2004 taking into consideration the legislative history of the law. The Conseil d’État noted that it lacked jurisdiction to examine the circular interpreting a legislative act for its compliance with the Constitution or the Declaration of the Rights of Man and of the Citizen of 1789. However, the Council did state that the circular did not disproportionately interfere with the Art. 9 of the European Convention of Human Rights and Art. 18 of the International Covenant on Civil and Political Rights in view of the general public interest in protection of the principle of secularity at public educational establishments.³⁷² In its press release the Council of State referred to the most recent jurisprudence of the Strasbourg Court and the large margin of

ban on religious signs in public schools is the only one of our twenty-five proposals yet implemented by President Chirac, his government, and the national assembly.”).

³⁶⁸ There were 494 votes in favor, 31 abstentions, and 36 against.

³⁶⁹ Circulaire du 18 mai 2004 relative à la mise en oeuvre de la loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics, NOR: MENG0401138C, <<http://www.c-e-r-f.org/fao-circ.htm>>.

³⁷⁰ *Id.* It should be noted that although the law had an overwhelming support in the parliament, the circular proved more controversial—26 members of the council responsible for drawing up the text voted for it, 28 abstained, and 8 voted against it. See Harry Judge, *The Muslim Headscarf and French Schools*, 111 (1) AMERICAN JOURNAL OF EDUCATION, 1, 22-23 (2004).

³⁷¹ Union française pour la cohésion nationale v. Minister of Education, Arrêt n° 269077 269704, Conseil d’Etat, 8 octobre 2004, <http://www.conseil-etat.fr/ce/jurispr/index_ac_ld0437.shtml>.

³⁷² *Id.*

appreciation it accorded to state parties in dealing with the reconciliation of religious freedom and secularity in the sphere of education.

Public opinion polls showed a significant support for the law.³⁷³ However, it also provoked a number of demonstrations not only in France³⁷⁴ but in other European countries³⁷⁵ as well, in which Muslims and Sikhs protested against the ban on religious clothing at school.³⁷⁶ Women with scarves protested on the streets of Cairo, Beirut and Gaza.³⁷⁷ The protests somewhat subsided when the Islamic Army of Iraq kidnapped two French journalists and demanded the repeal of the law.³⁷⁸ The President announced that France would not give in to threats, while the local French Muslim organizations all condemned the terrorist act. When the implementation of the law began in the fall of 2004 there were 48 students expelled by the end of the first semester--girls wearing headscarves and three Sikh boys³⁷⁹ while about 600 girls agreed to remove their headscarves.

Hanifa Cherifi, inspector general at the Education Ministry of France, has declared the new law a success, since it has released tensions at schools and has

³⁷³ Polls conducted after Chirac decided to act upon the Stasi Commission recommendation presented the following picture of the reaction of French society to the proposed law: "A January 2004 survey for Agence France-Presse showed 78% of teachers in favour. A February 2004 survey by CSA for Le Parisien showed 69% of the population for the ban and 29% against. For Muslims in France, the February survey showed 42% for and 53% against. Among surveyed Muslim women, 49% approved the proposed law, and 43% opposed it." See *French Law On Secularity And Conspicuous Religious Symbols In Schools*, <<http://www.answers.com/topic/french-law-on-secularity-and-conspicuous-religious-symbols-in-schools>>

³⁷⁴ Balibar has argued that the protests against the headscarf ban were not that "spontaneous" explaining how the marching girls were "solidly ensconced" by men preventing them from speaking to passers by and journalists. (See Etienne Balibar, *Dissonances within Laïcité*, 11 (3) CONSTELLATIONS VOLUME 353, 359 (2004)).

³⁷⁵ Tarlo has reported on the anti-liberal mood prevailing on a pro-hijab march in London where about 2000 women chanted through loudspeakers "'Do we want secularism? NO! Do we want liberty? NO! Do we want Islam? YES! 'Do we want secularism? NO! Do we want liberty? NO! Do we want Islam? YES!'" (See Emma Tarlo, *Reconsidering stereotypes: Anthropological Reflections on the Jilbab Controversy*, 26 (6) ANTHROPOLOGY TODAY 13,13 (2005)).

³⁷⁶ *Sikhs March in Paris Against Religious Signs Law Banning Muslim Hijab, Sikh Turban*, (visited 11 Dec 2004) <<http://www.punjabiamericanheritagesociety.com/news/2004/2004-02-06.html>>.

³⁷⁷ *A tragic twist of the scarf*, 372 (8391) ECONOMIST 9/4/2004 at 49.

³⁷⁸ *Id.*

³⁷⁹ *Beyond the Body of Belief*, The Becket Fund for Religious Liberty, <<http://www.becketfund.org/index.php/article/364.html>>.

“reaffirmed the principle of secularity.”³⁸⁰ Soon after this public announcement, the French media began to talk about a “new activism” among Muslims related to the implementation of the law. Groups canvassing for money and support for schools and tutoring services for girls wishing to keep their headscarves appeared at the annual fair of the Union of French Islamic Organizations.³⁸¹ Sikh organizations in France have also announced that they plan to open a private school to take care of the education of Sikh children.³⁸²

1.2 Constitutional Rights and Principles

Several constitutional principles and rights govern the 2004 law on religious symbols at schools. The constitutional principle of *laïcité*, whose best translation in English would be secularity,³⁸³ was the most widely discussed principle by all the politicians, legal scholars, political scientists, and the media in relation to the headscarves affair. Gunn has called *laïcité* “the founding myth of the French Republic” which has played a central role for the formation of French national identity.³⁸⁴

³⁸⁰ *Senior Official Declares Headscarf Ban a Success (France)*, Reuters, March 15, 2005, <<http://www.pluralism.org/news/intl/index.php?xref=Ban+of+Religious+Symbols+in+French+Public+Schools&sort=DESC#headline9303>>.

³⁸¹ Tom Heneghan, *French Veil Ban Prompts Muslims To Open Separate Schools*, DAILY TIMES, April 3, 2005, <http://www.dailytimes.com.pk/default.asp?page=story_31-3-2005_pg4_11>.

³⁸² *Sikhs Organizations to Open School in Response to Religious Symbols Ban*, HINDUSTAN TIMES/PRESS TRUST OF INDIA, MARCH 5, 2005, <<http://www.pluralism.org/news/intl/index.php?xref=Ban+of+Religious+Symbols+in+French+Public+Schools&sort=DESC#headline9303>>.

³⁸³ The word “secularism” has some negative connotations referring to hostility to religion and besides it has an exact French equivalent “secularism.” (See T. Jeremmy Gunn, *France*, Working Draft, August 3, 2003).

³⁸⁴ See Gunn, *supra* note 86. Gunn argues that the praise lavished on the principle of *laïcité* ignores the fact that the forging of the principle and its implementation throughout history was highly divisive and led to discrimination of dissenters, and that at present, with respect to the headscarves controversy, its application again creates societal rifts and does not respect unpopular beliefs. (*Id* at 422). While his second contention is not without merit, as will be discussed below, it should be noted that a number of scholarly works and public reports on the principle of *laïcité*, acknowledge the injustice been committed in the past in the name of *laïcité*. Thus the narration and analysis of the political history of *laïcité* is not wholly uncritical. (See e.g. the Stasi Commission report which distinguished between two

Laïcité or secularity is a constitutional principle. Article 2 of the Constitution of 1958 provides that “France is an indivisible, secular, democratic, and social Republic.”³⁸⁵ What is more, the state has an explicit constitutional obligation to provide for a “free, secular, public education” according to the Preamble of the 1946 Constitution.³⁸⁶ The Conseil D’État has held that the principle of secularity of public education is one of the elements of the secularity of the state and the neutrality of all public services.³⁸⁷ Finally, the secularity of the state is provided for by the 1905 law on Separation of Church and State.³⁸⁸

In its report the Stasi Commission confirmed the centrality of secularity as a foundation principle of the Republican Pact and identified three values which secularity upholds: (1) freedom of conscience, (2) equality of all religious and spiritual beliefs (pluralism), and (3) neutrality of the state.³⁸⁹ The same three values or principles are discussed as basic constituents of *laïcité* by the Counsel d’État as well.³⁹⁰

The right that has been evoked by most of the opponents of the religious symbols law is the right to religious freedom. The right to freedom of conscience is a “fundamental principle recognized by the laws of the republic” and has a constitutional status.³⁹¹ According to Art.2 of the 1958 Constitution, the state is obliged to respect all beliefs and “ensures the equality all of citizens before the law

models of secularity espoused—one “combative and anti-clerical” while the other “liberal and tolerant,” (Stasi Commission, *supra* note 365, at 11-12.)

³⁸⁵ CONSTITUTION OF FRANCE, 1958, Title I, Art.2 (1).

³⁸⁶ CONSTITUTION OF FRANCE, 1946, Preamble, para. 11.

³⁸⁷ *Kherouaa*, *supra* note 357, at 389.

³⁸⁸ Loi du 9 décembre 1905 concernant la séparation des Églises et de l’État.

³⁸⁹ Stasi Commission, *supra* note 365, at 9.

³⁹⁰ L’assemblée générale du Conseil D’état, *Réflexions sur la Laïcité: Considérations générales Un siècle de la Laïcité*, Rapport Public, 5 Feb 2004, 272-279, <<http://lesrapports.ladocumentationfrancaise.fr/BRP/044000121/0001.pdf>>.

³⁹¹ See Decision of the Constitutional Council No. 77-87 of 23 November 1977 cited in JOHN BELL, *FRENCH CONSTITUTIONAL LAW* 71, Oxford 1992.

without distinction as to origin, race, or religion.”³⁹² Article 10 of The Declaration of the Rights of Man and of the Citizen of 1789, provides that the state may not interfere with individual opinion, “including religious views, unless their manifestation disturb the public order established by law” and Art. 11 provides that “the free communication of the thoughts and the opinions is one of the most invaluable rights of the man.”³⁹³

Several statutes also provide for the rights to religious freedom. The 1905 Law on the Separation of Church from State provides in Art. 1 that freedom of conscience is guaranteed and that restrictions on the free exercise of religion may be enacted only in the interest of law and order.³⁹⁴ In the education context the Law on Orientation of Education of 1989 states that students have the right to freedom of information and expression, “in the respect of pluralism and the principle of neutrality,” provided that the exercise of these rights does not attack the activities of teaching. A government decree of 1991 added to the list of rights enjoyed by high school students the freedoms of “of expression, of information, of conscience, of meeting, of association, and of publication” which are subject to the same conditions specified in the 1989 law.³⁹⁵

1.3 Analysis of the Law on Religious Signs at Public Schools

The Law’s constitutionality cannot be challenged before the Constitutional Council because it has already been signed into a law and promulgated.³⁹⁶

³⁹² CONSTITUTION OF FRANCE OF 1958, Title I, Article 2 (1).

³⁹³ Declaration of the Rights of Man and Citizen of 1789.

³⁹⁴ Loi du 9 décembre 1905 concernant la séparation des Églises et de l’État, Article First.

³⁹⁵ La loi d’orientation sur l’Education du 10 juillet 1989 et le décret n° 91-173 du 18 février 1991.

³⁹⁶ The Constitutional Council exercises only abstract review of a bill before its promulgation. Bill can be submitted to the Constitutional Council for constitutional review by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, sixty deputies

Nevertheless this section will examine the conformity of the Law of 15 March 2004 with the constitutional principles and values, before proceeding with an examination of compliance with the provisions of the international instrument to which France is a party.

Although the law regulates the wearing of all religious signs by students, regardless of the religion that a student professes, it is clear that the main purpose of the law was to regulate the wearing of headscarves by Muslim girls.³⁹⁷ For the constitutional analysis it is necessary to determine first whether the wearing of religious symbols constitutes a protected right to freedom of conscience and religious expression. I would argue that the doctrinal disputes of whether wearing of the hijab is a religious obligation for Muslim women or not are of no relevance for the constitutional analysis. As long as it is an expression of a sincere religious belief, it is protected under the Constitution. Thus, while there may be some Muslim women who cannot assert a religious freedom claim to wear the hijab (i.e., those for whom it is only an issue of tradition), there are surely many who believe the obligation is religious. The sincerity of belief whose manifestation is the wearing of the religious symbols presupposes that it is one's own and the manifestation is freely chosen without any outside coercion and imposition, which are problems that have been identified as targets of the new law.

or sixty senators. (CONSTITUTION OF FRANCE, 1958, Art. 61 (2)). There was no political will to submit the law of March 2004 to the Council.

³⁹⁷ As Bauberot, noted, "Naturally there are none of these huge crosses in schools, but it served to create a pseudo-equilibrium between the major confessions. It is clear that this law is aimed primarily at the religious minorities, and mainly at Islam." (Interview with Jean Baub  rot, European Islam's News, (visited January 20, 2005) <http://www.confronti.net/english/archives/apr04_01.htm>). See also Willms arguing that "the controversy that the measure has provoked in France reflects the sense among both proponents and opponents that it had a tangible, specific target: the Islamic headscarves of young women, members of the 3.26 million-strong Muslim population of France" (Johannes Willms, *France Unveiled: Making Muslims Into Citizens?*, (visited 18 March 2005), <<http://opendemocracy.net/debates/article-5-57-1753.jsp>>.)

The right to free exercise of the students may be limited to prevent threats to public order (l'ordre public) as is provided by Art. 10 of the Declaration of the Rights of Man and of the Citizen of 1789 and Art. 1 of the Law on the Separation of State and Church of 1905. The public order doctrine allows for limitations on individual rights for the purpose of maintaining “public security, tranquility, and health.”³⁹⁸ There is no definition given by the Constitutional Council of what exactly constitutes public order.³⁹⁹ However, the Council’s interpretation comes close to that used traditionally in administrative law, namely “good order, security, public hygiene and the public peace.”⁴⁰⁰ According to the Council, “preventing violations of public order is necessary to safeguard our constitutional rights”⁴⁰¹ and thus it is “a democratic necessity.”⁴⁰²

The reconciliation between individual rights and public order is reviewed by the Constitutional Council by examining the proportionality of the restriction.⁴⁰³ The intervention by the state into the exercise of fundamental rights should not be excessive⁴⁰⁴ and the Constitutional Council review has to ensure that “that none of the potentially conflicting constitutional values is distorted or sacrificed to another.”

Thus, the Stasi Commission report repeatedly argued that a law banning conspicuous symbols at school was necessary for the protection of public order, and stated, “today the question is not any more the freedom of conscience, but the law and

³⁹⁸ See Bell, *supra* note 391, at 83, citing Leon Duguit, *Traite de droit constitutionnel* 728 (2d ed. 1923).

³⁹⁹ Conseil Constitutionnel, *Human Rights and Public Order: "The Main Criteria For Restricting Human Rights In The Judicial Practice Of Constitutional Law,"* (visited 16 March 2005), <<http://www.conseil-constitutionnel.fr/dossier/quarante/notes/libpuben.htm>>.

⁴⁰⁰ *Id.*

⁴⁰¹ Security and Liberty Decision No, 18 of 19 and 20 January, 1981, cited in Bell, *supra* note 391.

⁴⁰² Conseil Constitutionnel, *supra* note 399.

⁴⁰³ *Id.*

⁴⁰⁴ Security and Liberty Decision No, 18 of 19 and 20 January, 1981, cited in Bell, *supra* note 391, at 141.

order.”⁴⁰⁵ Several public order grounds were identified by the Stasi Commission Report and the Report of the National Assembly Commission as justifications for a law prohibiting students from wearing conspicuous religious signs at public schools: Muslim girls were being coerced by their families or peers to wear headscarves against their will—a violation of their rights to freedom of exercise, and girls not wearing headscarves were subject to violent attacks, which was a violation of their personal security; the rise of anti-Semitism and the frequent attacks of Jewish students wearing skullcaps; the difficulties suffered by heads of schools and other school officials in implementing the case law of the Conseil d’État under constant community pressure.

According to the case law of the Constitutional Council, a right that is of constitutional value can also be limited in order to be reconciled with another principle of constitutional value.⁴⁰⁶ According to Art. 34 of the Constitution, the legislature establishes “the rules concerning civil rights and the fundamental guarantees granted to the citizens for the exercise of their public liberties.”⁴⁰⁷ The Constitutional Council interpreted the constitutional boundaries to legislative intervention in its decision of October 10, 1984: “the law can regulate the exercise of it [freedom of speech] only in order to make it more effective or to reconcile it with

⁴⁰⁵ Stasi Commission, *supra* note 365, at 58.

⁴⁰⁶ According to the 1984 decision relating to the freedom of the press, the legislature can regulate the exercise of a fundamental freedom only for two objectives: to make it more effective, or to reconcile it with other rules or principles of constitutional values. (*see* Mission d’information de l’Assemblée nationale française sur la question du port des signes religieux à l’école - Audition de M. Roger ERRERA, conseiller d’Etat honoraire, <<http://www.reseauvoltaire.net/article12008.html>>, (hereinafter “Errera – hearings”).

⁴⁰⁷ CONSTITUTION OF FRANCE, 1958, Art.34 (2).

that of other rules or principles of constitutional value.”⁴⁰⁸ The Constitutional Council reviews this conciliation between conflicting constitutional values of equal rank.⁴⁰⁹

The constitutional principle invoked by both reports was the principle of secularity.⁴¹⁰ The main arguments for the necessity of the law were the following: the practice of wearing ostentatious religious symbols was in conflict with the secularity and neutrality of public education and its function to teach individual autonomy and critical thinking, to foster a sense of common French identity, and to transmit the constitutional value of gender equality. The wearing of the headscarves was deemed as impermissible proselytism because it exerted pressure upon Muslim girls not wearing headscarves, by stigmatizing them as not being good Muslims. Secularity was closely related to the constitutional principle of the equality of the sexes and the law was necessary to protect that principle from the being undermined by the practice in French society at large. Secularity was also threatened by communitarian tendencies propagated through the symbol of the headscarf.⁴¹¹

The discussion below will try to examine how accurately the reports identified the alleged threats to law and order and to the other constitutional values and objectives and the rationality of the relationship between the restrictions imposed by the law and the purpose it seeks to achieve, and the proportionality of the legislative measure to its objectives.⁴¹²

⁴⁰⁸ Décision n° 84-181 DC du 10 octobre 1984.

⁴⁰⁹ See Noëlle Lenoir, *The Role of the Constitutional Council (C.C.)*, (visited 17 March, 2005), <<http://www.legal-connexion.info/research/conconst.htm>>.

⁴¹⁰ “In our case, the intervention of the legislator aims to reconcile the freedom of religion with the constitutional principle of secularity” (*Id.*)

⁴¹¹ Similar arguments came up in the public debate as well, for a summery see Alison Dundes Renteln, *Visual Religious Symbols and the Law*, 47 AMERICAN BEHAVIORAL SCIENTIST 1573, 1579-1581 (2004).

⁴¹² On proportionality review as examination of the rational relationship between means and ends, see Bell, *supra* note 391, at 223, 242.

1.3.1 Constitutional Values

1.3.1.1 SECULARITY

As the NA Report noted the Constitution does not provide for a hierarchy between the two constitutional principles of secularity and freedom of conscience.⁴¹³ What is more, as was already noted secularity itself encompasses safeguarding of the individual right to free exercise. Nevertheless proponents of the Law of 15 March 2004 argued that the secularity and freedom of conscience were brought into conflict by the practice of students' wearing ostentatious religious symbols at school, notwithstanding the jurisprudence of the Counsel d'État which stands for the position that the practice in itself is not incompatible with the principle of secularity.

a) Neutrality

The reasons for the conflict arguably lie in the complexity of the principle of secularity.⁴¹⁴ On the one hand, the different pillars of secularity—neutrality, freedom of conscience and pluralism or equal rights for all religious and spiritual convictions may come into conflict. On the other hand, secularity transcends these principles and “beyond the spiritual and religious question will relate to the society in all its components” and thus “touches upon national identity, the cohesion of the social body, the equality between the man and the woman, upon education, etc.”⁴¹⁵ The French principle of *laïcité*, as Lyon and Spinni note, denotes more than a separation of church and state since it is perceived as a “fundamental conception of citizens and

⁴¹³ NA report, *supra* note 363, section - Le problème juridique du port des signes religieux dans les établissements scolaires : concilier deux principes consacrés.

⁴¹⁴ See Stasi Commission, *supra* note 365, at 27.

⁴¹⁵ *Id.* at 36. This delineation of the scope of secularity seems very large. Bauberot commented in an interview, that the commission members did not want to amalgamate all issues, but on the other hand, felt that they could not be studied in isolation. Nevertheless, he admitted that the Commission did not have enough time to study carefully the relations between secularity, equality between the sexes and

society.”⁴¹⁶ It is heavily value laden and stands for “critical analysis, tolerance, patriotism, neutrality.”⁴¹⁷

One may argue about the degrees of relatedness and distinction between the principles. The ECHR has noted that the principles of secularism and equality between the sexes “reinforce and complement each other.”⁴¹⁸ Regardless of what the proper elaboration of the relationship between the principles is, gender equality is a constitutional principle and thus may serve a separate ground for limitation of the right to religious expression. The issue of national identity and integration of immigrant population is more problematic as a separate ground for limitation of this right, although according to large number of scholars it is precisely this issue that lies at the heart of the political debate of the headscarf practice. The unity and indivisibility of the nation is enshrined in Art. 1 (2), which states “France is an indivisible, secular, democratic, and social Republic.” This constitutional principle, it may be argued, is the constitutional ground on which integration and the fostering of national identity rests and as a constitutional principle the unity and indivisibility of the nation may have to be reconciled with other constitutional rights.⁴¹⁹

This section will examine first the relationship between neutrality and freedom of conscience, both of which constitute basic principles of secularity. The principle of neutrality of the state commands neutrality of the public services, of which public education is a part. Thus according to the report of the Stasi Commission it was the

integration. (See Jean Baubérot, *Interviews*, (visited 18 Feb, 2005), <http://www.france5.fr/actu_societe/W00137/9/103209.cfm>.).

⁴¹⁶ Dawn Lyon and Debora Spini, *Unveiling the Headscarf Debate*, 12 FEMINIST LEGAL STUDIES 333, 335 (2004).

⁴¹⁷ *Id.*

⁴¹⁸ *Leyla Sahin v. Turkey*, (10 November 2005), at 104.

⁴¹⁹ For example, the principle of the indivisibility of the nation has been interpreted as a constitutional provision which does not allow the granting specific rights to “groups” speaking regional or minority languages in the regions where these languages are spoken. (*See* Constitutional Council Decision No 99-412 of 15 June 1999).

conflict between these two pillars of secularity—neutrality and freedom of conscience that had to be reconciled through the new law.⁴²⁰

How can the principle of neutrality of the political power, that is the state, be in contradiction with the purely private religious expression of students in state schools? According the American constitutional jurisprudence, as long as the religious expression cannot be attributed to the state or perceived as sponsored by or promoted by the state, it does not violate the principle of neutrality mandated by the Establishment clause. However that distinction between purely private religious speech and one attributable to the state appears not appear to be a decisive factor in the constitutional analysis offered by the proponents of the new law. As Davis notes, this is “a basic difference between how the issue is handled in France versus the United States ... [The] question of state sponsorship is one that French society finds mostly irrelevant.”⁴²¹

As was already noted the position of the Conseil d’État is closer the American one. Drawing from its decisions the Conseil d’État noted that the purpose behind the obligation of strict neutrality imposed on the agents of public services, including education is “to allow the full respect of the convictions of the users” and therefore the users’ freedom of expression of their membership in a particular religion “could not attack the neutrality of the public utility.”⁴²² To the contrary, the purpose of secularity should be precisely to protect such religious differences. It was this distinction between the agents and users of the public service which served as the

⁴²⁰ Stasi Commission, *supra* note 365, at 27.

⁴²¹ Derek H. Davis, *Reacting to France’s Ban: Headscarves and Other Religious Attire in American Public Schools*, 46 JOURNAL OF CHURCH AND STATE 221, 229 (2004).

⁴²² Rapport public 2004 du Conseil d’Etat, Intégralité du rapport du Conseil d’Etat: “un siècle de laïcité, at 276, (visited January 20 2005), <http://www.laic.info/Members/cabanis/La_laicite_en_France.2004-03-20.0335>.

basis for its 1989 decision on the wearing of headscarves at public schools.

Confirming this position the Conseil d'État in the *Kherouaa* case stated that:

[this distinction] was not sufficiently underlined between the obligations made to the pupils and those done to the teachers. Because teaching is laic, the obligation of neutrality is binding absolutely to the teachers who cannot express in their teaching their religious faith. On the other hand, because the freedom of conscience is the rule, such a principle could not be binding to the pupils who are free to express their faith, the only limit with this demonstration being the freedom of others.⁴²³

The NA Report expressed dissatisfaction with that position, calling the then current legal distinction between the status of teachers and students “regrettable.”⁴²⁴

The Report argued that students should not be regarded as simple users of the public utility of education. Rather, they are “individuals in construction of an institution whose mission is to form them” and as a part of the educational community, they should also meet certain obligations necessary for the maintenance of the neutrality of the public utility.⁴²⁵ Namely, it argued that “in so far as the wearing of religious signs undermines the principle of neutrality of school space” it would be legitimate to impose restrictions upon the students “in order to allow a stronger guarantee of the principle of secularity, i.e. respect, by all, of the beliefs of each one.”⁴²⁶

In what way then can the students’ religious expression undermine the neutrality of the school space? According to the Stasi Commission aggressive proselytism in the school space cannot be reconciled with neutrality.⁴²⁷ However, the jurisprudence of the Conseil d'État also prohibited aggressive proselytism. Therefore,

⁴²³ *Id.* at 337, citing from *Kherouaa* case, *supra* note 357.

⁴²⁴ NA Report, *supra* note 363, section - Les élèves ne doivent pas être traités comme de simples usagers du service public de l'Éducation nationale.

⁴²⁵ *Id.*

⁴²⁶ *Id.* Gökarıksel and Mitchell note that secularism as a political ideology has as its basis the idea that “public spaces and institutions must be free of ‘particularist’ influences such as religious or ethnic allegiance. Once purged of personal sentiments these spaces can be considered neutral and egalitarian, allowing a free and unhindered interaction of rational individuals.” (See Banu Gökarıksel and Katharyne Mitchell, *Veiling, Secularism, and the Neoliberal Subject: National Narratives and Supranational Desires in Turkey and France*, 5 (2) GLOBAL NETWORKS 147, 149-150 (2005), internal quotation omitted).

⁴²⁷ Stasi Commission, *supra* note 365, at 18.

this argument alone cannot serve as a justification of the proscription of all religious symbols, unless one also argues that the very fact that a student wears a religious sign at school already amounts to “aggressive proselytism.” Such an argument, however, is indefensible. The Stasi commission and the NA Commission themselves acknowledged the multiplicity of the meanings of religious signs and of the reasons why students wear them.

The Commission also argued that neutrality of the school and respect for the diversity of belief required there be some limits set on the expression of denominational identities in the public school context and approvingly referred to the doctrine of “reasonable compromise” developed in Quebec.⁴²⁸ However, as the discussion in section E *infra* shows, the application of the doctrine of reasonable compromise to the issue of religious symbols worn by students at schools has led to an approach opposite to the represented by the 2004 French law.

Further, it should be noted that the Stasi Commission admitted that the principle problems with the neutrality of public schools did not arise out of the wearing of religious signs by students, but out of other religious claims that could affect the organization of the public schools.⁴²⁹ Such challenges, identified elsewhere in the report, were objections to the curriculum, requests for exemption from certain classes, the organization of exams, and refusal by some parents to communicate properly with female school officials, among others.⁴³⁰ Therefore, the Stasi Commission did not succeed in demonstrating how neutrality is violated by the religious signs worn by students. Neither the Stasi Commission Report nor the one issued by NA Commission could offer any persuasive argument in favor of

⁴²⁸ *Id.* at 16.

⁴²⁹ *Id.* at 28.

⁴³⁰ NA Report, *supra* note 363, section - Le port des signes religieux et politiques : une manifestation du communautarisme.

abandoning to the principled position defended by the jurisprudence of the Conseil d'État, namely that secularity requires that the public services be neutral, and therefore places restrictions on the public agents as representatives of the state but does not require that students be religiously neutral, or leave their religious identities at the school gate, in order to be able to have access to public education.⁴³¹

Finally, Balibar has argued that both positions on the interpretation of neutrality - “neutrality *with respect to* religious beliefs (and thus respect for their equal expression)” and neutrality demanding suspension of religious beliefs are “both correct and incorrect.”⁴³² He maintains that the school, as a transitional place situated in the public place should both detach from primary identities but also enable individuals to claim them from the distance of their second, political identity.⁴³³ Such a process is enabled by a legal regime which private religious expression within schools and at the same time poses restrictions on the requests for exemptions from educational subjects that are not in full accordance with the religious belief of the communities shaping primary identities of students.

b) Autonomy as the Mission of the School

The secularity of public education guaranteed by the Constitution informs the mission of the public school, which has as a key component the nurturing and development of critical thinking and autonomy of judgment in students.⁴³⁴ The

⁴³¹ See also *France: Headscarf Ban Violates Religious Freedom, By Disproportionately Affecting Muslim Girls, Proposed Law Is Discriminatory*, Human Rights Watch, <<http://hrw.org/english/docs/2004/02/26/france7666.txt.htm>>, “[P]rotecting the right of all students to religious freedom does not undermine secularism in schools. On the contrary, it demonstrates respect for religious diversity, a position fully consistent with maintaining the strict separation of public institutions from any particular religious message”

⁴³² See Etienne Balibar, *Dissonances within Laïcité*, 11 (3) CONSTELLATIONS VOLUME 353, 357 (2004).

⁴³³ *Id.*

⁴³⁴ See e.g. Stasi Commission, *supra* note 365, at 28, “The operation of the school must enable them to acquire the intellectual tools intended to ensure their critical independence in the long term.” See also Baylet, claiming that in the place of “the old design of a resigned individual, installed in a circular

Conseil d'État also stated in its report that the students' rights to free exercise of their religion could be limited if they obstructed the educational mission of public schools:

“under no circumstances may they hinder the achievement of the missions reserved by the legislator for the public utility of the education, which must in particular allow acquisition by the child of a culture, his preparation for professional life and for his responsibilities for man and citizen, the development of his personality, and must make it possible to inculcate in him respect of the individual and to guarantee the equality between men and women.”⁴³⁵

According to the NA Commission Report the mission of the school is hindered by the wearing of signs designating a religious identity because this practice amounts to “affirming in advance what is necessary to believe and closing to any new knowledge that could question these beliefs.”⁴³⁶ The Stasi Commission also noted that “The visible character of a religious sign is felt by much as contrary to the mission of the school which must be a space of neutrality and a place of awakening of the critical conscience.”⁴³⁷

According to Gareluk, the state will be justified in enforcing the ban if it was certain that Muslim parents were forcing their children to wear headscarves, because “the state may be concerned that those girls may be compromised in their ability to make informed judgments about how they wish to lead their life.”⁴³⁸ Central for this justification of the ban is related to the issue of coercion, which is different from the rationale given above. This rationale is that wearing ostentatious religious signs impedes the development of future capacities for critical thinking and is independent

time” the Republic substituted the powerful image of an autonomous and free individual, choosing its destiny instead of undergoing the fate of its destiny, taking part in the social progress by the access of its free spirit to an education equalizes for all.” (Jean-Michel Baylet, *La laïcité veut empêcher l'affrontement religieux, pas le provoquer*, (visited 15 Feb 2005), <www.reseauvoltaire.net/article11175.html>).

⁴³⁵ Conseil d'État, *supra* note 422, at 338.

⁴³⁶ NA Report, *supra* note 363, section - L'école doit rester un lieu d'apprentissage de la citoyenneté.

⁴³⁷ Stasi Commission, *supra* note 365, at 58.

⁴³⁸ Dianne Gereluk, *Should Muslim Headscarves be banned in French Schools?*, (visited 21 March, 2005), <<http://k1.ioe.ac.uk/pesgb/x/Gereluk.pdf>>, p.3.

from the question of whether the students are forced to wear the religious signs or do so by their own volition.

The reports fail to prove how the sole fact that a child wears religious symbols closes her mind to new knowledge and thus endangers the development of a capacity for critical assessment of previously acquired beliefs and convictions. The wearing of a religious sign is an expression and manifestation of religious belief and/or a religious obligation imposed by the particular religious doctrine. In either case it is not the wearing of the religious sign itself that might hinder the inculcation of critical thinking and the development of a capacity for autonomous judgment in the child. What arguably might hinder this mission of the school are parental demands for exemption from curriculum subjects and readings that collide or call into question the religious beliefs that they wish to instill in their children. It is when children are prevented from being exposed to diverse views and concepts of the good and to different ways of life that the development of their critical thinking and independence of judgment may be hindered. Indeed both the Stasi commission and the NA Commission reports identified that the demands for curriculum exemptions were the main challenge to the mission of the school.

In a radio interview, Alain Touraine, a member of the Stasi Commission, admitted that the real issue to be addressed was curriculum objections, but then did not make it clear in what way banning headscarves would address this issue:

First of all to accept the veil in high school is one thing. When these girls, some of them, a few weeks afterwards say we don't want to make gym because of girls and boys together, when two weeks afterwards they say I cannot go to the biology class because they speak about sex, when two weeks afterwards they say I cannot even go to the history class because what the historians say about the history of the world is contradictory with what the Koran says. Well, you cannot accept that.⁴³⁹

⁴³⁹ Alain Touraine, Interview: *Banning the Veil – the French Option*, Encounter, Sunday 22 August 2004, <<http://www.abc.net.au/rn/relig/enc/stories/s1177796.htm>>. See also Alenka Kuhelj, *Religious Freedom In European Democracies*, 20 TUL. EURO. CIV. LF 1, 18 (2005), who explains that one of the reasons why the French public has been particularly intolerant to the display of Muslim religious dress

In a thoughtful article Gay offers a “partial defense” of the French law arguing that it may be seen as an “approach that gives the government authority to facilitate free choice among various religious options by unsettling religious preconceptions that parents and religious communities instill in their children.”⁴⁴⁰ Gay’s argument is that the French law tackles similar issues that have faced US courts regarding question of curriculum exemptions.

While I agree on principle with most of his discussion on the need of the public school to provide children from religious families with the intellectual capacity and freedom to take a critical stance towards the comprehensive doctrine of the good they have been inculcated by their parents and immediate communities and with the right to choose whether to exit or remain or even bring about a change in these communities, I do not agree with his main argument that the wearing of religious signs is any obstacle to this mission of public education. He fails to show why a girl wearing a headscarf or a boy wearing a turban is less open or perceptive to different religious and secular ideas, than religious or non-religious students who do not wear a religious sign.

Also, no argument has been given for the proposition that once a girl takes off her headscarf upon entering school, she all of a sudden becomes more “liberated” from her family and community religious teachings.⁴⁴¹ Indeed, the coerced action in contradiction to her belief may be as likely to inculcate unthinking conformity as wearing the veil. Given the anti-veil pressure, she may be forced to develop greater critical thinking to defend her position than would otherwise be the case.

symbols at schools in contrast to attitude to Catholic or Jewish symbols is the attitude of Muslim students towards subjects such as biology, history or physical education.

⁴⁴⁰ Steven G. Gey, *Free Will, Religious Liberty, And A Partial Defense of The French Approach to Religious Expression In Public Schools*, 42 HOUS. L. REV. 1, 4 (2005). This “unsettling” of course is often viewed by religious parents as an intolerant attack on their beliefs systems.

Besides not identifying the problem correctly, the effect of the law would be counterproductive to the aim pursued. When children are dismissed from public school for noncompliance with the law, it is most likely that they will be sent to private religious schools or withdrawn from school altogether. The president of the Union of French Islamic Organizations (UOIF) stated that if Muslim girls are not allowed to wear at least discrete bandannas or hairbands, then Muslims would start to establish their own private schools where the girls would be able to study with their heads covered, so that, “in five years, we’ll see private schools sprouting up like mushrooms.”⁴⁴² This is more likely to entrench communitarian patterns that supporters of the legislation oppose. Currently there is only one Muslim school in France, and a lot of Muslim parents prefer sending their children to Catholic schools which, as Gereluk notes, are “[i]n their eyes, a lesser evil: a school that believes in a higher Being, rather than the total exclusion of religion in state schools.”⁴⁴³

What is more, the purpose of developing critical thinking and autonomous judgment is hard to reconcile with the claim of the NA Report that it is the “development of individualism and the claim of the right to difference” that run counter to the principle of *laïcité*,⁴⁴⁴ which claim was asserted in even stronger terms by Baroin, a NA deputy.⁴⁴⁵ If one of the main missions of secular education is to

⁴⁴¹ For an excellent critique of Prof. Gay’s arguments see Dina Alsowayel, *The Elephant In The Room: A Commentary On Steven Gey’s Analysis Of The French Headscarf Ban*, 42 Hous. L. Rev. 103 (2005).

⁴⁴² *French PM: Hijab a Political Challenge*, Aljazeera.Net, 04 February 2004, <<http://english.aljazeera.net/NR/exeres/E53E4E37-4E1E-4B6E-8BDE-924D9E55F401.htm>>.

⁴⁴³ Gereluk, *supra* note 438, at 4. On the other hand, Patrick Weil submits that the Stasi Commission “received testimonies of Muslim fathers who had to transfer their daughters from public to (Catholic) private schools where they were free of pressure to wear the headscarf.” (*See* Weil, *supra* note 367).

⁴⁴⁴ *See* NA Report, *supra* note 363, *section* - Un modèle à conforter.

⁴⁴⁵ “The crisis of the scarf or the veil (the choice of the term is not indifferent), from this point of view, it is less the sign of a return to the monk than the sign of a political crisis, social and cultural and it is not so much a return of strength of religion in the schools but a destabilization of the school under the blows of individualism.” The veil it is an identity impulse in a world of individualities: it is a way of saying “I exist as me, not as French and I want to be made hear.... The freedom of expression and the recognition of the differences are privileged compared to other values like the authority of the Master, the mission of educating and emancipation of the person. . . . As Martine Barteley underlines it, at a

enable the child to develop autonomous judgment and to empower her to make informed choices among different conceptions of the good life, then to assert that this same mission is threatened by the “excessive legitimatizing of individualism”⁴⁴⁶ which is arguably demonstrated by the wearing of religious symbols at school appears contradictory. According to the report the wearing of religious signs privileges, and sometimes is even reduced to the identification of oneself with the religious component” and for this reason it represents an attack on secularity.⁴⁴⁷ However, the school does not teach independent judgment by refusing to accept the expression of a person’s identity—be it religious, communal, political, gender etc. It is rather by acknowledging diverse identities and creating a sense of inclusion, that the school can expose the child to new ideas, which might create new identities for him or make him critically examine his previously acquired identities. As Rowen has pointed out, referring to Kymlicka’s *Multicultural Citizenship*, some strands of liberal theory link the development of autonomy and critical thinking to the possibility to draw from one’s heritage: “becoming a fully capable liberal individual, one who can formulate and reformulate ideas and ideals, requires a tradition, a sense of respect for one’s heritage that engenders respect for oneself.”⁴⁴⁸

certain point, secularity and human rights are contradictory”(François Baroin, *Pour une nouvelle laïcité*, (visited 23 March 2005), <<http://www.reseauvoltaire.net/rubrique506.html>>.

⁴⁴⁶ See NA Report, *supra* note 363, section - Le port des signes religieux et politiques : une manifestation du communautarisme.

⁴⁴⁷ *Id.*

⁴⁴⁸ See John R. Bowen, *Muslims And Citizens: France’s Headscarf Controversy*, THE BOSTON REVIEW 31, 35, February/March 2004,

<<http://www.artsci.wustl.edu/~anthro/articles/Boston%20Review%20article.pdf>>. Such a theory, however, may not sit well with the traditional French doctrine of citizenship and democracy. As Fennema and Tillie point out the protection of the fundamental values of democracy—equality, autonomy, and knowledge, as conceptually developed in French political thought, arguably requires the relegation of symbols referring to particularistic identities to the private sphere only. These symbols are viewed by some as a “threat to civic equality, because wearing these particular religious symbols in public space or on public duty is seen as infringing upon the abstract equality of citizens” and autonomy too is “constructed by abstracting from all vertical ties and loyalties except the national loyalty.” (See Meindert Fennema and Jean Tillie, *Democratic Nationalism and Multicultural Democracy*, (visited May 12, 2005), <www.essex.ac.uk/ecpr/events/jointsessions/paperarchive/grenoble/ws24/fennema.pdf>, p. 9-11.)

It should be noted that the foregoing arguments presented by the NA report and by the Baroin Report tacitly acknowledge that for a large number of Muslim girls, the wearing of the headscarves is not done under parental or community compulsion. One cannot argue that the wearing of religious signs is assertion of individualism, an assertion of religious identity, of the right to express that identity in public space, unless one accepts that the individual does wear the sign by her own volition.

1.3.1.2 EQUALITY BETWEEN THE SEXES

The Stasi Commission placed a strong emphasis on the constitutional principle of the equality between the sexes, arguing that “today, secularity cannot be conceived without a direct bond with the principle of equality between the sexes”⁴⁴⁹ which principle is “an element of the republican pact today.”⁴⁵⁰ This was also the principle very often alluded to in the public debate by the proponents of the law.⁴⁵¹ The preoccupation of the Stasi Commission with the principle of gender equality was criticized by Baubérot, the only commission member who did not endorse the recommendation for the ban on conspicuous religious symbols at state schools. Although the main task of the Commission was to study the application of the

⁴⁴⁹ Stasi Commission, *supra* note 365, at 52. Such a bond has not always connected the two principles, as Widle observes, “The freedom and equality that secularism claims to guarantee has broadened only recently to include concern for the position of women, and thereby frame moral objections to the position of women under Islam. No similar outcries about the viability of the French state arose from gendersegregated secondary schooling in the 1930s, when girls accounted for only a third of state enrolment, nor from the fact that women were without the vote until 1944, largely due to the opposition of secularists who feared women would be more influenced by the church than men and shift the balance of power.” (Joel Windle, *Schooling, Symbolism and Social Power: The Hijab in Republican France*, 31 (1) THE AUSTRALIAN EDUCATIONAL RESEARCHER 95, 99, (2004).)

⁴⁵⁰ Stasi Commission, *supra* note 365, at 15.

⁴⁵¹ In relation to the importance accorded to the principle of gender equality it should be noted that it was not until the end of March, 2005 that the National Assembly voted on a law that would raise the legal age for marriage for girls to the age stipulated for boys. (See, *France to Raise Legal Marriage Age for Women*, Reuters, <<http://www.stuff.co.nz/stuff/0,2106,3232285a12,00.html>>.) Up to then girls could marry at 15, and boys at 18. The UN Committee on the Rights of the Child, recommended several times such an amendment, and one of the main concerns was the instances of forced marriages

principle of secularity, the question that was mostly debated was that of the equality between the sexes.⁴⁵² According to Baubérot:

In fact, a perception of moral blackmail rose within the Commission: if you were for equality between the sexes, then you could not be against the prohibition of religious symbols in the schools. ...It is this short-circuiting between the debate on secularity and the debate on equality between the sexes that has falsified everything.⁴⁵³

The justification of the law by the need to reconcile religious manifestation with the principle of gender equality encompasses two separate, although interconnected concerns: symbolism and coercion. First, the wearing of headscarves is arguably a symbolic reaffirmation of inequalities between women and men, and as such should not be tolerated at public schools, whose mission is to teach the equal rights and dignity of all persons.⁴⁵⁴ Second, the concern is that many young girls are being coerced into wearing headscarves by the pressures put on them by their families or communities.

a) Symbolism

One of the principle criticisms voiced against the 1989 decision of the Conseil d'État by the Stasi Report was that the decision did not take into account the principle of the equality between the sexes. The reason for that was that judges faced inherent limits which prevented them from inquiring into the religious symbolism of the headscarf, namely they could not enter into a discussion of the interpretation given by

of young Muslim girls, which the Stasi Commission listed as some of the most alarming examples of the plight of young Muslim girls. (See Stasi Commission, *supra* note 365, at 47.)

⁴⁵² *European Islam's News, Interview with Jean Baubérot*, (visited 10 Feb. 2005), <http://www.confronti.net/english/archives/apr04_01.htm>.)

⁴⁵³ *Id.*

⁴⁵⁴ See NA Report, *supra* note 363, *section* L'école doit rester un lieu d'apprentissage de la citoyenneté, ("The leveling relation between the boys and the girls is built at the school. The mission is convinced that if, for example, a pupil wears the veil it falls under a form of differentiation which can imply that the respect of the girls by the boys is subordinated to a special behavior.")

a religion to a particular sign.⁴⁵⁵ However, according to the Commission in the recent years the situation changed so that the question of the relationship between the practice of veiling and sexual equality could no longer be left unexamined.⁴⁵⁶ Although this issue was raised in 1989, it assumed a particular prominence in public debates about the headscarf after media reports of incidents of violence against young Muslim women in the suburban ghettos and after the mobilization and public activity of feminist organizations of Muslim women, such as “Ni puts, Ni surmises” (“Neither Whores Nor Submissive”).⁴⁵⁷

On the symbolic plane, the argument is that the veil symbolizes gender inequality and is thus incompatible with the mission of the school, which aims to promote and affirm the equality between men and women.⁴⁵⁸ The NA Commission report pointed out that a number of testimonies claimed that the social conditioning of women in state of inferiority to that of men is “at the base of the requirement or the “recommendation” of veiling formulated by certain preachers.”⁴⁵⁹ At the same time, the report mentioned that certain girls affirm that the headscarf is for them a form of

⁴⁵⁵ Stasi Commission, *supra* note 365, at 31. See also NA Report, *supra* note 363, arguing that, “the judge in a laic State, in a more general way, is stripped when it must define what is a religion and what is a religious fact (...) the judge, even if it were aware that certain scarves revealed a situation of inequality of the woman undoubtedly not very acceptable in the Republic, ran up against the limits of his role by estimating that it could not give a significance to the religious signs.”

⁴⁵⁶ Stasi Commission, *supra* note 365, at 29.

⁴⁵⁷ See Elaine R. Thomas, *France’s Renewed Reaction to the “Islamic Headscarf”: The Role of the Republican Model of Citizenship in Shaping French Public Responses to New Social Actors*, document de travail de la chaire mcd – 2004-04, <<http://www.chaire-mcd.ca/>>, at 16.

⁴⁵⁸ Baines has also noted that the civil war in Algeria, particularly the attacks on women advocating for secular values, who were seen bareheaded in public also contributed to a perceived symbolic relation between the headscarf and gender inequality and Islamic extremism. (See Cynthia DeBula Baines, *L'affaire Des Foulards--Discrimination, Or The Price Of A Secular Public Education System?*, 29 Vand. J. Transnat'l L. 303, 314.) The imposition of the veil by state authorities in certain Islamic countries and the repression of girls and women not wishing to wear it has also contributed to the severely negative image that the veil has for many Europeans. For example, in Saudi Arabia, where Shamblee recalls an incident in which fifteen school girls were allowed to burn to death in their school because there were not wearing veils. (See L. Elizabeth Chamblee, *Rhetoric Or Rights?: When Culture and Religion Bar Girls' Right to Education*, 44 VA. J. INT'L L. 1073 (2004), 1109-1110.)

⁴⁵⁹ NA Report, *supra* note 363, section - Le port des signes religieux et politiques : une manifestation du communautarisme.

emancipation and freedom.⁴⁶⁰ Thus, both reports acknowledge the possibility of multiple symbolic meaning of the headscarves.⁴⁶¹

For this reason, the law cannot be justified on the symbolic plane alone—after all there is nothing that puts legislators in a better position than judges to interpret the religious meaning of a given symbol. Issues of religious doctrine are to be left for resolution to the respective religious communities and their authorities, and the meaning of religious symbols should be determined by the individual believers who wear them.

With respect to the symbolism of the headscarves, research has established that the headscarf may be worn for a number of different reasons: as an expression of a voluntary commitment to a religious doctrine; as a fulfillment of a religious obligation; as an expression and a means to assert one's Muslim identity and belonging to a particular tradition and/or community, which is sometimes seen as a sort of a rebellion of adolescent girls against parental and societal authority and values; as a sort of protection against “machismo of fathers and brothers” so that they girls and women may go out freely by themselves; and as a means through which they

⁴⁶⁰ *Id.*

⁴⁶¹ It is interesting to note that a theory of female inferiority in theology is explicitly found not in the Qu'ran but in the Christian religious texts. According to the Qu'ran, *Surah* 24:31: “and say to the believing women that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear thereof; that they should draw their veils over their bosoms and not display their beauty except to their husbands, their fathers . . . their sons . . . their brothers . . . or their women.” (See Sylvia Maier, *Multicultural Jurisprudence: Muslim Immigrants, Culture and the Law in France and Germany*, Paper prepared for presentation at the Council of European Scholars Conference, Chicago, IL, March 11-13, 2004, <http://www.columbia.edu/cu/ces/conference2004/papers/G3_Maier.pdf>, p.24). With respect to veils, the Bible states, First Corinthians 11:5-10: “Now I want you to realize that the head of every man is Christ, and the head of the woman is man, and the head of Christ is God. Every man who prays or prophesies with his head covered dishonors his head . And every woman who prays or prophesies with her head uncovered dishonors her head—it is just as though her head were shaved. If a woman does not cover her head, she should have her hair cut off; and if it is a disgrace for a woman to have her hair cut or shaved off, she should cover her head. A man ought not to cover his head, since he is the image and glory of God; but the woman is the glory of man. For man did not come from woman, but woman from man; neither was man created for woman, but woman from man; neither was man created for woman, but woman for man. For this reason, and because of the angels, the woman ought to have a sign of authority on her head” (See L. Elizabeth Chamblee, *Rhetoric Or Rights?: When Culture and Religion*

can retain their Muslim identity and at the same time and opt out of male dominated culture and thus as a tool of emancipation. On the other hand, it can be worn because it is imposed by the girl's parents, or in some cases as a result of pressure exerted upon the parents by some Islamic groups.⁴⁶² This multiplicity of meanings of the headscarf was also noted by the Conseil d'État in its public report, which stated that the headscarf gives rise to various interpretations, which moreover may vary depending on whether they are given by those who carry it or are the image constructed by others, and then the report listed possible interpretations, which are in essence the same as the ones given above.⁴⁶³

Nor is there any single interpretation to be derived from authoritative pronouncements of religious doctrine since, as Dwindle observes, "within Islam debates over the meaning and nature of requirements for women's attire date back to at least the ninth century."⁴⁶⁴ This point was also conceded by Weil, also a member of the Stasi commission, who acknowledged that imposing a single meaning on the religious symbol "would have meant an intrusive interpretation of a religious symbol which, clearly, can have different meanings in different circumstances...and [t]he state has no right to "adjudicate" between these meanings, or to interpret religious symbols *tout court*."⁴⁶⁵

Even if it is assumed that the primary symbolic signification of the headscarf is that of a cultural practice that subordinates women, public schools would not end that practice by prohibiting students from veiling. Rather it should teach the principle of gender equality through the school curriculum and ethos. As Gutmann argues:

Bar Girls' Right to Education, 44 VA. J. INT'L L. 1073 (2004), 1126.) (Of course, this text is also subject to different interpretations).

⁴⁶²*The Veil Controversy: International Perspectives on Religion in Public Life*, <http://pewforum.org/events/index.php?EventID=55>

⁴⁶³ Conseil d'Etat, *supra* note 422.

Schools should tolerate the religious difference represented by the chadors without acquiescing in the gender segregation and subordination that typically accompanies this dress in religious practice outside of schools...Democratic education would not force the girls to give up wearing chadors in class, but it would expose them to a public culture of gender equality in public school. This exposure gives them reasons why women should view themselves as the civic equals of men, and it opens up opportunities (to pursue a career or hold public office, for example) that are not offered by their families and religious communities.⁴⁶⁶

Moreover, if the main justification for the law is the protection of the equality between the sexes then the question arises as to why it should not apply just to the wearing of headscarves but to other conspicuous religious signs as well. None of the proponents of the law have suggested that the wearing of Jewish kippahs,⁴⁶⁷ Sikh turbans,⁴⁶⁸ or large Christian crosses symbolizes or propagates inequality between the sexes. One has good reasons to believe that the legislators did not target only Muslim religious dress items in order to avoid the accusation that the law imposes religious discrimination against Muslims, which accusation they nevertheless failed to prevent. However, even if one accepts that the banning of headscarves at school bears a rational relationship to the end of safeguarding the constitutional principle of equality between the sexes, such a purpose of the application of the law to other religious symbols cannot be justified.

⁴⁶⁴ Joel Windle, *Schooling, Symbolism and Social Power: The Hijab in Republican France*, 31 (1) THE AUSTRALIAN EDUCATIONAL RESEARCHER 95, 99 (2004).

⁴⁶⁵ Weil, *supra* note 367.

⁴⁶⁶ Amy Gutmann, *Challenges of Multiculturalism in Democratic Education*, PHILOSOPHY OF EDUCATION 1995, (visited, 11 November 2005), <http://www.ed.uiuc.edu/EPS/PES-Yearbook/95_docs/gutmann.html>.

⁴⁶⁷ The reasons for wearing the skullcap usually include : "recognition that God is "above" us; "acceptance" of the 613 mitzvot (commandments); "identification" with the Jewish people." (Wikipedia, (visited May 20, 2005), <<http://en.wikipedia.org/wiki/Yarmulke>>. For a discussion on the wearing of the Jewish yarmulke see Immanuel Schochet, *The Skullcap: Introduction – The Basis of All Precepts*, (visited May 20, 2005), <<http://www.chabad.org/library/article.asp?AID=110371>>.

⁴⁶⁸ For information on the symbolism of the turban see, for example, *Sikh Theology: Why Sikhs Wear a Turban*, (visited May 20, 2005), <<http://www.sikhcoalition.org/Sikhism11.asp>>. According to the position paper by the legal advisor of the United Sikhs, "The Sikh turban (ie,. covering of one's head) also recognizes the equality of men and women. The essence of the head covering required for both Sikh men and women, was to react against any forceful covering of heads of women. That is the essence of an egalitarian and free society." (Amrik Singh Ahluwalia, *The Sikh Turban*, (visited May 21, 2005), <http://www.unitedsikhs.org/assets/doc/euro_campaign/Why-Sikhs-Wear-Turbans.doc>.).

Thus the Sikhs in France have been protesting against the law and complaining that they are its accidental victims.⁴⁶⁹ The law instigated different responses from the members of the Sikh community—some argued that the turban was not a religious sign but a cultural one and therefore the law should not apply to it, while others demanded respect for their right to free manifestation of their religion.⁴⁷⁰ Representatives of the community relying on the former position tried to obtain an exemption from the application of the law from the government. Although in April 2004 the ministry accepted their argument and proposed that the ban should not apply to “traditional costumes which testify to the attachment of those who wear them to a culture or to a customary way of dressing” the National Assembly voted down this exception.⁴⁷¹

b) Coercion

The other possible legitimate legal ground for the restriction on veiling at school is preventing actual coercion of young girls and existing oppression and discrimination of Muslim women. Firstly, as was noted above, it is a fact that there are students who wear the veil by their own choosing, as an expression of their religion, and or affirmation of their religious and cultural identity and students who are pressured by their families and communities to wear the headscarves against their will. The Stasi Commission put the emphasis on the bitter experiences of the latter

⁴⁶⁹ See *France Raises Sikh Turban Hopes*, BBC News, 13 February, 2004, <http://news.bbc.co.uk/2/hi/south_asia/3483409.stm>.

⁴⁷⁰ When marching in Paris in protest to the law Sikhs were carrying banners like “The turban is our religious symbol and we cannot take it off for any kind of law;” “Turban - sign of respect;” “Turban is a symbol of Sikh sovereignty, liberty and nationhood. It is not a religious symbol.” (See *Sikhs March in Paris Against Religious Signs Law Banning Muslim Hijab, Sikh Turban*, (visited 11 Dec 2004) <<http://www.punjabiamericanheritagesociety.com/news/2004/2004-02-06.html>>.

⁴⁷¹ Talal Asad, *Reflections On Laïcité & The Public Sphere*, SSRN: Items and Issues, VOL. 5, NO. 3, 2005, (visited 31 march 2005), <<http://www.ssrc.org/publications/items/v5n3/reflections2.html>>.

group and the need of the state to interfere to protect them, while only briefly mentioning the first group.⁴⁷²

The representation of Muslim women and girls at the Commission hearing was also disproportionate. The Commission heard representatives from feminist organizations strongly objecting to the practice of veiling, including NPNS, but groups opposing the banning of headscarves from public schools were not invited at the hearings.⁴⁷³ The students wearing headscarves heard by the commission were only two, and their hearing was scheduled very late, when the report had almost been drafted.⁴⁷⁴

Nevertheless, most commentators acknowledge the existence of two groups of students. The critical question is then, whether the law is the right measure to protect young girls who are subject to coercion and pressure to wear the headscarf as way of enforcing gender roles that run counter to the principle of equality between the sexes. Commission member Weil, described the balance the decision of the commission sought to achieve in the following terms:

Either we left the situation as it was, and thus supported a situation that denied freedom of choice to those – the very large majority – who do not want to wear the headscarf; or we endorsed a law that removed freedom of choice from those who do want to wear it. We decided to give freedom of choice to the former during the time they were in school, while the latter retain all their freedom for their life outside school. But in any case – and this is the fact I want to emphasize at the start – complete freedom of choice for all was, unfortunately, not on offer. This was less a choice between freedom and restriction than a choice between freedoms; our commission was responsible for advising on how such freedoms should both be guaranteed and limited in the best interests of all.⁴⁷⁵

⁴⁷² Stasi Commission, *supra* note 365, at 47. (While the some “girls or women voluntarily wear the veil, others cover under constraint or pressure,” and sometimes by violence. The girls, once veiled, can cross the stair-wells of apartment buildings and go on the public highway without fearing to be decried, even maltreated, as they were before, bareheaded. The veil offers to them thus, paradoxically, the protection which the Republic should guarantee”)

⁴⁷³ See Elaine R. Thomas, *supra* note 457, at 18.

⁴⁷⁴ Jean Baubérot, Interviews, (visited 18 Feb, 2005), http://www.france5.fr/actu_societe/W00137/9/103209.cfm

⁴⁷⁵ Weil, *supra* note 367.

According to Weil, the commission did not base its recommendation on a general enforcement of the constitutional principle of equality between the sexes, conceding that if veiling was automatically equated to a violation of these principles then the Commission should have recommended banning the practice “across the whole of society.”⁴⁷⁶ According to him by its recommendation, the Commission addressed the narrower issue of preventing coercion and protecting the freedom of choice of some of the Muslim girls.⁴⁷⁷

Some feminist scholars have given a very narrow construction of what constitutes a free “autonomous” choice. According to Badinter, whenever a girl puts on a headscarf she is forsaking her personal autonomy.⁴⁷⁸ She argues that even when the girl asserts that the decision is her own it still does not represent autonomous choice, because it has been conditioned by cultural norms that are inimical to personal autonomy – “the Muslim values of female restraint, modesty and seclusion.”⁴⁷⁹ According to Badinter, the autonomy of a person depends not only how a person makes a choice, but also on the type of choice she makes. Mookherjee describes such a conception of autonomy as “content-dependent” autonomy.⁴⁸⁰ There are a number of cultural or religious conventions that are inconsistent with a robust exercise of personal autonomy. However, these conventions cannot and should be changed coercively through law. The liberal state is supposed to be neutral between different conceptions of the good and paternalist measures based on enforcement of “content-dependent” autonomy” are in contradiction with such a position of state neutrality.

⁴⁷⁶ *Id.*

⁴⁷⁷ Gareluk, has also noted that some initial surveys showed that about 50 % of Muslim women were in favor of the ban, which “raises suspicions that Muslim women do require assistance through state legislation as a means towards gender equality” and “certain protections from the state to ensure their capacity to become free and equal persons.” (See Gareluk, *supra* note 438).

⁴⁷⁸ See Monica Mookherjee, *Affective Citizenship: Feminism, Postcolonialism and the Politics of Recognition*, 8 (1) CRITICAL REVIEW OF INTERNATIONAL SOCIAL AND POLITICAL PHILOSOPHY, 31, 33 (2005).

⁴⁷⁹ *Id.*

Commenting on the central place the Stasi Commission accorded to the distinction between girls who wore the headscarves by their own choice and those who wore them as a result of coercion, Asad pointed out that the Stasi Commission did not consider at all what were the “real” desires of those Muslim girls that did not wear a headscarf to school. It was possible, Asad, claimed, that some of those girls wanted to wear headscarves but were embarrassed to do so because of how their French classmates or people on the streets might react. As, Gunn observes, a number of agents in the French society are putting pressure on Muslim women not to wear a headscarf—school officials, politicians, employers; however the Commission selectively ignored that issue.⁴⁸¹

In relation to the issue of coercion, Asad has made another important point—the binary opposition of free choice versus coercion, in respect to the wearing of the headscarves is a semiotic constriction not an objective finding of fact, since “in ordinary life the wish to choose one thing rather than another is rooted in dominant conventions, in loyalties and habits one has acquired over time, as well as in the anxieties and pleasures experienced in interaction with lovers and friends, relatives, teachers and other authority figures.”⁴⁸² While it is true, that we cannot speak of a “free choice” independent of social influences, such simplification and reduction to opposites might be difficult if not possible to avoid. Nevertheless, even such schematic constructs should not be built so narrowly and should not exclude selectively, because the law may become fatally underinclusive.

Before considering the proportionality of the means through which the law addresses the issue of coercion, it is necessary to consider the argument voiced by the Islamic Human Rights Commission (IHRC), which brings into play not only the

⁴⁸⁰ *Id.*

⁴⁸¹ Gunn, *supra* note 86, at 473.

rights of students but also the interests and rights of their parents. According to the IHRC even if children were being coerced by their parents to wear headscarves, this was a legitimate exercise of the rights of parents to educate their children according to their own religious convictions. The state had no right to replace the parental authority over the child with “state control over the dress of individuals of an entire section of the community.”⁴⁸³ The IHRC referred to the Protocol 1 of the European Convention on Human Rights, as an international instrument obliging the state to respect the “the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”⁴⁸⁴

I would argue that the age of the students is of high relevance to the issue of coercion. When older students wear headscarves then the argument that they may wear it by their own volition is the strongest. However, when the students are very young children, then it is difficult to argue that veiling is the result of the students own free choice. As Raday observes, “genuine individual consent to a discriminatory practice or dissent from it may not be feasible where these girls are not yet adult.”⁴⁸⁵ For example, the NA Report referred to a case in which the family of a child of eight and a half informed the school officials that as of January 2000, when the child turned 9, she would go to school wearing a headscarf.⁴⁸⁶ In cases as this one, the binary opposition – coercion versus free choice is inapplicable, since it is clear that such a young child cannot form an opinion of her own.

⁴⁸² Asad, *supra* note 471.

⁴⁸³ Islamic Human Rights Commission, *Muslim Women, Human Rights and Religious Freedom: Europe Under the Spotlight of National and International Law*, 8 March 2004, <<http://www.ihrc.org.uk/show.php?id=1025>>.

⁴⁸⁴ European Convention on Human Rights, Article 2 - Protocol 1.

⁴⁸⁵ Frances Raday, *Culture, Religion, and Gender*, Roundtable: An Exchange with Ronald Dworkin, 1 INT'L J. CONST. L. 663,709 (2003).

⁴⁸⁶ NA Report, *supra* note 363, section - Des brèches importantes s'ouvrent dans le respect de la laïcité à l'école.

According to Weil, the law took full notice of the age factor. This was the reason why the ban applied only to public schools where students are minors and not universities, since “adults have means of defense that children do not; they can go to court and otherwise claim their right of freedom of conscience in ways children cannot.”⁴⁸⁷ However, at the same time he openly acknowledges that there are Muslim girls who wear the headscarf by their own free will –out of religious considerations, or as means of identity assertion, etc. This reveals that the question of when, at what age, can we consider students to be capable of making such choices themselves as to wearing a religious symbols is a difficult one. To draw the line between the school and the university might be an easy but a misleading move.

Nevertheless, as was noted above, it cannot be debated that very young children would wear headscarves only because their family has made that choice for them. On the one hand, parents constantly make choices on behalf of their children; it is their duty to do so. And generally it is their sincere belief that the choices that they make are in the best interest of their children. Parents are in the best position to make such choices since they know their children best and they love them the most. On the other hand, there are instances where the state should intervene when there is evidence that parents are abusing their special relationship, when it is evident that the interests and the rights of children are seriously harmed by the choices parents make for them.

Beller noted that in French legal culture in contrast to the US, the state rather than the parents that has “the ultimate responsibility to educate a child.”⁴⁸⁸ She criticizes the jurisprudence of the Conseil d’État for not addressing the possible

⁴⁸⁷ Weil, *supra* note 367.

⁴⁸⁸ See Beller, *supra* note 354, at 612. Of course, France has ratified Protocol 1 to the European Convention on Human Rights, whose Art.2 provides that: “In the exercise of any functions which it

tensions that exist between the parent's rights to ensure that the education of their children does not directly oppose their religious beliefs and the mission of the public school to "impart French culture and prepare students for French citizenship."⁴⁸⁹ The choices parents may on behalf on their children may come into conflict with the constitutional principle of equality of the sexes and also may have the effect of impressing on child an identity that is distinct and separate and does hinder her integration into French society. Despite these concerns, there is always a balance to be made, between the rights of parents and the interest of the state, and the child's best interest should be the primary consideration.

In the present context, while I do not think that it is wise choice to make an 8 or 9 year old girl wear a headscarf in order to comply with religious prescriptions on modesty and to tell her as so small a child that to be a good person she has to hide her body, I do not think, however, that such a parental decision compromises the child's interests and rights so severely as to justify the coercive intervention of the state.⁴⁹⁰ As long as the state ensures that the child is provided with an education that would enable her to acquire independence of thought and to be able to take a critical look at different religious and cultural norms in due course, her own included, such a parental choice needs to be respected. Both the child's right to exit and her interest in maintaining family and communal ties have to be protected.

Weil explained that the target of the law was a "large majority" of Muslims, who although not wishing to force their daughters to wear headscarves are nevertheless sensitive to any suggestion that they are not being faithful to their

assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

⁴⁸⁹ *Id* at 613.

⁴⁹⁰ See also Alex Colvin, *Muslim Headscarves Around the World Define Religious Expression Policies*, *International Coalition for Religious Freedom*, Summer 2004, <<http://www.religiousfreedom.com/nwsltr/headscarves.htm>>, ("While states also have a right to pass

religion, and are thus vulnerable to pressure from their community or family members that do wish to impose the headscarf. When the law is in force, they can withstand this pressure – it will not be their unwillingness to follow advice how to be faithful to religion, but the law that prevents them from forcing young girls to wear the headscarf. Weil, asserts that “the emotional logic is clear: a ban on religious display via the law, from the “outside”, ensures the protection of children from fundamentalist pressure yet does not enforce a break in religious ties.”⁴⁹¹ This kind of paternalist protection of part of the Muslim community, however, clearly trumps on the religious freedom rights of the another part of the same community.

Borrowing the terms from German constitutional jurisprudence, the Commission then, according to Weil, sought to achieve a balance between the positive and negative rights to freedom of religion of the Muslim girls.⁴⁹² He admitted that the balance achieved had “one unfortunate consequence: the right of Muslim girls who freely want to wear the scarf in public schools, without pressuring anyone else, is denied.”⁴⁹³ These girls, if they do not comply with the law would most probably go to private religious schools, if they go to school.

I would argue that in the balancing process the Commission did not give due weight to the rights of those girls who sincerely wanted to wear headscarves. What is more, naming the balance one between positive and negative freedom may be misleading in that on the one hand there is the right of some of the students to manifest their religion undisturbed by the state, and on the other hand the positive obligation of the state to protect the negative freedom of other students from private

appropriate legislation to protect minors from abuse, opponents of the French law argue that unnecessary codes of dress or behavior should not be used under the guise of preventing abuse.”).

⁴⁹¹ Weil, *supra* note 367.

⁴⁹² Justin Vaisse has also described the problem as one balancing of the freedom of girls who desire to wear the scarf and those that do not but are pressured to do so. (Justine Vasse in *The Veil Controversy*:

parties. It is unlikely that the pressure or coercion upon some of girls will be stopped by the law—outside school, these girls are in no better situation. Even, the plight of these girls may be increased, if they are excluded from public school for non-compliance with the law and remain home or sent to Coranic schools. That is why Baubérot has suggested that when the veil is worn because of pressure or coercion, then the girls' rights would be better protected by contacting the girls' parents or through the activities of the social services.⁴⁹⁴ And when violence or harassment occurs against girls who decide not to cover their heads, proper disciplinary measures and criminal law enforcement are the means to prevent that. Finally, the balance achieved by the law left out the Jewish and Sikh boys as well.

According to Baubérot, it is a fact that Muslim women are going through a process of emancipation, and “feminine emancipation has always been accompanied by chauvinist type speeches and attempts to control women.”⁴⁹⁵ Thus in the past Christian men also used religion as their “alibi” while there were trying to thwart the emancipation of women.⁴⁹⁶ The worst possible effect of the law may be to deprive young women of schooling. According to him then “the only instruction they will have will be from Islamists because this is the social system that will take charge of it”.⁴⁹⁷

It should also be noted that when religious norms are used to justify a given practice it is best to leave the interpretation of the norms to evolve within the

International Perspectives on Religion in Public Life, The Pew Forum on Religion and Public Life, Event Transcript, Monday, April 19, 2004, <<http://pewforum.org/events/?EventID=55>>.

⁴⁹³ *Id.*

⁴⁹⁴ *European Islam's News, Interview with Jean Baubérot*, (visited 10 Feb. 2005), <http://www.confronti.net/english/archives/apr04_01.htm>.

⁴⁹⁵ *Id.* See also, *An Unholy Alliance*, <<http://weekly.ahram.org.eg/2004/674/op2.htm>>; <<http://www.hanitzotz.com/society/veil.htm>>. (“This is no more than the age-old patriarchal struggle over women's heads, the fear that they might begin to think and throw off the bonds of slavery, of an inferiority enforced on them in all religions and in all societies.”)

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.*

religious tradition. Change should not be imposed from the outside.⁴⁹⁸ Such a process has already been commenced by Islamist feminists who reinterpret the Islamic texts in order to differentiate between Islamic principles and the subverting influence of Pre-Islamic patriarchy.⁴⁹⁹ Emancipation from the outside may have the opposite results. Elhabti's reference to what happened in Algeria in 1958 is an example in point. When a ceremony took place in which French women were unveiling Algerian women to show their emancipation, many Algerian women, who had long ago dropped the veil responded by donning it again.⁵⁰⁰ This was a statement that Algerian women did not liberate themselves at the invitation of France.

Finally, while the law is supposed to fight coercion of Muslim girls, it is itself a form of coercion, exerted upon those girls who wish to wear the headscarf. As ElHabti, has argued, "forcing women to take it off is no better than forcing them to wear it, both ways are discriminatory and undemocratic."⁵⁰¹ According to the European Council of The Fatwa and Research on the Question of the Islamic Scarf In France, "to force the Moslem woman to take off her veil - which expresses her religious conscience and her free choice - constitutes one of largest persecutions of

⁴⁹⁸ See Bauberot, Interview, *supra* note 498, "Religions are transformed through an inner modernization and not through increased external repression which, to the contrary, adds only tension and makes the conflict more difficult."

⁴⁹⁹ See Lyon and Spini, *supra* note 416, at 343.

⁵⁰⁰ Raja ElHabti, *The Veil Controversy*, *supra* note 492.

⁵⁰¹ See Raja Elhabti, *Laïcité, Women's Rights, And The Headscarf Issue In France*, (visited May 11, 2005), <http://www.karamah.org/docs/Veil_Paper.pdf>, at.7. See also Donna J. Sullivan, *Gender Equality and Religious Freedom: Toward A Framework For Conflict Resolution*, 23 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 795, 828, providing a detailed discussion of the practice of *purdah* and the possible conflicts between enforcing gender equality and protecting religious freedom rights, notes that "Where religious leaders promote *purdah* or where political authorities wish to reject demands that veiling be mandated, educational measures designed to promote acceptance of women's equality in social, economic and political life may represent the best means of addressing the effects of *purdah* on gender equality without unduly infringing religious rights. Measures prohibiting veiling would constitute a disproportionate restriction on the right of Muslim women themselves to engage in customary practices imbued with religious significance."

the woman” which cannot be reconciled with the French values that defend the dignity of the woman, and her personal and religious freedom.”⁵⁰²

c) Pressure to conform

Another argument proposed as a justification for the law, is that the fact that some Muslim girls are wearing headscarves at school while others are not was bringing pressure to the later group “to conform,” that is to start covering their heads as well in order to be considered “good” Muslims. According to the Stasi Commission, girls that do not wear the veil “perceive it as a sign of inferiorization which locks up and isolates” and the women not wearing headscarves are “indicated as “impure”, even “inaccurate”. ”⁵⁰³

This pressure, it is claimed, comes from the girls wearing headscarves, as well as, from “the mostly male aggressors” who claim that girls not covering their heads are “bad Muslims” and “whores” and should do as their sisters who follow the prescriptions of the Koran.⁵⁰⁴ Since it is the girls who wish to wear headscarves and they are the ones whose rights are restricted, it is necessary first to examine the argument that they are harassing other Muslim girls.

The figures cited by Elhabti do support the counter argument that she advanced: out of 500 000 Muslim girls, only less than 1 percent – 1 500, wear headscarves.⁵⁰⁵ It is really hard to imagine how such a minority can intimidate the large majority of girls who do not wish to wear the headscarves, and that is assuming that all those girls who wear headscarves engage in such harassment, which is not a realistic assumption, if the claim that most of them do it because of pressure is true.

⁵⁰² Communiqué du Conseil européen de la fatwa et de la recherche sur la question du foulard islamique en France, (<<http://www.reseauvoltage.net/article11779.html>>).

⁵⁰³ Stasi Commission, *supra* note 365, at 47.

⁵⁰⁴ Weil, *supra* note 367.

⁵⁰⁵ Raja Elhabti, *The Veil Controversy*, *supra* note 492., citing a government report.

When such intimidation and harassment does come from certain girls wearing headscarves, then such cases already fell under the grounds for limitation of the religious signs elaborated by the 1989 decision of the Conseil d'État, because such acts would be an instance of aggressive proselytizing.

It is of course possible that at certain schools the majority of Muslim girls might be wearing headscarves, and then the small minority of girls who do not wish to wear them might really experience peer pressure to conform to the practice of the majority. As the discussion on the problem of coercion in the school prayer cases showed, the pressure to conform experienced by young students is a key consideration in the analysis of the constitutionality of religious exercises in the jurisdictions discussed.

Does the peer pressure to wear headscarves lead to the same problem of coercion as in the school prayer cases, and therefore warrant the abolition of the practice? I would argue that there are substantial differences between the two contexts, which call for different legal solutions. The key difference between the two cases is that in the school prayer case, the state, through the school authorities was either mandating, encouraging or could be perceived to encourage the religious exercise and therefore the principle of neutrality was breached. The exercises were carried out under the auspices of the state and although children could be exempted, opting out was not a realistic choice because of peer pressure. However, neither in the US nor in Canada, have courts ruled that students should be forbidden to gather and pray on the school premises when not involved in school activities.

When the religious exercise is a purely private religious expression the school cannot constitutionally forbid it. It is true that students not participating will feel and be perceived as different, but an outright ban on all voluntary private religious

expression at school in order to protect some children from feeling different seems a largely disproportionate measure. As was already noted, when the wearing of religious signs constitutes an act of pressure or provocation under the jurisprudence of the Conseil d'État the school authorities have the right to interfere.

Weil also speaks of “male aggressors” and mentions cases in which “pupils who have had their arms broken in violent acts have lied to their parents in order to avoid denouncing their peers.”⁵⁰⁶ According to him, neither the police nor judicial complaints can effectively solve this problem.⁵⁰⁷ I would argue that when such violent acts occur, it is the obligation of school authorities to intervene, punish the aggressors, and enforce strict discipline.

1.3.1.3 EQUALITY BEFORE THE LAW

According to the NA report, the difficulties in interpretation of the constitutional principles elaborated in the decisions of the Counsel d'État leads to lack of uniformity in their application. Since the solutions adopted by different schools vary to a great extent—headscarves are permitted on the playground but not in class, tolerating scarves of particular colors, tolerating certain types of headscarves but not others, the report argued that these inconsistencies had lead to the emergence of “a true local right.”⁵⁰⁸ The report noted that such diversity of solutions resented a “real rupture of equality before the law.”⁵⁰⁹ That is why it claimed that a law passed by parliament banning religious signs worn by students would “allow the uniform application of a fundamental freedom, the freedom of religion, in the whole of the

⁵⁰⁶ Weil, *supra* note 367.

⁵⁰⁷ Marc Perelman, *French Ban on Muslim Veil Protects Girls, Advocates Say*, interview with Patrick Weil, January 23, 2004, <<http://www.forward.com/issues/2004/04.01.23/news9.html>>.

⁵⁰⁸ NA Report, *supra* note 363, section - La création d'un « droit local » pour l'exercice d'une liberté fondamentale.

⁵⁰⁹ NA Report, *supra* note 363, section - Des brèches importantes s'ouvrent dans le respect de la laïcité à l'école.

school establishments and thus would guarantee the constitutional principle of equality.”⁵¹⁰

This argument relies on the premise that in all situations the right to freedom of exercise and freedom of expression of the students should be restricted in the same way, that is, that all cases involving the wearing of religious signs are alike. This is precisely what the jurisprudence of the Conseil d’État rejected, by listing only a limited number of situations in which restrictions of the wearing of religious symbols were justified. A correct application of the jurisprudence of the Conseil d’État does not lead to a denial of equality before the law, nor does it mean, as the president of the NA Commission claimed in one of the hearings “that the right is not the same for all.”⁵¹¹ The limits on the right elaborated by the Conseil d’État apply to all students equally, and these limits have been made clear enough by its jurisprudence.⁵¹²

The principle of equality before the law was also evoked by opponents of the law, who claimed that it constituted a discrimination on the basis of religious convictions, which is forbidden by the Constitution, as well as, a denial of equal access to education.⁵¹³ As a number of commentators have noted, although the law is

⁵¹⁰ NA Report, *supra* note 363, section - Un dispositif législatif qui garantit un juste équilibre entre liberté de religion et principe de laïcité dans le respect de la Constitution et conforme au droit international.

⁵¹¹ Errera- hearings, *supra* note 406.

⁵¹² In some cases, the report pointed out, when identical situations came before the administrative courts they were resolved in the opposite ways. However, it has been noted that the reason for the different outcomes such cases lies in the fact that the school authorities advanced different justifications for the prohibition. General prohibitions, banning headscarves because they were a religious symbol, were stricken down, but when school authorities justified prohibition because of law and order problems, they were upheld. (See Mission d’information de l’Assemblée nationale française sur la question du port des signes religieux à l’école - Audition de M. Rémy SCHWARTZ, maître des requêtes au Conseil d’Etat, <<http://www.voltairenet.org/article11978.html>>, (hereinafter “ Schwartz – hearings”).

⁵¹³ “This law suggested, even if it appears to include all the “religious signs”, aims into final at prohibiting the Islamic veil, which constitutes a religious discrimination against the Moslems, and is contrary with all the constitutions, in what we commonly call the free world,” (See Conseil européen de la fatwa , *supra* note 502). See also *France: Headscarf Ban Violates Religious Freedom, By Disproportionately Affecting Muslim Girls, Proposed Law Is Discriminatory*, Human Rights Watch, <http://hrw.org/english/docs/2004/02/26/france7666_txt.htm>, (“The impact of a ban on visible religious symbols, even though phrased in neutral terms, will fall disproportionately on Muslim girls, and thus violate antidiscrimination provisions of international human rights law as well as the right to

couched in neutral terms it's primary target are religious minorities and Islam in particular.⁵¹⁴ Such inordinately large crosses as the ones prohibited by the law are not a common sight at French schools.⁵¹⁵

The argument for discrimination centers on both the intent and effect of the law. The ECRI in its recommendation encouraged France to evaluate this measure “from the perspective of indirect discrimination.”⁵¹⁶ It referred to its General Policy Recommendation No 7 according to which indirect racial discrimination exists:

in cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as “race”, color, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification. This latter would be the case if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realized.⁵¹⁷

Furthermore, even assuming that there are students, wearing large crosses and that they will be affected by the law as well, there is a significant difference between them and the students of minority faiths affected by it. For a large number of the Sikh, Jewish, and Muslim students the wearing headgear constitutes a fulfillment of a religious mandate, not only an expression of their religious identity.⁵¹⁸

equal educational opportunity.”); Christopher Caldwell, *Veiled Threat*, THE WEEKLY STANDARD, 01/19/2004, Volume 009, Issue 18,

<<http://www.weeklystandard.com/Content/Public/Articles/000/000/003/583lxmcr.asp?pg=1>>, “The neutrality of the law is a fraud, because France is worried about *Islam*, not about “religion.”... Clearly *laïcité* is not the principle that is being defended here--it is being defended, yes, but only incidentally, as a means of curbing Islam while allowing the French state to appear politically correct.”

⁵¹⁴ *European Islam's News, Interview with Jean Baubérot*, (visited 10 Feb. 2005),

<http://www.confronti.net/english/archives/apr04_01.htm>.

⁵¹⁵ *Id.* See also Jean-Michel Baylet, *La laïcité veut empêcher l'affrontement religieux, pas le provoquer*, (Secularity wants to prevent the religious confrontation, not to cause it), <www.reseauvoltaire.net/article11175.html>, (“It is thus completely hypocritical to pretend to believe that the problem arises equally for all the religions and the signs of membership which were unfortunately tolerated for a long time at the school.”).

⁵¹⁶ CRI (2005) 3, Third report on France, Adopted on 25 June 2004 and made public on 15 February 2005, European Commission Against racism and Intolerance,

<http://www.coe.int/T/E/human_rights/Ecri/1-ECRI/2-Country-by-country_approach/France/France_CBC_3.asp#TopOfPage>, at.79.

⁵¹⁷ *Id.*, at footnote 12. Another formulation of the test is that such a law should be “objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary” (Equality and Non-Discrimination: Annual Report 2004, European Commission)

<http://www.stop-discrimination.info/fileadmin/pdfs/Reports/Annual_Reports_2004/annualrep2004_en.pdf>.

⁵¹⁸ See “L’affaire du foulard islamique,” Q NEWS, January 2004, <<http://www.q-news.com/353.pdf>>.

President Chirac stated that the principle of *laïcité* is non-negotiable.⁵¹⁹ In reality, however, the principle of *laïcité* is not applied in the same way through the whole of France. It should be noted that the Stasi Commission stated that the affirmation of secularity need not lead to any changes in the “special” status of the Alsace-Lorraine region (the departments of Bas-Rhin, Haut-Rhin, and Moselle).⁵²⁰ Without giving any explanation for this statement it noted that the population of the three departments is “particularly attached to this status.”⁵²¹ Baubérot has suggested that making compromise with the inhabitants of that region, but refusing to give anything to the Muslims, does not amount to a principled position on the implementation of the principle of secularity.⁵²² Thus France, secular and indivisible, because of considerations of history,⁵²³ can tolerate crucifixes on the walls of classrooms in a certain region, a practice that arguably violates the secularity of education because it much more clearly implicates the state in promoting a religious doctrine, but refuses to tolerate a headscarf or a turban as a student’s private religious expression.

1.3.1.4 INTEGRATION

⁵¹⁹ *Un Code de la laïcité*, Discours de Jacques Chirac relatif au respect du principe de la laïcité dans la République, (visited 16 May 2005), <<http://www.reseauvoltage.net/article11805.html>>.

⁵²⁰ The only recommendation it made was that the practice of requiring a specific request from parents wishing to exempt their children from religious education should be changed, so that the subject becomes voluntary, and that Islamic religion be also offered as a course. (See Stasi Commission, *supra* note 365, at 51.)

⁵²¹ Stasi Commission, *supra* note 365, at 51.

⁵²² Jean Baubérot, *Point De Vue : Pouvons-nous - en la matière - presque tout concéder aux Alsaciens-Mosellans et pratiquement rien aux musulmans ?* LE MONDE, 03.01.04, 15h02, <<http://www.ac-versailles.fr/PEDAGOGI/ses/themes/laicite/bauberot.html>>.

⁵²³ The three departments of Alsace-Lorraine were annexed by Germany between 1870 and 1918, during the time that 1901 and 1905 laws came into effect. When they were acceded to France after World War I, they were allowed to continue applying the Napoleon-Pius VII Concordat of 1801 and other laws adopted in the nineteenth century. (See Gunn, *supra* note 383, at 18.)

The problems related to the integration of the large Muslim community of France seem to be the underlying concern behind the enactment of the 2004 law.⁵²⁴ Integration although not an explicit constitutional value can be inferred from the principle of the indivisibility of the Republic, postulated by Art. 1. The principle of secularity is related to integration. According to the Stasi Commission the principle of secularity has the task to forge unity while and at the same time respecting the diversity of the society.⁵²⁵ Secularity makes possible the coexistence of people who do not share the same convictions and the weaving of a social bond among them, so that they do not become communities that are closed within themselves with no ties with the rest of society.⁵²⁶

The public school is the foremost place where the socialization process and the forging of the social bond take place.⁵²⁷ The wearing of religious signs at school arguably hinders the socialization mission of the school, because it pushes forward religious identity and also contributes to division of the students along religious lines.⁵²⁸ The law banning ostentatious religious symbols, according to the Stasi

⁵²⁴ See Elaine R. Thomas, *supra* note 348, at 175 (“The crux of the national debate was how and whether public expressions of cultural and religious differences--particularly those of new social groups of recent foreign origin--could be reconciled with maintaining and reproducing a cohesive French national community.”). “The polemics over the right to wear a headscarf to school was little more than a proxy conflict for the true issue, the position--social, political, cultural--and integration of the large North African Muslim immigrant community into French society.” (See Maier, *supra* note 461, at 25.) See also Michel Tubiana, president of the League of the human rights, at the hearing before the Stasi Commission. The veil is “a smoke screen, a manner of avoiding, of hiding other debates differently more significant: violence, ghettoisation, school maladjustment, work, transport, unemployment, housing. We are more confronted with a question of integration than of secularity”. <http://www.aidh.org/laic/sta-11-12-03-audit.htm>.

⁵²⁵ Stasi Commission, *supra* note 365, at 18.

⁵²⁶ *Id.*

⁵²⁷ In the Republican tradition the public school has always been considered “the prime site of integration” and one of the primary missions of the public school teachers has been “to institute the nation.” (See Jane Freedman, *Secularism as a Barrier to Integration? The French Dilemma*, 42 (3) INTERNATIONAL MIGRATION 5, 10-11 (2004).)

⁵²⁸ NA Report, *supra* note 363, section -- Le port des signes religieux et politiques : une manifestation du communautarisme, (“the school, which should be a protected and neutral framework, becomes the privileged ground of these identity claims, which are likely to extend to other institutions (university, place of work) as the pupils grow.”).

Commission, should be understood “like a chance given to integration” as a means “to fix a rule of a joint life.”⁵²⁹

The law, however, as has been pointed out by a number of commentators, is likely to be counterproductive, and instead of serving the goal of integration, is likely to exacerbate social division and the alienation of a large part of the Muslim community.⁵³⁰ Integration can be achieved through inclusion and respect for diversity, not by exclusion and elimination of all signs of difference.⁵³¹ As Errera has pointed out, the general, neutral formulation of the ban cannot mislead anybody, and this ban would be perceived by many of the French Muslims as “an act of exclusion.”⁵³² The public school cannot achieve its mission of integration by excluding students because of their peaceful religious expression. As Errera has argued, the feeling of religious discrimination would be added to the feeling of discrimination in employment and housing experienced by a large part of the Muslims in France.⁵³³ This highlights another weakness of the law—it does not address the real cause of the problems related to integration, namely the problems of “poverty, unemployment, poor housing, and discrimination”⁵³⁴ which are experienced most acutely by the young generation of the *Beurs*.

Commenting on the fact that a large number of teenagers were donning the veil, while their mothers had long ago abandoned it, Baubérot noted that this phenomenon was related to two general trends that were not specific to Muslim immigrants in particular. The first one is that while the first generation of immigrants

⁵²⁹ Stasi Commission, *supra* note 365, at 59.

⁵³⁰ See e.g., Freedman, *supra* note 527, at 22.

⁵³¹ See Raja ElHabti, *The Veil Controversy*, *supra* note 492, quoting De Saint-Exupéry, “Your difference, my brother, far from scaring me, enriches me,” and asking “How do French officials, then, expect to teach their kids to live in a diverse society if they think that every sign of difference should be banned from schools, and how do they intend to erase more inherent signs of difference: color of skin and difference of gender?”

⁵³² Errera- hearings, *supra* note 406.

⁵³³ *Id.*

“wants to be assimilated by becoming as invisible and silent as possible, because they do not feel themselves members of the host country,” the second and the later generations already feel that they are citizens of the country but at the same time want to rediscover “their own diversity or specificity.”⁵³⁵ The second trend is related to globalization. According to Baubérot, globalization by bringing about a certain type of “uniformity” engenders in its turns a desire to “specifically re-identify oneself, against any uniformity.”⁵³⁶ These two trends add to the poor social conditions in which a large number of the families of Muslim immigrants live, and thus provide a plausible explanation of the causes of the phenomena of identity assertion demonstrated by the wearing of headscarves.⁵³⁷ They also show why the law is not rationally related means for coping with the problems of integration.

Furthermore, the mission of the public school cannot be achieved when the student is excluded for failure to take off a religious dress item. The NA Commission argued that the probability of children going to private religious schools as a result of the law was not an argument against it since before the adoption of the law private schools were already collapsing under the requests for enrollment by students leaving public schools because of the various conflicts occurring there.⁵³⁸ However, when children go to private schools they are not forbidden to wear religious symbols. Therefore, it is not the students’ religious symbols that are the primary cause of the undesirability of the public schools.

⁵³⁴ See Husain Haqqani, *The Veil Controversy*, *supra* note 492.

⁵³⁵ *European Islam's News, Interview with Jean Baubérot*, (visited 10 Feb. 2005), http://www.confronti.net/english/archives/apr04_01.htm.

⁵³⁶ *Id.*

⁵³⁷ See also Lyon and Spini, *supra* note 416, at 342., arguing that: “If the life choices of Muslim women are a concern of the French state, it is the background social, economic, legal and political conditions in which they live, including the everyday reality of racism, that need to be the focus of attention, to create conditions in which choice can be real.”

⁵³⁸ NA report, *supra* note 363, section - Le port des signes religieux et politiques : une manifestation du communautarisme.

1.3.1.5 FIGHTING ISLAMIC EXTREMISM

Another argument voiced to justify the law, was that it is necessary to fight the spread and the influence of radical Islamist groups. According to Weil, “the wearing of a headscarf or the imposition of it on others is much more than an issue of individual freedom: it has become a France-wide strategy pursued by fundamentalist groups who use public schools as their battleground.”⁵³⁹ This is both a law and order argument and one related to preserving the democratic character of the state as guaranteed by Art. 2 of the Constitution.⁵⁴⁰ Baroin has presented such a type of “militant democracy” argument claiming that “Western modes are questioned because the extremism develops under cover of freedom of expression and the institutions are called into question in their missions even under pretext of respect of the differences.”⁵⁴¹ He argued that the situation in certain districts in France was similar to what happened in Iran in 1979 and in Algeria since 1992 in that Islamism there was carrying a “strong revolutionary dimension.”⁵⁴²

This argument, however, is particularly unconvincing. Even if there was a danger to the democratic institutions posed by the development of radical Islam in France, it is highly unlikely that banning the wearing of headscarves at public school will diminish that threat.⁵⁴³ On the contrary, as the International Helsinki Federation for Human Rights argued, this law is very likely to result in increased “alienation and

⁵³⁹ Weil, *supra* note 367.

⁵⁴⁰ Art. 2 (1) France is an indivisible, secular, democratic, and social Republic.

⁵⁴¹ Rapport de François Baroin « Pour une nouvelle laïcité » (Club Dialogue & Initiative), <<http://www.reseauvoltaire.net/rubrique506.html>>. See also Stasi Commission, *supra* note 365, at 59.

⁵⁴² *Id.*

⁵⁴³ See e.g., Baines, *supra* note 458, at 323.

marginalization” of the French Muslims.⁵⁴⁴ Such a result would only further the possibility for increasing the influence of radical Islamist groups.

Another effect of the law that demonstrates its lack of proportionality is that “it would “automatically but mistakenly stigmatize all Muslim women wearing the headscarf as fundamentalists.”⁵⁴⁵ A symbolic equation between the headscarf and Muslim radicals was suggested also by Weil, who stated that “the wearing of a headscarf or the imposition of it on others is much more than an issue of individual freedom: it has become a France-wide strategy pursued by fundamentalist groups who use public schools as their battleground.”⁵⁴⁶ A similar politicization of the headscarf was also made by the NA report which noted that demonstrations of anti-Semitism which too often accompany the identity claims of “certain young Moslems,” particularly at public schools “do not have much to do with the religious practice,” arguing therefore that headscarves were turning more into a political and ideological symbol than being simple a religious sign.⁵⁴⁷ However, as the European Council of The Fatwa and Research rightly pointed out, a law that takes into consideration the “unworthy” behavior of some Muslims in order to legitimize the deprivation of the right to freedom of religious manifestation of a large majority of Muslim girls in France is clearly disproportionate.⁵⁴⁸

Another member of the Stasi Commission, Tourain, after describing what he called the ghettos around Paris and the growing influence of radical Islamist groups stated that the Commission thought “right or wrong” that they had to state in

⁵⁴⁴ *French Ban on Religious Symbols Would Violate International Protections of Freedom of Religion*, IHF, (visited at 30 Jan 2005), <http://www.ihf-hr.org/viewbinary/viewhtml.php?doc_id=5259>. See also, Husain Haqqani, *The Veil Controversy*, *supra* note 492.

⁵⁴⁵ IHF, *supra* note 544.

⁵⁴⁶ Weil, *supra* note 367.

⁵⁴⁷ NA Report, *supra* note 363, section -- Le repli communautaire : une tentation pour les jeunes en difficulté.

agreement with the “vast majority” of the French population “stop, to the development of a certain number of practices, of speeches.”⁵⁴⁹ He explained that since the public debate was centered on the veil, firstly they had to oppose that practice, since in his view they “could not attack groups or imams or anybody else if you at the same time take a completely opposed position accepting the veil which has never been accepted.”⁵⁵⁰ Such a line of argument is very unconvincing. It tries to make out of the veil a symbol of all the problems of integration and the spread of radical Islam in France. It is also surely not contradictory to protect the right to freedom of conscience and of religious expression of students, and at the same time oppose and take measures against actions that threaten the rights and freedoms of others or undermine the public order. Terrain’s statement amounts to the following argument: “In order to restrict Islamic militancy, we must first restrict the peaceful religious expression of Muslim girls at public schools!”

1.3.2 Law and Order

Discussing the relationship between secularity and religious freedom the Conseil d’État stressed that, “[i]ndissociable of the freedom of conscience and religious freedom, secularity must allow the religious diversity of the company, which includes the possibility for the various religious sensitivities of cohabiting in public space, in so far as do not arise difficulties of law and order.”⁵⁵¹ This section will deal with several arguments, all based on the concept of law and order, which are offered as justification for the ban. Before that it should be mentioned, that according to the jurisprudence of the Conseil d’État law and order was a possible ground for limitation

⁵⁴⁸ See Conseil européen de la fatwa , *supra* note 502.

⁵⁴⁹ See Tourain, *supra* note 439.

⁵⁵⁰ *Id.*

⁵⁵¹ Conseil d’État, *supra* note 422, at 276.

of the religious expression of students, but school officials had to prove specific threats to law and order in individual cases involving individual pupils. It was also possible to enact general prohibitions if they were “justified by considerations of time and place and [were] limited and proportioned with these considerations of time and place.”⁵⁵² Thus, school officials at a given establishment could prohibit all religious signs for a certain period of time—one term, for instance, provided that they justified that prohibition “by circumstances of time and place.”⁵⁵³

Violent Conflicts

One of the principle justifications for the law for that the wearing of religious symbols by students was the cause of violent conflicts and disorders within the schools.⁵⁵⁴ Weil also identified violence at schools at the main reason for the creation of the NA Commission.⁵⁵⁵

1.3.2.1 ANTI-SEMITISM

The Commission emphasized the recurrence of conflicts within school caused by anti-Semitism.⁵⁵⁶ According to the Commission, it was often dangerous for Jewish boys to wear the kippa, because of the risk of violent attacks by other students. Most often Jewish students were harassed verbally and with offensive graffiti.⁵⁵⁷ Many

⁵⁵² Schwartz - hearings, *supra* note 512.

⁵⁵³ *Id.*

⁵⁵⁴ Stasi Commission, *supra* note 365, at 41, 56-57.

⁵⁵⁵ Weil, *supra* note 367.

⁵⁵⁶ Stasi Commission, *supra* note 365, at 48.

⁵⁵⁷ According to BBC, about 455 “racist and anti-Semitic incidents” were recorded in French public schools only for the autumn term of academic year 2003. (France tackles school anti-Semitism, BBC News, 27 February, 2003, <<http://news.bbc.co.uk/1/hi/world/europe/2806627.stm>>. And according to a report by the National Consultative Commission on Human Rights on Anti-Semitic attacks in 2003, there was an increase in the proportion of such incidents occurring on the school ground - 18 percent of the attacks 16 percent of the threats took place at schools., which is the highest proportion of such incidents in schools since 1997, the latest year for which there is data in the report. The report noted that: “The number of threats testifies most particularly to the persistence of tensions, notably through the language of adolescents and children for whom [anti-Semitic] insults seem to be banal...This 'banalization' of uncivil acts, often provocative, and the aggressive behavior of certain children, notably in the so-called sensitive neighborhoods, accentuate incomprehension and rejection.” (See France: International Religious Freedom Report 2004, US Department of State, Released, September 15, 2004

teachers were having difficulties in teaching about the history of the Jewish community. As a result, a lot of Jewish students were transferring from the public schools to private Jewish and Catholic denominational schools.⁵⁵⁸ The fact that the chief Rabbi of France, after an arson attack on a Jewish school, warned Jewish boys against wearing skullcaps on the streets and the subways, for fear they might become targets for violent attacks, and suggested that they cover their heads with baseball caps instead, is telling enough.⁵⁵⁹

The evidence about the rise of anti-Semitism by the Commission has been confirmed by other sources. A draft Report for the European Commission stressed that this was an urgent problem in France and pointed to “Muslim youth” as those responsible for many of the attacks. This part of the report became controversial and even led to a disclaimer issued by the European Commission.⁵⁶⁰ Another report also identified disaffected young persons of Arab descent as a source of rising Anti-Semitism in Europe.⁵⁶¹ Two reasons are generally offered as explanations for this phenomenon—the poor social conditions and resulting alienation experienced by young Muslims in France and their attitude to the Arab-Israeli conflict that is being projected by them in French society.⁵⁶²

, <<http://www.state.gov/g/drl/rls/irf/2004/35454.htm>>.) There is also a remarkable increase of French Jewish emigration during the recent years. According to the Israeli Government the number of emigrants from France to Israel during 2002 was the double of that in 2001 and had not been higher since the time of the Six Day War. Allegedly hostility and violence towards Jews is one of the main reasons for these high emigration figures (See Jeremy Harding, *What to Wear to School*, London Review of Books, Vol. 26 No. 4, 19 February 2004, <http://www.lrb.co.uk/v26/n04/print/hard01_.html>).

⁵⁵⁸ Stasi Commission, *supra* note 365, at 48.

⁵⁵⁹ *Rabbi Warns French Jews Against Wearing Skullcaps*, AP, November 21, 2003, <<http://www.smh.com.au/articles/2003/11/20/1069027257765.html?oneclick=true>>.

⁵⁶⁰ Elaine R. Thomas, *supra* note 457, at 18-19.; See also Eugene Volokh, The European Union's racism watchdog has shelved a report on anti-semitism, The Volokh Conspiracy, <http://volokh.com/2003_11_16_volokh_archive.html#106953327574511545>.

⁵⁶¹ *The Fight Against Anti-Semitism and Islamophobia: Bringing Communities Together*, European Commission, EUMC, pp 22-30, (visited 1 April 1, 2005), <<http://eumc.eu.int/eumc/material/pub/RT3/Report-RT3-en.pdf>>.

⁵⁶² See Asad . For an analysis of the issue of rising Anti-Semitism in France and the response of the state authorities to the problem see Sylvie Bacquet, *An Analysis of The Resurgence of*

The critical question, not explicitly answered by the commission report, is how a law banning headscarves or other conspicuous symbols would prevent the occurrence of anti-Semitic attacks at state schools. One can argue that the religious symbols ban deals with the problem of anti-Semitism in schools similarly to the way in which regulations prohibiting gang insignia in US schools are supposed to tackle gang violence rampant at certain school districts. However, this analogy does not work for the reason that in French schools the verbal and physical violence does not come from the students wearing such signs—neither the girls wearing headscarves, nor the Jewish boys wearing kippahs, nor the Sikh boys wearing turbans are named in any of the reports or articles as responsible for the anti-Semitic incidents at schools.

The law then is supposed to act on the symbolic plane. Commenting on the rise of racist incidents at school, Ferry stated that, “In an explosive situation we should be able to say to all students: ‘Drop the crosses, the veils, the skull caps, we are going to stop that and play by the rules of the Republic.’”⁵⁶³ The argument is that the wearing of religious symbols at school by bringing forth and emphasizing religious communal identities is exacerbating divisions and conflicts among students along religious lines and brings to the school campus political conflicts, namely the Arab-Israeli one. According to the Stasi Commission, although the school should not be an artificial environment secluded from the real world, the pupils “must be protected from fury of the world,” in order to allow for an environment conducive to their education.⁵⁶⁴ However, the overt affirmation of religious identities brings the

Anti-Semitism In France, JOURNAL OF DIPLOMATIC LANGUAGE I:4 (2004),
<http://www.jdlonline.org/I4Baquet1.html>.

⁵⁶³ *France tackles school anti-Semitism*, BBC NEWS, 27 February, 2003,
<http://news.bbc.co.uk/1/hi/world/europe/2806627.stm>.

⁵⁶⁴ Stasi Commission, *supra* note 463, at 57.

political clashes into the school and give rise to violations of the law and order and attacks on personal freedoms.⁵⁶⁵

It should be noted that a similar argument was also advanced by the school authorities in the case of *SB, R v. Denbigh High School* (2005)⁵⁶⁶ discussed in section XVII. They argued that in schools where there is a diverse body of students, there is a tendency for students to “identify themselves as different from others” along religious or racial lines, and this divisions was conducive to the occurrence of conflicts among the defined groups. This was one of the reasons why the school wanted a uniform policy that would not allow students to overtly identify themselves as belonging to a particular religions.⁵⁶⁷

The banning of symbols however, seems unlikely to resolve the question of racist violence at schools. At least the immediate effect of the law has been to further divide French society and antagonize a significant part of the French Muslim population. On the other had, it is indeed true that if Jewish students cannot be identified at school it is likely that such conflicts would diminish. But then, the authorities would be punishing the victims of such incidents by preventing them from peaceful religious expression and exercise. The government has taken a number of measures to combat the occurrence of Anti-Semitism, including in the sphere of education.⁵⁶⁸ These are the proper means to combat such incidents. The banning of religious symbols, however, is disproportionate in that it burdens the religious freedom of students who are not responsible for the evil the government wants to fight. As Gunn has rightfully argued, the Commission sought the protection of Jewish

⁵⁶⁵ *Id.*

⁵⁶⁶ EWCA Civ 199 (2 March 2005).

⁵⁶⁷ *Id.* at para. 53.

⁵⁶⁸ Third report on France, Adopted on 25 June 2004 and made public on 15 February 2005, CRI (2005) 3, <http://www.coe.int/t/e/human_rights/ecri/1-ecri/2-country-by-country_approach/France/France_CBC_3.asp>.

boys by acceding to their harassers and giving them what they wanted --removal of Jewish skullcaps.⁵⁶⁹ Since these boys are attacked because of their religious identity that the state should not protect them by ordering them to conceal this identity. It should also be noted that the Chief Rabbi opposed the new law⁵⁷⁰ and at the hearings before the Stasi Commission Jean Kahn, President of the Central Consistory Israélite Reception, stated that “Judaism does not wish any modification with the law of separation of the Church and the State.”⁵⁷¹

Moreover, as the discussion above shows, the law is not suited to address the real cause of this offensive attitudes of some of the students—the failure of integration of the French Muslim population. Regarding the potential for the rise of conflicts among students identifying themselves along religious or ethnic lines, the mission of the school should be to teach tolerance and respect for diversity through both curricula and extra-curricula activities, and inculcation of values, and to protect the right of students to religious manifestation. And it is impossible to teach tolerance and respect for diversity if this diversity is banished by the very state agent that wants to promote it.

1.3.2.2 ADMINISTRATIVE DIFFICULTIES

Both reports stressed that the heads of schools were having great difficulties and found it extremely hard to manage conflict situations under the case law of the Conseil d’État, which left the power and responsibility for resolution of such conflict to them, limiting it by the principle guidelines contained in the decisions. The Stasi report emphasized that school officials had great difficulties, applying the decision of the Conseil d’État, working “often insulated in a harsh environment” and that teachers

⁵⁶⁹ Gunn, *supra* note 86, at 473.

⁵⁷⁰ <http://www.upi.com/view.cfm?StoryID=20031211-032204-3206r>

were complaining that they could not fulfill their mission anymore, where pressure was put on them by local forces.⁵⁷² The Commission stressed that it was “particularly sensitive to their distress”⁵⁷³ As, Gunn has noted the Stasi Commission did not identify who were these “local forces” exerting pressure on the officials.⁵⁷⁴ He argued that although the Stasi Commission left one with the impression that these were Muslim communities, the pressure may very well have been coming from those who insisted on banning of the headscarves in violation of the case of the Conseil d’État’ ruling.⁵⁷⁵ Gunn’s argument finds its corroboration in some of the statements presented in the NA report.

One argument that the situation called for the intervention of the legislation in order to preserve law and order, which was presented by the NA Commission Report, was that there was an “evolution” of the attitude of girls which made dialogue and convincing the girls to take off the headscarves very difficult.⁵⁷⁶ The report said that the girls, knew better and better the cases of the Conseil d’État, they were assisted by lawyers and preachers, and evoking their rights to freedom of conscience and expression they adopted a more adamant and determined stance.⁵⁷⁷ The report stated that in the face of such difficulties in the application of the legal framework, certain school officials do not sanction the pupils out of fear that their decision may be contested and voided in court.⁵⁷⁸

This argument does not provide a law and order justification for the ban. The fact that students become aware of their constitutional and statutory rights, and that

⁵⁷¹ La retranscription de l'audition de M. Jean Kahn, Président du Consistoire Central Israélite, <http://www.laic.info/Members/webmestre/La_laicite_en_France.2003-09-24.1545/view>.

⁵⁷² Stasi Commission, *supra* note 365, at 31, 43, 57.

⁵⁷³ *Id* at 57.

⁵⁷⁴ Gunn, *supra* note 86, at 477.

⁵⁷⁵ *Id*.

⁵⁷⁶ NA Report, *supra* note 363, section - Le Conseil d’État a posé des limites au port de signes religieux que les chefs d’établissement n’ont pas toujours les moyens d’appliquer.

⁵⁷⁷ *Id*.

they can receive legal assistance to defend them is not a danger to law and order. School administrators might be finding it more difficult to dissuade girls from wearing headscarves, but if the reason is, as the report says, the girls' awareness of their rights and their access to legal advice, then there is nothing disturbing in that, on the contrary it is commendable. It is disturbing that school officials complain that they find it difficult to circumvent the legal rules.

The NA Report argued that although the case law of the Conseil d'État established that when the wearing of religious signs by students resulted in violations of law and order, then restrictions on the rights of students were justified, it was very difficult for school officials to manage conflict situations because they could not prove before the courts, that these conflict situations amounted to "manifest" disruptions of order and discipline. The courts had accepted that restrictions were justified in situations where participated in demonstrations and movements seriously disrupting the normal school operations⁵⁷⁹ or leaflets were being distributed in front of the school and the media were called to the event⁵⁸⁰. The principle behind this justification was that the disruption with law and order was manifest and serious. The report argued, that there were a number of instances, where religious signs caused significant tensions and divided the teaching body, but in the absence of proven "material disorders, caused by the interested parties or their entourage" exclusion was difficult to justify.

According to the US constitutional jurisprudence, it is exactly only when symbolic expression by students "materially and substantially interferes with the requirements of appropriate discipline in the operation of the school," or "involves

⁵⁷⁸ *Id.*

⁵⁷⁹ Conseil d'Etat, 27 novembre 1996, Ligue islamique du Nord et autres, n° 170207 .

⁵⁸⁰ Conseil d'Etat, 10 mars 1995, M. et Mme Aoukili, n° 159.981.

substantial disorder or invasion of the rights of others” ” that it may be restricted.⁵⁸¹ This burden of proof that the state has to bear in order to justify its interference protects the constitutional rights of the students. Thus it appears that one of the reasons why school officials had difficulties in managing conflicts was that these officials attempted to or were pressured to circumvent the decisions of the Conseil d’État. Gunn’s comment on this justification for the new law thus appears particularly relevant:

It would indeed be a disservice to the rule of law if people were able to place inappropriate pressure on school officials to ignore the constitutional law articulated by the Conseil d’Etat, and then the Stasi Commission were to respond by recommending a change in the law to satisfy the very people who had acted against the law.⁵⁸²

Both reports also claimed that the guidelines issued by the Conseil d’État were not clear and precise and the school officials found it difficult to apply them.⁵⁸³ The NA Commission report asserted that school officials found it hard to perceive the boundary between legitimate expression and impermissible proselytizing, and they had difficulties defending their decision before courts.⁵⁸⁴ However, as the report itself acknowledged there were a number of concrete cases that followed the 1989 advisory opinion of the Conseil d’État, and these cases, it might be argued provided enough guidance as to the application of the principles enunciated in 1989.⁵⁸⁵

Before the escalation of the “headscarves affair” in 2003, respectable research bodies and commentators acknowledged that the legal framework elaborated by the

⁵⁸¹ See *Tinker v. Des Moines School Dist.* 393 U.S. 503 (1969).

⁵⁸² Gunn, *supra* note 86, at 477.

⁵⁸³ Stasi commission, *supra* note 365, at 31; NA Report, *supra* note 363, section - Le Conseil d’État a posé des limites au port de signes religieux que les chefs d’établissement n’ont pas toujours les moyens d’appliquer. See also Beller, *supra* note 354, at 621, (Even as it proposed a redefinition of laïcité, the Conseil d’État rendered a decision ambiguous enough to increase rather than decrease the level of conflict over the presence of headscarves in France’s public schools. Combined with the fear of fundamentalist Islam and the increase in the headscarf’s popularity, the Conseil’s delegation of so much discretion to individual schools helped keep the issue simmering.).

⁵⁸⁴ *Id.*

Conseil d'État usefully served to resolve conflict situations at schools. A November 2000 report of the High Council for Integration (Haut Conseil à l'Intégration) stated that the judicial framework had helped state officials in their dealings with legal difficulties in connection to the wearing of headscarves. In April 2003, the official at the Education Ministry, responsible for mediation of disputes related to the wearing of headscarves, reported that since 1994 the average conflict cases per year had diminished from 300 to 150.⁵⁸⁶

One is led to the impression that the real problem the report found with the application of the law was that under the decisions of the Conseil d'État, school officials could not defend the position that by its very nature, the act of wearing headscarves at school amounted to proselytizing. The reliance of the report to the *Dahlab v. Switzerland*⁵⁸⁷ decision of the European Court of Human Rights, and the discussion of the Court about the potentially proselytizing effect of the headscarf worn by a teacher is evidently misplaced. The position and functions of a teacher are very different from that of a student, and that makes the analogy between the two issues a false one, despite the attempts of the NA report to argue that the law should attempt to bring closer the duties and obligation of students and teachers in respect to the principle of secularity. Thus the problem some school officials had appears to be not one of interpretation and application of the case law of the Conseil d'État, but of a disagreement with its substance.

1.3.3 Compliance with International Standards

1.3.3.1 ECHR

⁵⁸⁵ See also, Errera before the NA Commission, arguing that the rules laid down by the Conseil d'État were pretty well established, and that the Ministry of education envisaged the drafting of a legal guide to be addressed to the heads of schools. (Errera- hearings, *supra* note 406.)

After a French court upheld the expulsion of three Sikh boys from school under the new law for their refusal to remove their keskis or under turbans, which are a discrete version of the turban, the boys' attorney announced that if their case fails before the national courts they would take it before the European Court of Human Rights.⁵⁸⁸ The case illustrates the type of cases likely to reach the Strasbourg Court.

The law most likely is going to be examined for its compliance with the provisions of art. 9 protecting the right to hold and manifest religious beliefs, art. 14 protecting against discrimination on the basis of religion, and Article 2 of Protocol No. 1 protecting the right to education. The decision of the ECHR on the case of *Leyla Sahin v. Turkey*, 29 June 2004 in which a chamber of the Court found that Turkey did not violate the right to freedom of religion of a Muslim student, who was forbidden to wear a headscarf at the state University of Istanbul, was published after the debates on and the enactment of the French law. After the enactment of the law, the *Leyla Sahin* case was appealed before the Grand Chamber and it affirmed the chamber decision.⁵⁸⁹ This section will examine how the *Leyla Sahin* decision affects the possible outcome of a challenge of the French law of March 2004 before the ECHR.

The analysis will begin by laying out the arguments defending the compatibility of the French law with the ECHR. Then the section will examine how these arguments are likely to stand with the Strasbourg Court in light of the *Leyla Safin* decision and will argue the case of France is distinguishable from that of

⁵⁸⁶ Gunn, *supra* note 86, at 458.

⁵⁸⁷ App No 42393/98, Decision of 15 February 2001.

⁵⁸⁸ *3 Sikhs Face Expulsion From School: French Court*, THE INDIA DAILY, Apr. 20, 2005, <http://www.indiadaily.com/breaking_news/32271.asp>. The Paris Administrative Court of Appeals in 2005 upheld the decision to expel the boys and held that it was taken in pursuance of the law of March 2004 and was in conformity with art.9 and 14 of the European convention of Human Rights. See Cour Administrative d'Appel de Paris, N° 05PA01831, 19 juillet 2005, <<http://www.legifrance.gouv.fr/WAspad/UnDocument?base=JADE&nod=J1XBX2005X07X000000501831>>

Turkey, so despite the fact that the Grand Chamber confirmed the decision on the case of *Leyla Sahin*, a challenge of the French law *ought to* be successful. On the other hand, it should be noted that given the wide margin of appreciation the Court is prepared to give to state parties in matters regulating religious dress at public institutions, there is a great likelihood that Strasbourg court will defer to the decision of the French legislature.

The compliance of the law with the ECHR was an important consideration in the reports of the Stasi Commission and the NA Commission. One of the key arguments of the opponents of the proposed law was that it would not meet the requirements of the European Convention. When Jean-Paul Costa, vice-president of the European Court of the Humans Rights, was heard by the Commission in October 2003 his testimony had “the effect of a bomb” and shook the convictions of the Commission members most hostile to the legislation.⁵⁹⁰ Contrary to the expectations of most commentators, he stated that: “If such a law were subjected at our Court, it would be considered to be in conformity with the French model of secularity, and thus not contrary with the European Convention of the Human Rights.”⁵⁹¹ The main argument of Costa was that the then current system regulated by jurisprudence of the Conseil d’État which left discretion to the heads of establishments was susceptible to

⁵⁸⁹ *Leyla Sahin*, *supra* note 418.

⁵⁹⁰ Josette Alia and Carole Barjon, *Voile : une loi, mais laquelle ?*, LE NOUVEL OBSERVATEUR, 2.11.2003, <<http://www.france-mail-forum.de/fmf33/art/33aliaba.htm>>. For example Luc Ferry, the Minister of Education, had justified his opposition to a law prohibiting the religious signs before the Stasi Commission, by the fact that it would be likely to be contrary to the general principles of pertaining to human right in Europe. (See, *Voile: pas d'obstacle européen à une loi*, Oct 18, 2003, <<http://www.precoces.org/site/modules.php?op=modload&name=News&file=article&sid=2060>>.)

⁵⁹¹ La CEDH ne verrait "aucun problème" à une loi en France – AFP, (The ECHR would not see "any problem" with a law in France – AFP), <http://www.laic.info/Members/webmestre/Revue_de_presse.2003-10-19.1613/view>.

attack before the court, for possible lack of compliance with the requirement for the presence of a “legal basis” for restrictions.⁵⁹²

This argument was also presented by the NA Commission report. The NA Commission report argued that there was a need for the legislature to enact a law regulating the wearing of religious symbols at public schools, because the restrictions on fundamental freedom have to have a basis in law, and the law has to be clear and foreseeable. According to the commission although the case law of courts is recognized to constitute a legal basis for the restriction of rights, the jurisprudence of the Conseil d’État did not satisfy these two conditions.⁵⁹³

The decisions of the Conseil d’État clearly are accessible, since they are duly published, and are also freely accessible via the internet. Moreover, as the NA Commission report itself acknowledged the girls who wanted to wear headscarves were fully aware of the decisions and had access to legal aid to protect their rights. If the decisions were accessible to the students surely they must be accessible to school officials. It can also be argued that, despite the criticism aimed at the generality of the language of the 1989 decision, the subsequent case law on the application of these principles contributed to the clarity and foreseeability of the legal rules. Nevertheless, whatever the drawbacks of the legal framework before the enactment of the law, it remains to be evaluated whether the particular text of the law enacted and its application comply with the Convention.

The Stasi Commission stressed that the law was in full compliance with the jurisprudence of the ECHR on the Convention. Since it is obvious that the law imposes restrictions on student’s manifestation of religion, it is necessary to consider the justifications offered for that restriction. Regarding the requirement for legitimate

⁵⁹² *Id.*

aims of the restrictions, the Commission noted that the Strasbourg court gives weighty consideration to legal measures enacted by state parties in order to protect secularity when it is a fundamental principle or value of the state. Another legitimate purpose was the protection of the rights and freedoms of others, namely the protection of “minors against external pressures.”⁵⁹⁴ In that relation Costa noted at the hearings, that “the Court would be very sensitive to the fact that the law would seek to protect the girls against the pressures from the family medium”.⁵⁹⁵ Another legitimate purpose which the state can invoke is the protection of public order, namely the protection of law and order in the public schools. The Stasi Commission also relied on the wide margin of appreciation the Strasbourg Court is likely to give to state parties, in regulating issues on which there is no uniform practice among them. It noted that the Court “rests on recognition of the traditions of each country, without seeking to impose a uniform model of relations between the Church and the State.”⁵⁹⁶

The NA Commission acknowledged that the “heart of the problems” with the law would be the evaluation of the proportionality of the restriction to the legitimate aims pursued.⁵⁹⁷ The Report stated that although the legal experts heard could not argue with certainty what the position of the Court in Strasbourg would be they offered several arguments defending the proportionality of the ban. Firstly, they argued that the educational system in France made it possible for students who wished to manifest their religion by wearing religious signs to enroll in “another school establishment,” meaning private religious schools where the law would not apply or

⁵⁹³ NA report, *supra* note 363, section - Des restrictions à l'exercice d'une liberté fondamentale dépourvues de fondement législatif.

⁵⁹⁴ Stasi Commission, *supra* note 365, at 59.

⁵⁹⁵ Voile: pas d'obstacle européen à une loi, Oct 18, 2003, <<http://www.precoces.org/site/modules.php?op=modload&name=News&file=article&sid=2060>>.

⁵⁹⁶ Stasi Commission, *supra* note 365, at 21.

⁵⁹⁷ NA report, *supra* note 363, section - Un dispositif législatif qui garantit un juste équilibre entre liberté de religion et principe de laïcité dans le respect de la Constitution et conforme au droit international.

to take classes through distance education.⁵⁹⁸ The NA report claimed that the presence of chaplaincy added to the possibility of continuing the studies elsewhere did guarantee the freedom of religion of students and therefore the prohibition on the wearing of religious signs would survive the test of proportionality.⁵⁹⁹

Although the decision on the *Leyla Sahin* case had not yet been published, the report mentioned another case against Turkey decided by the European Commission - *Karaduman v. Turkey* (1993).⁶⁰⁰ In that case the Commission declared inadmissible the complaint of a Muslim student who was refused a degree certificate for the university course she had taken unless she presented a photograph of herself in which she was not wearing a headscarf. The student claimed that the state had violated art. 9 of the Convention. The NA Commission report noted, however, that the decision was very specific and the headscarf ban was necessary to “protect minorities in this Muslim country” which made the case “not very transposable to France.”⁶⁰¹

I would argue that the *Leyla Sahin* decision is also not very transposable to the situation in France. The applicant in the *Sahin* case had studied medicine at the University of Bursa, where she had worn a headscarf for four years and then enrolled at the Medicine Faculty at the University of Istanbul.⁶⁰² The Vice – Chancellor of the University issued a circular regulating students admission to the University Campus, which stated that students wearing headscarves should not be admitted to lectures, courses and tutorials. In accordance with this circular the applicant was denied access to examinations and lectures, because of her refusal to remove her headscarf. When Sahin challenged the regulation before the Istanbul Administrative Court claiming a

⁵⁹⁸ *Id.*

⁵⁹⁹ *Id.*

⁶⁰⁰ no. 16278/90, Commission decision of 3 May 1993.

⁶⁰¹ NA report, *supra* note 363, section - Un dispositif législatif qui garantit un juste équilibre entre liberté de religion et principe de laïcité dans le respect de la Constitution et conforme au droit international.

violation of her rights under art. 9, art. 14, Art. 2 of Protocol No. 1, and Art.8, the court dismissed her complaint, finding that the regulation was in conformity with existing legislation and the Appeals Court upheld the decision of the lower court on points of law.⁶⁰³ The European Court of Human rights after evaluating the claims for alleged violation of the above mentioned articles unanimously declared that there was no violation of Art. 9, and no separate question arose under the remaining articles evoked by the applicant. The Grand Chamber of the Court held with 16 to 1 votes that there was no violation of Art 9 and no violation of Art.2 of Protocol 1.

Before examining the law under the Convention, the Court reviewed briefly the legislative frameworks dealing with the wearing of religious symbols at educational institutions in European countries. The Court referred to the situation in France noting that “secularism is regarded as one of the cornerstones of republican values.”⁶⁰⁴ The Court noted that the law of March 2004 was enacted “in accordance with the principles of secularism”⁶⁰⁵ This reference of the Court to the situation in France supports the arguments made by the French Commissions about the weight that the Court is likely to give to measures protecting *laïcité* as a fundamental constitutional principle.

In relation to the review of relevant legislation in European countries, the Court noted that “special importance” should be given to the decisions of decision-making bodies of state parties on issues regarding the relationship between church and State on which “opinion in a democratic society may reasonably differ widely.”⁶⁰⁶ The Court further noted that a margin of appreciation is particularly necessary “when it comes to regulating the wearing of religious symbols in educational institutions...in

⁶⁰² *Leyla Sahin*, *supra* note 418, at 11.

⁶⁰³ *Id* at 18-20.

⁶⁰⁴ *Id* at 56.

⁶⁰⁵ *Id* at 56.

view of the diversity of the approaches taken by national authorities on the issue.”⁶⁰⁷ The Court concluded that “the choice of the extent and form” of regulations of religious expression in public institutions “must inevitably be left up to a point to the State concerned, as it will depend on the domestic context concerned.”⁶⁰⁸ This part of the opinion of the Court supports the argument of the Stasi Commission that upon a challenge of the law under the ECHR the French state will be accorded a large margin of appreciation.

The importance of secularism for the democratic system in Turkey was a key consideration taken by the Court when it examined the challenge under art. 9. The Court accepted that there was an interference with the applicant’s right to manifest her religion, and that the interference was “prescribed by law” and that the protection of the principle of secularism was a valid legitimate aim:

the principle of secularism, which is the paramount consideration underlying the ban on the wearing of religious symbols in universities. In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn.
„⁶⁰⁹

It can be assumed that the Court in Strasbourg will accept that the limitation was prescribed by law and that similar aims will surely be presented by the French government as the pursuit of the law of March 2004.⁶¹⁰ The Strasbourg Court also

⁶⁰⁶ *Id.* at 109.

⁶⁰⁷ *Id.*

⁶⁰⁸ *Id.*

⁶⁰⁹ *Id.* at para. 116.

⁶¹⁰ Mukul Saxena has argued that France cannot evoke public order as a legitimate aim of the Law of March 2004, since prior to the adoption of the law there has been “has been no situation of civil unrest, rioting or even public indignation” and none of the of the groups of students directly affected had ever been involved in incidents of criminal violence or instigation of religious hatred. (See Mukul Saxena, *The Manifestation of Belief and the Display of Ostentatious Religious Symbols in France*, The Berkeley Electronic Press 2006, (visited 15 June, 2006) <<http://law.bepress.com/cgi/viewcontent.cgi?article=4433&context=expresso>> at 29). I would argue however that some of the law and order concerns discussed by the Stasi Commission really represented a law and order issue, and incidents of anti-Semitism and violent

noted with approval that the regulations in Turkey had the aim of protecting the principle of gender equality, “one of the key principles underlying the Convention.”⁶¹¹ As was discussed above the Stasi Commission also used the protection of equality between the sexes as a justification for the ban on religious symbols at schools. The European Court also took into consideration the pressure to conform that is likely to be experienced by Muslim women who choose not to wear the headscarf if a great number of women conform to that practice especially when that practice is “presented or perceived as a compulsory religious duty.”⁶¹² Again this argument is very similar to the one advanced by the Stasi Commission on the peer pressure exerted on some Muslim girls in French public schools. Moreover, it may be argued in favor of the proportionality of the French law that it is even less restrictive than the ban upheld in the Turkish case—in France, the law takes into account the fact that as students grow more mature they are less likely to be vulnerable to such pressure, and that is why the ban does not apply to universities. In the 2004 Chamber decision, the judges noted also the formal neutrality of the resolution adopted by the Istanbul University which “treated all forms of dress symbolizing or manifesting a religion or faith on an equal

attacks cannot be reduced, as Saxena argues, to tensions representing “unavoidable consequences of pluralism.” However, whether the restrictive measures of the law are proportionate is an entirely different question. Maxena has also argued that the French law fails to meet the “prescribed by law” requirement since the term “ostentatious/ conspicuous” “obscure[s] the exact interpretation and make the interpretation *dangerously ambiguous*.” (Id at 27). According to him the law is imprecise because it does not define what symbols/dress items are improperly proselytizing, but only “merely addresses the philosophical issues concerning *Laïcité* and secularism.” (Id at 18). In *Sunday Times v. UK* (1979) 2 EHRR 245 the Court defined the precision prong of the “prescribed by law” requirement that the norm is “formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able to foresee...the consequences which a given action may entail.” I would argue that the law fulfills this requirement, since the circular clearly defines which actions fall within the ambit of the law. Whether the law should restrict only improper proselytization or all signs amounting to overt expression of religious identity in order to achieve its aims is a question that should be addressed in the analysis of its necessity in a democratic society.

⁶¹¹ *Leyla Sahin*, *supra* note 418, at 115.

⁶¹² *Id* at 115.

footing in barring them from the university premises.”⁶¹³ The French law also treats in a formally neutral way students of all religious convictions.

Another factor considered by the Court in its assessment of the necessity of the measure in Turkey was the fact that the headscarf had been employed as a political symbol by “extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts” and noted that the state was justified to take a position against such movements, based on its “historical experience” provided it employed measures in conformity with the Convention.⁶¹⁴ This consideration already points to the differences in context between the situations in Turkey and France, which I would argue, should lead to a different outcome of an eventual French case before the Court. Although the report of the Stasi and the NA Commission tried to argue that the ban on religious signs at school was necessary to restrict the spread and influence of extremist Islamic movements in France, as the discussion above showed, the ban is not narrowly tailored to achieve that purpose. However, what is important also is that the political strength of such movements in France cannot be compared to the one they have in Turkey.⁶¹⁵

In the original decision of the Court the emphasis on the relevance of the particular context in the assessment of the law was particularly strong. Within the five pages in which the Court stated the relevant principles and examined their application to the case, the word “context” appeared no less than 6 times. The Grand Chamber again stressed the relevance of the domestic context.⁶¹⁶

⁶¹³ *Leyla Şahin v. Turkey* (2004), at 111.

⁶¹⁴ *Leyla Sahin*, *supra* note 418, at 115.

⁶¹⁵ The Controversial *Refah* Case dealt with the ban a party that allegedly posed threats to the democratic secular form of government in Turkey. See *Refah Partisi (The Welfare Party) and Others v. Turkey* (2003)

⁶¹⁶ *Leyla Sahin*, *supra* note 418, at 109.

The “context” in France is markedly different from the context in Turkey. Although *laïcité* is important for historical reasons in France as well, it is related to the struggle between the Catholic Church and the state after the French Revolution, and the laws concerning the relationship between church and state were concerned mainly with the relation between these two institutions. Furthermore, Islam is not the religion of the majority of the population – although it is now the second largest religion in France it is still the religion of a minority⁶¹⁷ which is far from politically empowered. On the contrary, as was noted above, the increase of the influence of extremist propaganda among the French Muslims is due to a large extent to the discrimination they face in terms of employment and housing.

It should also be noted, as Errera, emphasized in the hearings before the NA Commission that the European Court of Human Rights may have to rule not “on a law which would have the contents that [the NA Commission] evoke[s], but on an individual measure of marked final exclusion under the terms of this law” and on the proportionality of that measure to the aims pursued.⁶¹⁸ Thus if the expelled Sikh students challenge the measure before the ECHR it will be very difficult for the French government to justify the proportionality of this restriction on their right to freedom of religion and right to access of education. The discussion *supra* showed that the laws cannot survive a test of rationality under the French Constitution and it should not pass the test of proportionality developed by the jurisprudence of the ECHR.

The above discussion showed that the expulsion from school of students for

⁶¹⁷ In the *Karaduman* Case, the Commission discussing the issue of pressure on students who did not wish to wear headscarves, took notice of the fact that Islam is the majority religion in Turkey. “Especially in countries where the great majority of the population owes allegiance to one particular religion, manifestation of the observances and symbols of that religion, without restriction as to place and manner, may constitute pressure on students who do not practice that religion or who adhere to another religion.” (*Kraduman*, *supra* note 600, at 108).

wearing religious symbols is a measure disproportionate to preventing the alleged threat to *laïcité*, order in schools, and the protection from peer pressure and coercion of Muslim girls to wear the headscarf. There are other means, which do not restrict the freedom of religion and expression of the students, and at the same time address the real causes of the problems at school, the failure of integration, and defend *laïcité* and gender equality. As Michel Tubiana, president of the Ligue des droits de l'homme, has argued “the remedies exist”: application of the law such as it is [before the adoption of the law of March 2004], putting greater effort in the destruction of the ghettos and “the fight against discriminations and social exclusion;” fighting against the forced marriages, “opening places where the women can come in freedom,” defending the neutrality of public services “which respects the cultural diversity of the users.”⁶¹⁹ However, as he noted, that does not imply a negation of cultural pluralism,⁶²⁰ declaring Islam incompatible with the Republic and denying education to “the faithful ones of this faith or, finally, creating a hierarchy among excluded.”⁶²¹

While it is beyond the scope of the paper to analyze the *Leyla Sahin* decision insofar as it extends to university students, since the focus here is on pre-university education, it should be noted that the decision has attracted a great deal of scholarly criticism.⁶²² The Court referred, for instance, to the case of *Dahlab v. Switzerland*

⁶¹⁸ Errera- hearings, *supra* note 406.

⁶¹⁹ Michel Tubiana, *Une loi ne résoudra rien*, (visited May 5, 2005) <http://perso.wanadoo.fr/felina/doc/laic/loi_tubiana.htm>.

⁶²⁰ As the Court in Strasbourg has noted that “The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it [the right to freedom of religion. (*Kokkinakis v. Greece*, 25 May 1993, at 3). As Beller has noted, value placed on pluralism may clash “with France’s commitment to avoiding the language of multiculturalism and group rights.” (Beller, *supra* note 354, at 621).

⁶²¹ *Id.*

⁶²² See e.g., T. Jeremy Gunn, *Fearful Symbols: The Islamic Headscarf and the European Court of Human Rights*, draft 4 July 2005, The Strasbourg Conference: A Forum on Freedom of Religion or Belief, 2005, <<http://www.strasbourgconference.org/papers/Sahin%20by%20Gunn%2021%20by%20T.%20Jeremy%20Gunn.pdf>>, Tore Lindholm, *The Strasbourg Court Dealing with Turkey and the Human Right to Freedom of Religion or Belief: A Critical Assessment in the Light of Recent Case Law*, The Strasbourg Conference: A Forum on Freedom of Religion or Belief, 2005,

(2001), in which the applicant was schoolteacher of small children, in order to support its present decision noting that in that case

the Court stressed among other matters the “powerful external symbol” which her wearing a headscarf represented and questioned whether it might have some kind of proselytising effect, seeing that it appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality. It also noted that wearing the Islamic headscarf could not easily be reconciled with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society should convey to their pupils.⁶²³

It is precisely the crucial difference between the relationship of a teacher and small children on the one hand, and that among university students, or in the case of France, students attending public schools, on the other hand, that makes the reasoning in *Dahlab* inapplicable to the *Sahin* case and to the French law as well.⁶²⁴

The foregoing analysis argues that the law of March 2004 complies neither with the French Constitution nor with the European Convention of Human Rights. A note of caution should be inserted here. It is not precisely clear whether the French Conseil Constitutionnel or the European Court of Human Rights if presented with a challenge of the law would reach the same conclusion.⁶²⁵ The decision of the Conseil Constitutionnel on the question of whether the ratification of the Treaty establishing a Constitution for Europe required a prior revision of the Constitution from November 2004⁶²⁶, might be interpreted as a signal that the Conseil would have been likely to go the other way.

<<http://www.strasbourgconference.org/papers/Lindholm%20Strasbourg.pdf>>, commenting on the Chamber decision See also Benjamin D. Bleiberg, *Unveiling The Real Issue: Evaluating The European Court Of Human Rights' Decision To Enforce The Turkish Headscarf Ban In Leyla Sahin V. Turkey*, 91 CORNELL LAW REVIEW 129 (2006).

⁶²³ *Leyla Sahin*, *supra* note 418, at 111.

⁶²⁴ *Leyla Sahin*, *supra* note 418, at 7, dissenting Opinion of Judge Tulkens.

⁶²⁵ See Samantha Knights, *Religious Symbols in the School: Freedom of Religion, Minorities and Education*, 5 E.H.R.L.R. 499, 516 (2005), criticizing the European Court of Human Rights for giving too great a margin of appreciation to state parties on Art.9 issues.

⁶²⁶ Decision 2004 – 505 DC of November 19 2004.

In its decision the Conseil considered the compatibility of Art. II-70 of the European Constitution, which is the same as Art. 9 of the ECHR with the French constitutional principle of *laïcité*. The Conseil stated that the interpretation of Art. 70 should be guided by the jurisprudence of the European Court of Human Rights on Art.9. The Conseil then referred to the case of Leyla Sahin saying that:

the [Strasbourg] Court has thus given official recognition to the principle of secularism recognized by various national constitutional traditions and leaves States considerable leeway to define the most appropriate measures, taking into account their national traditions, to reconcile the principle of freedom of religion and that of secularism.⁶²⁷

The Conseil then concluded that Art.70 of the European Constitution does not contradict art.1 of the French Constitution, “which forbids persons to profess religious beliefs for the purpose of non compliance with the common rules governing the relations between public communities and private individuals are thus respected.”⁶²⁸ This is the first time that the Conseil lists a decision of the Strasbourg Court in the number of the visas of its decision. Commentators have argued that through this statement on Art.70 the Conseil has assuaged the fears the law of March 2004 would be incompatible with Art.70 of the new Constitution of Europe.⁶²⁹ This statement has also been interpreted as a kind of endorsement by the Conseil of the law of March 2004.

Other International Instruments

It is beyond the scope of this section to examine the compliance of the French law with all other international instruments to which France is a party. Nevertheless, a brief overview of how the law fares under the Convention of the Rights of the Child

⁶²⁷ *Id* at 18.

⁶²⁸ *Id.*

⁶²⁹ Anne Levade, Le cadre constitutionnel du débat de révision de la Constitution: Commentaire de la décision n° 2004-505 DC du 19 novembre 2004 “Traité établissant une Constitution pour l’Europe,” 06 Decembre 2004, <<http://www.robert-schuman.org/supplement/sup191.htm>>.

shall be made because of its importance to the issue of religion in public schools. The decision of the UN Human Rights Committee on an individual communication concerning a university prohibition on the wearing of head coverings in Uzbekistan is also relevant to the question of the compliance of the French law with the ICCPR. Finally the section will briefly examine the law in light of the right to education, particularly the statements of the UN Special Rapporteur on the Right to Education.

1.3.3.2 CONVENTION ON THE RIGHTS OF THE CHILD

France is a party to the CRC, which provides under Art. 14 that states should respect the right of the child to “freedom of thought, conscience and religion” and limitations on the right to manifest religion or beliefs have to be prescribed by law and “necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others”.⁶³⁰ As was already noted above the Law of March 2004 does not satisfy this condition of necessity and proportionality. According to para. 2 of Art. 14, state parties have to respect the rights and duties of parents to “provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.” Thus it can be argued that when the wearing of religious symbols is a choice made by the parents on behalf of younger children the CRC requires the state to respect that choice, as long as it is not injurious to the immediate and long term interests of the child, and the child has the opportunity to exercise her right to reconsider that choice as she grows up.⁶³¹

The CRC also protects the child’s right to education (art.28) and access to education is the precondition necessary for the exercise of that right. When children

⁶³⁰ CRC, Art. 14.

⁶³¹ See the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Art. 5 (5), providing that: Practices of a religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development, taking into account article 1, paragraph 3, of the present Declaration.

are excluded from school for failure to comply with the new law access to education is unduly restricted. Thus the UN Committee on the Rights of the Child expressed its concerns that the Law of March 2004 may be “counterproductive.”⁶³² It cautioned that the law may not be giving due consideration the principle of the best interests of the child and the right of the child to access to education. The main concern of the Committee was that children expelled for not conforming to the law might be “excluded or marginalized from the school system and other settings.”⁶³³ The Committee recommended that during the evaluation of the law France should consider:

alternative means, including mediation, of ensuring secular character of public schools, while guaranteeing that individual rights are not infringed upon and that children are not excluded or marginalized from the school system and other settings as a result of such legislation. The dress code of schools may be better addressed within the public schools themselves, encouraging participation of children.⁶³⁴

Furthermore, the CRC also provides directions as the contents of education.

Art. 29 (1) provides that education shall be directed to:

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.

A law that prevents students from wearing “ostentatious religious symbols,” which symbols happen to be the religious symbols of minority faiths and which treats as a threat the manifestation or assertion of a religious identity by students runs counter to the aims of education listed above. As the discussion above showed the law

⁶³² Concluding Observations of the Committee on the Rights of the Child, France, U.N. Doc. CRC/C/15/Add.240 (2004), <<http://www1.umn.edu/humanrts/crc/france2004.html>>, para. 25. The Committee has also expressed its concern with regulations in Tunisia forbidding girls to wear headscarves at schools. (See Concluding observations of the Committee on the Rights of the Child: Tunisia. 13/06/2002. CRC/C/15/Add.181. (Concluding Observations/Comments, para 29.)

⁶³³ *Id* at para. 26.

⁶³⁴ *Id*.

is not a proportionate measure to achieve the purpose of educating children in the spirit of equality of the sexes. The Committee on the rights of the Child has noted that:

...at first sight, some of the diverse values expressed in article 29 (1) might be thought to be in conflict with one another in certain situations...But in fact, part of the importance of this provision lies precisely in its recognition of the need for a balanced approach to education and one which succeeds in reconciling diverse values through dialogue and respect for difference.⁶³⁵

Emphasizing the relationship between the values in Art. 19(1) and the struggle against racial discrimination, xenophobia, and related intolerance, the Committee again noted the need to teach respect for differences since “Racism and related phenomena thrive where there is ignorance, unfounded fears of racial, ethnic, religious, cultural and linguistic or other forms of difference, the exploitation of prejudices, or the teaching or dissemination of distorted values.”⁶³⁶ Again the law of March 2004 does not teach respect for difference by banning students from manifesting their religion through religious symbols. The fact that the effects of the law fall disproportionately on minority religions does not contribute to the teaching of tolerance and respect for differences either.⁶³⁷

1.3.3.3 ICCPR

The freedom to manifest religion or belief is also protected by Art. 18 of the International Covenant on Civil and Political Rights and according to the General Comment of the Human Right Committed it encompasses the “the wearing of distinctive clothing or headcoverings.”⁶³⁸ Freedom to manifest religion may be

⁶³⁵ The Aims of Education: . 17/04/2001. CRC/GC/2001/1. (General Comments), para.4.

⁶³⁶ *Id.* at 11.

⁶³⁷ See Raja ElHabt, *supra* note 501, “It would be rather difficult for French officials to teach their children to live together in diversity if they think that expressing differences is dangerous for school and public space. And if they manage to cover religious differences, it would be impossible for them to erase more inherent differences such as the color of skin and gender differences.”

⁶³⁸ The Right to Freedom of Thought, Conscience and Religion (Art. 18): 30/07/93. CCPR General Comment 22, para.4.

limited only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. According to the Committee Art. 18 (2) forbids “coercion that would impair the right to have or adopt a religion or belief” and this includes also “policies or practices having the same intention or effect, such as, for example, those restricting access to education.”⁶³⁹ Therefore, it can be argued that a law that excludes from public schools students for failure to take off religious signs does not conform to the provision of Art. 18 (2).

The Human Rights Committee has expressed its views on a complaint about university regulations prohibiting the wearing of headscarves, which was initiated by an individual communication brought by a female university student in Uzbekistan.⁶⁴⁰ The author of the communication alleged that the state has violated her rights under Art. 18 of the ICCPR when it excluded her from the university for wearing headscarf for religious reasons and refusing to remove it. The Government claimed that the applicant had been excluded for failure to comply with the university regulations according to which students were “forbidden to wear clothes “attracting undue attention”, and forbidden to circulate with the face covered (with a hijab)”⁶⁴¹ and also for a “rough immoral attitude toward a teacher.”⁶⁴²

The Committee found that the State had violated Art. 18, paragraph 2, since the government did invoke any of the specific grounds for which the restriction imposed on the rights of the author of the communication “would in its view be necessary in the meaning of article 18, paragraph 3.”⁶⁴³ It should be noted however, that the committee stated that its present view did not prejudice “the right of a State

⁶³⁹ *Id.* at para.5.

⁶⁴⁰ Communication No. 931/2000 : Uzbekistan. 18/01/2005. CCPR/C/82/D/931/2000. (Jurisprudence).

⁶⁴¹ *Id.* at para. 4.2.

⁶⁴² *Id.* at para. 4.3.

party to limit expressions of religion and belief in the context of article 18 the Covenant ... duly taking into account the specifics of the context” nor “the right of academic institutions to adopt specific regulations relating to their own functioning.”⁶⁴⁴ Thus the sole reason why the Committee found that there was a violation of the ICCPR was that the state did not present any justification for the restrictions. Therefore the view of the Committee on the Uzbekistan case does not as a technical matter dictate what its opinion would be when facing a challenge to the French law of March 2004. Nevertheless, as was already argued above, a strict construction of the grounds for limitations and the test of proportionality applied to the French law should lead to the conclusion that it is not in conformity with Art. 18. The Committee found that the State had violated Art. 18, paragraph 2, since the government did invoke any of the specific grounds for which the restriction imposed on the rights of the author of the communication “would in its view be necessary in the meaning of article 18, paragraph 3.”⁶⁴⁵ It should be noted however, that the committee stated that its present view did not prejudice “the right of a State party to limit expressions of religion and belief in the context of article 18 the Covenant ... duly taking into account the specifics of the context” nor “the right of academic institutions to adopt specific regulations relating to their own functioning.”⁶⁴⁶ Thus the sole reason why the Committee found that there was a violation of the ICCPR was that the state did not present any justification for the restrictions. Therefore the view of the Committee on the Uzbekistan case does not as a technical matter dictate what its opinion would be when facing a challenge to the French law of March 2004. Nevertheless, as was already argued above, a strict construction of the grounds for

⁶⁴³ *Id* at para. 6.

⁶⁴⁴ *Id.*

⁶⁴⁵ *Id* at para. 6.

⁶⁴⁶ *Id.*

limitations and the test of proportionality applied to the French law should lead to the conclusion that it is not in conformity with Art. 18.

It should also be noted that the “public order” limitation ground in Art. 18 is different from the French notion of “ordre public,” and the latter is not added as a parenthetical term. Therefore, restrictions on the freedom to manifest one’s religion on this ground are permissible under the Covenant only “avoid disturbances to the order in the narrow sense of the word.”⁶⁴⁷ Public order as a limitation ground is to be construed narrowly to encompass the meaning of prevention of public disorder, and not as “ordre public,” which has a much broader meaning related to the “fundamental policies of a society.”⁶⁴⁸ Therefore the argument that administrative difficulties are a law and order ground on which the religious manifestation of girls wearing headscarves may be limited is not in accordance with Art. 18 of the ICCPR, since administrative difficulties pointed out are not a “public order” issue within the meaning of Art. 18.

1.3.3.4 ICESCR

The right to education is guaranteed by Art. 13 of the ICESCR. In her annual reports the Special Rapporteur on the Right to Education has emphasized “the recognition of human rights in education as the necessary prerequisite for the teaching of human rights” since “it is well known that children learn through observation rather than exhortation, the recognition of their rights in education will greatly facilitate

⁶⁴⁷ Manfred Nowak and Tanja Vospernik, *Permissible Restrictions on Freedom of Religion or Belief*, 147, 152-53, in TORE LINDHOLM, W. COLE DURHAM, JR., BAHIA G. TAHZIB-LIE (EDS.), *FACILITATING FREEDOM OF RELIGION OR BELIEF: A DESKBOOK*, 147-172. © 2004 Koninklijke Brill NV, Leiden, Netherlands.

⁶⁴⁸ *Id.*

human rights education.”⁶⁴⁹ That is why the law fails to achieve teaching respect for human rights when it imposes unjustified restrictions on student’s right to freedom of religion and expression. The Special Rapporteur also notes that “the ability of education to socialize children into understanding and accepting views different from their own is an important lesson for all human rights education.”⁶⁵⁰ Thus although the French government is rightly disturbed by incidents of anti-Semitism at public schools and the projection of the Israeli-Palestine conflict into the school life, it is not by elimination of outward difference and manifestation of religious identities that the problem should be solved.

The Special Rapporteur has also commented with approval on the legal regime regulating the wearing of religious symbols by students in France prior to the enactment of the law of March 2004. She noted the right to be different as posited by UNESCO, “all individuals and groups have the right to be different, to consider themselves as different and to be regarded as such” and recognized that “educational systems which are officially committed to respecting human rights in education, including such a right to be different, are continuously forced to examine the boundaries for recognizing, accepting and accommodating diversity.”⁶⁵¹ After a brief review of court decisions from several countries on the issue of wearing headscarves at state school, she commented that:

These sketches from the recent court case revolving around headscarves within educational institutions show the long and uphill road towards recognizing, accepting and accommodating everybody’s right to be different. Perhaps this will remain impossible, and some of the avenues towards fully accommodating all facets of diversity will remain closed. It is gratifying, however, to see how much the human rights rationale has influenced judicial interpretations of human rights in education.

⁶⁴⁹ Distr.GENERAL E/CN.4/2001/52 09 January 2001, Original: ENGLISH, Annual report of the Special Rapporteur on the right to education, Katarina Tomaševski, submitted in accordance with Commission on Human Rights resolution 2000/9, at 73.

⁶⁵⁰ *Id.* At 13.

⁶⁵¹ K. Tomaševski, *Human rights in education as prerequisite for human rights education*, Novum Grafiska AB, Gothenburg, 2001, (visited May 8, 2005), <www.right-to-education.org/content/primers/rte_04.pdf>, at 35.

Much as reconciling collective and individual rights, the rights of parents and the rights of each child, the rights of teachers and the rights of learners, is – and will always remain – difficult, the realization of human rights is a continuous process and addressing its full complexity moves it forward.⁶⁵²

2. Regulations of Teacher's Religious Dress

Public school teachers have to fulfill a duty of neutrality, imposed on them because of their position of public agents. As was already noted, the neutrality of the public service, public schools included, is necessary in order to ensure the respect for the diversity of beliefs of its users. Thus, public school teachers are not allowed to carry religious or political signs.

In the *Marteaux* case, from May 2000, the Conseil d'État held that although public agents enjoyed the right to freedom of religion and the right not to be discriminated in their access to public office, the principle of secularity requires a complete neutrality of the public service and therefore precludes public agents from expressing their religious convictions within the framework of the public service.⁶⁵³ In public education, it is immaterial whether the public agent was actually engaged in teaching or had some other function, the carrying of a sign which demonstrates belonging to a particular religion constitutes a failure to fulfill his/her obligations. The Conseil d'État also noted that in some cases it may be appropriate to take account of the extent to which the sign is ostentatious.⁶⁵⁴

The rationale for the prohibition of religious signs in France rests on the principle of neutrality of the public service. And this principle is applied in the same way for all public services not just education. In the US laws prohibiting teachers

⁶⁵² *Id* at 38.

⁶⁵³ Conseil d'Etat, avis du 3 mai 2000, *D^{lle} Marteaux*, N° 217017, <http://education.assemblee-nationale.fr/site-jeunes/laicite/sources_juridiques/sourcesJuridCas4.asp#source4>.

⁶⁵⁴ *Id.*

from wearing religious garb are also based on the principle of the neutrality of the state, however, the impressionability and vulnerability of young students, and the authoritative position of teachers vis-à-vis students are key considerations in the neutrality analysis. Such considerations are absent from the French position, which is solely based on the argument that neutrality of all public services⁶⁵⁵ is required in order to respect the different convictions of the users of these services.

The government Circular of 2004, clarifying the application of the new law, points out that the law does not modify the rules applicable to the agents of public utility of education.⁶⁵⁶ The circular posits the same rules as the ones stated in the Conseil d'État's decision but notes that the strict duty of neutrality prohibits the wearing "any sign of religious membership, even discrete."⁶⁵⁷ Thus the circular is more restrictive than the Conseil d'État's decision. Although the prohibition of religious symbols worn by teachers is justifiable, particularly in the context of elementary schools, the prohibition of discreet religious symbols, such as a small cross worn on a necklace, can hardly violate the religious neutrality of the school officials.

XIII. USA

The regulation of religious dress for students and teachers will be examined separately. Although in both types of cases the right to free exercise of religion of those wearing religious symbols is at stake,⁶⁵⁸ in the case of teachers the

⁶⁵⁵ According to the Constitutional Council among the fundamental principles of the public utility are "the principle of equality and its corollary the principle of neutrality of the service." (Décision n° 86-217 DC du 18 septembre 1986, Loi relative à la liberté de communication).

⁶⁵⁶ Circulaire N°2004-084 Du 18-5-2004 JO du 22-5-2004, para. 2.3, <<http://www.education.gouv.fr/bo/2004/21/MENG0401138C.htm>>.

⁶⁵⁷ *Id.*

⁶⁵⁸ See *Tinker*, *supra* note 581, at 507. ("First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.")

Establishment Clause is implicated as well because of the position of teachers at state schools, which makes the analysis different from the cases involving students.

1. Students

1.1 Legal Framework

The reaction of US scholars, politicians, and NGOs towards the law of March 2004 in France was critical.⁶⁵⁹ While Davis cautions that “American law may not be as far removed from the new French approach as most Americans think”⁶⁶⁰ the analysis of the cases discussed *infra* point to the conclusion that while statutes and/or administrative regulations prohibiting conspicuous religious garb worn by teachers are constitutional, statutes or regulations preventing students from wearing religious dress items have been in most cases declared unconstitutional. Thus a law like the one adopted in France cannot survive a First Amendment challenge in the US.

The wearing of religious dress items has come in conflict with dress codes passed by public schools. Dress codes range from requiring obligatory school uniforms⁶⁶¹ to prohibitions of certain types of clothing. Where violence is a pressing

⁶⁵⁹ For instance, Mr. Hanford, a top-ranking official on issues of religious freedom of the Bush administration stated in an comment on the proposed law in France that “A fundamental principle of religious freedom that we work for in many countries of the world, including on this very issue of head scarves, is that all persons should be able to practice their religion and their beliefs peacefully, without government interference, as long as they are doing so without provocation and intimidation of others in society.” *U.S. Chides France on Effort to Bar Religious Garb in Schools*, NYT December 19, 2003, <<http://www.nytimes.com/2003/12/19/politics/19RELI.html?ex=1104555600&en=edf9d494d324cef7&ei=5070&ex=1093665600&en=dd3aed9558d52451&ei=5070&oref=regi>>. See also Research Report: Controversy over the Headscarf, The Pluralism Project, Harvard University Committee on the Study of Religion, (visited 9 Feb. 2005), <<http://www.pluralism.org/research/profiles/display.php?profile=73482>>, “[O]ver 45 members of the U.S. Congress wrote to the French government to express their concern, arguing that the ban would force French children to choose between their faith and their schooling.”

⁶⁶⁰ See Davis, *supra* note 421, at 222.

⁶⁶¹ Regarding school uniforms some regulations provide that students may be exempted from the obligation to wear a uniform if their parents or guardians state a bona fide religious or philosophical objection to the requirement. For example, see Texas Education Code section 11.162(c), TEX. EDUC. CODE § 11.162(c) providing that: A parent or guardian of a student assigned to attend a school at which students are required to wear school uniforms may choose for the student to be exempted from the

problem, school districts proscribe “gang related” clothing, colors, insignia, or jewelry.⁶⁶² Other purposes for such dress codes, as listed by one school include:

(1) to promote a more effective climate for learning, (2) to create opportunities for self expression, (3) to increase campus safety and security, (4) to foster school unity and pride, (5) to eliminate “label competition,” (6) to ensure modest dress, (7) to simplify dressing, and (8) to minimize cost to parents.⁶⁶³

The central question that needs to be answered when students’ religious attire comes into conflict with dress codes has to do with the level of scrutiny under which the courts will examine the constitutionality of the regulations.⁶⁶⁴ Wearing of religious dress items comes within the protection of the First Amendment right of a student to free exercise of religion. It is enough that students sincerely believe that wearing the religious symbols is part of their religion in order to enjoy the protection of the Free Exercise Clause of the First Amendment. It has been established that it is not necessary that a given conduct be required by the official doctrine of the religion, nor that it be practiced by a majority of the adherents to a particular religion, in order to merit constitutional protection.⁶⁶⁵ It should be noted that this principle of protecting the subjective conviction of the individual has also been established by Canadian and German case law.⁶⁶⁶

requirement or to transfer to a school at which students are not required to wear uniforms and at which space is available if the parent or guardian provides a written statement that, as determined by the board of trustees, states a bona fide religious or philosophical objection to the requirement.

⁶⁶² Max J. Madrid & Elizabeth A. Garcia, *Student Dress Codes: Constitutional Requirements and Policy Suggestions*, (visited 5 Dec 2004), <http://www.modrall.com/articles/article_13.html>.

⁶⁶³ Phoenix Elementary Sch. Dist. No. 1 v. Green, 943 P.2d 836 cited in Christopher B. Gilbert, *We Are What We Wear: Revisiting Student Dress Codes*, B.Y.U. EDUCATION AND LAW JOURNAL 4 (1999) <http://www.law2.byu.edu/jel/v1999_2/gilbert.pdf>.

(Ariz. Ct. App. 1997).

⁶⁶⁴ Derek, *supra* note 421, at 229.

⁶⁶⁵ See *United States v. Ballard*, 322 U.S. 78 (1944); *Thomas v. Review Bd. of Indiana Employment Div.*, 450 U.S. 707, 713-716; *Mississippi Employment Security Commission v. McGlothlin* 556 So.2d 324 (1990) at 330, (“First, we are told that there is no specific tenet of the African Hebrew Israelites mandating that women wear headdress. First Amendment protections, however, do not turn on whether the claimant’s conduct or form of expression has been mandated by doctrine or teaching of a particular religious organization or denomination, nor is it necessarily of concern that members of the particular faith may disagree with claimant’s interpretation of church dogma.”).

⁶⁶⁶ For Canada, see *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at paras 42-43, for Germany see *Headscarf Decision*, BVerfGE 108, 282 (297), NJW 56 (2003), 3111 (3112), 2 BvR 146/02, para. 38.

If dress codes single out religious garb for prohibition, as does the French law, then under the *Smith* doctrine⁶⁶⁷ the regulation must pass the strict scrutiny test, that is it must narrowly tailored to serve a compelling state interest. If the regulation is religiously neutral and generally applicable burdening religion only incidentally, then it has to bear a rational relation to a legitimate government interest. However, if it is applied in a discriminatory manner singling out religion in general or a particular religion, again strict scrutiny would be called for.

Strict scrutiny is also applied when the regulations allow for individualized exceptions.⁶⁶⁸ A question that has arisen in relation to this aspect of the *Smith* decision is whether strict scrutiny should be applied to categorical exceptions as well. In the case of *Fraternal Order of Police v. City of Newark*⁶⁶⁹ the US Court of Appeals for the Third Circuit held that under *Smith* and *Lukumi* the policy of the Newark police department which required uniformed police officers to be clean shaven, and had an exemption for medical reasons, but refused to grant such exemptions to officers who wanted to grow beards for religious reasons, had to be examined under heightened scrutiny.⁶⁷⁰ The court rejected the argument that since the medical exemption provided for is not an "individualized exemption" but rather a categorical one, the rule under *Smith* and *Lukumi* does not apply. According to the court:

While the Supreme Court did speak in terms of "individualized exemptions" in *Smith* and *Lukumi*, it is clear from those decisions that the Court's concern was the prospect of the government's deciding that secular motivations are more important than religious motivations. If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but

⁶⁶⁷ *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990); *see also* *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

⁶⁶⁸ *See Smith*, *supra* note 667, at 884, ("where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason.")

⁶⁶⁹ 170 F.3d 359 (3d Cir. 1999), cert. denied, 120 S. Ct. 56 (1999).

⁶⁷⁰ The court assumed that "an intermediate level of scrutiny applies since this case arose in the public employment context and since the Department's actions cannot survive even that level of scrutiny." *Id* at 15.

instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection.⁶⁷¹

The court reasoned that the exception for medical reasons undermined the department's purpose to achieve uniformity in a way similar to the way an exception for religious reasons would, therefore not granting religious exception called for heightened scrutiny. The exception for undercover officers, like the exception for prescription drugs in *Smith* did not have the same relation to the purpose of the regulation that is why it did not call for a more vigorous judicial examination.⁶⁷²

This interpretation of *Smith*'s rule for exemptions has been favorably reviewed by a number of legal scholars⁶⁷³ and has been applied by other courts as well,⁶⁷⁴ although not by all. Others, such as Kaplan, have criticized such an interpretation as being "too broad." She argues against categorical exceptions, claiming that a distinction should be made between legislative categorization and discretionary power of administrative officials, and that it is only when there are provisions for the latter that strict scrutiny should be applied.⁶⁷⁵

But she also finds that the *Newark* decision was a correct one. According to her, the court correctly invalidated the ordinance, because it failed the "general applicability prong" of the *Smith* decision.⁶⁷⁶ But the *Newark* court explicitly said that it is precisely the categorical exemption for medical reasons that called for heightened scrutiny. So, while the question is not beyond debate, I would argue that at least when

⁶⁷¹ *Id.* at 13.

⁶⁷² *Id.* at 14.

⁶⁷³ See e.g., Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 32 (2002), James M. Oleske, Jr., *Federalism, Free Exercise, and Title VII: Reconsidering Reasonable Accommodation*, JOURNAL OF CONSTITUTIONAL LAW, 525, 562-562 (2004).

⁶⁷⁴ See e.g., *Rader v. Johnston*, 924 F. Supp. 1540 (D. Neb. 1996).

⁶⁷⁵ She interprets *Smith* in the following way: "On the one hand, *Smith* requires that courts defer to ex ante legislative enactments of neutral, generally applicable laws; on the other hand, *Smith* expects courts to police ex post enforcement of laws and regulations by unelected government officials who wield considerable discretion." Carol M. Kaplan, *The Devil Is In The Details: Neutral, Generally Applicable Laws And Exceptions From Smith*, 75 N.Y.U. L. REV. 1045, 1050 (2000).

⁶⁷⁶ *Id.* at 1079-1080.

categorical exemptions for secular activities, exist, which undermine the purpose of the regulation in a way similar to the way an exception for religious reasons would undermine it, then strict scrutiny should be applied.

Strict scrutiny of general and neutral laws is also called for when there are “hybrid rights” involved - “[T]he Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . or the right of parents, to direct the education of their children.”⁶⁷⁷ Although this “hybrid rights” rule has given rise to much criticism by the scholarly community,⁶⁷⁸ and Justice Souter has argued that it is “ultimately untenable,”⁶⁷⁹ it remains good law. Lower courts have not applied the rule with much consistency⁶⁸⁰ and have used different standards for determining when there is a hybrid rights claims under *Smith*.⁶⁸¹ However, it may be concluded that at least when a claimant has a strong free speech or parental rights claim coupled with a free exercise claim, then courts would apply a strict scrutiny test to review the legislation giving rise to these claims.

⁶⁷⁷ *Smith*, supra note 667, at 882.

⁶⁷⁸ See e.g., Kent Greenawalt, *Should The Religion Clauses of The Constitution Be Amended?* 32 LOYOLA OF LOS ANGELES LAW REVIEW 9, 16 (1998).

⁶⁷⁹ “If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith* But if a hybrid claim is one in which the litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all” (*Lukumi Babalu Aye v. City of Hialeah* 508 U.S. 520, 567 (1993) (Souter, J., concurring).)

⁶⁸⁰ For a survey of lower courts decisions see William L. Esser IV, *Religious Hybrids In The Lower Courts: Free Exercise Plus Or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211 (1998). Esser’s conclusion is that “First, when a court allows a hybrid to “win” by applying strict scrutiny to the claim, it never does so as the primary basis for the decision. Either the case had already been decided on some other basis (such as free speech), or strict scrutiny was mandated by the state constitution anyway. Second, the “success” of hybrid claims is directly tied to the constitutional strength of the right with which free exercise is combined. Thus, free speech hybrids are more likely to win than parental right to educate hybrids.” (*Id* at 243).

⁶⁸¹ The Sixth Circuit Court of Appeals refused to apply the hybrid rights exception absent further clarification by the Supreme Court—see *Kissinger v. Board of Trustees*, 5 F.3d 177, 180 (6th Cir.1993) (“We do not see how a state regulation would violate the Free Exercise Clause if it implicates other constitutional rights but would not violate the Free Exercise Clause if it did not implicate other constitutional rights.”). The First Circuit Court of Appeals and the D.C. Circuit required the existence of an independently viable constitutional right for a hybrid rights exception—see *Brown v. Hot, Sexy and Safer Productions*, 68 F.3d 525, 539 (1st Cir.1995); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455,

The wearing of religious symbols represents symbolic religious expression and is protected by the Free Speech Clause of the First Amendment. Generally the symbol is worn to communicate belonging to a particular faith. Religious expression is high value speech, like political speech. Therefore, as the Supreme Court held in *Tinker v. Des Moines School District*⁶⁸² symbolic expression is protected unless it “materially and substantially interferes with the requirements of appropriate discipline in the operation of the school,” or “involves substantial disorder or invasion of the rights of others.”⁶⁸³

Lechliter has argued that parental rights to the religious upbringing of their children are also implicated when students wear religious dress items at school.⁶⁸⁴ Commenting on the much publicized case of *Hearn v. the Muskogee, Oklahoma Public School* which ultimately resulted in a settlement,⁶⁸⁵ he argued that “without a hybrid parental right, *Smith’s* general ruling would prohibit any redress from this generally applicable law. It is in cases like *Nashala’s* that one can see the enduring need for some type of constitutional parental right to direct the religious upbringing of their children.”⁶⁸⁶

However, students have usually relied with success on free speech “hybrids” as will be discussed below⁶⁸⁷. In the case of *Nashala Hearn*, who was barred from

467 (D.C. Cir. 1996). The Ninth Circuit Court required the demonstration of a “colorable claim”—see *Thomas v. Anchorage Equal Rights Commission*, 165 F.3d.

⁶⁸² 393 U.S. 503 (1969).

⁶⁸³ *Id.*

⁶⁸⁴ See Michael Lechliter, *The Fundamental Right of Parents to Direct the Religious Upbringing of Their Children: An Examination of Free Exercise and Parental Rights Under Justice Scalia’s Theory of Hybrid Rights*,

<http://www.alliancedefensefund.org/programs/Parental_Rights_Hybrid_Theory_paper_Lechliter.pdf>

⁶⁸⁵ Consent Order in the case of *Eyvine Hearn v. Muskogee Public School District 020*, C.A. No. CIV 03 598-S, 20 May 2004, <http://www.usdoj.gov/crt/religdisc/hearn_consent_decree_final.pdf>.

⁶⁸⁶ See Lechliter, *supra* note 684, at 27.

⁶⁸⁷ Parental rights hybrids have been invoked with respect to demands for exemptions from school uniform regulations, *see e.g.*, *Hicks v. Halifax County Bd. of Educ.*, 93 F. Supp. 2d 649, 653 (E.D. N.C. 1999). (A great-grandmother challenged the mandatory school uniform policy claiming a violation of free exercise right in conjunction with her right to direct the upbringing of the grandson,

wearing her headscarf at school, the Justice Department intervening on her behalf also argued on the bases of her free exercise and free speech rights.⁶⁸⁸ Arguing an infringement on hybrid parental rights in this context would not have been the strategically wise for the claimant, having in mind the great publicity of the headscarf debate in France and Germany and the fact that one of the central arguments of the proponents of headscarf bans is that this is a legitimate way to limit the ability of Muslim families and communities to force gender stereotypes on young girls.

1.2 Review of courts decisions

The courts have upheld the rights of students to wear religious items at public schools finding that state laws, school district regulations, or school policies that have limited students free exercise rights failed to pass a strict scrutiny review. In the *Hearn* case a Muslim girl was barred from wearing a hijab at school pursuant to the school district policy which provided that “[s]tudents shall not wear . . . hats, caps, bandannas, plastic caps, or hoods on jackets inside the building.”⁶⁸⁹ The dress code provided that the principal could grant exceptions on individual case-by-case basis and such exceptions had been granted to students who wished to wear headgear for medical problems resulting in hair loss.⁶⁹⁰

The Justice Department argued that since the dress code provided for individualized exceptions, the district could not deny exception for religious reasons without a compelling state interest. Strict scrutiny was also called for because the

the district court accepted that strict scrutiny should apply because of the hybrids rights claim and the case resulted ultimately in a settlement.)

⁶⁸⁸ United States’ Memorandum of Law in Support of Its Cross-Motion For Summary Judgment and in Opposition To Defendants’ Motion For Summary Judgment, Eyvine Hearn and Nashala Hearn, v. Muskogee Public School District 020; Et Al., <http://www.usdoj.gov/crt/religdisc/musk_memo.pdf>.

⁶⁸⁹ (Def. Br., Ex. A at 4.) , United States’ Memorandum, *supra* note 688, at 2.

⁶⁹⁰ *Id* at 3.

dress code violated both her free speech and free exercise rights and presented a hybrid rights claim under *Smith*.⁶⁹¹

According to the justice department the dress code could not withstand strict scrutiny. One of the justifications given by the school was that the code was “necessary for student discipline and safety,” especially to help solve gang related problems. However, the school could not show that the hijab is a gang related symbol or that Nashala was involved in such activities.⁶⁹² The district could not prove that under the above mentioned test set in *Tinker* that the symbolic speech should be suppressed.

The second justification given by the district was that the code was necessary to achieve a “religion free zone” at public schools.⁶⁹³ This argument resembles the justifications for the French law of March 2004, namely preserving the secularity of state schools. However, in the US such an argument with regard to religious symbols worn by students is without merit. As the Justice Department argued, the Supreme Court has held that the First Amendment does not allow schools to discriminate against student religious speech, when there is not endorsement of the speech by the school.⁶⁹⁴ The wearing of religious symbols by students represents private religious speech and cannot be attributed to the school. Thus although avoiding a violation of the Establishment Clause is a compelling state interest,⁶⁹⁵ when students wear religious symbols the state is not endorsing religion, nor can it be perceived to be endorsing religion by a reasonable observer. The third justification advanced by the school district was that such a measure was necessary to conform to the U.S.

⁶⁹¹ *Id.* at 8, 9. The Justice department also argued that the policy was not enforced in a religiously neutral manner, rather the policy has been enforced against Nashala on a discriminatory basis because of her particular religious faith. Prior to 11 September 2003 Nashala had worn the headscarf several weeks without any notification that she was in violation of the code.

⁶⁹² *Id.* at 17.

⁶⁹³ *Id.*

Department of Education's guidelines on "Religious Expression in Public Schools."⁶⁹⁶ The Guidelines, as a statement of the current law, do not support the school's position.⁶⁹⁷

The case resulted in a settlement in which the school district agreed that Hearn would be allowed to wear her hijab to school and the dress code would be amended to provide for exceptions from the rule banning head coverings when "previously approved by the School Board upon written application for a bona fide religious reason."⁶⁹⁸ This result of the case is supported by other cases dealing with similar issues.

In *Isaacs v. Board. of Educ. of Howard County*(1999),⁶⁹⁹ the court held that the school could prevent a student from wearing a multicolored headwrap in celebration of her African-American and Jamaican cultural heritage. The no-hats policy served the important interest of providing safe school environment even if wearing the headwrap was symbolic speech. The court noted, however, that:

[i]f the wearing of headgear constitutes speech and also represents an exercise of religion, a student would have 'hybrid' constitutional protection arising out of both the free speech and free exercise. This fact alone would provide ample basis for the school system's decision to exempt religious headgear from its 'no hats' policy.⁷⁰⁰

⁶⁹⁴ See e.g. *Good News Club*, 533 U.S. at 107 (2001), *Widmar v. Vincent*, 454 U.S. 263, 277 (1981).

⁶⁹⁵ *Good News Club v. Milford Central School*, 121 S. Ct. 2093 (2001).

⁶⁹⁶ See *United States' Memorandum*, *supra* note 688, at 18.

⁶⁹⁷ In the relevant part the Guidelines read: "Schools enjoy substantial discretion in adopting policies relating to student dress and school uniforms. Students generally have no Federal right to be exempted from religiously-neutral and generally applicable school dress rules based on their religious beliefs or practices; however, schools may not single out religious attire in general, or attire of a particular religion, for prohibition or regulation. Students may display religious messages on items of clothing to the same extent that they are permitted to display other comparable messages. Religious messages may not be singled out for suppression, but rather are subject to the same rules as generally apply to comparable messages." (*Religious Expression In Public Schools*, <<http://www.ed.gov/Speeches/08-1995/religion.html>>).

⁶⁹⁸ See *Consent Order* *supra* note 685, at 3.

⁶⁹⁹ 40 F. Supp. 2d 335, 338 (D. Md. 1999).

⁷⁰⁰ *Id.*

In the case of *Chalifoux v. New Caney Independent School District* (1997)⁷⁰¹ students were prohibited from wearing rosaries⁷⁰² as necklaces outside their clothes pursuant to a school dress code which prohibited “gang-related apparel.” The district court held that this was a hybrid “religion-plus-case” and the school regulation burdening the plaintiffs’ religious exercises should pass a heightened judicial scrutiny.⁷⁰³ The court held that under *Yoder* it had performed “a balancing test to determine whether the school’s regulation places an “undue burden” on Plaintiffs’ religious exercise and whether the regulation bears more than a “reasonable relation” to NCISD’s stated objective.”⁷⁰⁴ The court held that there were a number of more effective means available to the district to control gang-related activities than a blanket prohibition on wearing of rosaries, and that “regulation places an undue burden on plaintiffs, who seek to display the rosary not to identify themselves with a gang, but as a sincere expression of their religious beliefs.”⁷⁰⁵

A school dress code which prohibited Native Americans students from wearing long hair was also found to violate the Constitution in *Alabama and Coushatta Tribes of Texas v. Trustees of the Big Sandy Independent School District* (1993), in which the court held that case involved a hybrid claim of free exercise and free speech and that the regulation could not be sustained, since other means less burdensome on the students’ religious belief were available for achieving school discipline.⁷⁰⁶

⁷⁰¹ 976 F.Supp. 659

⁷⁰² “A string of beads used in counting prayers; specif.: a string of beads by which the prayers of the Roman Catholic rosary are counted. (Webster’s Third New International Dictionary 1974 (3d ed.1986). cited in *Chalifoux* supra note 52 at ft. 1).

⁷⁰³ The fact that wearing rosaries as a is not required by orthodox Catholicism nor is it a common catholic practice does not defeat the students first Amendment claims. (*Chalifoux*, supra note 701, 22-23). As was noted above only sincerity of belief is required.

⁷⁰⁴ *Id* at 25,26.

⁷⁰⁵ *Id* at 27.

⁷⁰⁶ 817 F. Supp. 1319 (E.D. TX 1993).

Another case, *Gurdev Kaur Cheema v. Harold Thompson* (1995),⁷⁰⁷ involved Sikh students who were forbidden to wear their kirpans—ceremonial knives⁷⁰⁸—at school in accordance with the no-gun policy adopted in compliance with state laws. The plaintiffs relied on their statutory rights under RFRA⁷⁰⁹, which was in force at the time of the litigation. The U.S. Court of Appeals for the Ninth Circuit sustained a compromise plan ordered by the district court which lifted the blanket bans on kirpans and ruled that the children be allowed back in school wearing kirpans under several conditions prescribed to enhance school safety,⁷¹⁰ pending a full trial on the merits under RFRA. The Court of Appeals held that the school should be enjoined from enforcing the total ban since it was very likely that the plaintiffs would succeed on the merits, because the blanket⁷¹¹ prohibition was not the least restrictive means to achieve the compelling state interest of school safety. In 1997 a settlement was reached which allowed the students to wear the kirpans subject to a safety plan.⁷¹²

⁷⁰⁷ 67 F. 3d 883 (9th Cir. 1995).

⁷⁰⁸ See Renteln, *supra* note 411, at 1571, “The kirpan is one of the five Ks, symbols which Sikhs are required to wear if they have taken *amrit*, meaning that they have been baptized... Lal explained the importance of the kirpan for Sikh identity: The attachment to the sword, or the *kirpan*, must be perceived as an attachment to an “object” that becomes an inalienable part of oneself, constitutive of a life of affirmation, honor, and self-respect; and to forgo the *kirpan*, at least on the orthodox view, is to relinquish one’s identity as a Sikh observant of the faith,” (citations omitted).

⁷⁰⁹ Religious Freedoms Restoration Act of 1993 (“RFRA”), 42 U.S.C. § § 2000bb.

⁷¹⁰ The conditions were the following: “(1) the kirpan will be of the type demonstrated to the Board and to the District Court, that is: a dull blade, approximately 3 - 3 1/2 inches in length with a total length of approximately 6 1/2 - 7 inches including its sheath; 2) the kirpan will be sewn tightly to its sheath; 3) the kirpan will be worn on a cloth strap under the children's clothing so that it is not readily visible; 4) a designated official of the District may make reasonable inspections to confirm that the conditions specified above are being adhered to; 5) if any of the conditions specified above are violated, the student's privilege of wearing his or her kirpan may be suspended; and 6) the District will take all reasonable steps to prevent any harassment, intimidation or provocation of the Cheema children by any employee or student in the District and will take appropriate disciplinary action to prevent and redress such action, should it occur.” (*Id.*)

⁷¹¹ *Id.*

⁷¹² *Settlement Reached in Lawsuit Concerning Rights of Baptized Sikh Students to Wear Symbolic Ceremonial Knives to School*, ACLU-NC Press Release, June 12, 1997, <<http://aclunc.org/pressrel/n061297b.html>>.

The pertinent question to ask is what would have been the result, if the case were litigated now, after RFRA was struck down.⁷¹³ If the wearing of kirpan is recognized as religious expression, and most probably it would, then this would be a hybrid religious plus speech case, similarly to the cases discussed above, and courts would not sustain a blanket prohibition.

There is one pre-Smith case, *Menora v. Illinois High School Athletic Ass'n* (1982),⁷¹⁴ in which religious plaintiffs lost a case. Students challenged the constitutionality of ban on head gear during basketball games arguing that it violated their Free Exercise rights, since it prevented them from wearing yarmulkes. The Illinois High School Association argued the rule was necessary because headgear might fall and trip and injure players. The students argued that it was their religious obligation to wear yarmulkes at all times and demanded to fasten them with bobby pins. The Court held that the players could wear the yarmulkes but they had to devise a more secure method of fastening them. According to the Court the method of fastening the yarmulke was not a religious obligation but rather a convention and the students “have no constitutional right to wear yarmulkes insecurely fastened by bobby pins and therefore they cannot complain if the Association refuses to let them do so because of safety concerns which, while not great, are not wholly trivial either.”⁷¹⁵ Thus, although the plaintiff students lost the case, nevertheless the court did not rule for a blanket ban on religious attire, rather similarly to the kirpan case, it allowed the religious items subject to certain safety regulations.⁷¹⁶

⁷¹³ See *City of Boerne v. Flores*, 521 U.S. 507 (1997) striking down RFRA as exceeding Congress’ remedial power under § 5 of the Fourteenth Amendment.

⁷¹⁴ 683 F.2d 1030 (7th Cir.1982).

⁷¹⁵ *Id.*

⁷¹⁶ Some have criticized the outcome of this case as based not on safety concerns but not prejudice. See Renteln, *supra* note 411, at 1582, “Little evidence exists to show that yarmulkes put other players in peril. Jewish players in high school and college have played thousands of games with no reported injuries from a yarmulke or bobby pin. Even if one were persuaded that the pins or clips endanger other players in the court, there appears to be a double standard. Eyeglasses are much more likely to cause

As evidenced by two recent cases the situation may not that clear however, if the student is not wearing a dress item either mandated by her religion or traditionally associated with her religion but has chosen to wear a garment with verbal religious messages inscribed on it. In the case of *Jacobs, et al v. Clark County School District*, (2005)⁷¹⁷ pursuant to a Nevada state law authorizing the establishment of mandatory dress codes a school district issued regulations requiring students to wear “wear Khaki pants and either red, white, or blue shirts without any printed material thereon”⁷¹⁸ and failure to comply with the code results in “progressive administrative sanction.”⁷¹⁹ The regulations also provided that “a student is not considered noncompliant if wearing a school uniform violates the religious beliefs of a student or parent.”⁷²⁰

A student and her father alleged that the regulations violated the student’s 1st Amendment free exercise and free speech rights, as well as the parental rights under the 14th Amendment. The student had insisted on wearing a T-shirt with religious messages associated with her faith and had been suspended from school for a certain period for failing to comply with the regulations. Another student had requested an exemption from the dress code because she and her parents believed that wearing a uniform was against the tenets of their religion but had been denied such exemption. These plaintiffs too alleged violation of their rights under the 1st and 14th Amendment.

In examining the compliance of the regulations with the Free Speech Clause⁷²¹ the Court decided to apply the *O’Brien* symbolic speech test and rejected the assertion

injury and yet, this headgear is allowed. Considering the greater hazard posed by braces on teeth, for example, and the risk of injuries from the sport itself, the refusal to allow yarmulkes in sports competitions appears to reflect unmitigated prejudice,” (citations omitted).

⁷¹⁷ 373 F.Supp.2d 1162, 199 Ed. Law Rep. 701.

⁷¹⁸ *Id.* at 1165.

⁷¹⁹ *Id.* at 1166.

⁷²⁰ *Id.*

⁷²¹ The Court noted that since Art. 9 sec. 1 of the Nevada Constitution protecting freedom of expression and freedom of exercise is co-extensive with the First Amendment of the Federal Constitution according to the Nevada Supreme Court the its discussion of the First Amendment applies to the Nevada Constitution as well. (*Id.*, at ft1).

of plaintiffs that they were unconstitutional because they failed to pass the *Tinker* test. The Court relied on a passage from *Tinker* where Justice Fortas stated that, “The problem posed by the present case does not relate to the regulation of the length of skirts or the type of clothing, to hair style, or deportment.”⁷²² The Court reasoned that mandatory student dress codes present therefore the type of speech regulation which the *Tinker* Court exempted from its ruling and therefore the *Tinker* standard should not be applied.⁷²³ Therefore the Court rejected the view of the *Chandler* panel that all student speech falls into three categories: “(1) vulgar, lewd, obscene, and plainly offensive speech (governed by *Fraser*); (2) school-sponsored speech (governed by *Hazelwood*); and (3) all other speech (governed by *Tinker*)” and insisted that there was a fourth category – that of symbolic communication implicated by students’ dress, grooming and comportment, which should be governed by *O’Brien*.⁷²⁴

The Court found that the regulation passed constitutional scrutiny. The regulation was furthering an important government interest in improving the educational process through “increasing student achievement, promoting safety, and enhancing a positive school climate.”⁷²⁵ The second prong of the test was also satisfied, because plaintiffs had not established that the regulation aimed at suppression of student speech.⁷²⁶ Finally according to the Court the regulation did not impose greater restriction on student speech than was necessary. In support of this conclusion the Court noted that a “range of clothing and color options,” students could express themselves through other means through the school day, only their expression through choice of attire was being limited; and finally the restriction

⁷²² *Tinker*, *supra* note 581, at 507-513.

⁷²³ *Jacobs*, *supra* note 717, at 1178.

⁷²⁴ *Id.* at 1181.

⁷²⁵ *Id.* at 1186.

⁷²⁶ *Id.* at 1187.

applied during school or school related activities, while outside school students could wear whatever they wished.

The Court dismissed also the plaintiffs claim under the Free Exercise Clause. According to the Court plaintiffs assertion of a “hybrids rights” claim failed because they did not have a “colorable claim” that a companion right had been violated – “a ‘fair probability’ or a ‘likelihood,’ but not a certitude, of success on the merits”⁷²⁷ The Court reasoned that since it did not find a violation of the Free Speech Clause, nor a violation of parental rights protected under the 14th Amendment Due process clause⁷²⁸, there was no valid hybrids rights claim which would call for strict scrutiny and therefore under *Smith* the regulations had to be reviewed under a rational basis test, which they satisfied.⁷²⁹

By applying in this way the necessity of colorability the Court precludes any examination of a hybrids rights claim under *Smith*. If strict scrutiny to a free exercise claim can be applied only if the court finds that other constitutional rights have been violated then there is no point in going through a hybrids rights claim analysis. Such an interpretation of *Smith* would render the hybrid rights exception to rational basis superfluous.

The only constitutionally offensive part of the regulations according to the Court was Section V providing that “The principal shall retain the authority to grant exceptions for designated spirit days, special occasions, or special conditions” and Section VI.D.4.a. providing that “No student shall be considered noncompliant with the policy in the following instances: a. When wearing standard student attire violates a student's/parent's religion”. The Court held that these sections conferred “unfettered

⁷²⁷ *Id.* at 1188.

⁷²⁸ As for plaintiff's parental rights claims, the Court adopting the reasoning in *Littlefield v. Forney Independent School District*, 268 F.3d 275 (5th Cir.2001) and applied a rational basis review to the dress code regulations and upheld them.

discretion” to the school administration to determine whether a dress code was violating a students’ religious believes or not.⁷³⁰ This allows administrators to evaluate the “validity” of a religion, thus treating mainstream religions preferentially. Moreover there was no appeal mechanism provided against such determinations. The absence of any factors or procedural guarantees to govern this determination rendered these sections unconstitutional, because they violated the First Amendment.⁷³¹

A proper application of the First Amendment constitutional jurisprudence on appeal should however reverse this decision with the exception of the part where the Court held the unchecked administrative powers regarding exemptions unconstitutional. Such a holding would be in conformity with the general approach to students’ religious dress.

On the other hand, the special circumstances of the school environment seem to justify the proscription of some verbal messages worn students on their clothing. Another justification for curtailing student religious speech according to the Conseil d’État is the protection of the “dignity or to freedom of the pupils” when they are being undermined by the religious expression on a student. A recent US case has also posed the question as to whether given the special circumstances of the school environment school authorities may constitutionally silence speech that is deeply offensive and attacks “a core identifying characteristic such as race, religion, or sexual orientation”⁷³² of other students.

While prior to the case of *Harper v. Poway Unified School Dist.* 445 F.3d 1166, 1171 (9th Cir. 2006), courts usually put the emphasis on the requirement of real

⁷²⁹ *Jacobs*, *supra* note 717, at 1188.

⁷³⁰ *Id.*

⁷³¹ *Id.* at 1185.

⁷³² *Harper v. Poway Unified School Dist.* 445 F.3d 1166, 1171 (9th Cir. 2006), < at p. 19-20. [http://www.ca9.uscourts.gov/ca9/newopinions.nsf/D2D4CBF690CD61A6882571560001FEBD/\\$file/0457037.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/D2D4CBF690CD61A6882571560001FEBD/$file/0457037.pdf?openelement)>.

possibility of disruption of order and discipline before a school may suppress private student speech, in that case the court of appeals dealt extensively with the second prong of the *Tinker* standard - that student speech may be proscribed in school if it invades the rights of others.

In the particular case a student wore a T-shirt with an anti-gay messages written on it during a “Day of Silence” an event organized by the Gay-Straight Alliance at the school to “teach tolerance of others, particularly those of a different sexual orientation.”⁷³³ The messages were the expression of the student’s religiously based belief about homosexuality. Reinhardt held that school authorities could constitutionally proscribe speech which imposes a psychological injury on other students and causes “young people to question their self-worth and their rightful place in society.”⁷³⁴

I would argue that the court’s opinion correctly takes into consideration the special characteristics of the public school environment and is justified in reading *Tinker* in a way which would empower school authors to limit speech severely injurious to the core identity of a student. Students at primary and high schools are vulnerable and impressionable, they are put in a state-created situation and represent a captive audience. These unique circumstances justify the proscription of such “verbal assaults” which the state may not constitutionally ban outside of the school setting. The court noted that its ruling would not be applicable to colleges where students “acquire more strength and maturity” and “become adequately equipped emotionally

⁷³³ Harper v. Poway Unified School Dist. 445 F.3d 1166, 1171 (9th Cir. 2006), <[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/D2D4CBF690CD61A6882571560001FEBD/\\$file/0457037.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/D2D4CBF690CD61A6882571560001FEBD/$file/0457037.pdf?openelement)>.

⁷³⁴ *Id.* at 20.

and intellectually to deal with the type of verbal assaults that may be prohibited during their earlier years.”⁷³⁵

Another special characteristic of the public school environment is the educational mission of the school which sometimes may be in tension with its mandate of religions and ideological neutrality. On the one hand the school is to be neutral with respect to religions and ideologies but on the other hand the school should teach children about the values of tolerance and respect for difference, the values of democracy and develop capacity for critical thinking. Therefore it seems there is no principled way in which the school is entirely neutral. And as the court said, the First Amendment does not mandate that if the school holds a day of racial tolerance it should also give equal weight to racist speech.⁷³⁶ Finally the school is obliged to create an atmosphere where students can learn and if a child feels demeaned and intimidated because of injurious speech that this would inevitably interfere with her learning process.⁷³⁷

2. Teachers

Religious attire worn by public school teachers raises Establishment Clause concerns besides the issue of the Free Exercise rights of teachers. The critical issue is whether religious apparel worn by teachers violates the neutrality of the state in

⁷³⁵ *Id.* at 32.

⁷³⁶ *Id.* at 37.

⁷³⁷ *Id.* at 21, 25. I would not agree however, with the holding of the court that such type of speech may be proscribed only when it relates to a core identifying feature of a student’s minority status. The logic of the famous footnote four in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938) does not hold true with respect to the school setting. School regulations with respect to dress codes or anti-harassment policy are not voted and passed by the student body, but by the school authorities. Therefore it cannot be argued that the majority of students have at their disposal the majoritarian “political process” through which to protect their interests. Rules are adopted and decisions are taken by authorities outside the student community. Therefore I do not see any principled way though which

school and whether it involves religious coercion or proselytizing of students, whether such a practice would unduly infringe upon the students rights to religious freedom as well as parental rights to religious education of their children. Commenting on this issue Davis asserts that:

While no cases in the United States address the right of a public school teacher to wear a headscarf while on duty, it is likely that courts would protect such a practice, provided the teacher was not using her position as a state worker to advance or promote her own religious viewpoint, but rather was wearing the headscarf purely as a part of her religious commitment. To hold otherwise would be a denial of her free exercise rights in the interest of a too-strict separation of church and state.⁷³⁸

While it is true that there are no Supreme Court cases addressing public school teacher's right to wear a headscarf during instruction there are number of lower court cases dealing with the First Amendment issues arising from the practice of teachers wearing religious attire at public schools. The discussion of these cases *infra* suggests that Davis's conclusion is wrong, and courts will not protect such a practice when it involves young children and the wearing of ostentatious religious attire.

2.1 No Statutes

In early cases in which there was no specific statute or even administrative regulation prohibiting religious dress items worn by public school teachers, courts have found these practices constitutional. It should be noted that these early cases were decided before the incorporation of the Establishment Clause⁷³⁹ and the issue was the conformity of the practice with state constitutions forbidding sectarian teaching in public schools.⁷⁴⁰

to accord protect from a verbal assault on the core dignity of only those students who have a minority status.

⁷³⁸ Davis, *supra* note 421, at 234.

⁷³⁹ See *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) in which the Establishment Clause applied to state and local governments through Fourteenth Amendment.

⁷⁴⁰ For example see California's Art. 9, § 8 ("nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in and of the common schools of this State"); Nevada's Article 11, § 9 ("No sectarian instruction shall be imparted or tolerated" in the public schools); Washington's Article 9, § 4 (Public schools "shall be forever free from sectarian control or

For example in the case *Hysong v Gallitzin Borough School Dist.* (1894)⁷⁴¹ the court held that absent concrete evidence that the teachers engaged in sectarian instruction or held religious exercises, the sole fact that they were wearing religious attire in class did not amount to sectarian religious teaching.⁷⁴² The fact that the students would identify the faith community to which the teachers belonged or the possibility that they would regard them as role models did not by itself constitute sectarian teaching and did not violate the Constitution. Absent a statute or regulation on prescribing dress codes for teachers the court would not enjoy their employment because they wore religious apparel.⁷⁴³

Similarly in *Gerhardt v Heid* (1936)⁷⁴⁴ the court ruled that since the laws did not regulate the dress worn by public school teachers it was not for the courts to determine whether it was wise or not to prohibit religious clothes and insignia worn by teachers. The court was limited to finding whether such practice violates the Constitution and held that it did not.

As was noted above these early cases do not test the compatibility of religious dress worn by teachers with the Establishment Clause doctrine after it was held

influence"). (*See Cooper v. Eugene School District No. 4J*, 301 Or. 358, 723 P.2d 298 (1986), appeal dismissed, 480 U.S. 942 (1987) at footnote 13.

⁷⁴¹ 164 Pa 629, 30 A 482, 26 LRA 203, 44 Am St Rep 632.

⁷⁴² *See also Johnson v. Boyd*, 28 N.E.2d 256 (Ind. 1940), relying on *Hysong supra* note 72 rejecting the argument that nun habits of teachers constituted "sectarian teaching."

⁷⁴³ "It was not assumed that the fact of membership in a particular church, or consecration to a religious life, or the wearing of a clerical coat or necktie, would turn the schools into sectarian institutions. In the 60 years of existence of our present school system, this is the first time this court has been asked to decide, as matter of law, that it is sectarian teaching for a devout woman to appear in a school room in a dress peculiar to a religious organization of a Christian church. We decline to do so. The law does not so say. The legislature may, by statute, enact that all teachers shall wear in the school room a particular style of dress, and that none other shall be worn, and thereby secure the same uniformity of outward appearance as we now see in city police, railroad trainmen, and nurses of some of our large hospitals. But we doubt if even this would repress knowledge of the fact of a particular religious belief. That, if the teacher had any, would still be effectively taught by unselfish devotion to duty. No mere significance or insignificance of garb could conceal it. The daily life would either exalt or make obnoxious the sectarian belief of the teacher" (Cited in L. S. Tellier, *Wearing Of Religious Garb By Public-School Teacher*, Annotation, 60 A.L.R.2d 300, 4.)

⁷⁴⁴ 66 ND 444, 267 NW 127.

applicable to the state. However, the case of *Moore v. Bd. of Education* (1965)⁷⁴⁵ confirms the rule established by the early authorities. The Ohio Court of Common Pleas refused to grant an injunction sought by parents to enjoin the school board from allowing elementary school teachers to teach in Nun's habits. The court held that where there was no statute or regulation prohibiting religious dress teachers could wear such dress in public schools.⁷⁴⁶

In the majority of cases in which parents have challenged the practice of teachers wearing religious garb at public schools, courts have allowed the practice provided there is no statute or regulation to the contrary. In two of the states, Arkansas and Tennessee, the statutes even explicitly allow teachers to wear religious apparel at school.⁷⁴⁷ However, the majority of cases dealing with statutes or administrative regulations which prohibit religious dress worn by teachers have had their constitutionality sustained against a First Amendment challenge.

Earlier cases, before the incorporation of the First Amendment religious clauses, tested the compliance of administrative regulation or statutes prohibiting teacher's religious dress items with teachers' the right to religious liberty under state constitutions. Thus in *O'Connor v Hendrick* (1906)⁷⁴⁸ the court upheld a regulation of the superintendent prohibiting religious garb worn by public school teachers, reasoning that even if this practice did not amount to teaching of denominational belief, it would engender respect and sympathy for the religious denomination the teachers belonged, because of the susceptibility of young children to the authority of

⁷⁴⁵ 212 N.E. 2d 833 (Ohio 1965).

⁷⁴⁶ See also *Rawlings v Butler* (1956, Ky) 290 SW2d 801, 60 ALR2d 285, emphasizing that "the garb does not teach. It is the woman within who teaches," and that there was no statute regulating teachers' dress at public school and preventing the sisters from teaching at public schools because of their religious attire would be a violation of the Equal Protection Clause of the US Constitution.

⁷⁴⁷ *May a teacher wear clothing not approved by a teacher dress code?*, <<http://www.firstamendmentschools.org/freedoms/faq.aspx?id=13027&printer-friendly=y>>.

⁷⁴⁸ 184 NY 421, 77 NE 612, 7 LRA NS 402, 6 Ann Cas 432.

their teachers.⁷⁴⁹ And in *Commonwealth v Herr* (1910)⁷⁵⁰ the court held constitutional a statute prohibiting religious attire worn by teachers, which had been enacted after the decision in *Hysong* supra. The court relied on a distinction between beliefs and acts, and held the latter were not absolute and were subject to reasonable restraint by statute. While there is a difference between the level of protection that should be accorded to the *forum interum*, which is inviolable, and manifestation of religious beliefs, it is disturbing if the latter can be restricted by any reasonable statute. It should be noted that such a distinction is ultimately untenable and does not serve as a theoretical framework protecting religious liberty and has been rejected by subsequent court decisions.⁷⁵¹ The court distinguished the present case from *Hysong*, arguing that it does not follow that the legislation has to fall because efforts to achieve the same aim through the courts had been found unconstitutional. Both of these decisions were mentioned with approval by Justice Brennan in his concurring opinion in *Abington School District v. Schempp* (1963)⁷⁵² in his discussion of the Establishment Clause.

While the above mentioned cases held constitutional administrative regulation barring teacher's religious garb without holding that absent such a regulation the practice would violate the state or federal constitutions, in the case of *Zellers v Huff* (1951),⁷⁵³ the Supreme Court of New Mexico not only upheld the School Board regulation, but went further. It declared that in the event the School Board changed its regulation the court felt compelled to:

announce [its] decision that the wearing of religious garb and religious insignia must be henceforth barred, during the time the Religious are on duty as public school teachers. We hold the trial court erred in denying an injunction on this feature of the case. Not only does the wearing of religious garb and insignia have a propagandizing effect for the church, but by its very nature it introduced sectarian religion into the

⁷⁴⁹ *Id.* at 428-429.

⁷⁵⁰ 29 Pa 132, 78 A 68, Ann Cas 1912A 422.

⁷⁵¹ See for example *Cooper*, supra note 740, at 371.

⁷⁵² 374 U.S. 203 at footnote 28.

⁷⁵³ 55 N.M. 501, 236 P.2d 949.

school.⁷⁵⁴

This is one of the few cases in which a court held that the practice of teachers wearing religious garb by itself amounts to a constitutional violation. In some cases courts have also held that one of the conditions that a school must meet in order to be considered non-sectarian is that its teachers do not wearing religious apparel while teaching.⁷⁵⁵ Thus it is important to note, that there is no unanimity on that issue.

2.2 Statutes

Some states have enacted “religious garb” statutes.⁷⁵⁶ While behind the statutes in Germany and France lies the issue of integration of a growing population of Muslim immigrants, the original enactment of the garb statutes in the US were animated by anti-catholic sentiments,⁷⁵⁷ but courts have accepted that later reenactments of the statutes served legitimate purposes such as preserving the religious neutrality of public schools and have been applied consistently with that purpose.⁷⁵⁸

Statutes barring teachers from wearing religious dress or insignia are not neutral laws of general application. In contrast to the student dress codes which do not prohibit religious items specifically, the garb statutes single out religious dress. These

⁷⁵⁴ *Id* at 964.

⁷⁵⁵ See e.g. *Buford v. Southeast DuBois County School Corp.*, 472 F.2d 890 (7th Cir.1973).

⁷⁵⁶ See Neb.Rev.St. § 79-898 (1996) (prohibiting teachers from wearing “any dress or garb indicating the fact that such teacher is a member or an adherent of any religious order, sect, or denomination” while on duty. *Id.*); OR. REV. STAT. §§ 342.650, .655 (1989) (providing that “No teacher in any public school shall wear any religious dress while engaged in the performance of duties as a teacher” *Id.*); PA. STAT. ANN. tit. 24, § 11-1112 (1982) (providing that “no teacher in any public school shall wear in said school or while engaged in the performance of his duty as such teacher any dress, mark, emblem or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect, or denomination.” *Id.*)

⁷⁵⁷ See *Cooper*, *supra* note 740, at 308; *United States v. Board of Education for the School District of Philadelphia*, 911 F.2d 882 (3rd Cir. 1990) at 893. See also Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997) commenting on the prevalent anti-catholic animus in the 19th century which played a great role in controversies about the role of religion in public and in questions of government aid to private schools.

laws thus target religious acts so they are not affected by the *Smith* doctrine. That is why they must pass the strict scrutiny test in order to comply with the Constitution.⁷⁵⁹

There are several cases dealing with the constitutionality of such statutes. In the case of *Cooper v. Eugene School District No. 4J* (1986)⁷⁶⁰ the Oregon Supreme Court upheld the constitutionality of the state statute.⁷⁶¹ The statute was challenged by a teacher whose teaching certificate was revoked for violation of the religious garb statute because the teacher upon becoming a Sikh had started to wear white clothes and a turban while teaching classes.⁷⁶² The court rightfully rejected the argument that the law does not burden free exercise because it regulates action and verbal expression of belief.⁷⁶³ It reasoned that the statute should be interpreted as forbidding apparel that a teacher wears because of its significance for his or her religion and the same time communicates to the students “a degree of religious commitment beyond the choice to wear common decorations that a person might draw from a religious heritage, such as a necklace with a small cross or Star of David.”⁷⁶⁴ The statute forbids the wearing of such dress only when the teacher directly communicates with students in his/her teaching capacity. Such a construction of the statute served the compelling state interest of ensuring religious neutrality of the public school, by avoiding the perception by students or their parents that the school authorities endorse

⁷⁵⁸ See *Cooper*, *supra* note 740, at 308; *US v. Board of Education for the School District of Philadelphia* *supra* note 90, at 894.

⁷⁵⁹ See *United States v. Board of Educ.*, 911 F.2d at 888 n. 3. See also, *Nichol v. Arin Intermediate Unit* 28 268 F.Supp.2d 536, 550 (2003). (In this case the court referred to “heightened scrutiny” rather than strict scrutiny, because of the public employment context).

⁷⁶⁰ 301 Or. 358, 723 P.2d 298 (1986), appeal dismissed, 480 U.S. 942 (1987).

⁷⁶¹ ORS 342.650 provided that: “No teacher in any public school shall wear any religious dress while engaged in the performance of duties as a teacher.” And ORS 342.655 said: “Any teacher violating the provisions of ORS 342.650 shall be suspended from employment by the district school board. The board shall report its action to the Superintendent of Public Instruction who shall revoke the teacher's teaching certificate.”

⁷⁶² The court examined the compliance of the statute with the provisions of the Oregon state constitution which guarantee freedom of religion. Completing the analysis under the state constitution the court found that as the statute was interpreted and applied it violated neither the state constitution nor the First Amendment of the federal Constitution. (*Id.* at 381.)

⁷⁶³ *Cooper*, *supra* note 740, at 371.

the particular religious commitment of the teacher,⁷⁶⁵ and thus protects also the “child's right to the free exercise and enjoyment of its religious opinions or heritage, untroubled by being out of step with those of the teacher.”⁷⁶⁶

The court concluded that such a narrow interpretation and application of the statute did not restrict the teacher's right to free exercise more than was necessary in order to serve the compelling state interest. Thus the court found that although the Constitution did not forbid the wearing of religious dress by teachers at public schools, the legislature or the authorities with delegated powers could rule that such a practice is impermissible in order to ensure the neutrality of the public school, provided that statute or regulation stayed within the constitutional boundaries of permissible limitation of the teachers rights to free exercise.⁷⁶⁷

A final point of interest in this case is the court's treatment of the issue of the relevance of the question of whether the teacher belongs to a majority or a minority religion. The court recognized that the perils of endorsement and sectarian influence are most evident when the teacher represents a dominant religion in the community, noting that “It may be a far cry from these historic conflicts [Catholic/Protestant] to perceive any threat of sectarian influence in the dress of a sect that, in this country, may seem an exotic curiosity.”⁷⁶⁸ However, the court held that a teacher's membership of a majority religion is not a necessary factual prerequisite for the constitutionality of a statute forbidding religious dress. The first argument, although not explicitly stated, was based on equality. The court stated that, “neither their [teachers'] religious freedom nor that of their students can depend on calculations

⁷⁶⁴ *Id* at 380.

⁷⁶⁵ *Id.*

⁷⁶⁶ *Id.* at 376.

⁷⁶⁷ *Id* at 372.

⁷⁶⁸ *Id* at 377.

which faiths are more likely than others to snatch a young soul from a rival creed.”⁷⁶⁹

The second argument was based on the contention that religious majorities are fluid and “what is exotic today may tomorrow gain many thousands of adherents and potential majority status in some communities.”⁷⁷⁰

In the case of *United States v. Board of Education for the School District of Philadelphia* (1990)⁷⁷¹ the Court of Appeals for the Third Circuit upheld the application of the Pennsylvania garb statute⁷⁷² to a Muslim teacher wearing a headscarf and a long loose dress⁷⁷³ against a complaint that the statute constituted religious discrimination in employment in conflict with Title VII and therefore was unenforceable.⁷⁷⁴ In ruling on the concrete issue of the case—whether allowing the teacher to wear her religious garb in class would cause the school board to suffer undue hardship, the majority relied on *Cooper* discussed above.⁷⁷⁵ It concluded that since the Pennsylvania garb statute, like that in Oregon, permissibly served “a compelling interest in maintaining the appearance of religious neutrality in the public school classroom” then sacrificing a compelling state interest to accommodate the teacher would constitute an undue burden for the board.⁷⁷⁶

⁷⁶⁹ *Id.*

⁷⁷⁰ *Id.*

⁷⁷¹ 911 F.2d 882 (3rd Cir. 1990).

⁷⁷² 24 Pa.St. Ann. § 11-1112., (a) That no teacher in any public school shall wear in said school or while engaged in the performance of his duty as such teacher any dress, mark, emblem or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination.

⁷⁷³ Such a dress is called abaya.

⁷⁷⁴ But see *McGlothin v. Jackson Municipal Separate Sch. Dist.*, 829 F. Supp. 853 (S.D. Miss. 1992) in which a federal district court upheld the dismissal of a teacher, reasoning that the teacher had failed to communicate the religious basis of her conduct (wearing a headwrap to express cultural her cultural and religious heritage) but observed that “[d]istrict is required, under the First Amendment and Title VII, to make some accommodation for the practice of religious beliefs when it pursues an end which incidentally burdens religious practices.” (*Id.* at 886).

⁷⁷⁵ The majority relied on the precedential value of *Cooper*, since it reached the US Supreme Court (at the time the appeal was as of right) and was summarily dismissed. The precedential value of *Cooper* was disputed by the concurring opinion of judge Ackerman.

⁷⁷⁶ See *United States v. Board of Education for the School District of Philadelphia* *supra* note 771, at 890.

The concurring opinion on the other hand argued that accommodation of the teacher would result in a violation of the Establishment Clause and therefore it would cause an undue hardship. According to the judge permitting the teacher to wear religious garb would convey a message to the young and impressionable students for whom the teacher is a figure of great authority that the school or the state is favoring religion over non-religion, and would constitute impermissible endorsement of religion.⁷⁷⁷ The conspicuousness of the religious dress was also a relevant issue of the analysis. The judge noted that the issue of the prohibition of small sized religious items “such as a mezuzahs, crucifixes, or mini-Buddhas, etc., worn, for instance, on necklaces” which could arguably be covered by the statute was not before the court and that “the difference from the instant case to the next case may simply be one of degree and effect.”⁷⁷⁸

The issue of what dress items should be covered by the statute arose in *E.E.O.C. v. Reads, Inc.*, 759 F.Supp. 1150 (E.D.Pa. 1991). The court held that a simple head covering such as a Muslim headscarf would not be identified as a religious garb by the students and therefore this practice did not come within the ambit of the Pennsylvania statute, giving it a construction similar to the one given to the Oregon statute by the *Cooper* court. The reasoning of the court is in clear contrast with how the headscarf is viewed in France, where the headscarf is the primary ostentatious symbol that the law of March 2004 targets.

The most recent case related to the Pennsylvania garb statute is that of *Nichol v. Arin Intermediate Unit* 28 268 F.Supp.2d 536 (2003). The district court found unconstitutional the “religious affiliation” policy⁷⁷⁹ enacted by the school governance

⁷⁷⁷ *Id* at 899-900.

⁷⁷⁸ *Id.* at 900, ft.4.

⁷⁷⁹ The policy prohibited employees from wearing "religious emblems, dress, or insignia" in schools under ARIN's authority (a political and governmental subdivision of the Commonwealth of

body of the school district pursuant to the state garb statute and noted that if called upon to address the state statute, it probably would find it unconstitutional as well.⁷⁸⁰

The outcome of this case runs contrary to the cases discussed above, but it may be argued that the crucial legal and factual difference of the case was the broad construction of the statute and the breadth of the scope and application of the religious affiliation policy. While in previous cases the statutes were construed narrowly and prevented teachers from wearing only conspicuous, ostentatious symbols, in the present case the policy forbade the plaintiff to wear a small cross on a necklace. The probability that young impressionable students would perceive a message of official endorsement of the teachers religion is arguably *de minimus* when the teacher wears small unobtrusive religious symbols. The fact of the size of the symbol was noted by the district court several times and was an important factor for the outcome of the decision.⁷⁸¹ The court also noted that this was a factual ground that made the present case distinguishable from *United States v. Board of Education for the School District of Philadelphia* (1990) where the Court of Appeals had “specifically and approvingly” emphasized the observation of the Oregon court in *Cooper*, that the Oregon statute would should not be interpreted to ban “dress that communicates an ambiguous message, such as, for example, the occasional wearing of jewelry that

Pennsylvania, receiving federal, state, and local school district funding), specifically including religious jewelry such as “crosses and Stars of David.” (See *Nichol v. Arin Intermediate Unit* 28 268 F.Supp.2d 536 (2003) at 541).

⁷⁸⁰ *Nicol* supra at 555 (“In the current legal landscape of the Establishment Clause, it is unlikely that the Garb Statute would withstand the heightened scrutiny and endorsement analysis to which it now must be subjected.”)

⁷⁸¹ “Given the *inconspicuous* nature of plaintiff’s expression of her religious beliefs by wearing a small cross on a necklace, and the fact that other jewelry with secular messages or no messages is permitted to be worn at school, it is extremely unlikely that even elementary students would perceive Penns Manor or ARIN to be *endorsing* her otherwise unvoiced Christian viewpoint, and defendants certainly presented no evidence to support such a perception. Merely employing an individual, such as plaintiff, who *unobtrusively displays her religious adherence* is not tantamount to government endorsement of that religion, absent any evidence of endorsement or coercion.” (See *Id* at 554, emphasis added.) It also noted that a reasonable observer, i.e., one who was familiar with the history and context of ARIN’s Religious Affiliations policy and its application in the schools under ARIN’s authority, could

incorporates common decorations like a cross or a Star of David.”⁷⁸²

The policy was subjected to higher scrutiny⁷⁸³ and was found to violate the free exercise and free speech right of the teacher. Since allowing the teacher to wear a cross would not have violated the Establishment Clause, because it would not be perceived as endorsement of religion, the government had no compelling state interest which was achieved by the policy. The court referred to the Supreme Court decision in *Widmar v. Vincent*, 454 U.S. 263 (1981), where the Supreme Court stated that:

...the state interest asserted here - in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution - is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State's interest as sufficiently "compelling" to justify content-based discrimination against respondents' religious speech.⁷⁸⁴

This is a question of crucial importance for the constitutionality of religious garb statutes and regulations: Is the court in *Nichol* correct in asserting in reliance on *Widmar*, that absent a violation of the Establishment Clause, there is no sufficiently compelling state interest that can justify the limitation on teachers' Free Exercise rights? Stated differently, can maintaining a neutral school environment be a compelling state interest if the Establishment Clause doesn't require the strictness of the neutrality that is being implemented?

There is no Supreme Court ruling on the issue whether the practice of wearing religious attires by teachers while they communicate with students in their official capacity violates the Establishment Clause. The discussion *supra* shows that most courts have held that the religious attire worn by public school teachers by itself would not violate the Establishment Clause, but it should be noted that most of these

not perceive that ARIN was endorsing religion by permitting its employees to wear *small crosses or similar jewelry with religious content* or viewpoint to work at school. (*Id* at 555, emphasis added).

⁷⁸² *Id* at 555, citing *Cooper supra* note 740, at 890.

⁷⁸³ The court held that although policy that targets religious conduct specifically is ordinarily subjected to strict scrutiny the additional factor of the plaintiff being in public employment, called for higher scrutiny only. (*Id* at 550).

cases were decided before the incorporation of the Establishment Clause and the development of the modern Establishment Clause doctrine and judicial opinions to the contrary have been in dicta or concurrence.

However, even assuming that the practice does not violate the Establishment Clause, the holding of the district court in *Nicol* is still debatable. Its reliance on *Widmar*, may be misplaced because *Widmar* is distinguishable from religious garb cases in that it involved the religious expression of private religious groups which wanted to use the school premises after the school day, not the religious expression of public school teachers during instruction time. This is why free speech challenges to garb statutes may be unsuccessful because of the greater leeway accorded to public employers for regulation of employee speech.⁷⁸⁵ In *Marchi v. Bd. of Cooperative Educ. Services of Albany*, (1999)⁷⁸⁶ the Court of Appeals for the Second Circuit held that:

[W]hen government endeavors to police itself and its employees in an effort to avoid transgressing Establishment Clause limits, it must be accorded some leeway, even though the conduct it forbids might not inevitably be determined to violate the Establishment Clause and the limitations it imposes might restrict an individual's conduct that might well be protected by the Free Exercise Clause if the individual were not acting as an agent of government.⁷⁸⁷

Relying on the reasoning in *Marchi* the District Court for Connecticut in *Downing v. W. Haven Bd. of Educ.*, 162 F.Supp.2d 19 (D. Conn. 2001), upheld a school administrative action preventing a teacher from wearing a T-shirt with the inscription "JESUS 2000-J2K" during times of instruction. The court held that allowing the teacher to wear the T-shirt was likely to be perceived by the students as endorsement of religion by the school and would thus violate the Establishment Clause. The Court noted that even if this would not have violated the Establishment

⁷⁸⁴ See *Widmar v. Vincent*, 454 U.S. 263 (1981) at 276.

⁷⁸⁵ See *Waters v. Churchill*, 511 U.S. 661, 673-674 (1994).

⁷⁸⁶ 173 F.3d469 (2d Cir.), *cert. denied*, 528 U.S. 869 (1999).

Clause, the school's action passed constitutional muster, since the school should be accorded some leeway in resolving the tension between the Free Exercise and the Establishment Clause when it regulates the conduct of its employees, citing *Marchi*:

The decisions governmental agencies make in determining when they are at risk of Establishment Clause violations are difficult, and, in dealing with their employees, they cannot be expected to resolve so precisely the inevitable tensions between the Establishment Clause and the Free Exercise Clause that they may forbid only employee conduct that, if occurring, would violate the Establishment Clause and must tolerate all employee conduct that, if prohibited as to non-employees, would violate the Free Exercise Clause. When government is both the initiator of some religiously related actions, through the conduct of its employees, and the regulator of the extent of such actions, through the conduct of its supervising employees, it need not determine, at the peril of legal liability, precisely where the line would be drawn if its employees were not involved.⁷⁸⁸

The opposite position is taken by LaMacchia, who labels as cases of “reverse accommodation,” situations in which “the government acts to promote the values implicit in the Establishment Clause by increasing the constitutionally required separation between church and state, but in so doing burdens an individual's free exercise rights” and thus violates the Constitution.⁷⁸⁹ According to him when the state proscribes an activity to enforce the Establishment Clause but goes beyond the constitutional requirements “it often does so only because of the religious nature of the act it seeks to prohibit. According to him this amounts to intentional discrimination and, under *Smith*, unconstitutional.”⁷⁹⁰ According to LaMacchia the *Smith* decision gives much more extensive protection to Free Exercise claims in cases of “reverse accommodation” because the government is precluded from advancing reasons to justify the burden on Free Exercise rights of teachers under a compelling states interest.⁷⁹¹

⁷⁸⁷ *Id* at 476.

⁷⁸⁸ *Downing v. W. Haven Bd. of Educ.*, 162 F.Supp.2d 19 (D. Conn. 2001), citing *Marchi* *supra* note 786, at 476.

⁷⁸⁹ Thomas F. LaMacchia, *Reverse Accommodation of Religion*, 81 GEO. L.J. 188, 120 (1992).

⁷⁹⁰ *Id.*

⁷⁹¹ *Id* at 121.

LaMacchia gives *United States v. Board of Education* as an example of a case involving “reverse accommodation” which has been wrongly decided. He argues that the court was wrong and mistakenly reviewed the school board action under the compelling interest test.⁷⁹² Instead LaMacchia maintains that the analysis should consist of two steps. The first one is to establish whether the state of “Pennsylvania was not trying to prevent an actual Establishment Clause violation, the only exception to Smith's prohibition of intentional religious discrimination.”⁷⁹³ If the answer is no, then the next step needs to establish whether the state singles out religious activity for unequal treatment, and if it does, then according to LaMacchia, the court has to strike down the regulation as unconstitutional without further examination⁷⁹⁴ Thus he maintains that courts should dispense with the compelling state interest test in such cases and absent a violation of the Establishment Clause they should strike down laws and regulations that provide for “overseparation” because they violate the Free Exercise Clause by being intentionally discriminatory..

But *Smith* does not dispense with the application of the compelling interest test. Under *Smith* when the laws are not neutral and of general applicability, then strict scrutiny of the laws or regulations should be applied.⁷⁹⁵ The question whether there may be a compelling state interest in achieving religious neutrality of the public school and protecting the free exercise rights of students through narrowly tailored means which would constitutionally restrict the free exercise rights of public school teachers, even though such a restriction is not mandated by the Establishment Clause.

I would argue that the above mentioned state interest in achieving religious neutrality of the public school and protecting the free exercise rights of students is a

⁷⁹² *Id* at 132.

⁷⁹³ *Id.*

⁷⁹⁴ *Id.*

⁷⁹⁵ *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 531, 546, 547 (1993).

compelling state interest and when a regulation or a law is narrowly tailored to achieve that interest it is in fact aimed at preventing a potential violation of the Establishment Clause. That is, by narrowly tailoring the means to achieve that purpose the state is in fact targeting only acts that if permitted would be found to violate the Establishment Clause.

In the cases discussed above only the concurring opinion of Judge Ackerman argues that the practice of teachers wearing religious apparel while teaching is by itself a violation of the Establishment Clause. Bastian criticizes his opinion as stemming from “a rigid, absolutist view of the Establishment Clause and a flawed contextual analysis.”⁷⁹⁶ He has three main arguments against Ackerman: firstly, that in a large and diverse urban setting students are likely to perceive a policy allowing teachers to wear religious dress as a result of the principle of religious neutrality adopted by the school, and if they cannot reach that conclusion they are unlikely to perceive that the school is endorsing the teacher’s religion either; secondly, since only some states have similar “garb statutes,” if such statutes were mandated by the Establishment Clause then all the other states would be “in a continual violation” of the Establishment Clause; and thirdly, a total ban on teacher’s religious dress is likely to be perceived by students as a disapproval and animosity towards religion, which would lead to a violation of the non-endorsement principle.⁷⁹⁷

His first contention is debatable. Teachers are authority figures for students, and especially when the students are young it is very likely that their attitude towards religion and the particular religion of the teacher would be affected. Justice Brennan, has emphasized that one of the reasons among others as to why the Supreme Court has been “vigilant in monitoring compliance with the Establishment Clause in

⁷⁹⁶ Holly M. Bastian, *Religious Garb Statutes and Title VII: An Uneasy Coexistence*, 80 GEO. L.J. 211, 229 (1991).

elementary and secondary schools” is “because of the students' emulation of teachers as role models.”⁷⁹⁸ The religious influence that a teacher wearing a religious garb may exert does not come as a result of the position of authority in a particular religion that his or her clothing may denote, as Bastian argues,⁷⁹⁹ but rather from the position of authority the teacher has vis-à-vis the students.⁸⁰⁰

As for his second contention, it may be argued that while some states do not have religious garb statutes, that does not mean that there are no sub-statutory regulations that impose restrictions on the wearing of religious attire by teachers. However, there are, as was already noted, two states that have passed statutes expressly allowing teachers to wear religious apparel. However it is no argument to say that this practice is constitutional because if courts find it unconstitutional then at least two states would have been applying unconstitutional statutes. His argument amounts to the following—a practice is not unconstitutional, because if it is then the law that authorizes it is unconstitutional.

I think that his third argument has the greatest merit. It cannot be denied that there is likelihood that if students learn that their teacher has been dismissed because of he or she has been wearing a religious dress symbol at school, they may perceive the reaction of the school authorities as hostility to religion. However, this argument may be opposed to all actions by school authorities that are directed at preventing school teachers from imparting religious messages to students, even in cases where the messages would undoubtedly violate the Establishment Clause. Thus relying on

⁷⁹⁷ *Id.* at 231.

⁷⁹⁸ *Edwards v. Aguillard* 482 U.S. 578, 584-583 (1987).

⁷⁹⁹ Bastian notes, that “the result might be different if Reardon wore religious clothing such as a clerical collar or a nun's habit that symbolized not only religious affiliation but also an authoritarian position within a particular religion.” (*Id.* at 231).

⁸⁰⁰ See also *Edwards v. Aguillard* 482 U.S. 578, 584-583 (1987), where Justice Brennan notes that one of the reasons among others as to why the Supreme Court has been “particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools” is “because of the students' emulation of teachers as role models.”

this argument alone is not sufficient to justify the permission of symbolic religious expression by teachers in class – otherwise one may slide into a slippery slope whereby all such expression should be permitted lest the students perceive hostility to religion.

Furthermore as Gunn has observed, there is the possibility that a single faith dominates a particular school or school board and then “the religious attire of the teacher may be seen by the religious minority, correctly or incorrectly, as part of a larger plan to use the schools to promote the majority’s religious faith.”⁸⁰¹ In such cases the religious attire of a teacher belonging to the dominant religion may exacerbate existing divisions in the community along religious lines.⁸⁰²

I would argue that in the case of teachers as opposed to students, when there are certain factual prerequisites met, namely: the symbols worn are conspicuous and elementary children are involved, then Establishment concerns are strongest, because children are more likely to be influenced by the religious convictions of the teacher. When the case involves high school seniors, Establishment concerns are weaker, because as students approach maturity they are less impressionable and more secure in their own religious identity.⁸⁰³ Volokh argues that religious garb statutes are overinclusive for high school students,⁸⁰⁴ and even with small children proper explanation would prevent a perception of endorsement, therefore religious garb

⁸⁰¹ T. Jeremy Gunn, *Neutrality, Expression, and Oppression: A Response to Professor Schachter*, 23(3) JOURNAL OF LAW & EDUCATION 391, 349 (1994).

⁸⁰² *Id* at 396.

⁸⁰³ For example, the Louisiana Attorney General expressed the opinion that college teachers may wear religious attire in class, since university students are “less impressionable and less susceptible to religious indoctrination,” referring to *Tilton v. Richardson*, 403 U.S. 672, 686 (1971). (1982-83 *La. O.A.G. 17* (1982)), <<http://www.ag.state.la.us/ShowDoc.asp?DocID=7453>>.

⁸⁰⁴ Eugene Volokh, Religious Garb Statutes, Volokh at MAIL.LAW.UCLA.EDU, Thu May 10 12:56:53 PDT 2001, <<http://lists.ucla.edu/pipermail/religionlaw/2001-May/002361.html>>. See also R. A. Swanson, *The Constitutionality Of 'Garb Laws' In The Context Of The Public High School*, *Journal of Law and Education*, 23(4), 549-569, Fall 1994, arguing that in a high school setting garb laws are unconstitutional.

statutes are not the least restrictive means for achieving neutrality in public schools.⁸⁰⁵

While this argument is persuasive regarding older students, the impressibility of young children, the authoritative position of the teacher, explanations and disclaimers would most likely not succeed.⁸⁰⁶ Furthermore, I think that endorsement concerns maybe much stronger when the school displays religious symbols, such as the crucifix on the classroom wall, because there it is the school as an institution that endorses the religious message of the symbol, while when the teacher wears a crucifix on the neck, it is much more likely for students to understand that the school is accommodating the personal religious expression of the teacher. But still the religious expression of the teacher is likely to influence the minds of young and impressionable children, because he/she is an authoritative figure and a role model for the kids. Thus the crucial factual circumstances for the constitutionality of religious garb statutes and regulations are the ostentatiousness of the religious dress symbols and the age of the students.

One last issue that needs to be addressed is whether the majority or minority status in the particular community of the religious group to which the teacher belongs has any relevance to the endorsement analysis and therefore to the constitutionality of the practice. According to Carpenter, when the teacher belongs to a religious minority there is no danger that students or parents would perceive the state as endorsing the

⁸⁰⁵ (visited Dec 28, 2004), <<http://lists.ucla.edu/cgi-bin/mailman/private/religionlaw/attachments/20010510/50720717/attachment.htm>>. See also Dale E. Carpenter, *Free Exercise And Dress Codes: Toward More Consistent Protection Of A Fundamental Right*, 63 Ind. L.J. 601, 628 (1988) arguing that informing students and parents of the facts regarding a teacher's religious clothing is a less restrictive means than preventing the teachers from wearing such clothes.

⁸⁰⁶ For example a public school in Orlando, Florida allowed teachers to wear t-shirts with the phrase "Champions in Christ" on the front and a New Testament verse on the back on a religious holiday. The school tried to avoid Establishment Clause concerns by distributing disclaimers. (See Mark I. Pinsky, *Christian Groups Seek Converts at Schools; A Friendlier Legal Environment Finds at Least Five Outreach Groups Active in Area Public Schools*, Orlando Sentinel, Sept. 14, 1997, at A1, cited in Steven G. Gey, *Religion And The State*, 2004 Supplement, (visited 25 January, 2005), <<http://www.lexisnexis.com/lawschool/study/texts/pdf/Religion2004S.pdf>>. at 59. However, given the ostentatiousness of the religious message, the act amounts to impermissible proselytizing by public school teachers and in addition to endorsement concerns it also come perilously close to religious coercion of students.

religion. Since “[t]he purported beneficiary of the state's endorsement is a minority religion [and] [n]o ‘objective observer’ could possibly perceive the State of Oregon as endorsing the Sikh religion” he argues that the *Cooper* case was wrongly decided.⁸⁰⁷

Such a line of argument runs contrary to the constitutional principle of equality and would lead to discrimination against religious communities that have a larger number of adherents in a particular community. And given that religious majorities maybe be shifting in time and space, this would result in one school permitting Nun’s habits while in another school dictret they may be forbidden, but headscarves allowed, etc. What is more Carpenter’s argument does not solve the problem of the appearance that the state is endorsing religion in general nor does it solve the problem of impermissible religious influence over young students by the teachers who are employees and representatives of the state.

XIV. GREAT BRITAIN

The reaction to the French law of March 2004 in Britain has generally been negative.⁸⁰⁸ The Foreign Office Minister has stated that integration does not require

⁸⁰⁷ See Carpenter, *supra* note 805, at 619.

⁸⁰⁸ In a public speech a Home Office official, stated that, “There has been a long running controversy in France both within the state education system and nationally about symbols and the role of faith in a secular society. This is a debate we had a long time ago, and with our very different traditions and with sensitivity displayed by all faiths, we have been able to find within our own culture a way of celebrating diversity without controversy. For example, a British woman can wear the hijab comfortably in public or in a school. That diversity is something that as a Government we value and why we are developing work on inter-faith dialogue and the importance of understanding of each other’s cultures and respect for one another’s traditions and values.” (Speech by Home Office minister Fiona Mactaggart, 18 December

2003 in HUGH MUIR AND LAURA SMITH, ISLAMOPHOBIA – ISSUES, CHALLENGES AND ACTION: A REPORT BY THE COMMISSION ON BRITISH MUSLIMS AND ISLAMOPHOBIA, 2004 Uniting Britain Trust, <www.insted.co.uk/islambook.pdf>, p. 1). See also. *Livingstone Attacks French Headscarf Ban: Conference Hears London Mayor Denounce Legislation Outlawing The Hijab In Schools, And Attack 'Demonisation of Islam' By Parts of Press*, THE GUARDIAN, July 13, 2004, <http://www.guardian.co.uk/uk_news/story/0,3604,1259773,00.html>. It is not only the academics and politicians in the UK that support the wearing of religious symbols by students at school. The results of public opinions polls in the UK also differ from those in France. For example, according to a poll of 736 parents in England and Wales 70 per cent were in favor of letting students wear religious dress items such as headscarves at school. (See Michael Shaw and Warwick Mansell, TES, 16 April 2004, <<http://www.humanism.org.uk/site/cms/contentViewArticle.asp?article=1971>>).

assimilation and “In Britain we are comfortable with the expression of religion.”⁸⁰⁹ One of the main reasons given for the difference of approach to the issue are the different models of minority integration the two countries have – the British “communitarist” model, based on a “affirmative recognition of diverse communities and different cultural, ethnic and/or religious Identities” is often contrasted with the “assimilationist” French model based on a universal acceptance of French Republican values and the principle of *laïcité*, regardless of one’s origins.”⁸¹⁰ Another reason that has been given is the different legal approach to the relationship between church and state. While the French Constitution protects the principle of *laïcité*, which requires a separation of church and state, the UK is a state with an established church. It has also been suggested that a reason for the difference is the pragmatism of the common law tradition in the UK as opposed to the civil tradition in France and the enforcement of abstract ideas.⁸¹¹ The following section will examine the British approach to the issue of religious symbols at state schools.

1. Students

In contrast to the jurisdictions of France and the US discussed above, in the UK there is no constitutional doctrine of separation of church from state, the Church of England has the status of Established church. There is also no constitutional or

⁸⁰⁹ *British Criticism Of Headscarf Ban*, BBC News, 10 February 2004, <<http://news.bbc.co.uk/1/hi/education/3477109.stm>>.

⁸¹⁰ See Lina Molokotos Liederman, *Pluralism in Education: the Display of Islamic Affiliation in French and British Schools*, 11 (1) ISLAM AND CHRISTIAN AND MUSLIM RELATIONS 105, (2000). See also *The War of the Headscarves*, THE ECONOMIST, Feb. 5, 2004, <http://www.economist.com/World/europe/displayStory.cfm?story_id=2404691>, and Basil R. Singh, *Responses of Liberal Democratic Societies to Claims from Ethnic Minorities to Community Rights*, 25 (2) EDUCATIONAL STUDIES 187, 195 (1999).

⁸¹¹ Lennart Lehmann, *Integration Policy in Britain: The Influence of Common Law*, 19.11.2004, Qantara.de 2004, <http://www.qantara.de/webcom/show_article.php/_c-478/_nr-191/i.html?PHPSESSID=133099777>.

statutory requirement for religious neutrality of public schools.⁸¹² Thus the main issue in the UK is the compliance of dress codes with the statutory right to freedom of conscience and religion and with anti-discriminations statutes.

1.1 The Human Rights Act 1998

The right to freedom of thought, conscience and religion is protected by Article 9 of the Human Rights Act 1988. The right includes freedom to manifest religion or belief in practice and observance and such manifestation is subject only to such limitations that are “prescribed by law and are necessary for public safety or for the protection of the rights and freedoms of others.”⁸¹³ The right is applied by courts in conformity with the jurisprudence of the European Court of Human Rights.

1.2 The Race Relations Act

The Race Relations Act 1976, as amended by the Race Relations (Amendment) Act 2000 prohibits discrimination against anyone on the grounds of race, color, nationality (including citizenship), or ethnic or national origin.⁸¹⁴ The Act applies in the sphere of education⁸¹⁵ and proscribes both direct and indirect discrimination. Indirect discrimination occurs when a regulation applying to everyone would put people from a particular race, ethnicity or nationality at a particular disadvantage and the regulation may not be justified irrespective of the racial origins of

⁸¹² See *The Queen on the application of SB v The Headteacher and Governors of Denbigh High School* (2005) EWCA Civ 1999, at para. 94.

⁸¹³ The statute incorporates the rights under the ECHR into the law of the UK and obliges public bodies, school governors included, to act in a way compatible with its provisions. When courts review secondary legislation for compliance with the Human Rights Act they if they find that it is not compatible with the Act they may strike it down and not apply it.

⁸¹⁴ Race Relations Act 1976, Art. 1-3.

⁸¹⁵ Race Relations Act 1976, Part III.

the person concerned.⁸¹⁶ In the sphere of education such a regulation or policy has to be “justifiable on educational or some other grounds, and this justification must not be outweighed by any detriment that the requirement or condition entails.”⁸¹⁷ The Act protects the rights of Jews and Sikhs⁸¹⁸ but not those of Muslims or Hindus, since the former are considered ethnic groups in contrast to the latter. Some Muslims though have been successful in their claims under the Act but only when they have argued that have been discriminated on the basis of their national origin not on their religion.⁸¹⁹

1.3 Uniforms and Case Law

The wearing of religious attire or signs by students may come into conflict with school regulations on student’s dress. There is no statutory regulation regarding school dress codes or uniforms. The decision on whether there should be a uniform and what it should consist of falls within the authority of the governing body. This authority is derived from the governing bodies’ responsibility for the promotion of discipline and good behavior of the pupils and the general conduct of the school provided for by sections 38 and 61 of the School Standards and Framework Act 1998. It is the headmaster’s responsibility to enforce the decisions concerning uniforms by the governing body.

The Government through the Department for Education and Skills (DfES) has issued general guidelines concerning the regulation of student dress. The department

⁸¹⁶ Race Relations Act 1976, Art.1

⁸¹⁷ Education code of practice - England & Wales, Education and the Race Relations Act, (visited June 6, 2005), <http://www.cre.gov.uk/gdpract/ed_cop_ew_legal.html>.

⁸¹⁸ See *Mandla v Dowell Lee* (1983) 2 AC 548.

⁸¹⁹ For example a Pakistani woman raised a successful claim against future employers refusing to employ her unless she wore a knee-length skirt. She argued that she suffered discrimination because of her Pakistani origin. (See Lara Maroof, *The Race Relations Act*, (visited June 7, 2005), <<http://www.aml.org.uk/journal/3.3/Maroof%20-%20The%20Race%20Relations%20Act.pdf>>).

stated that “schools must be considerate to the needs of different cultures, races and religions” and thus they should allow for example Muslim girls to wear appropriate dress and Sikh boys to wear their traditional headgear.⁸²⁰ According to the guidelines it is “inappropriate for a child to be punished for breaking uniform rules that make him or her adopt a different cultural, racial or religious dress code” and in general non-compliance with the a school’s dress code is not to be considered a sufficient ground for exclusion except when “it is part of a pattern of defiant behavior generally.”⁸²¹ Finally the guidance explicitly admonishes school governors to take into account the requirements posed by Sex Discrimination Act 1975, the Human Rights Act 1998 and the Race Relations Act 1976 when dealing with issues of dress codes and uniforms.

The British approach to issue of students’ religious dress is one of accommodation. The earliest case dealing with the issue of a student’s religious dress is the case of *Mandla v. Lee* (1983)⁸²² in which the House of Lords held that the refusal of a headmaster to admit a Sikh boy to a Christian school unless he cut his hair and removed his turban was a violation of the Race Relations Act because it was an act of unjustifiable indirect discrimination on the ground of ethnicity. One of the main questions was whether Sikhs could be identified as an ethnic community for the purposes of the RRA, and Lord Fraser answered it in the positive. As was already mentioned Muslims in Britain have long been arguing that the RLA is not an adequate protection for their rights, in the absence of an act banning religious discrimination in particular, since Muslims cannot easily fit the definition of “ethnic community” under the RLA in order to claims rights under it. What is important in the discussion

⁸²⁰ Department for Education and Skills, School Uniform Guidance, (visited June 7, 2005), <http://www.direct.gov.uk/EducationAndLearning/Schools/SchoolLife/SchoolLifeArticles/fs/en?CONTENT_ID=4016078&chk=nMFEvS>.

⁸²¹ *Id.*

on the meaning of indirect discrimination, forbidden by s 1(1)(b) of the Act. According to Lord Fraser, although Sikhs “can” refrain from wearing a turban if “can” is interpreted as a physical capability, but such an interpretation could not be consistent with legislative intent, therefore it rather meant, “can consistently with the customs and cultural conditions of the racial group.”⁸²³ According to Lord Fraser the school had failed to prove that its action was justifiable without regard to the ethnic origins of the applicant, since “the principal justification on which the respondent relies is that the turban is objectionable just because it is a manifestation of the second appellant's ethnic origins.”⁸²⁴ The school had argued that its decision aimed to “minimise external differences between races and social classes” and to “present a Christian image of the school to outsiders.”

Although the case concerned a state maintained Christian school not a community school it is relevant to the present discussion since it affirms even more forcefully the protection afforded to students religious expression. Arguably a school with a religious ethos could have a better chance of justifying limitations on symbolic religious expression by enrolled students than a public school with no such ethos. Therefore, the holding of the case sends the signal that “secular” schools would not be able either to justify such limitations.

A recent case from 2006 – *R (Shabina Begum) v Head teacher and Governors of Denbigh High School* [2006] UKHL 15, put to the test the limits of accommodation to student’s religious expression. The case concerned the refusal of a school to accommodate the wish of a Muslim girl to wear the jilbab at school. This controversy quickly attracted the attention of the media and appeared in the spotlight of public debates. Prior to that controversy the wearing of religious attire by students was not a

⁸²² 2 AC 548.

⁸²³ *Id.*

big issue in the UK, in contrast to France.⁸²⁵ There were isolated incidents, which were resolved in favor of the Muslim girls wishing to wear a headscarf to school. In 1998 in a Manchester school two Muslim girls were initially refused entry into the classroom because according to the school the wearing of headscarves was incompatible with requirements of health and safety.⁸²⁶ The scarves were free flowing and had long fringes, and according to the headteacher they were a hazard in gym and laboratory classes.⁸²⁷ The school also pointed out that it had accommodated Muslim girls attending the school by allowing the wearing of the shalwar and had consulted the local Muslim council which had not mentioned headscarves.⁸²⁸ After the Commission for Racial Equality indicated that this might be interpreted as an instance of indirect discrimination, the girls were allowed to attend classes in headscarves provided that they were in the colors of the school uniform and were securely fastened.⁸²⁹

Another incident occurred in a High School in Luton, which had a uniform policy banning all headgear in the classroom except for turbans. When a parent to a prospective Muslim student turned to the Luton Borough Council the matter became a focus of public attention and arguments were voiced that the policy might be violating

⁸²⁴ *Id.*

⁸²⁵ See Liederman, *supra* note 810, at 108, “The number of articles gathered from the French and British press on the wearing of the Islamic headscarf in school underscores this important difference. Between 1989 and 1998 a total of 1,261 articles were gathered from the French press on the Islamic headscarf controversy in France. Indicative of the magnitude of the controversy in France is the publication of 34 articles gathered from the British press on the Islamic headscarf issue in France, indicating a strong British interest in the French Islamic headscarf issue. In sharp contrast, only 23 articles were gathered from the British press on the Islamic headscarf issue in Britain. Indicative of the weakness of the headscarf issue in Britain is the fact that the British press published more articles on the headscarf controversy in France than on the same issue in Britain. In comparison, only eight articles were gathered from the French daily press on the Islamic headscarf issue in Britain.”

⁸²⁶ Nadia Hashmi, *Gender and Discrimination: Muslim Women Living in Europe*, (visited June 8, 2005) <<http://www.lse.ac.uk/collections/EPIC/documents/ICHashmi.pdf>>.

⁸²⁷ Poulter, *supra* note 359, at 67.

⁸²⁸ *Id.*

⁸²⁹ *Id.*

the Race relations Act.⁸³⁰ Finally the school governors agreed to lift the ban.⁸³¹ Thus in general it may safely be concluded that public schools in Britain as a rule accommodate the wish of Muslim girls to wear headscarves because of concerns of about anti-discrimination within a policy framework resting on multiculturalism.⁸³²

The most recent case - *R (Shabina Begum) v Head teacher and Governors of Denbigh High School* (2006) put to the test the limits if any of such accommodation. In 2002 a Muslim girl in a Luton high school decided that that in order to fulfill the religious mandates of her faith she has to wear to school a jilbab. The school uniform rules permitted the wearing of headscarves, provided that are in the colors of the school uniform and securely fastened and also the wearing of shalwar kameeze – “a sleeveless smock-like dress with a square with “loose trousers which taper at the ankles.”⁸³³ The design of the school uniform had been done after consultation with parents, students, and representatives of the local Mosque. It also had the approval of the governing body, in which Muslims are represented.⁸³⁴ The school insisted that the applicant could attend school only if she complied with the school uniform rules and the applicant claimed that the shalwar kameeze did not satisfy the requirements of her religion and she refused to attend dressed in anything but a jilbab, and as a result of

⁸³⁰ *Why Muslims Make Britain a Better Place*, Commission for Racial Equality, visited May 24, 2005), <<http://www.cre.gov.uk/Default.aspx?LocID=0hgnew03s.RefLocID=0hg00900c002.htm>>.

⁸³¹ *School Lifts Ban on Headscarves*, BBC News, 2 March, 2004, <<http://news.bbc.co.uk/1/hi/england/beds/bucks/herts/3527681.stm>>.

⁸³² See Trevor Phillips, The Race Relations Commissioner for the UK, stating that: “ we have found ways in which where there are school uniforms, we can design a hijab which fits with the school uniform. So instead of people saying I’m not going to wear the school uniform because it doesn’t allow me to wear a headscarf, all we’ve done is encourage people and found ways of adding an item to the uniform list, which is the headscarf, and anybody, if they wanted to, could wear the headscarf, but of course Muslim girls are the ones who will do that preferentially, but it’s still part of the uniform and that way the school keeps its uniform, the families get to wear the headscarves if they want to. And everybody wins except the extremists, except the people who say “You can’t be British and Muslim at the same time”. And what we’re seeing by this small but I think extremely important process, is emergence of an identifiable British Muslim, and I think that’s really where we need to go.” (*The Religion report Multiculturalism*, Radio National, 2 June 2004, <<http://www.abc.net.au/rn/talks/8.30/re/rpt/stories/s1135424.htm>>).

⁸³³ *The Queen on the application of SB v The Headteacher and Governors of Denbigh High School* (2005) EWCA Civ 199, para. 6.

that she was sent home. When the girl challenged the school action on the basis of her right to freedom of region under Art.9 and right to education under Art.2 of Protocol 1 of the ECHR the judge in the High Court of Justice dismissed her claim.⁸³⁵ The judge held that the school's actions did not amount to exclusion of the claimant:

The Claimant had a choice, either of returning to school wearing the school uniform or of refusing to wear the school uniform knowing that if she did so refuse the Defendant was unlikely to allow her to attend. She chose the latter. In my judgment it cannot be said the actions or stance of the school amounted to exclusion, either formal, informal, unofficial or in any way whatsoever.⁸³⁶

After finding that the claimant had not been excluded from school, the judge held that for this reason her whole claim had to be dismissed. The judge also noted for the sake of clarity that even if it is presumed that there had been exclusion the claimant failed to show that her rights under the convention had been unjustifiably restricted.⁸³⁷

As was noted the case soon gained much publicity. What contributed to this was the circumstance that no other but Mrs. Cherrie Booth, the prime Minister's wife argued the appeal of the case before the Court of Appeal. This was a fact that sent a clear symbolic message about the political attitude towards the issue. The Court of Appeals overturned the High Court's decision to the applause of the Muslim community. However, a careful reading of the decision shows that similarly to the UN decision on the headscarf issue in Uzbekistan,⁸³⁸ the court found for the claimant because of the lack of proper argumentation on the part of the government and avoided deciding on the substantive issues involved in the case, namely whether the restrictions could be justified as proportionate.

⁸³⁴ *Id* at para. 12.

⁸³⁵ *See* Begum, R (on the application of) v Denbigh High School [2004] EWHC 1389 (Admin) (15 June 2004).

⁸³⁶ *Id* at para. 60.

⁸³⁷ *Id*.

⁸³⁸ Communication No. 931/2000 : Uzbekistan. 18/01/2005. CCPR/C/82/D/931/2000. (Jurisprudence).

The Appeals Court found that the claimant had been effectively excluded from school since she was sent home for disciplinary reasons and could not fulfill the disciplinary requirements because they collide with her religious beliefs.⁸³⁹ The judge noted that the opinions of Islamic scholars differed on the question of what the required dress for Muslim women is, some of whom he called “liberal” or “mainstream” thought that the shalwar kameeze was satisfactory while the “strict” Muslims thought that it was too revealing for women after puberty so the jilbab was required.⁸⁴⁰ Regardless of these different opinions, the sincerity of the belief of the claimant was not challenged and was accepted.

The crucial question addressed by the judge concerned the proportionality of the restriction on the claimant’s right. The judge did not issue a definitive ruling on this substantial question. Instead, commenting on the case of *Leyla Sahin v. Turkey* he observed that the ECHR gave much weight to several factors when assessing the necessity of the restriction in Turkey: the constitutional principal of secularity, the fact that Muslims were a majority of the population in Turkey; the possible effect the permission of wearing the headscarf might have on women not wishing to wear it; the politicization of the headscarf as a symbol; the existence of political movements in Turkey aiming to impose a conception of society based on their religious principles. The judge concluded that “context is all-important” adding that the fact whether a country has as its constitutional principle secularity or not was very important and depending on that circumstance different legal conclusions about proportionality may

⁸³⁹ *The Queen on the application of SB*, *supra* note 833, at para. 24.

⁸⁴⁰ *Id* at para.48. W. Shadid and P. S. Van Koningsveld identify three categories of scholarly opinions concerning the requirements for modest dress for Muslim women: women should cover all their bodies with the exception of the face and the hands; women should cover their whole bodies including the face leaving visible only the eyes or only one eye; Islamic prescriptions for covering the female body are not valid in the present age. (See W. Shadid and P. S. Van Koningsveld, *Muslim Dress In Europe: Debates On The Headscarf*, 16:1 JOURNAL OF ISLAMIC STUDIES 35, 1 (2005).

be warranted.⁸⁴¹ He noted that the UK in contrast to Turkey is not a secular state nor does it have a written constitution. Thus on the one hand, he intimated that at least some of important contextual factors present in the Turkish case were missing in the case of the UK. On the other hand, he also noted that decision-makers were entitled to give due weight to considerations such as the ones expressed by the teaching staff of the school at the present case.

Thus without ruling on whether the school actions could meet the proportionality standard and be justified as necessary in a democratic society, the justice declared that the school had “unlawfully denied her the right to manifest her religion; unlawfully denied her access to suitable and appropriate education” because the school had approached the issue from the wrong premise.⁸⁴² The school had not started from the premise that the claimant had a right protected by English law and therefore the school authorities should bear the onus of justifying their interference with that right according to the steps of legal analysis developed in the Strasbourg case law on the Convention rights. Rather it had assumed that “its uniform policy was there to be obeyed: if the claimant did not like it, she could go to a different school.”⁸⁴³

Again Lord Justice Brooke, emphasized that nothing in his decision precluded the school from justifying its policy on school uniform, taking into consideration: whether students from faiths different from the strict Muslims would also want to wear clothing currently not permitted by the uniform rules and if so the effect of many students wearing different religious clothing on the school’s policy of inclusiveness; the appropriateness of not accommodating strict Muslims when liberal Muslims have already been accommodated given that the school is not completely secular; possible

⁸⁴¹ *Id* at para.72.

⁸⁴² *Id.* at para.76.

ways in which the school could retain a uniform policy similar to its present one and at the same time accommodate strict Muslim students; and finally the weight that should be accorded to these concerns and to the rights of the students to manifest her beliefs.⁸⁴⁴

I would argue that the holding of the Appeals Court was correct although it should have turned to the merits of the case and engaged in the proportionality analysis, as the Law Lords of the House of Lords argued in the decision of the appeal of the Court of Appeals judgment.⁸⁴⁵ Before turning to an examination of the House of Lords decision which overruled the lower court decision and found for the school authorities, I would briefly justify my position calling for an analysis of the proportionality of the interference.

The concerns expressed by the witness were very similar to the arguments presented for justification of the French law of March 2004. It was argued that allowing the wearing of jilbab would bring pressure on other Muslim girls to start wearing it as well, less they be perceived as “religious inferiors.”⁸⁴⁶ The current uniform policy protected a lot of Muslim girls from pressure coming from more extremist groups and if the wearing of jilbab is allowed “these girls would be deprived

⁸⁴³ *Id.*

⁸⁴⁴ *Id.* at para. 81.

⁸⁴⁵ Lord Bingham noted that European Court of Human Rights has dealt with the issue of whether a state party has violated the applicant's Convention right and not “whether the challenged decision or action is the product of a defective decision-making process.” (R (Shabina Begum) v Head teacher and Governors of Denbigh High School [2006] UKHL 15, at 29). He emphasized that the Court of Appeals should have dealt on the merits with the issue of proportionality of the restriction that it found was imposed upon the Begum and should not have retreated to the safety of procedural review. It was not tenable to maintain that the school action was disproportionate and at the same time state that on proper reconsideration of the issues the same action may very well turn out to be justified, as the Court of Appeals said in its decision. (*Id.* at 30) As Lord Hoffman argued a court is not entitled to hold that “a justifiable and proportionate restriction should be struck down because the decision-maker did not approach the question in the structured way in which a judge might have done.” (*Id.* at 68). Lastly, the law lord noted that while the Court of Appeal's recommended decision making steps would make a good guidance to a lower court or legal tribunal, headmasters at school could not be required to go through an intricate legal analysis in order to respect the convention rights of a student. It was the outcome, Lord Bingham correctly re-emphasized and the quality of the decision making process of the

of proper protection and would feel abandoned by those upon whom they were relying to preserve their freedom to follow their own part of the Islamic tradition.”⁸⁴⁷

In England a child has the right under the Children Act⁸⁴⁸ to attempt to challenge an exercise of parental authority that forces her to wear a headscarf or jilbab against her wishes. She has to have a leave from a court and a determination that she understands what is at stake. The court may issue a “specific issue order” or a “prohibited steps order” so that the child should not be required to wear a headscarf or jilbab.⁸⁴⁹ Poulter notes that this is a very unlikely development, since conflicts between parents and their adolescent children are normal and generally their resolution does not involve litigation between the parties. However, he argues that students should be advised at school that if they are forced to wear a jilbab or headscarf by threats from peers, local communities or family members they should inform the school authorities, the local school service department or the police.⁸⁵⁰ Such measures are indeed the only means which are least restrictive of the students’ rights to freedom of religious and expression at school.

Related to the above discussion is also the question, already discussed in relation to the headscarf debate in France, about the genuineness of free choice and

school authorities that a court of law should consider in determining whether a Convention right has been disproportionately restricted or not.(Id. at 31).

⁸⁴⁶ *Id.* at 51.

⁸⁴⁷ *Id.* at 56. According to Tarlo after the litigation started it was soon evident that Shabina Begum was advised by members Hizb ut-Tahrir, and that her brother who was her legal guardian had litigation friend possibly was a full member of the organization – a controversial radical Islamic political organization, banned in countries in Central Asia, and controversial in Germany and Denmark (Tony Blair also announced in 2005 plans to ban the organization in the UK, See Tony Blair and Hizb-ut-Tahrir: “Muslims under the bed,”

<<http://www.opendemocracy.net/debates/article.jsp?id=2&debateId=124&articleId=2740>>), which has the political objective of the creation of a Caliphate in the Muslim world through non-violent means.

(See Tarlo, *supra* note 375, at 14; the website of Hizb ut-Tahrir in Britain is :

<http://www.hizb.org.uk/hizbnew/index.php?id=2208_0_44_0_M86>). According to Tarlo, the publicity surrounding the litigation of the Begum’s case “became a convenient avenue for the organization to push its sartorial agenda indirectly.”

⁸⁴⁸ Children Act 1989, s 10 (1), (8).

⁸⁴⁹ See Poulter, *supra* note 359, at 73.

⁸⁵⁰ *Id.*

the line between acceptable parental influence and impermissible coercion. Commenting on the situation in Great Britain, Poulter has noted that parental choices about religious upbringing are protected by the ECHR and the CRC. He argues that what is most important in most cases is that veiled girls attend public schools because in this way they will come to internalize the values of critical thinking and sexual equality and will be able to make an informed choice whether to continue to wear the evil or the jilbab or not.⁸⁵¹

The school authorities in the *Sabina* case also stressed that a change in the uniform policy could bring “religious divisiveness” into the school especially given the “the potential for pupils to identify themselves as distinct from other groups along cultural, religious or racial grounds, and for conflict to develop between such groups.”⁸⁵² Finally, a great number of the teachers at the school objected to a change in the uniform rules, because to them it was important that the school was a secular one, and the objected to the school giving the impression that it was promoting a particular faith.⁸⁵³

The very experience of success in providing quality education to a religiously and ethnically plural student community⁸⁵⁴ however, undermines the validity of the above mentioned concerns. The school has allowed the wearing of the *hijab*, which clearly differentiates Muslim from non-Muslim girls. The same possibility for creating “better” and “worse” Muslims exists when some Muslims girls choose to wear the hijab while others do not. One need not repeat all the arguments against the

⁸⁵¹ Poulter, *supra* note 359, at 71.

⁸⁵² *The Queen on the application of SB*, *supra* note 833, at 53.

⁸⁵³ *Id.* at 55.

⁸⁵⁴ “Its [the school’s] performance is now well above average for schools with a similar intake, and it cannot accommodate all the pupils who wish to attend it. It has ranked tenth in the country for adding value to its pupils’ prior attainment. It has won school achievement awards from the Department for Education and Science (DfES), and it featured in a video on ethnic minority achievement which the department produced.” (*Id.* at 3.)

headscarves in France to show that the concerns submitted by the Luton school have equal validity for allowing or not the wearing headscarves.

On the other hand a very important question is whether there should be no limits then to the accommodation of students wishing to wear specific garments as a manifestation of their faith or as a fulfillment of a religious mandate. Should, for instance, a school accommodate the desire of a student to wear a *burqa* or *niqab*, which covers not only the hair but also the whole face? As I argue with respect to an incident of a German school prohibiting burqa clad girls from receiving instruction there are be valid security and pedagogical reasons why students should be identifiable. Out of security concerns a school may wish to know who enters the school building. Teachers may want to identify the students being examined or questioned. While education is not listed a one of the permissible legitimating grounds for limitation in Art. 9 (2), the protection of public safety and order is a ground for limitation of the right to manifestation of religion and it may be argued that a uniform policy not allowing students to cover their faces can pass the proportionality test.

As in France, there were calls for more precise regulation of the matter and limiting the discretion of school officials. A spokesperson for the Muslim Council of Britain said: “The current situation is causing chaos....We feel that those who wish to wear jilbab should be able to do so. But the Government’s policy is that dress codes are open to interpretation by each school and that is why we have got this mess...It seems that the Government needs to set out precisely what is and is not acceptable.”⁸⁵⁵

⁸⁵⁵ Cahal Milmo, *British Set Code For Muslim Students*, 9 November 2004, (visited 15 July 2005), <<http://education.independent.co.uk/news/article19388.ece>>

These statements were made following a decision in 2004 of the school authorities in Tower Hamlets, a London borough with a very high concentration of Muslims, which decided to implement a dress code that allowed the wearing of headscarves and tunics but prohibited the wearing of jilbabs and burqas on health and safety grounds.⁸⁵⁶ As consequence of the ban there were at least three girls who stayed out of classes to protest the ban.⁸⁵⁷ These incidents took place before the decision of the Court of appeals on the *Sabina* case came out. It should be noted that the schools' grounds for the limitation of the rights to students' religious expression were not discussed in the *Sabina* case. Health and safety reasons are a legitimate ground for limitation and they do not involve any subjective and value laden interpretations of the symbolism of the religious dress and its effect on others, provided school authorities can show that wearing a jilbab to school is indeed a safety hazard because of the high probability of tripping and falling. However, after community dialogues were opened up among headteachers and parents in Tower Hamlets, the schools eventually changed their uniform policies and allowed the wearing of the jilbab,⁸⁵⁸ which suggests that the ban might have been motivated by different reasons or that the justification may not have been sufficiently strong.

As it turned out the fact that there were other schools which allow the wearing of jilbabs was one of the main reasons why the House of Lords found against Shabina when the decision of the Court of Appeals was appealed. While for the Supreme Court of Canada, the fact that there are schools in other provinces which accommodate the wearing of a kirpan by Sikh school children contributed to the

⁸⁵⁶ *Id.*

⁸⁵⁷ Abul Taher, *Stay-At-Home Protest as Schools Ban Islamic Dress*, TIMES ONLINE, (November 7, 2004),

<<http://www.timesonline.co.uk/article/0,,591-1349989,00.html>>

⁸⁵⁸ Assembly for the Protection of Hijab, *Press Release: habina Begum Wins Jilbab Case*, (16 July 2005), <<http://www.prohijab.net/english/Press-Release-shabina-begum.htm>>.

finding that the prohibition for wearing kirpan in a Québec school did not satisfy the requirement of minimal impairment under the Canadian Charter, the law lords of the House of Lords used this similar circumstance as basis of finding that there was no restriction on Shabina's rights to manifest her religion. The House of Lords simply dismissed the referral to the Canadian case because it was "decided, on quite different facts, under the Canadian Charter of Rights and Freedom."⁸⁵⁹ Three of the law lords held that there was no interference with Shabina's right to manifest her belief under Art. 9, and even if it was assumed that there was, the interference was justified and proportionate. Two of them held that there was interference but it was justified.

1.3.1 Interference

Lord Bingham accepted that Art.9 was applicable since the belief of Shabina that wearing a jilbab was a sincere one, noting that "any sincere religious belief must command respect, particularly when derived from an ancient and respected religion."⁸⁶⁰ Hopefully, the lord's emphasis on the longevity and respectability of the religion to which a claimant belongs does not mean that if the religion is not that ancient or not that respected by mainstream society, a claimant is entitled to less protection under the Human Right Act.

The main thrust of the Lord's argument was that an interference with a convention right should not be automatically established in each and every instance in which a claimant has proved that she has been prevented from manifesting her belief, but that the specificity of the situation of the claimant and particularly the circumstance of whether she could reasonably expect her manifestation to be

⁸⁵⁹ *Shabina Begum*, *supra* note 845, at 34.

⁸⁶⁰ *Id.* at 21.

respected under the particular conditions should be taken into consideration.⁸⁶¹ He relied on several cases of the European Court of Human Rights in which the court did not find an interference with the right to freedom of religion protected by Art.9. One group consisted of cases concerning refusals of employers to accommodate the applicant's religious practice or observance in which the Strasbourg court did not find that the refusal constituted interference with the applicants Art.9 rights because they had voluntarily accepted terms of employment and could terminate the employment contract if they found it too burdensome on their religious practice.⁸⁶²

Cases concerning employment based on contractual relations are however clearly distinguishable since education is mandatory for children and the state is under a statutory obligation to provide for it. The child does not choose to have "an education career."⁸⁶³ Children are not equal parties in a contractual relationship and as Lord Nicholls noted relying on the possibility to transfer to another school underestimates the disruption this may cause to a child's education. It is clear that the prohibition to wear a jilbab imposed a restriction to Shabina Begum's right to express her religion. And it can be argued that since accommodation was made for headscarves and shalwar kameeze at her school and since jilbabs was accommodate at other schools then Begum could reasonably expect that her school would also respect her understanding of Muslim religious requirement.

Lord Hoffmann also found that there had been no interference with the girl's rights to manifest her religion because:

⁸⁶¹ *Id.* at 22.

⁸⁶² The cases referred to in the judgment are: in *X v Denmark* (1976) 5 DR 157, *Ahmad v United Kingdom* (1981) 4 EHRR 126, *Konttinen v Finland* (1996) 87-A DR 68, *Stedman v United Kingdom* (1997) 23 EHRR CD 168, *Kalaç v Turkey* (1997) 27 EHRR 552.

⁸⁶³ This objection to the applicability of employment cases to education issues was dismissed by Lord Hoffmann, who argued that Shabina could have chosen another school, regardless of the fact that her relationship with the school was not contractual and that the state's statutory duty to provide education did not include provision of education at a particular school (*Shabina Begum*, *supra* note 845, at 57).

there was nothing to stop her from going to a school where her religion did not require a jilbab or where she was allowed to wear one. Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing. Common civility also has a place in the religious life.⁸⁶⁴

The fact that Shabina had discovered that her religion required her to wear a jilbab, was according to Lord Hoffmann, a problem for her and her family and not a problem or issue for the school. Admittedly she would bear some burden to change schools but “but people sometimes have to suffer some inconvenience for their beliefs.”⁸⁶⁵ According to Lord Hoffmann, instead of dealing with her own problem Shabina and her brother had sought to make it a problem for the school in a rather confrontational manner. And instead of quickly seeking transfer to another school Shabina had waited until after her application for judicial review had failed at the first instance court because “she and her family were intent upon enforcing her “rights””(quotation marks from the original).⁸⁶⁶ The ease with which Lord Hoffmann dismissed the alleged infringement is indeed notable. It appears from his opinion that he considered the fact that Shabina had relied on the statutory protection of the right to freedom of religion under the Human Rights Act a breach of “common civility.” Of course whenever a person’s human rights are restricted it is primarily her problem, she is the one who suffers from the restriction but when it is the state acting through its authorities that imposes the restriction then the Human Rights Act 1998 makes it a problem of the state too. One could argue that in the opinion of Lord Hoffman we see an argument that approaches the position of the US Supreme Court in *Smith* – the uniform rule was one of general application and not targeting to discriminate on the basis of religion. However, under this approach the fact the school made exemption for a number of interpretation of religious dress requirement

⁸⁶⁴ *Id.* at 50.

⁸⁶⁵ *Id.*

⁸⁶⁶ *Id.* at 52.

would pose a high burden on the state to justify its selective refusal to accommodate the wearing of the jilbab.

Lord Scott also found no infringement of Begum's right under Art. 9. Relying on the Strasbourg cases mentioned above he argued that:

The cases demonstrate the principle that a rule of a particular public institution that requires, or prohibits, certain behaviour on the part of those who avail themselves of its services does not constitute an infringement of the right of an individual to manifest his or her religion merely because the rule in question does not conform to the religious beliefs of that individual. And in particular this is so where the individual has a choice whether or not to avail himself or herself of the services of that institution, and where other public institutions offering similar services, and whose rules do not include the objectionable rule in question, are available.⁸⁶⁷

However, what Begum sought in litigation was not to that the school change its uniform policy so that it conforms to her religious beliefs—she did not press a demand that all Muslim girls that had reached puberty be required under school rules to wear jilbabs, which was what her understanding of religious dress requirements was. Rather she sought an individual exemption in order to make it possible for her to follow her sincere belief.

To support his argument Lord Scott argued that the same conclusion would be reached in the “reverse situation” involving not a secular school trying to accommodate dress requirement of Muslim pupils, but a faith school in which accommodation is sought by a student who has become an atheist. According to the law lord in a faith school requiring pupils to attend a daily religious worship it may be assumed that all enrolled students agree to participate in it. If a student becomes an atheist and decides that he no longer wishes to attend, the refusal of the school authorities to accept his request for excusal may not be represented, consistently

⁸⁶⁷ *Id.* at 87.

with Strasbourg's jurisprudence, as an infringement on his Art. 9 rights, unless the service offered by the school could not be obtained elsewhere.⁸⁶⁸

The hypothetical is however misleading. Faith schools is a term commonly referring to those schools in the UK which are foundation or voluntary aided or controlled schools maintained by the state and have been designated by the Secretary of State as schools with a religious character.⁸⁶⁹ Parents whose children attend any state maintained school have the statutory right to exempt their child from attendance of collective worship by virtue of Art. 71 of the School Standards and Framework Act 1998.⁸⁷⁰ The right of parents to excuse their children is unconditional and absolute and no state maintained school, be it a secular or a faith school, may refuse to grant such an exemption. Thus such a reverse situation is impossible to happen unless there is an amendment to the UK statutory law.⁸⁷¹ While it may be true, Lord Bingham states, that the Human Rights Act 1998 does not have as its purpose to "enlarge the rights or remedies of those in the United Kingdom whose Convention rights have been violated but to enable those rights and remedies to be asserted and enforced by the domestic courts of this country and not only by recourse to Strasbourg"⁸⁷² it is also true that the Human Rights Act does not have as its purpose to constrict the rights enjoyed under UK statutory law.

⁸⁶⁸ *Id.* at 88.

⁸⁶⁹ *Categories of Schools – Overview*, GovernorNet, <http://www.governornet.co.uk/cropArticle.cfm?topicAreaId=1&contentId=548&mode=bg>.

⁸⁷⁰ 71. - (1) If the parent of a pupil at a community, foundation or voluntary school requests that he may be wholly or partly excused-

(a) from receiving religious education given in the school in accordance with the school's basic curriculum,
 (b) from attendance at religious worship in the school, or
 (c) both from receiving such education and from such attendance, the pupil shall be so excused until the request is withdrawn.

⁸⁷¹ It is true that at the time the decision was issued students themselves no matter what their age do not have a right to request exemption and this is a problem with the law, as was discussed in Chapter 2. But this is irrelevant for the sake of the present discussion since firstly, this limitation on student's rights applies in secular schools as well, and secondly, there no argument that Shabina and her family were of different minds with respect to request for exemption from the school uniform rules.

⁸⁷² *Shabina Begum*, *supra* note 845, at 29.

1.3.2 Justification

Lord Bingham began his rather short analysis by pointing out several broad principles established in *Leyla Sahin* case.⁸⁷³ His reliance on broad principles is reasonable inasmuch as much of his fore-going arguments centered the contextually of the analysis of restrictions on Art.9 rights and the context in the Turkish cases, emphasized also by the Strasbourg Court is very different from that of the UK. Firstly, the UK in contrast to France or Turkey cannot use as a justification a principle of secularism in view of the church state relations established in the country, and especially in view of the prominence of Christianity in state schools. Secondly, there the political situation in Turkey and the religious make-up of the country to which the Court in Strasbourg referred are not comparable to that of the UK. According to Lord Hoffman, however, such distinctions between the contexts of the two countries “miss the point”⁸⁷⁴ What was relevant was only that Turkey had a national rule about the permissibility of headscarves while the UK parliament had delegated the issue for regulation to school authorities and “From the point of view of the Strasbourg court, the margin of appreciation would allow Parliament to make this choice.”⁸⁷⁵

Indeed what is perhaps most significant is the willingness of the Strasbourg Court to grant an inordinately large margin of appreciation to state parties in cases dealing with religious /anti-religious expression especially when the state is acting to protect the rights and freedoms of others.⁸⁷⁶ Lord Hoffmann translated the doctrine of

⁸⁷³ “the high importance of the rights protected by article 9; the need in some situations to restrict freedom to manifest religious belief; the value of religious harmony and tolerance between opposing or competing groups and of pluralism and broadmindedness; the need for compromise and balance; the role of the state in deciding what is necessary to protect the rights and freedoms of others; the variation of practice and tradition among member states; and the permissibility in some contexts of restricting the wearing of religious dress.” (*Id* at 32).

⁸⁷⁴ *Id.* at 62.

⁸⁷⁵ *Id.*

⁸⁷⁶ See Sylvie Langaude, *Indoctrination, Secularism, Religious Liberty, and the ECHR*, 55 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 929 (2006).

margin of appreciation of the Strasbourg into a principle allowing domestic courts to defer on democratic grounds to decision of legislators, or the authority to whom legislative power is delegated, on rules which are contested as infringement of Convention rights.⁸⁷⁷

Lord Bingham too adopted a very deferential approach in examining the proportionality of an assumed interference. For him the school was justified in its differential treatment of headscarves and jilbabs, since when in 1993 accommodation was made to allow headscarves in school uniform it was done upon the request of several schoolgirls and there was no record of any objections. The jilbab was requested by Begum alone and several girls had voiced objections. By themselves these factual difference cannot serve as a justification absent some further elaboration – after all it does not matter for the legal analysis how many students adhere to a given religious doctrine when the question is whether they should be allowed to follow religious dress requirement or not. Most difficult is the issue about the possibility of coercion and pressure on other girls which the school sought to prevent. And here the question is one of proportionality. To state simply that there were objections to the allowance of jilbabs by others and that's why it was not allowed seems like enforcing a heckler's veto. Instead of engaging in a detailed analysis of the proportionality of the measure, as was offered in the discussion following the Court of Appeals decision above, the House of Lords decided to adopt a deferential approach to the school authorities decision in this "sensitive" matter emphasizing several times that "the rules were acceptable to mainstream Muslim opinion."⁸⁷⁸

It was Baroness Hale that engaged in an analysis of some of the controversial issues and that is why her opinion merits to be examined separately. While the rest of

⁸⁷⁷ *Shabina Begum*, *supra* note 845, at 63-64.

⁸⁷⁸ *Id.* at 34- 44.

the law lords did not discuss the autonomy of Begum's choice to wear a jilbab and accepted, since it was never contested, that she held a sincere belief that her religion required her to do so, Baroness Hale touched upon the issues of autonomy, free choice and gender equality which were central also in the French headscarf debate and drew from judicial decision and practices in countries other than the UK. However, some of the basic analogies and distinctions that she made seem not well argued.

She contended that as long as a woman chooses by herself to wear a headscarf or a jilbab, this is her right and no one has the right to prevent her from doing so. This is so despite the fact that, she argued, strict dress codes for women requiring them to cover all but the face and hands while leaving men freer to decide how to dress amounts to unequal treatment and may be a signal that women may be relegated to the private sphere while men only will occupy public roles. It not clear however, why the wearing of a headscarf does not pose such similar problems related to gender equality. After all in France, Germany and in Turkey it was the wearing of Islamic headscarf at educational institutions that was opposed for the reason that it was not consistent with the principle of sexual equality. She refers to scholarly and judicial opinions which emphasize that the choice to wear a hijab both in French schools and in Turkish universities is a genuine autonomous choice and should therefore be respected and protected by the Convention. However, there is nothing in the record of the case that Begum did not make that choice or that her choice was less autonomous than the choice made by the French students the Baroness referred to. While it is true that in the Turkish case the applicant was a grown up woman, in France the rights of school girls like Shabina were at issue.

According to Baroness Hale, the school had made considerable effort to create dress rules that would both promote social cohesion and would also respect cultural

and religious diversity. Headscarves and the shalwar kameez were allowed, she argued, but jilbab was rightly not allowed since girls at the school had expressed concerns that such an action by the school authorities would expose them to family or community pressure to wear jilbab while they did not wish to do so.⁸⁷⁹ According to the Baroness this was the evidence that distinguished the present case from that of Leyla Sahin, in which she found the dissenting opinion very persuasive.⁸⁸⁰ However, it is not at all clear how she would differentiate this case from the situation in France where the Stasi Commission referred to statements made by schoolgirls who said that they would feel abandoned by the school if headscarves were allowed or from the *Sahin* case, where concerns about community and social pressure on university students not wishing to wear a headscarf were very important.

It should be noted however, that commentaries from journalists, representative of the legal community as well as from mainstream Muslim leaders supportive of the decision of the House of Lords as one of sound common sense⁸⁸¹ The main reason for this is most probably the involvement of the radical Muslim organization Hizb ut-Tahrir in the case.⁸⁸²

The latest controversy about students' symbolic religious expression also shows that the accommodationist approach in the UK is not without limitations, which again appear unjustified in the particular context of the case. In June 2006 several

⁸⁷⁹ *Id.* at 98.

⁸⁸⁰ *Id.*

⁸⁸¹ See Jenny McCartney, *The School Uniform Case was a Victory for Bigots*, Telegraph.co.uk, (visited 1 July 1, 2006), <<http://www.telegraph.co.uk/opinion/main.jhtml?xml=/opinion/2005/03/06/do0605.xml&sSheet=/opinion/2005/03/06/ixop.html>>; Andrew Towler, *Lords Reject Human Rights Uniform Case*, Solicitors Journal, (24 March 2006), <http://www.solicitorsjournal.com/story.asp?sectioncode=61&storyCode=7385&eclipse_action=getsesion>; Tarlo, *supra* note 375, at 16, quoting Ghayasuddin Siddiqui, the Leader of the Muslim Parliament, as saying on hearing the result of the decision of the Court of Appeals that : "It may be a victory for human rights but it is also a victory for fundamentalism." For the negative reaction to the Court of Appeals decision see also, Ian Ward, *Shabina Begum and the Headscarf Girls*, 15 (2) JOURNAL OF GENDER STUDIES, 119, 121 (2006).

⁸⁸² See *supra* note 847.

teenage girls were barred from wearing a silver “chastity ring” for the reason that the school had a “no jewelry” policy and that the issue was also one of health and safety.⁸⁸³ The mother of a student was told that the school was concerned that if the girl fell on the ground and reached out her hand to stop her, the ring might injure her.

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At least one of the girls involved is considering legal action for infringement of her rights under the Human rights Act 1998. The girl and her parents claim that she has been unlawfully restricted in expressing her religious convictions to abstain from sex before marriage. The Silver Ring Thing is an American Christian movement with followers in the UK promoting abstinence before marriage, and the silver ring is worn by its faithful as a demonstration of an abstinence pledge.⁸⁸⁵ Girls wearing such rings were taught lessons in isolation and missed classes.

School authorities as in the *Begum* case have stated that no rights infringement occurred since the school had a clearly stated uniform policy with high standards sensitive to religious expression. The no jewelry policy is aimed at preventing competition among students on the basis of their parent’s wealth. One of the issues is then whether these silver rings were the sort of jewelry that should normally be governed under the policy or are they protected religious expression.

Some argued that the silver ring cannot fall into the same category as the Sikh bracelet, for which an exception is allowed, or the Muslim headscarf, because they constitute mandatory articles of faith of long established recognized religious, in

⁸⁸³ Gaby Hinsliff, *Banned: Schoolgirls Are Forced to Take off Chastity Rings - or Be Ordered out Of Lessons*, (June 18, 2006), THE OBSERVER, http://observer.guardian.co.uk/uk_news/story/0,,1800271,00.html?gusrc=rss.

⁸⁸⁴ Elizabeth Day, *Sikh Bracelets, But No Christian Rings At School Bans Pupils From Wearing 'Purity Rings'*, (June 18, 2006), TELEGRAPH.CO.UK, <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/06/18/nring18.xml>

⁸⁸⁵ *Id.*

contrast to the new “fundamentalist” movement of a “cult-like character.”⁸⁸⁶ These arguments recall the remark of the Lord Bingham about the particular respect that should be accorded to sincere beliefs coming from “ancient and respected religions.” However, as has been argued on many occasions throughout this paper, what should matter in the legal analysis is the sincerity of the individual’s belief, not the longevity or the number of adherents of the religious group, nor the state’s or the majority’s acceptance or denial of its teaching (as long as the religious organization has not been duly declared illegal for proven violations of human rights). And it is no wonder that the girls in this case consider the refusal to accommodate their religious symbols as discriminatory.

It has also been argued that the school anyway provides a better and more effective policy with respect to teenage sex – its program on sexual education, a claim highly contested by religious groups. However, this may not serve as a justification for the interference since the issue here is not a request for exception from sex education, but the prohibition on the manifestation of a stance on this problem grounded in sincere religious belief. Whether or not the religious group is effective in dealing with the problem is irrelevant in evaluating the proportionality of the interference.⁸⁸⁷ Thus although it may be accepted that the no jewelry policy serves a legitimate interests in protecting their rights and freedoms of others, the prohibition of the purity rings is not rationally related to that purpose, and may not be justified as “necessary in a democratic society.”

The real issue in an eventual litigation of the case before courts in the UK in light of the House of Lords’ decision in the *Begum* case may turn out to be whether

⁸⁸⁶ Blogs on UK today, <http://www.theuktoday.co.uk/2006/06/the_silver_rings_the_thing.html>, (visited 26 June 2006).

there was any interference with the freedom of religion and expression right of the students. Regretfully, courts following that decision are likely to make critical to the inquiry the question of whether there were other schools which do not prohibit the wearing of purity rings to which the girls could transfer.

1.4 Conclusion

The British approach to students' symbolic religious expression via dress items and signs of membership is generally one of accommodation. However, the main weakness of the approach is that it favors mainstream interpretations of religious doctrines and is ill-suited to protect the religious expression of minority groups whose beliefs differ from those in the majority of faith. That is demonstrated both in the Shabina Begum case as well as in the recent controversy regarding the wearing of the chastity rings. As Rivers argues, "the law struggles to deal with minorities-in-minorities. If there is a group within a religion or culture that has a specific understanding of the requirements of their religion, there is a danger that the majority interpretation is taken as normative."⁸⁸⁸

2. Teachers

2.1 Legal framework

There are no statutes in the UK regulating teacher's uniforms and dress codes. It is for the school governing body to determine what is appropriate for a teacher

⁸⁸⁷ The Observer has reported that "research by Columbia and Yale Universities found while those who pledge chastity may delay first sex, 88 per cent of them eventually break the promise, and are then less likely than non-pledgers to use contraception." (See Hinsliff, *supra* note 883.

⁸⁸⁸ Julian Rivers, *Religious Dress: British Perspectives and OSCE Developments*, <<http://www.strasbourgconference.org/papers/Religious%20Dress%20British%20Perspectives%20and%20OSCE%20Developments.pdf>>, at p.3.

during the school day.⁸⁸⁹ Teachers who wish to wear religious dress items enjoy the protection of Art.9 of the Human Rights Act 1998 as well as statutory protection under the Employment Equality (Religion or Belief) Regulations 2003.

2.1.1 The Employment Equality Regulations 2003

The Act forbids discrimination “on the grounds of grounds of religion or belief covers any religion, belief or similar philosophical belief (provided that this is similar to a religious belief)” in employment relations. Besides direct discrimination the Act also outlaws indirect discrimination unless it can be justified as a proportionate means of achieving a legitimate aim.⁸⁹⁰ Indirect discrimination is defined as “a provision, criterion or practice” of general application which however puts persons belonging to a particular religion and a person of that particular religion at a particular disadvantage when compared with other persons.⁸⁹¹

2.2 Analysis

Blair and Aps have criticized the fact that whereas following EU directives, statutory guarantees against religious discrimination in employment have been enacted, the same guarantees are absent in education, since “This leaves the pupils, such as Shabina Begum, who feel that uniform restrictions are inconsistent with their faith, in a much weaker position than the teacher employed by her school”⁸⁹²

Until recently there had been no cases dealing with the issue of the lawfulness of regulations prohibiting religious dress by teachers or dress codes forbidding headgear. The general practice is that there are no specific regulations on teachers’

⁸⁸⁹ Ian Robson, Department for Education and Skills, (Correspondence by e-mail).

⁸⁹⁰ The Employment Equality Regulations 2003, Art. 3(1)(b).

⁸⁹¹ The Employment Equality Regulations 2003, Art. 3(1)(b).

⁸⁹² Ann Blair and Will Aps, *What Not To Wear And Other Stories: Addressing Religious Diversity In Schools*, 17 (1_2) EDUCATION AND THE LAW, 1, 11 (2005).

dress codes.⁸⁹³ A number of legal scholars have argued that prohibitive dress codes would be an instance of indirect discrimination against Muslim women who choose to wear a hijab or niqab, or Sikh or Jewish men.⁸⁹⁴ To justify such a regulation the school's governing body must prove that it has a legitimate aim and that the regulation is necessary and there is no less restrictive alternative available.⁸⁹⁵ Thus, the Muslim Council of Britain has noted in regards to the obligation of employers to provide reasonable accommodation for Muslim employees under the Employment Equality Regulations 2003 that "Employers need to ensure that dress requirements allow: for women, the covering of the whole body except the face and hands. Muslim women may be unwilling to wear clothing that reveals parts of their body or their figure."⁸⁹⁶ According to the Council, a dress code may be lawful if it is in place for health and safety reasons, mentioning no other reasons as a possible justification.⁸⁹⁷ Another possible justification for not accommodating religious dress practices may be a "genuine business requirement," but the practice is that schools are generally accommodating teachers with respect to religious dress.⁸⁹⁸

As was already noted Lord Justice Brooke several times emphasized in the *Sabina* judgment the absence of a legal requirement of neutrality for public schools in

⁸⁹³ Marilyn Mason, Education Officer at the British Humanist Association also affirmed that this is the general practice at UK schools. (Correspondence by e-mail from June 17, 2005).

⁸⁹⁴ See e.g. *Employment Law*, <http://www.paul-williamsons.co.uk/services/employment/employ_showarticle.asp?aid=36>; A Guide for Employers and Employees: Religion and Belief and the Workplace, ACAS, (visited June 20, 2005), <<http://www.acas.org.uk/publications/pdf/religion.pdf>>; Blair and Apps, *supra* note 892, at 10. If an employer prohibited a Muslim woman to wear a headscarf but allowed nuns to teach in habits this would then amount to direct discrimination on the ground of religion. (See Bob Hepple & Tufyal Choudhury, *Tackling Religious Discrimination: Practical Implications For Policy-Makers And Legislators*, Home Office Research Study 221, (visited 18 July 2005), <<http://www.homeoffice.gov.uk/rds/pdfs/hors221.pdf>>, p. 43, para. 6.2).

⁸⁹⁵ *Id.*

⁸⁹⁶ The Muslim Council of Britain, *Muslims in the Workplace: A Good Practice Guide for Employers and Employees*, March 2005, <www.mcb.org.uk/approved.pdf>, p.14.

⁸⁹⁷ *Id.*

⁸⁹⁸ Maree Day, Senior Officer, Salaries, pensions, conditions of Service, (Communication by e-mail).

the UK in contrast to France or the US.⁸⁹⁹ There is also no requirement for religious neutrality of the public services either, with respect to religious symbols displayed by public officials—for example Sikh policemen in the UK are allowed to wear turbans as a practice and manifestation of their religion, and recently the police uniform for women has also been modified so that Muslim women can wear a headscarf.⁹⁰⁰ There is a judge sitting on the High Court wearing a turban.⁹⁰¹

Thus, whereas in the US schools can argue that accommodating a teacher to wear a conspicuous religious garb while teaching elementary school children would be an act violating the Establishment Clause, in the UK there is no comparable “constitutional” requirement that would be violated by such an accommodation. In the *Dahlab* case the ECHR also placed great weight on the principle of religious neutrality that the school officials had to safeguard. The question is then, given a teacher’s right to freedom of religion under the HRA 1998 and protection against indirect discrimination and duty to provide reasonable accommodation on the part of school as employers under the EERA 2003, and the absence of a requirement of religious neutrality of public school, whether a school might still be justified under the two applicable statutes to refuse to accommodate a teacher to wear conspicuous religious dress while teaching young children. The justification for such a limitation on the rights of teachers may be the potentially proselytizing effect such a teacher wearing a religious garb may have on young and impressionable children and the respect for their right to “negative religious freedom” and parental rights to educate children in accordance with their religious beliefs.

⁸⁹⁹ *Shabina Begum*, *supra* note 845, at. 73, 94.

⁹⁰⁰ *Isalmophobia*, *supra* note....., at 44.

⁹⁰¹ Clare Dyer, *Rabinder Singh, Q.C.: Britain's First Turbaned High Court Judge*, *The Guardian*, Mar. 24, 2003, (visited 14 July 2005), <http://www.sikh-times.com/bios_032403a.html>.

To support his argument regarding the absence of a neutrality requirement Justice Brook mentioned the facts that schools in the UK are obliged by statute to provide for collective worship of a generally Christian character and for religious education.⁹⁰² The legitimacy of concerns about the proselytizing effect of a teacher's religious dress on young students however cannot be weakened by these examples. Regardless of its adequacy and sufficiency as a protection against religious coercion, there is still the legal possibility for opting out of such requirements, which may be exercised by parents. Such a possibility of exemption from the potentially proselytizing influence of a teacher wearing a conspicuous religious dress while teaching young children does not exist. Without repeating the arguments made in the discussion on the constitutional issues involved in teachers' religious dress in the US, I would contend that the same arguments may be defended within the UK legal framework, however the emphasis would be on the proselytizing effect on young children.

Blair and Aps have also argued that "that the logical limit of neutrality should be that maintained schools should not impose religious values on others, in which case staff wearing religious dress is intrinsically more dangerous than pupils doing so."⁹⁰³ The Court of Appeals in the *Sabina* case held that it may be possible for school to justify their decision on not allowing a Muslim girl to wear a jilbab at school. While I would argue that such a justification will be hard to defend with respect to students, it may be possible to defend it when applied to teachers. The signal about what it is to be a "good Muslim" sent to young girls by the fact that a teacher is wearing the jilbab is much stronger than the one coming from the fact that other fellow students are doing so. Such a ground for justification is not a value free one.

⁹⁰² *The Queen on the application of SB*, *supra* note 833.

⁹⁰³ Blair and Aps, *supra* note 892, at 16.

Some parents “strict Muslims” may argue that such a restriction also sends a signal about what is to be a “good Muslim”, a signal contrary to the religious ideas and practices they wish to transmit to their children. But parental rights cannot go as far as to demand that the state employ Muslim teachers who adhere to their particular interpretation of Islam. Furthermore, if the regulation is a general restriction of conspicuous religious symbols worn by teachers, in elementary schools for example, then the restriction would not be singling out particular religious beliefs and would not be making value judgments about the meaning of religious symbols.⁹⁰⁴

There is little probability however that such restrictions will be enacted in the UK. And the current position of the British government is that teachers may fulfill their role wearing religious garb.⁹⁰⁵ As in the case of students however, there would be some limits to the accommodationist approach. A case in point again is the wearing of a *niqab* which covers the entire face. Reasons of safety as well as the need for personal communication between teacher and students, which may be regarded as genuine occupational requirement, will justify a restriction on that type of religious clothing.⁹⁰⁶ Mahlmann has argued that, in the German context, given the primary place of human dignity in the “objective hierarchy of values” a *burqa* that covers the whole face “suppresses completely the personality of the women concerned is certainly on this ground not acceptable.”⁹⁰⁷ However, if a woman wears the face cover

⁹⁰⁴ See also Matthias Mahlmann, *Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court’s Decision in the Headscarf Case*, 4 (11) GERMAN LAW JOURNAL 1099, 1113 (2003), “Given the Dahlab-Decision of the European Court of Human Rights there is little reason to believe (if such a case would reach the European Court of Justice at all) that the European Court of Justice would necessarily regard a ban on head scarves in schools not reconcilable with the anti-discrimination regime of community law.”

⁹⁰⁵ See Anthony J. Carroll, *Religious Symbols In State Institutions*, 43/3 THE WAY, 80, 84 (2004).

⁹⁰⁶ For example such is the case in the Netherlands, while teachers may wear headscarves but may not wear a covering of the whole face. In the Netherlands however, “Headscarves are prohibited for lawyers, judges, and physicians.” (See Joyce Marie Mushaben, *More than just a Bad-Hair Day: The Head-Scarf Debate as a Challenge to Euro-National Identities*, at 28, (visited 14 July 2005), <http://www.euopanet.org/conference2004/papers/17_Mushaben.pdf>

⁹⁰⁷ Mahlmann, *supra* note 904, at 1114.

out of her own volition a restriction on that may be a violation of her of personal dignity and autonomy. One need not go into the difference between the headscarf and the burqa as to how they affect the dignity of the person, the first two grounds are enough to justify a limitation, since allowing the wearing of such a garb would go beyond the requirement of reasonable accommodation.

Indeed the recent decision of the Employment Appeal Tribunal in the case of *Azmi v. Kirklees Metropolitan Borough Council* (March 30 2007),⁹⁰⁸ confirms the position expressed above. The teacher had been employed as a bi-lingual support worker by the Headfield Church of England (Controlled) Junior School. When she applied for the position she was wearing a headscarf not covering her face and a long dress.⁹⁰⁹ during her first week of duties she informed the school authorities that if it is not possible for her to work isolated from other male staff she would have to wear not only a headscarf, as was the practice of other Muslim female teachers working in the school, but also a niqap covering her whole face even during instruction time. The school authorities responded by expressing their “commitment to valuing cultural and religious diversity” but stated that effective communication with pupils required that the full face of the teacher be visible.⁹¹⁰ The Local Education Authority also expressed the position in a letter of advice to the school authorities:

It follows that for teachers or support workers, wearing a veil in the work place will prevent full and effective communication being maintained. In our view, the desire to express religious identity does not overcome the primary requirement for optimal communication between adult and children.⁹¹¹

The school authorities informed the teacher that she could wear anything she wants on the school campus when she is not instructing children. Azmi insisted that

⁹⁰⁸ *Azmi v. Kirklees Metropolitan Borough Council* (March 30 2007) UKEAT/0009/07/MAA, <http://www.employmentappeals.gov.uk/Public/Upload/07_0009ResfhAMMAA.doc>.

⁹⁰⁹ *Id* at 8.

⁹¹⁰ *Id* at 11.

⁹¹¹ *Id* at 19.

when she is working with male teachers in class she has to wear a full veil, and the school authorities warned her that if she does not comply with their instruction she would be dismissed.

The Employment Appeal Tribunal examined the complaint of the teacher alleging discrimination on the ground of religion and belief under The Employment Equality (Religion or Belief) Regulations 2003. The tribunal held that the school authorities had not subjected the teacher to direct discrimination on the ground of religion, since any other teacher who covered her face and mouth for reason other than religious belief would have received the same instruction from the school, and a failure to comply with it would have resulted in dismissal.⁹¹²

The Tribunal accepted however, that the case involved an instance of indirect discrimination, in that the school regulations were apparently neutral but put Appellant's belief at a particular disadvantage when compared with others.⁹¹³ The Tribunal concluded that the indirect discrimination was justified under the statute because the requirements of proportionality of the means used to achieve the legitimate aim of effective school instruction had been met.⁹¹⁴ The teacher was required to have her face unveiled only while teaching in the classroom and the school had considered in good faith a number of other alternative means before instructing the teacher to be unveiled in class.⁹¹⁵

The next question is whether if there is no regulation in place forbidding teachers' religious garb in elementary school, for example, as the current practice is, parents may have a successful claim that such a practice violates the right to freedom of religion and belief of their children and their parental rights to educate their

⁹¹² *Id* at 55-57.

⁹¹³ *Id* at 62-63.

⁹¹⁴ *Id* at 74.

⁹¹⁵ *Id.*

children in conformity with their religious beliefs. The provisions of the Human Rights Act 1998 are to be interpreted in light of the jurisprudence of the Court in Strasbourg. The Court has given a large margin of appreciation as to how a state organizes its school system. In the *Kjeldsen, Busk Madsen and Pedersen v. Denmark* case the Court held the state could impart through education information of a directly or indirectly religious or philosophical character presented in objective pluralistic way. The state was forbidden from indoctrinating children and disrespecting parents' religious or philosophical convictions. Thus as long as there is no concrete evidence that a teacher was actively proselytizing it is unlikely that parental objections will have success in UK courts.

XV. SOUTH AFRICA

The Minister of Education publicly commented that South Africa should not follow the example of France, and public schools should accommodate the religious expression of students⁹¹⁶ and the new Draft National Guidelines on school uniforms are in part a response to the law of March 2004 in France.

1. Students

1.1 Legal Framework

1.1.1 Constitution

The Constitution guarantees under Art. 15 (1) the individual right “to freedom of conscience, religion, thought, belief and opinion.”⁹¹⁷ This right would encompass the protection of student's religious manifestation and expression through the wearing

of religious symbols and dress items. The right to freedom of religion and belief is subject to the general limitations contained in Art. 36 (1):

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

- a the nature of the right;
- b. the importance of the purpose of the limitation;
- c. the nature and extent of the limitation;
- d. the relation between the limitation and its purpose; and
- e. less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

The Constitution also guarantees rights of religious communities to “enjoy their culture, practice their religion and use their language.”⁹¹⁸

1.1.2 South African Schools Act (1996)

The statutory framework regarding school uniforms is similar to the one in the UK. The setting of a school uniform policy is within the authority of the public schools governing bodies, which are responsible for adopting a code of conduct after consultation with parents and teachers.⁹¹⁹ Without interfering with that authority the Department of education has published a draft of the National Guidelines on School Uniforms in accordance with Sec 8(3) of the Act which gives the Minister of education the authority to set guidelines to be considered by the school governing bodies in regulating conduct at schools. The draft guidelines were published in April

⁹¹⁶ Cite article [www.radio786.co.za/news/archives/ Default.asp?date=23%20January%202004](http://www.radio786.co.za/news/archives/Default.asp?date=23%20January%202004)

⁹¹⁷ CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA 1996, Art.15 (1).

⁹¹⁸ CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA 1996, Art.31.

⁹¹⁹ South African Schools Act (1996), Art.8 (1). The reasons behind the adoption of school uniform are similar to the one advanced in the US or Great Britain. (“The adoption of a school uniform could promote school safety, improve discipline, and enhance the learning environment. The potential benefits of school uniforms include: Decreasing violence and theft -- even life-threatening situations -- among pupils over designer clothing or expensive footwear; Helping prevent gang members from wearing gang colours and insignia at school; Instilling discipline in pupils; Helping parents and pupils resist peer pressure; Helping pupils concentrate on their school work; and Helping school officials recognize intruders who come to the school.” National Guidelines on School Uniforms In Terms of the

2005 and the ministry called for a public discussion and recommendations to be submitted within 25 days.

*1.1.3 National Guidelines on School Uniforms In Terms of the South African Schools*⁹²⁰

The guidelines stipulate that uniform policies should not infringe the constitutional rights of persons and should not impede in any way the student's access to education.⁹²¹ According to the guidelines school uniform policies should protect students "religious expression" and "accommodate pupils whose religious beliefs are substantially burdened by a uniform requirement" and "when wearing particular attire, such as yarmulkes and headscarves, during the school day is part of pupils' religious practice; under the Constitution schools generally may not prohibit the wearing of such items."⁹²² Schools also should protect other expressive conduct by students, such a wearing of a HIV ribbon "so long as such items do not independently contribute to disruption by substantially interfering with discipline or with the rights of others" similarly to the way student expressive conduct is regulated in the US.⁹²³ Finally the guideless stipulate that unwillingness to comply with uniform requirements should be treated as a disciplinary matter in the Code of conduct.⁹²⁴

The National Policy on Religion and Education, established by the Education Department also states that the constitutional provisions providing for religious observances in public schools – Art. 5 (2)⁹²⁵ imply also ongoing observances "such

South African Schools, (visited June 23, 2005),
<<http://education.pwv.gov.za/content/documents/643.doc>>. at para. 22).

⁹²⁰ National Guidelines, *supra* note 919.

⁹²¹ *Id.* at para.2.

⁹²² *Id.* at para 29.

⁹²³ The guidelines state that school may prohibit gang insignia, or vulgar messages displayed on dress.

⁹²⁴ *Id.* at para. 13.

⁹²⁵ See discussion *supra* in Chapter 2.

as dress, prayer times, and diets” and that they should be “respected and accommodated” in such a way as the school and the faith authorities have agreed.⁹²⁶

1.2 Analysis

The approach to the issue of students’ religious symbols at public school in South Africa can be viewed as a part of the general pluralist approach to religious expression. The regulation of religious dress is similar to the one in the UK and the US. There have been no court cases whose issue is the constitutionality of regulations banning student religious dress items and the reason for that is that generally schools accommodate such expression. There was one incident in a school in Southern Johannesburg where a 13 year old Muslim girl⁹²⁷ was told by the principal that she could not wear a headscarf since it was not part of the school uniform.⁹²⁸ The media reported that the girl was temporarily allowed to wear the headscarf until the school governing body made a decision on the issue. Commenting on the issue, the education minister of Gauteng province, whose capital is Johannesburg, said he hoped this was an isolated incident and that they would be able “correct it as soon as possible”⁹²⁹ thus indicating that such restrictions are not in line with the position of the ministry, which is made clear in the draft guidelines issued next year.

Preventing students from wearing religious headgear or other symbols because they are not part of the school uniform is in conflict not only with the Draft National

⁹²⁶ National Policy on Religion and Education, <<http://www.info.gov.za/otherdocs/2003/religion.pdf>>.

⁹²⁷ For a thoughtful discussion on the different Muslim communities in South Africa and their place within the social and political fabric of South Africa see: Goolam Vahed and Shamil Jeppie, *Multiple communities: Muslims in Post-Apartheid South Africa*, <http://www.hsrcpress.ac.za/user_uploads/tblPDF/2055_10_State_of_the_Nation_2004-2005~16112004105739AM.pdf>.

⁹²⁸ *Wrangle Over Headscarf at Joburg School*, THE STAR, January 23, 2004, <<http://www.thestar.co.za/index.php?fSetId=257&fSectionId=129&fArticleId=332160>>.

⁹²⁹ *Headscarf Issue Hits SA School*, NEWS 24, 23/01/2004, <http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_1473729,00.html>.

Guidelines but also, and more importantly with the South African Constitution. Such an act on the part of the school would clearly be a limitation on the student's constitutional right to religion and conscience and freedom of expression. This limitation cannot meet the proportionality test required by the Constitution.

A regulation on school uniforms is neutral and of general application, however if it does not allow the wearing of religious headgear, as was in the reported incident in the Johannesburg school, such a regulation substantially burdens the right to freedom of religion of some students. For them the wearing of religious dress items may constitute a sincerely held belief that they are fulfilling a religious mandate. Thus preventing them from doing so is an infringement on a very important fundamental right. The fact that they are preventing from manifesting their belief or fulfilling the mandate of their religion only while at school, does not mitigate the severity and intrusiveness of the limitation.

On the other hand, the purposes uniforms are said to serve are several: enhancing school safety – preventing the wearing of gang insignia, identifying intruders in school, decreasing violence and theft among students over expensive clothing; enhancing discipline, achieving better academic results, “helping parents and pupils resist peer pressure,”⁹³⁰ helping the formation of a South African identity.⁹³¹ None of these enumerated purposes is rationally related to a restriction on the wearing of religious dress items by students. One may argue as the French Stasi Commission did, that allowing overt religious identification at school will increase the potential for division and conflict among students based along religious lines or that it will hinder the inculcation of a common national identity. As was already argued tolerance and respect for diversity, values underpinning the South African

⁹³⁰ National Guidelines, *supra* note 919, at para.22.

⁹³¹ *Id.* at para.10.

Constitutional order, cannot and should be taught by elimination of all outward difference. As Justice Sachs has noted, “Openness coupled with diversity presupposes that persons may on their own, or in community with others, express the right to be different in belief or behavior, without sacrificing any of the entitlements of the right to be the same in terms of common citizenship.”⁹³²

There has been no public debate about the symbolism of the headscarf. Arguments like the one advanced by the French Stasi Commission about the headscarf’s symbolization of sexual inequality, that is subjugation and oppression of women, would have little weight in a constitutional proportionality analysis. The main reason for this is that courts would not impose their interpretation of religious symbols. Furthermore, there is a particular sensitivity about the danger of value imposition on and ensuing misinterpretation of religious practices different from Christianity, the religion of the majority. Contrasting the interim South African constitution with the pre-constitutional era Justice Sachs rejected the “identification of Christianity with what a judge called “civilized peoples” [which] emphasized the role of the Christian religion as a specific source of values for the interpretation and development of the law”⁹³³ and “[the] tendency for the norms of ‘Christian civilization’ to be regarded as points of departure, and for Hindu and Muslim norms to be relegated to the space of the deviant ‘Other.’”⁹³⁴ Finally, it should be noted that less restrictive means aimed at enforcing the principle of gender equality through

⁹³² *S v Lawrence*, supra note 217, at para. 147.

⁹³³ *Id.* at 151.

⁹³⁴ *Id.* at 152. Justice Sachs was referring to court decisions refusing to recognize the validity of Muslim and Hindu marriages because of the potentially or actually polygamous character. The present South African Constitution allows the recognition of religious systems of personal and family law—Art. 15(3)(a). Such recognition, however, is also subject to the Bill of Rights and should be consistent with it according to subparagraph (b) of the same article. For the problems related to the reconciliation of gender equality and recognition of Muslim marriages and inheritance law see for example Na’eem Jeenah, *The MPL Battle in South Africa: Gender Equality vs. “Shari’āh,”* (visited July 1, 2005), <<http://naeemjeenah.shams.za.org/MPL%20Battle%20in%20SA.pdf>>, Christa Rautenbach, *Gender*

education has been employed – a policy aimed at identifying and addressing gender equality issues through the 2005 National Curriculum.⁹³⁵

As in the UK the where the government's position is one of accommodation and protection of students right to religious expression through wearing of religious dress items, the contested legal issues concern the boundaries if any of such accommodation, or the instances in which school may be justified to impose limits on the student's religious expression. Such a contested issue in South Africa might prove to be the permissibility of students wearing beards to school as a way of manifestation of their religion. There have been instances in which Muslim boys have been excluded from school for wearing beards. The education department stated that in their current form the guidelines do not offer any determination as to whether students should be allowed to wear beards for religious purposes. The guidelines apply only to school uniforms and not to the overall physical appearance of students.⁹³⁶

Arguing against permitting students to wear beards, a member of parliament made the following statement: "We cannot allow religious identity to become part of uniforms, otherwise Rastafarians [may as well] come to school wearing long hair and smoking dagga. School uniform is one thing, religious expression is another."⁹³⁷ A school uniform policy reflecting such a position would amount to a violation of the rights to freedom of religion of children belonging to minority faiths. Unless there are

Equality and Religious Family Laws In South Africa, 3 (1) QUT Law & Justice Journal (2003), <www.law.qut.edu.au/about/ljj/editions/v3n1/pdf/rautenbach.pdf>.

⁹³⁵ For a critical analysis of the governmental policy for gender equality in the curriculum GENDER EQUITY IN SOUTH AFRICAN EDUCATION 1994 - 2004, CONFERENCE PROCEEDINGS LINDA CHISHOLM; JEAN SEPTEMBER (EDS.), (visited July 1, 2005), <http://www.hsrcpress.ac.za/user_uploads/tblPDF/2079_00_Gender_Equity~03052005094003AM.pdf>.

⁹³⁶ Statement By The Department of Education On Reports That Learners Will Be Allowed to Grow Beards as Part of The National Guidelines On School, Ministry of Education, 11 April 2005, <<http://www.info.gov.za/speeches/2005/05041114451002.htm>>.

⁹³⁷ *Education Dept Denies Allowing Beards*, Mail & Guardian Online, 11 April 2005, <http://www.mg.co.za/articlePage.aspx?articleid=214901&area=/breaking_news/breaking_news_national>.

legitimate health and safety reasons, which cannot be accomplished by other less restrictive means, not allowing Muslim or Rastafarian students⁹³⁸ to attend school unless they shave their beards or cut their dreadlocks would be a disproportionate limitation on their rights under 36 of the South African Constitution. I would argue that no such health and safety concerns arise out the practice of wearing beards or dreadlocks. Similarly the legal experts of the Education Right Projects have declared that although the Draft National Policy on Uniforms does not mention other religious attire and symbols except for headscarves and skullcaps “crucifixes, dreadlocks, the aum symbol, beards, *imibhaco* or *iintsimbi* (beads)” should also be included “as long these are used for religious purposes and not because it is the latest fashion.”⁹³⁹

The Department of Education has already taken action to protect the rights to freedom of religion and education of Rastafarian children. When in 2001 nine students were suspended from high school for wearing dreadlocks the Department of Education allowed them to attend school again. It also stated that children belonging to that faith would be allowed to wear dreadlocks to school provided they satisfied the requirement of sincerity of belief.⁹⁴⁰ The same policy should be adopted regarding Muslim students who wish to wear beards as a part of their religion.

As was already mentioned above, the public reaction to the prohibition of students' religious symbols in France was mostly negative. Cynthia Kros, a South African education expert, has however argued that South African multiculturalism may not be really transferable to France. Moreover, defending the positions taken by the Stasi Report, she argued that it was possible that:

⁹³⁸ For a discussion of the problems faced by Rastafarian community in South Africa see Pauline Bain, *Born Into Jah. The Clash Between Government And Rastafari Parents In South Africa With Regards To The Rights Of The Child*, (visited July 1, 2005), <http://www.pixibain.co.za/Anthro/Papers/paper4.htm>.

⁹³⁹ Na'eem Jeenah, *Religion and Schools*, Education Rights Project, p. 12, (visited March 27 2006) http://www.erp.org.za/pdf/religion%20booklet_WEB.pdf.

tolerance of signs of 'cultural' difference in the public space of the classroom may not be the best way to achieve social justice in the long term, and ... there is a real danger that the superficial tolerance of difference may really be tantamount to perpetuating forms of oppression particularly against women and girls.⁹⁴¹

Kros did not argue that religious garbs for students should be forbidden in South African public schools, but after trying to justify the concerns about the perceived threats against *laïcité*, integration and gender equality in France against what she calls a "superficial reading of culture and identity" by the English speaking world she again asked whether "compromising the secularity of the public space is really the best way of achieving integration and social justice."⁹⁴²

Soyinka has argued that the primary justification for the French law is to uphold the principle of equality. According to him the school is "the one place, in a child's life, where he or she can see the other as a human equal."⁹⁴³ As school uniforms, he argued, do not allow students' clothes to become a manifestation of wealth differences, so they should not allow a manifestation of religious differences:

I am wealthier than you "as an attitude among youth earns our immediate disapprobation. No less an institutional responsibility should be the attenuation of all buntings that, today especially, leave impressionable youth with the message "I am holier than thou."⁹⁴⁴

Leaving aside the fact that in France there are no school uniforms, in contrast to the practice in the UK, US, or South Africa, which fact has given rise to ironic commentaries that girls may wear visible thongs at school but cannot wear a headscarf, it should be noted that arguments against school uniforms based on general liberty rights are different from arguments against prohibitions of religious dress items based on religious freedom rights. There is no constitutional right to manifest

⁹⁴⁰ United States Embassy Stockholm, *Country Reports on Human Rights, Practices for 2001 : South Africa*, (visited July 4, 2005), <http://www.usemb.se/human/2001/africa/south_africa.html>.

⁹⁴¹ Cynthia Kros, *Secularity in a World 'Torn by Difference': A Consideration of the French Headscarf Affair from South Africa*, 32(1) POLITIKON 1, 1-2 (2005).

⁹⁴² *Id.* at 14.

⁹⁴³ Wole Soyinka, *French Ban Levels the Playground*, THE SUNDAY TIMES, 18 January 2004, <<http://www.suntimes.co.za/2004/01/18/insight/in03.asp>>.

⁹⁴⁴ *Id.*

family affluence or to dress according to the latest fashion however the right to manifest one's religious beliefs is constitutionally protected.⁹⁴⁵ What is more, one of the main problems with uniforms that the Ministry of Education had to address in its policy was the fact that for many families school uniforms are more expensive than the clothes children normally wear to school and the ministry urged schools to assist families who are burdened by these costs.

An analogy similar to Soyinka's was also offered by Elster, commenting on the French law of March 2003, while adding that it was hard not to suspect that the real motives behind the law are different:

one might say that the veil has negative externalities since the more girls who wear it, the harder it is for any given girl not to do so. The appropriate analogy might then be the mandatory wearing of school uniforms to block social pressures stigmatizing those who do not follow the fashion."⁹⁴⁶

As was already argued, the peer and social pressure in France goes, except for schools in which Muslim children are in the majority, in the opposite direction. And this is valid only for France – a study among Muslim students in Ontario, Canada identified two types of peer pressure that they experienced. One was coming from Muslim students who “followed the cultural norms of the mainstream” and from non – Muslim friends, while the other was from social networks from the Muslim community and Muslim student organizations.⁹⁴⁷ The study quotes a young female student explaining the type of pressure she experienced from fellow students at school:

⁹⁴⁵ School uniforms may of course be challenged on freedom of expression grounds. The right to freedom of expression is protected under a standard similar to the one the US Supreme Court established in *Tinker* -- so long as such [expressive] items do not independently contribute to disruption by substantially interfering with discipline or with the rights of others” they are permitted.⁹⁴⁵ Vulgar messages may also be prohibited. Thus it may be argued that an s.1 analysis will have different results when the infringed expression of students is of political or religious nature, and when it is a general expression of personality.

⁹⁴⁶ Jon Elster, *Responses To Uncertainty: Terrorism and Civil Liberties*, (visited, 25 November 2005), <http://economics.uchicago.edu/download/Responses_to_uncertainty.pdf>, p.7.

I had a lot of problems with students who were always telling me, ‘Oh you know, you could take that scarf off when you come to school, your parents won’t know—you’ve got to be like us, you’ve got to dress like us, you’ve got to go out with us, we’re going out to a pub tonight, do you want to come?’⁹⁴⁸

Zine has also noted that where young Muslim students who were a minority in a given school faced stereotyping by teachers as students who do not have the desire to learn and to achieve, and are at the mercy of authoritative parents, simply because there were wearing headscarves they felt a strong pressure to conform to the cultural practices of the majority.⁹⁴⁹

Soyinka also assumes that the question is one involving exclusively parental rights and their religious freedom rather than the religious freedom of students.

Six to eight hours each day, five or six times a week, in a basically undifferentiated companionship of their age group, a period that is interspersed with huge spaces of holiday weeks during the year, strikes me as being not too great a sacrifice for parents to make, and I must stress that this "sacrifice" is made, not by the children, but by the parents, the adult stakeholders that are so obsessed with reliving their lives, with all acquired insecurities and prejudices, through their offspring.⁹⁵⁰

While this may be true for smaller children, the debate in France has revealed that a significant number of adolescent girls have started to wear hijab by their own decision, sometimes in outright defiance of parental wishes.⁹⁵¹ Thus it cannot be seriously argued that only parental rights are stake. Furthermore, Soyinka maintains that: “That sacrifice, or danger, exists only in the parental mind, since no child loses his or her spiritual bearings simply from the removal or addition of a piece of material from an outfit for a few hours a day.”⁹⁵² If he is right, and the effect of removing of headscarf is so minimal, why is it not more appropriate for the state to make this accommodation?

⁹⁴⁷ Jasmin Zine, *Redefining Resistance: Towards an Islamic Subculture in Schools*, 3 (3) Race Ethnicity and Education 293, 305 (2000).

⁹⁴⁸ *Id.*

⁹⁴⁹ *Id.* at 308-310.

⁹⁵⁰ See Soyinka, *supra* note 943.

⁹⁵¹ See e.g., Ghaiëss Jasser, *The Twin Evils of the Veil*, 5 (1) SOCIAL IDENTITIES 23 (1999).

⁹⁵² See Soyinka, *supra* note 943.

2. Teachers

2.1 Legal Framework

2.1.1 Constitution

The Constitution guarantees the rights of the teachers to freedom of religion and belief and its practice and manifestation – Art. 15 (1). In contrast to the French Constitution the South African Constitution contains no principle of secularity, nor is there any express equivalent to the US Establishment Clause. The Constitutional Court has held that such a provision should not be “read into” the South African constitution.⁹⁵³ Writing on the meaning of Art. 14 of the Interim Constitution, which has the same wording as that of the 1991 Constitution, Justice Sachs stated the following, which is worth quoting in full:

South Africa is an open and democratic society with a non-sectarian state that guarantees freedom of worship; is respectful of and accommodatory towards, rather than hostile to or walled-off from, religion; acknowledges the multi-faith and multi-belief nature of the country; does not favour one religious creed or doctrinal truth above another; accepts the intensely personal nature of individual conscience and affirms the intrinsically voluntary and non-coerced character of belief; respects the rights of non-believers; and does not impose orthodoxies of thought or require conformity of conduct in terms of any particular world-view. The Constitution, then, is very much about the acknowledgement by the state of different belief systems and their accommodation within a non-hierarchical framework of equality and non-discrimination. It follows that the state does not take sides on questions of religion. It does not impose belief, grant privileges to or impose disadvantages on adherents of any particular belief, require conformity in matters simply of belief, involve itself in purely religious controversies, or marginalise people who have different beliefs.⁹⁵⁴

⁹⁵³ *S v Lawrence*, supra note 217, para. 10, Justice Chaskason stated: “Section 14 does not include an “establishment clause” and in my view we ought not to read into its provisions principles pertaining to the advancement or inhibition of religion by the state. To do so would have far reaching implications beyond the apparent scope and purpose of section 14.....] I should add that I can see nothing in the text of section 14(1) or in the historical background to a constitution which made no provision for an establishment clause, which would require such a principle to be read into its provisions.” In the same case, Justice O’Rigan concluded that “It seems appropriate to imply from this provision and from the absence of an express establishment clause that a strict separation between religious institutions and the state is not required by our Constitution.”

⁹⁵⁴ *Id.* at para. 148.

Such an approach of accommodation would suggest that religious dress by teachers would not be prohibited, the state being “respectful and accommodatory towards, rather than hostile to or walled-off from religion.” In an article commenting on the regulation of religious dress in a European school Oppelt criticizes the ruling of the German Constitutional Court that Land legislatures may ban teacher’s religious garb contrasting and praising the South Africa approach,

Will Ludin’s head-covering affect her competency to teach young minds? ... Do those who want to ban the headscarf believe that a square of material will act as a converter for Islam?... Maybe they, with all their development, could learn a thing or two from South Africa about diversity and integration.⁹⁵⁵

There is no provision in the Education Act nor any regulations of provincial school authorities restricting teacher’s religious garbs. Teachers’ rights to religious expression are also protected by statute – the Employment Equity Act (1998) and the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000. Employers are required to provide a “reasonable accommodation” to enable persons for designated groups to participate in employment. If employers provide accommodation for secular purposes a similar accommodation for religious purposes may not be denied.⁹⁵⁶

On the other hand, the Constitutional Court has noted that in certain cases endorsement of a religion by the state “would contravene the “freedom of religion” provisions.”⁹⁵⁷ In such cases the state would be coercing individuals, directly or indirectly to the practices of a religion or would be hindering individuals in the observance of the practice of “their own different religions.”⁹⁵⁸ A further case of a prohibited state endorsement would be if the state is sending a symbolic message

⁹⁵⁵ Phylcia Oppelt, *French Tailspin Over Muslim Headscarves Is a Study In Hypocrisy*, THE SUNDAY TIMES, 4 January 2004, <<http://www.suntimes.co.za/2004/01/04/insight/in05.asp>>.

⁹⁵⁶ Gary Watkins, *Religious Accommodation in the Workplace*, <<http://www.workinfo.com/free/Downloads/86.htm>>.

⁹⁵⁷ *S v Lawrence*, supra note 217, at para. 104.

⁹⁵⁸ *Id.*

“that is inclusionary for some and exclusionary for others in violation of section 14.”⁹⁵⁹

It cannot be maintained that in each and every case students or parents would perceive that the state is identifying itself with the religion of the teacher wearing a religious garb. This is especially unlikely when representatives of minority religions are concerned. Commenting on what kind of employment practices would constitute impermissible endorsement or denigration of religion Watkins observes that factors such as “the context of the expression or whether official channels of communication are used, are relevant to what a reasonable observer would conclude.”⁹⁶⁰

Nevertheless it may be argued that the accommodation of teachers religious expression finds its limits in the rights of students to be free from religious indoctrination by the state and rights of parents to educate their children according to their religious convictions. Again I would argue that due to the special characteristics of the relationship between students and teachers, and the obligatory nature of education, such restrictions may satisfy the proportionality test under Art.36 (1). The religious freedom rights of the teacher have to be balanced against the religious freedom rights of the students and the rights of their parents. Both the nature of right limited and the importance of purpose of the limitation maybe said to be of equal weight. When the limitation applies only to the wearing of ostentatious religious symbols and only during instruction of children under 14 years of age, then it maybe be argued that it bears a close relation to the purpose it aims to achieve and is narrowly tailored.

⁹⁵⁹ *Id.* at 138.

⁹⁶⁰ *Id.*

3. CONCLUSION

South Africa's approach to religious attire in public schools is an accommodationist and a pluralist approach. It protects fully religious freedom rights of students and is conducive to teaching about tolerance in a religiously diverse society. On the other hand the current statutory regulations on teachers' religious attire seem to underestimate the possibility of conflict between teacher's rights to religious manifestation and the student's rights to be free from undue influence in the formation of their religious or secular views in their early school years.

XVI. GERMANY

The issue of religious symbols at public schools attracted a lot of public attention and debates in Germany as in France and again at the heart of the problem appears to be the presence and the integration of the large Muslim community in Germany which numbers approximately 3.2 million and most of them of Turkish origin.

1. *Students*

When the "headscarf affair" captured the attention of the nation in France in 1989 politicians in Germany considered it as an overreaction, and the German press frequently commented that in contrast to France where the sight of schoolgirls in headscarves was viewed as a threat to the Republic's values, the same sight in Germany was generally deemed as completely normal.⁹⁶¹ Two reasons might lie behind the difference in attitude according to Karastoyano—a different model of the

relationship between church and state and a greater commitment to pluralism or indifference to the practice arising of the fact that immigrants were considered as “guests” not as a part of the nation.⁹⁶² According to her, it is no coincidence that the debates about the permissibility of teachers wearing headscarves at school erupted in Germany at the same time when laws about obtaining German nationality were being debated.⁹⁶³

The right of students to wear religious symbols at public schools is protected by art. 4 (2) of the Basic law, which protects religious expression. There is no federal or Länder law preventing students from wearing religious dress items at school and such a law is not likely to survive a constitutional challenge, since neither the principle of neutrality of the state, nor gender equality or rights and freedoms of others, can be relied on as constitutional principles justifying a limitation of art. 4 (2) in respect of symbolic religious expression by students. According to Marion Eckertz-Hoefer, a justice on the Federal Administrative Court, students may be forbidden to wear headscarves only if it is proven that the headscarves are being used “for active proselytization of others.”⁹⁶⁴ A conflict among students about the propriety of the headscarves is not a sufficient ground to justify their prohibition.⁹⁶⁵ Thus the sight of schoolgirls wearing headscarves has become a common one at German public schools.⁹⁶⁶ What was litigated was the right of Muslim girls to be exempted from

⁹⁶¹ Riva Kastoryano, *Religion and Incorporation: Islam in France and Germany*, 38 INTERNATIONAL MIGRATION REVIEW 1234 (2004).

⁹⁶² *Id.*.

⁹⁶³ *Id.*

⁹⁶⁴ Maier, *supra* note 461, at 19.

⁹⁶⁵ *Id.*

⁹⁶⁶ See Ates Altinordu, *The Meaning(s) of the Headscarf: the German Kopftuchstreit*, (visited 10 July 2005), <http://research.yale.edu/ccs/workshop/altinordu_headscarf.pdf>, at 15.

physical education classes and the Supreme Administrative Court ruled in 1993 that if exemptions are request for religious reasons that have to be granted.⁹⁶⁷

However, there are some functional limits to the accommodation of students' religious dress at public schools. In April 2006 two teenage schoolgirls appeared at a school in Bonn wearing burkas - a Muslim dress covering the whole body and head with a small piece of mesh in front of the eyes.⁹⁶⁸ The girls were suspended for disturbing the peaceful running of the school since their appearance caused disruption of lessons. There are valid pedagogical and security reason why burkas may be prohibited at school: school authorities should be able to identify who enters the school premises; teachers should be able to have visual contact with students and identify who sits for exams. The state mandate with respect to education under Art.7 of the Basic is a ground for limitation of the Art. 4 rights of the two students. The state as the organ entrusted by the Basic Law with the supervision of the school system and it has a legitimate interests in maintaining an effective education and a secure school environment which is likely to be compromised if students are allowed to come in an attire which does not allow full visual contact and makes their identification difficult.

2. Teachers

2.1 Legal Framework

The wearing of religious symbols by public teachers, the headscarf included, is protected as manifestation of religious belief and exercise of religion by Art. 4

⁹⁶⁷ Bundesverwaltungsgericht, August 25, 1993, *InfAuslR*, 1994, 59 cited in Eva Brems, *Diversity in the Classroom: The Headscarf Controversy in European Schools*, 31 (1) PEACE & CHANGE 117, 123 (January 2006)

(2).⁹⁶⁹ This provision guaranteeing the right of undisturbed practice of religion does not contain an internal limitation clause. Therefore, it can be limited only by rights and principles of constitutional rank. These may be fundamental rights of third parties or community values of constitutional rank.⁹⁷⁰ The limitation also has to have a sufficiently determined legal basis.⁹⁷¹ Teachers are also protected by Art. 33 (3) of the Basic law which provides that “Neither the enjoyment of civil and political rights, nor eligibility for public office, nor rights acquired in the public service shall be dependent upon religious affiliation.”⁹⁷²

Constitutional rights that may come into conflict with the teachers’ rights to practice of religious are the “negative” rights of students to freedom of religion, guaranteed again by art. 4 (1) and (2). The Basic Law students are protected from religious coercion and indoctrination by the state.⁹⁷³ Parental rights to educate their children in conformity with their religious and moral beliefs are protected by Art. 6 (2) which provides that: “The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them.”⁹⁷⁴ The state, or more specifically the länder also have a responsibility for the education of children independent from and shared with parents – under Art. 7 (1) which provides that “the entire school system shall be under the supervision of the state.”⁹⁷⁵

⁹⁶⁸ *School Suspends Burka-Clad Students*, DEUTSCHE WELLE WORLD, (15.06.2006), < <http://www.dw-world.de/dw/article/0,2144,1985601,00.html> >.

⁹⁶⁹ BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY (Grundgesetz, GG), Art. 4(2).

⁹⁷⁰ BVerfGE 28, 243.

⁹⁷¹ BVerfGE 83, 130 – 142.

⁹⁷² GG, Art.3(3).

⁹⁷³ See BVerfGE 93, 1 (1987).

⁹⁷⁴ GG, Art. 6 (1).

⁹⁷⁵ GG Art.7 (1).

2.2 Cases before the “Kopftuch Debate”

Before the emergence of the “Kopftuch” debate the question of the constitutionality of teacher’s religious dress at public schools had already been before the courts. Teachers, members of the Bhagwan sect, had been wearing at school the typical red dress and necklace⁹⁷⁶ portraying Baghwan Shree Rajneesh.⁹⁷⁷ The courts of Appeal in Munich and Hamburg held that banning the practice in public schools was constitutional in 1986⁹⁷⁸ and after two years the Highest Administrative Court affirmed their judgments.⁹⁷⁹ ⁹⁸⁰ According to the courts of appeal the principle of state neutrality towards religions required that public school teachers should not be allowed to proselytize students and also that they be neutral towards religions while teaching.⁹⁸¹ Such a neutral attitude was especially important in elementary schools because of the vulnerable and impressionable age of the students and the tendency of students to “look to their teachers as examples and try to imitate them.”⁹⁸² In the particular cases the courts found it important that the sect itself did not mandate the wearing of the religious apparel – the main reason for wearing the dress was that its simplicity was suitable for mediation, and that it was worn also in order to attract people towards the sect. The courts held that since teachers were required to teach and not to mediate in the classroom there was no need for them to be dressed in their

⁹⁷⁶ See Muehlhoff, *supra* note 15, 481.

⁹⁷⁷ “Bhagwan Shree Rajneesh (1931-1990), controversial spiritual teacher from India, whose *sannyasins* (followers) include thousands of Americans, Europeans, and Asians. His philosophy blends Western and Eastern traditions, with special emphasis on Zen Buddhism. Important themes include meditation, putting aside the self and personal desires, and integrating the material and the spiritual aspects of life.” (See Marion Goldman, *Bhagwan Shree Rajneesh*, Microsoft® Encarta® 2006 [DVD]. Redmond, WA: Microsoft Corporation, 2005.)

⁹⁷⁸ See OVG Hamburg, in NVwZ 406 (1986); VGH Munchen, in NVwZ 405 (1986), cited in Muehlhoff, *supra* note 15, at 481.

⁹⁷⁹ See OVG Hamburg, in NVwZ 406 (1986); VGH Munchen, in NVwZ 405 (1986) cited in Muehlhoff, *supra* note 15, at 482.

⁹⁸⁰ See OVG Hamburg, in NVwZ 406 (1986); VGH Munchen, in NVwZ 405 (1986) cited in Muehlhoff, *supra* note 15, at 482.

⁹⁸¹ *Id.*

⁹⁸² *Id.*

religious clothing while performing their duties at school.⁹⁸³ In affirming these decisions the Highest Administrative Court held that the constitutionality of teachers' religious apparel depended to a large extent on the factual circumstances of the case, particularly "the nature of the dress and the impression the dress created on outsiders."⁹⁸⁴

Commenting on these cases, Muehlhoff argues that in deciding on the constitutionality on teachers' religious dress courts should take into account factual circumstances such as whether the wearing of the particular religious dress is mandated by the religious doctrine or whether it is voluntary and also the degree of its proselytizing effect on pupils.⁹⁸⁵ The second factor is a legitimate consideration, but a more objective test should be used. A simple statement, such as Muehlhoff's, that the "Bhagwan dress...is considered to be much more proselytizing than the wearing of a Muslim scarf"⁹⁸⁶ does not suffice, since it is a too subjective evaluation. The first factor mentioned, on the other hand, requires an intrusive enquiry by courts into a given religious doctrine and secular courts are not the institution that should determine such doctrinal matters. Moreover, it should not make a difference for the purposes of the constitutional analysis what the official religious doctrine says, so long as a teacher's religious beliefs are sincere.

2.3 The "Kopftuch Debate"

Several German states have legislated on the question of the permissibility of religious symbols worn by teachers at public schools. These statutes, or statutory amendments, were enacted as a result of the much awaited decision of the Federal

⁹⁸³ *Id.*

⁹⁸⁴ *Id.*

⁹⁸⁵ *Id.*

⁹⁸⁶ *Id.*

Constitutional Court on the case that gave rise to the so-called German headscarf debate. It should be noted while there has been almost no public discussion as to student's religious garb, when the issue about the veiled teacher came into the limelight, public opinions polls showed a prevailing negative attitude to the phenomenon of teachers wearing headscarves at school.⁹⁸⁷

*The Headscarf Case*⁹⁸⁸

Fereshta Ludin, born in Afghanistan, completed her schooling in Germany and received German citizenship. She graduated from a university and passed the preliminary state exams and in 1996 started her practical training as a schoolteacher. By a special permission from the Education Minister of Baden-Wurttemberg, she was allowed to do this training wearing a headscarf. Upon successful completion of the training and passing the required state examination she normally would have obtained a position of support teacher and then a regular teacher. The Stuttgart school authority, however, denied her the post unless she agreed to teach without a headscarf, since otherwise the principle of state neutrality toward religion would be violated. Ludin appealed this denial on the ground of Art. 33 (3) before the Administrative court of Stuttgart but the court rejected her appeal. The Federal Administrative Court also dismissed her complaint. The Federal Constitutional Court held that the action of the Stuttgart education authority was unconstitutional since it infringed upon rights protected by Art. 33 (2) in connection with Art. 4 (1) & (2) and with Art.33 (3)

⁹⁸⁷ A 2002 survey among the Protestant church members and those with no religious affiliation, representing together 2/3 of the were asked to tell on a scale of one to seven how much they agreed to the proposition that "that it might be necessary for a good coexistence with Muslim immigrants to get used to teachers with headscarves on". Only 17% agreed strongly or very strongly while 41% disagreed strongly or very strongly. (Monika Wohlrab-Sahr, *Integrating Different Pasts, Avoiding Different Futures? Recent Conflicts about Islamic Religious Practice and Their Judicial Solutions*, 13 (1) TIME & SOCIETY 51, 55 (2004).).

⁹⁸⁸ BVerfG, 2 BvR 1436/02, (2003),

<http://www.bverfg.de/entscheidungen/frames/rs20030924_2bvr143602>.

without a sufficient legal basis. The Court has been criticized that in holding so it avoided giving a definite pronouncement on the issue and transferred the responsibility to the legislature.⁹⁸⁹

2.3.1 *Neutrality*

According to the Court, although not expressly mentioned the principle of neutrality of the state towards religious beliefs is mandated by Art. 4(1), Art. 3 (3), Art. 33 (3) and the articles 136 (1)&(4) and Art. 137(1) from the Weimar constitution that have been incorporated in Germany's current Basic Law.⁹⁹⁰ However there is no "wall of separation" between the church and state. The state is "open" to an equal accommodation of all confessions.⁹⁹¹ The Court noted in this respect that Christian references are not entirely forbidden in public schools which are open to other religious views and in this way retain their neutrality.⁹⁹² The Court noted that if legislators decided that stricter neutrality was necessary within schools it was not a sign of a "laicization" of the principle of neutrality but rather an evolution of its meaning as a result of the increased religious plurality of society.⁹⁹³ The Court thus affirmed the doctrine of "open" neutrality, which stands for the proposition that religions are not totally excluded from public life where they play a positive role. What the principle demands from the state is that it does not discriminate among the religions and does not identify with any one them.⁹⁹⁴

⁹⁸⁹ See Michael Ernst-Pörksen, *Germany's Constitutional Court Decides "Headscarf Case"* 2 INT'L J. CIV. SOC'Y L. 86, 87 (2004). See also Marco Finetti, *The Headscarf Debate*, Goethe Institute – Canada, (visited 19 December 2005), <<http://www.goethe.de/ins/ca/kug/ges/en72815.htm>>.

⁹⁹⁰ *Headscarf case*, *supra* note 988, at 42.

⁹⁹¹ *Id* at 43.

⁹⁹² *Id* at 44.

⁹⁹³ *Id* at 22.

⁹⁹⁴ See Matthias Mahlmann, *The Constitutionalisation of Secularism in Germany*, Migration, religion and secularism A comparative approach (Europe and North America) Paris, June 17 – 18, 2005, (visited August 17, 2005), <<http://histoire-sociale.univ-paris1.fr/Collo/Migrations/Mahlmann.pdf>>.

2.3.2 Endorsement

One the basic question before the Court was the relationship between the requirement of neutrality of the state with respect to religious and ideological doctrines and the duties of public teachers as civil servants of the state. The approach adopted by the majority of the FCC is contrary to the French jurisprudence. According to the Court when the state permits the symbolic religious expression of an individual teacher it does not make the statement its own.⁹⁹⁵ There is a crucial difference between a situation where the state mandates the display of a religious symbol at school and a situation where the symbol is worn by an individual teacher.⁹⁹⁶ In the latter case there is no intention of the state to endorse a particular religious message. Besides the intention of the state's acts, the perception of these acts by students and their parents is also important. Similarly to what has been argued in the US, the German Constitutional Court noted that schools could make a disclaimer about the religious message expressed by the teacher's clothing and in this way to minimize the possibility that it is perceived as a message endorsed by the school.⁹⁹⁷

2.3.3 Prevention of conflicts within the school

The increased religious plurality in German society leads to more diverse student bodies at schools. As a consequence there is a "larger potential for possible

⁹⁹⁵ *Headscarf case*, *supra* note 988, at 54.

⁹⁹⁶ *Id.* Altinordu has also argued the Crucifix case is distinguishable from the Headscarf case, since in the former there is no individual whose positive religious freedom is affected, while in the latter the bearer of the symbol is an individual employed by the state whose rights have to be taken into consideration. Moreover, in the first case the crucifix was placed on the wall in pursuance of a state regulation while in the latter case the religious symbol is an expression of a particular individual although in service of the state. (*See Altinordu*, *supra* note 966, at 16). On the other hand, the dissenting judges in the present case argued that the headscarf was even more forcefully affecting students since it was exposed not impersonally but by the authoritative figure of the teacher. (*See Headscarf case*, *supra* note 988, at 113).

⁹⁹⁷ *See Headscarf case*, *supra* note 988, at 113.

conflicts.”⁹⁹⁸ This potential for conflicts the Court recognized as a legitimate reason why legislators may determine that within the public school stricter state neutrality may be necessary which justifies more restrictive requirements as to the religious expression by teachers through their outward appearance. The aim of such regulations would be “to avoid conflicts with pupils, parents or other instructors from the beginning.”⁹⁹⁹

2.3.4 Negative religious freedom of children

The compulsory nature of education coupled with the fact that students have no way of avoiding being exposed to the religious symbol of the headscarf during the hours of instruction were some of the main reasons why the lower courts had upheld the denial of employment to Ludin and this circumstance was also noted by the FCC.¹⁰⁰⁰ The FCC also considered the effect of a headscarf on young school children worn by a teacher,¹⁰⁰¹ including the possibility that the sight of a teacher giving instructions in a headscarf would result in pressure on Muslims girls to exercise their religion in a particular way or that it would make more difficult for them to perceive the values of the German Constitutional order and in particular the equality between the sexes. However the Court was of the opinion that in the case before it these alleged dangers had not been proven.¹⁰⁰²

The Court did not find that there was any definitive evidence presented from the field of children’s psychology as to the effects of this practice on the development of children. Mahlmann draws attention to this observation and argues that although it is widely believed that children at a young age are very impressionable and likely to

⁹⁹⁸ *Id* at 64-65.

⁹⁹⁹ *Id* at 65.

¹⁰⁰⁰ *Id* at 46, 54.

¹⁰⁰¹ *Id* at 14.

¹⁰⁰² *Id* at 52.

imitate teachers, who represent authoritative figures, there are nevertheless different possible effects that teachers' religious apparel may have.¹⁰⁰³ One such effect presumably would be that children are taught by example to tolerate and respect different religious and cultural identities.

The Federal Constitutional Court also noted that the school is not a "refuge" in which the eyes are closed to social plurality and reality. The mission of the school is to prepare children for growing up for the reality that will meet them in society.¹⁰⁰⁴ While in France as well, according to the Stasi Commission, the school should not be absolutely detached from and closed to social reality; the emphasis should be placed on protecting children from societal conflicts and on forging a common French national identity. The Stasi Commission opined that the open affirmation of religious identity may bring the school into the conflicts of society. At first blush the position of the FCC is different, but in the end it too recognized that prevention of conflict may be a valid justification for restriction on symbolic religious expression of teachers.

2.3.5 The meaning of the headscarf

One of the main arguments voiced for prohibition of the headscarves worn by teachers was that the symbolic meaning of the headscarf is incompatible with the principle of gender equality protected by the Basic Law.¹⁰⁰⁵ According to the Court the meaning of the headscarf is related to the person that is wearing it, but decisive for its determination is the perception of the "neutral observer."¹⁰⁰⁶ The Constitutional

¹⁰⁰³ See Mahlmann, *supra* note 904, at 1110.

¹⁰⁰⁴ *Headscarf* case, *supra* note 988, at 18.

¹⁰⁰⁵ GG Art. 3 (2). When in September 2003, prominent women from Berlin and Brandenburg appealed to lawmakers not to prohibit headscarves at the workplace, there was an immediate response by group of feminists arguing that such a ban was necessary to defend women's rights, drawing from their experiences with helping "foreign victims" of domestic abuse. (See Mushaben, *supra* note 906, at 18)

¹⁰⁰⁶ *Headscarf* case, *supra* note 988, at 53.

Court noted the multiplicity of meanings the symbol of the headscarf may denote: fulfillment of religious obligation, attachment to the religious and cultural traditions of the country of origin, indication of sexual unavailability, as well as a political symbol of radical Islam, among others.¹⁰⁰⁷ The Court concluded that research has shown that the headscarf cannot be reduced to just one meaning—the social suppression of women.¹⁰⁰⁸

2.3.6 Legal Basis

The ground on which the Court found a violation of the Basic Law was the lack of a sufficient legal basis for the limitation of the rights of the teacher. According to the Court, a regulation that requires a teacher to give instructions without headscarf or any other religious symbols is a serious limitation to the religious freedom of the teacher, and also varies in intrusiveness according to the fact whether the individuals concerned regard the wearing of the symbols as a religious duty or not. It is only the legislature that is empowered by the Basic Law to supply the missing legal basis for such a restriction.¹⁰⁰⁹

The Court reasoned, similarly to the Stasi Commission in France that it was for the legislature and not the administrative bodies or courts to strike the necessary balance between the positive religious freedom of the teacher on the one hand and the negative religious freedom of the students, parental rights to the religious upbringing of their children, and the principle of religious neutrality on the other hand.¹⁰¹⁰ It was for the Länder legislatures to reach a compromise. The reliance on the democratic process for resolving conflict of rights in the sphere of education in this case is similar

¹⁰⁰⁷ *Id* at 50-51.

¹⁰⁰⁸ *Id.*

¹⁰⁰⁹ *Id* at 70.

¹⁰¹⁰ *Id* at 47.

to the arguments advanced by the Court in the *School Prayer Case*.¹⁰¹¹ However, if one is concerned about the religious freedom of minorities, such reliance on the democratic process may not be the best solution, as was already argued in relation to the *School Prayer* decision. Since the Constitutional Court was concerned with the limitations on teachers' religious freedom it is hard to see the justice of different Länder solutions based on the factor whether Christian tradition is more or less deeply rooted.

In Germany the federal system gives a different meaning to the demand for legislation from the one it has in France. As was discussed above, the Stasi and NA commissions maintained that legislation was necessary so that there is a uniform rule on the question of the wearing of the veil and to avoid the emergence of local rights. In Germany however, the regulation of education is done by the different Länder, and when the FCC held that it was for the legislatures not the courts or administrations to regulate the issue of the headscarf, it added that laws may differ from Land to Land because Länder legislatures could take into consideration the confessional composition of the population, the local school traditions, and the degree to which religion is rooted in the population.¹⁰¹² Thus while in France it has been argued that a nationwide solution to the headscarf affair is necessary, the German CC argued that it is up to regional legislators to regulate in ways best suited to the local conditions. While France insisted on uniformity, the German Constitutional Court was concerned with whether the rule of law constraints were met, regardless of whether this resulted in uniformity or not.

The German Court held that local legislatures, in striking the balance between the constitutional rights, could provide the missing legal basis for prohibiting teachers

¹⁰¹¹ See Chapter 2 .

¹⁰¹² *Headscarf case*, *supra* note 988, at 47.

from wearing headscarves at school.¹⁰¹³ Such a prohibition can be a permissible limitation on teacher's rights to freedom of religion "as an element of a *legislative decision over the relationship of state and religion in public education*" which the Court noted is in conformity with the jurisprudence of the European Court of Human rights.¹⁰¹⁴ The Court referred to the *Dahlab* decision, discussed below, which upheld a decision of cantonal educational authorities to forbid a Muslim teacher to give instruction to elementary school children in a headscarf.

2.3.7 Dissent

2.3.7.1 NEUTRALITY AND CIVIL SERVANTS

The three dissenting judges argued that the Constitution itself provided a legal basis for prohibiting teachers from wearing headscarves in public schools. The duty of public servants, teachers included, to be politically and religiously neutral was mandated by Art. 33 (5) of the Basic Law.¹⁰¹⁵ This duty encompassed the obligation to abstain from displaying religious symbols while giving instruction. Thus a legislative basis for the prohibition could be provided, but such a prohibition could be grounded in the provisions of the Basic Law itself, without the need for further implementing legislation.

The dissent's view on the relationship between neutrality and the role of civil servants is similar to the French conception. Upon entering the public service a teacher has to identify with certain principles that the state adheres to since public servants share in the state power.¹⁰¹⁶ Thus the obligation of worldview and religious

¹⁰¹³Id. at 62.

¹⁰¹⁴Id. at 66.

¹⁰¹⁵GG, Art. 33 (5) The law of the public service is regulated with due regard to the traditional principles of the professional civil service.

¹⁰¹⁶*Headscarf* case, *supra* note 988, at 77, 81.

neutrality is also taken up by civil servants. When there is a conflict between students' negative rights to religious freedom and parental rights on the one hand and the positive religious freedom rights of teachers on the other, the Basic Law mandates that more weight be given to the former since teachers are exercising state powers: "the teacher has to respect the fundamental rights of the pupils and their parents, he stands not only on the side of the state, the state acts through him."¹⁰¹⁷ The religious rights of the teacher and the negative religious freedom of students and parents do not have an equal weight.¹⁰¹⁸

The dissent argued that the measure of restraint and neutrality that may be required from public servants depends not only on general principles but also on "the concrete and changing requirements of the office."¹⁰¹⁹ This obligation applied with particular force to public school teachers because they have the possibility to influence children in a way comparable to that of parents and could potentially interfere with the right of parents to determine the religious upbringing of their children.¹⁰²⁰

2.3.7.2 *EFFECT ON STUDENTS—THE MEANING OF THE HEADSCARF*

The dissent did not discuss the effect on students from exposure to any religious symbols worn by teachers but concentrated on the headscarf in particular and its meaning. Thus it is not clear whether this particular part of the reasoning of the dissenting judges can be applied with equal force to Christian symbols. The judges noted that school children interacted not only with their teachers but also with their parents and social environment. In the case of non-Islamic parents or Islamic parents who do not accept veiling in public as a religious duty of believing Muslim women, a

¹⁰¹⁷ *Id.* at 87.

¹⁰¹⁸ *Id.* at 76.

discussion about the headscarf may impose upon the child the conflict between the values symbolized by the teacher's headscarf and those of their parents or social environment.¹⁰²¹

The judges noted that the veiling requirement for women in Islam stood for many people within the Islamic community as well as outside of it for a “religiously justified politico-cultural statement” about the proper relationship between the sexes—namely their moral and hence social inequality.¹⁰²² This statement is contrary to the principle of equality between the sexes protected by Art. 3 (2) of the Basic Law.¹⁰²³ Although the Basic Law respects religious doctrines whose teachings about the relationship between the sexes is difficult to reconcile with the values projected by the Constitutional order, the toleration of such views does not extend to accepting symbols representing these views in civil service settings where they are likely to cause conflicts.¹⁰²⁴ The association of the headscarf with political Islamism also supports that ideological view, according to the dissent, and cannot be allowed in civil service settings precisely because it may give rise to conflicts within the school..¹⁰²⁵

Finally the dissent did not agree that preventive measures to protect students' and parental rights required not merely a showing of abstract possibility of a conflict but a concrete danger situation. What they argued might be necessary is the possibility of “a scientific empirical proof” in principle.¹⁰²⁶ What this test means, however, was not elaborated. The dissent also criticized the Court that it avoided decision on the constitutional issue. It was for the Constitutional Court to concretize the immanent

¹⁰¹⁹ *Id.* at 100.

¹⁰²⁰ *Id.* at 111.

¹⁰²¹ *Id.* at 115.

¹⁰²² *Id.* at 177, 121.

¹⁰²³ “Men and women are equal. The state supports the effective realization of equality of women and men and works towards abolishing of present disadvantages.” GG, Art. 3 (2).

¹⁰²⁴ *Headscarf case*, *supra* note 988, at 125.

¹⁰²⁵ *Id.* at 117.

¹⁰²⁶ *Id.* at 105.

limitations to fundamental rights and instead it passed the decision over to the legislatures without even providing guidance.¹⁰²⁷

2.4 Analysis

While some have argued that the dissent was correct in maintaining that there was no need of legislation on the issue, since the constitution itself supplied the legal basis for prohibition of religious symbols worn by teachers at school,¹⁰²⁸ opponents of prohibitions maintain that allowing teachers to teach in religious apparel is the way to teach students the value of tolerance necessary for a life in a religiously diverse society such as that which currently exists in Germany.¹⁰²⁹ This was also the position of the Administrative Court of Lüneburg from 16.10.2000,¹⁰³⁰ in which the court held that the desire of a school teacher to wear a headscarf cannot by itself be a ground for finding a lack of suitability for the school service. The case was brought before the court by a teacher who had converted to Islam and desired to teach in a headscarf, but the regional authorities in Lower Saxony refused to allow her to wear religious symbols, arguing that this went against the requirement of neutrality for holders of public office. The teacher appealed against this action and the Administrative Court of Lüneburg held in her favor. The decision however, was later overruled by the Higher

¹⁰²⁷ *Id.* at 130-133.

¹⁰²⁸ See Axel Frhr. von Campenhausen, *The German Headscarf Debate*, 2004 B.Y.U. L. REV. 665 (2004).

¹⁰²⁹ See Altinordu, *supra* note 966; Mushaben, *supra* note 906; Oliver Gerstenberg, *Germany: Freedom of Conscience in Public Schools*, 3 INT'L J. CONST. L. 94 (2005). The UN Committee on the Rights of the Child expressed its concern with "laws currently under discussion in some of the Länder aiming at banning schoolteachers from wearing headscarves in public schools, as this does not contribute to the child's understanding of the right to freedom of religion and to the development of an attitude of tolerance as promoted in the aims of education under article 29 of the Convention." (See CRC/C/15/Add. 226, 30.01.2004, at para. 30).

¹⁰³⁰ Administrative Court Lueneburg, Judgement of 16.10.00, (1 A 98/00) NJW 2001, 767

Administrative Court of Lüneburg, employing essentially the same reasoning as one of the lower courts in the case of Ludin.¹⁰³¹

According to the Administrative Court of Lüneburg, the requirement of neutrality does not mandate that teachers are denied the possibility of expressing any religious beliefs at school. Rather there should be a learning process of mutual acceptance and tolerance in which students, teachers and parents are involved. There was no right to be exempted from exposure to any religious symbols, when the decision to display the symbol was made by a private individual and not the state. According to the court if there is no evidence that the teacher engages in proselytization or indoctrination of the pupils, and there is no evidence of a lasting disturbance of school peace, not allowing the teacher to teach in a headscarf unjustifiably limits her rights under Art. 33 (2) and Art. 4(1).¹⁰³²

Ates has described the Lüneburg's court definition of neutrality within the public school context as "point[ing] towards an enlarged understanding of pluralism under liberal democracies."¹⁰³³ She argued that the Lüneburg court was correct in holding that when children are exposed to a teacher's religious expression that may differ from theirs or their parents, it does not follow that their negative rights to religious freedom have been violated. Rather this exposure has to be viewed as a

¹⁰³¹ Higher Administrative Court Lueneburg, Judgment of 13.03.02 (2 LB 2171/01), NVwZ RR 2002, 658 NdsVBl 2002, 212

¹⁰³² *Id.*

¹⁰³³ See Altinordu, *supra* note 966, at 19. See Robbers, *supra* note 3. Prof. Robbers also emphasizes the role of schools to teach tolerance, which is an essential element of the process of integration. His argument that tolerance cannot be taught absent "knowledge of what is to be tolerated and what is to be integrated" is very persuasive. He also notes that throughout their life children will be taught meet with different teachers, belonging to different religions and worldviews and such encounters would help them to learn about living in a religiously diverse society. The inevitable tensions that may arise from the meeting of different faiths and worldviews at school should be resolved through mutual tolerance and reconciliation. (*Id.* at 11-14).

learning process of “negotiation of different beliefs through mutual tolerance” in which all—teacher, parents, and students—are involved.¹⁰³⁴

There are two problems with such a conception of neutrality in the public school context. Firstly, it may be inferred from Ates’s argument that the principle of neutrality imposes “obligations” on students and parents and not only on teachers as representatives of the state. While it is true that the interpretation of fundamental rights in Germany tends to be less individualistic and more communitarian than in the US, placing greater weight on the fact that individual rights must be exercised in concord with societal interests, the principle of neutrality still remains a mandate on the state not on individual citizens.

Even if the principle of neutrality is not taken that far, the foregoing conception remains problematic when the factor of students’ age is not taken into consideration. Neither Ates nor Robbers address this issue, which is related to the central question of the psychological effect of exposure to conspicuous religious or political symbols worn by teachers. As has already been argued, the religious freedom of parents and pupils would be better protected if at least in classrooms with children below a certain would be required to abstain from outward manifestations of their religious affiliations. In the *Crucifix Case* the Federal Constitutional Court noted that symbol of the crucifix:

...identifies the contents of belief it symbolizes as exemplary and worthy of being followed. This takes place, moreover, in relation to persons who because of their youth are not yet fixed in their views, still have to learn critical capacity and the formation of viewpoints of one's own, and are on that account particularly easily susceptible to mental influencing.¹⁰³⁵

On the one hand it can be inferred from the opinion of the dissenting judges in the *Headscarf Case* that they are inclined to regard the crucifix as permissible because

¹⁰³⁴ *Id* at 20.

¹⁰³⁵ BVerfGE 93, 1 at 46.

it was more a cultural symbol than a religious one,¹⁰³⁶ a position inconsistent with the principle of the neutrality of the state. On the other hand, the judges' argument that the religious influence of symbols is more powerful when it is related to the personality of a teacher than when it is just affixed over the school door "which exhibits no direct relationship with concrete humans or life circumstances"¹⁰³⁷ is a quite persuasive. For older students the possibility of an effect of impermissible religious influence is considerably smaller. The arguments offered by Robbers and Ates are considerably more persuasive when applied in the context of more mature pupils.

Robbers admits that schools should "avoid the individual case where a student feels that the headscarf of a Muslim teacher is a missionary tool or is indoctrinating"¹⁰³⁸ and that "in extreme cases the teacher may be forbidden in a specific context from wearing the headscarf for as long as a student feels that this scarf unduly impairs his/her negative freedom of worship."¹⁰³⁹ However, it is highly unlikely that an individual student would address the school administration and complain that his negative religious freedom has been impaired by the teacher's religious symbol.

In building his arguments against the prohibition of teacher's headscarves Robbers proceeds from the premise, which has been maintained also by constitutional scholars in the US, that if the school is to be religiously neutral then it has to make space for religious views, perspectives and values to be presented; otherwise the school would be fatally skewed towards "irreligion" and would thus

¹⁰³⁶ *Headscarf* case, *supra* note 988, at 113

¹⁰³⁷ *Id.*.

¹⁰³⁸ Robbers, *supra* note 3, at 11.

¹⁰³⁹ *Id.* at 14.

violate its constitutional mandate.¹⁰⁴⁰ The second premise is that the “constitutional school” is a cultural school - “The schools are a substantial place of education and cultivation, of the conveyance of cultural identity in the composed community.”¹⁰⁴¹

Since however, it is next to impossible to make equal space for all religious perspectives,¹⁰⁴² he first justifies the preferential treatment of Christianity by the fact that it has been and still is a potent factor of cultural formation in Germany and the “Occidental world.”¹⁰⁴³ Islam is also part of this culture and therefore the headscarf worn by a Muslim teacher is a permissible religious reference. Professor Robbers gives examples of the influence of Islamic culture on the “Christian thinking” and on the history of ideas in the Western world.¹⁰⁴⁴ This is meant to serve as justification for permitting Islamic symbols worn by teachers, but as such it is highly unconvincing. The argument has force when it is applied to curriculum construction and the presence of religious perspectives. But it is not convincing when it is used to justify the constitutionality of a balance between the positive religious freedom of the teacher, the negative religious freedom of students, parental rights, and state neutrality. Does it follow from Robbers argument that if a teacher happens to be from a religious or world-view minority that is not culturally relevant to German traditions and culture that he or she should not have the right to wear symbols expressing beliefs of that world-view or religion? This would be a consequence in sharp contradiction with the right to equality, which in German constitutional jurisprudence is based upon the idea

¹⁰⁴⁰ *Id.* at 12.

¹⁰⁴¹ *Id.* at 3.

¹⁰⁴² See Mushaben, *supra* note 906, at 10, “German schools have never been “neutral” places -- neither during the 1930s, nor the 1950s, and not once since. The question is not whether education can be offered in a value-free context; the core question is whose values get to dominate.”

¹⁰⁴³ Robbers, *supra* note 3, at 9.

¹⁰⁴⁴ *Id.*

of the equal dignity of human beings and cannot be made dependent on the significance of the cultural contributions of a particular person's religious faith.¹⁰⁴⁵

Häußler has tried to distinguish the Bhagwan dress cases from the *Headscarf* case, and maintains that while the facts in the former justify the prohibition of the teacher's religious dress, the facts in the latter do not. The fact that the red dress was required primarily for meditation means, according to him, that the teachers did not need to wear the clothing to fulfill their teaching obligation because "it is a teacher's job to teach, and not to meditate at school."¹⁰⁴⁶ However, there was no evidence that the teachers had meditated in class. Häußler also notes that "the courts have indirectly addressed the problem deriving from the fact that the Bhagwan religion has been regarded as a religion rendering its members psychologically dependent."¹⁰⁴⁷ He concludes that only religious expression of teachers which displays proselytizing aims or is related to a "religious belief which is particularly dangerous for young people because the respective denomination renders its members psychologically dependent" should be prohibited.¹⁰⁴⁸ Such a line of reasoning is particularly unpersuasive. First of all it acknowledges that symbolic religious expression by teachers may have an impact on the religious views of students; otherwise it would be irrelevant whether the faith of the teachers is "harmful" or not. And then it rules out denominations which make its members "psychologically dependent." Such classifications are constitutionally very suspicious. After all it may be plausibly argued that all religions to some extent render their members psychologically dependent. If constitutional

¹⁰⁴⁵ Prof. Robbers argumentation based on culture and tradition may be seen also as a response to judicial commentators who have claimed that Islam is not part of the German cultural tradition in contrast to Christianity. (See Sahr, *supra* note 987, at 57).

¹⁰⁴⁶ Ulf Häußler, *Muslim Dress-codes in German State Schools: Review of Judgments of the Administrative Courts of Stuttgart and Lüneburg*, 3 EUROPEAN JOURNAL OF MIGRATION AND LAW 457, 468 (2001). This of course neglects to take into account the fact that there might be quiet times during the day when a Bhagwan adherent might meditate without drawing attention to the fact.

¹⁰⁴⁷ *Id.* at 467.

¹⁰⁴⁸ *Id.* at 479.

requirements of neutrality mean anything, they mean that courts should not engage in this kind of substantive evaluation of religious beliefs. If courts or legislatures are to make categorizations according to levels of psychological dependence or malevolent and benevolent psychological dependence, there is a great likelihood that only “traditional religions” would be found as permissible in the classroom.

I would argue that in the German context again the approach that best conforms to the Constitution is one based on the two factors of age and conspicuousness. A special factor for Germany would be an exception from the rule for religious education classes. The Court did not set up such a framework and this is a weakness of the judgment. Moreover, it has not been unknown for the court to issue very specific guidelines to the legislature as to how to enact a statute so that it is in conformity with the Basic Law. The primary example of that is its second decision on the issue of abortion.¹⁰⁴⁹

It is maybe true that the dissent’s view on the relationship between neutrality and public servants is too restrictive.¹⁰⁵⁰ It cannot be said that in all circumstances public servants should abstain from any religious expression while on duty. Furthermore, neutrality within the context of the public school is different both from the French *laïcité* and the US strict separation of church and state.¹⁰⁵¹

2.4.1 Age

One of the problems with the decision, as Mahlmann has correctly observed, is that it makes no account of the factor of the age of the students.¹⁰⁵² The argument that

¹⁰⁴⁹ Abortion Case II, 88 BVerfGE 203. (1993)

¹⁰⁵⁰ See Mahlmann, *supra* note 904, at 22. Gerstenberg, *supra* note 1029, at 100-101, arguing that teachers are not mere “obliges” but right holders as well.

¹⁰⁵¹ An example that suffices to highlight the difference is the fact that confessional religious education is constitutionally mandated and Christian denominational and inter-denominational schools are constitutionally allowed.

¹⁰⁵² See Mahlmann *supra* note 1003 at 1112.

the danger of impermissible proselytizing and perception of endorsement is minimal when students are older applies with equal force in the German context as well. As Mahlmann has pointed out, according to German law, children of the age of 14 have the right to choose their religion.¹⁰⁵³ They also have the right at this age to decide whether to participate in religious education classes or not. Therefore, the law recognizes that at the age of 14 students are mature enough and it is unlikely that their negative rights to religious freedom would not be so limited by exposure to a teachers' religious apparel so as to justify a flat ban on the teacher's symbolic religious expression.

Exemptions from the Rule against Conspicuous Symbols in the Religious Education Context

An interesting question as to the permissibility of religious symbols arises which is peculiar to the German context. The provision of religious education is constitutionally mandated in Germany, it is not an education about world religious traditions, but education *in* particular religious traditions whose doctrines are taught as truth. The question is then, should not teachers teaching RE be allowed to give instruction wearing the religious symbols of their faith? Attendance in such classes is voluntary. Parents, or children themselves after the age of 14, may opt out. Since the teacher gives instruction in the particular faith and this is not only constitutionally unobjectionable, but required, then neutrality of the state cannot require that in such classes teachers should not expose children to the faith's symbols.

Even assuming that this is the case, however, a further complexity arises where the meaning of religious symbols is contested. Thus, one might argue that when Islam is concerned, the instructor should not be wearing a headscarf because

¹⁰⁵³ *Id.*

this would put pressure on Muslim girls to conform to a particular interpretation of Islam. But in the context of German religious education courses, the decision of such issues would appropriately be left to the autonomy of the religious community in deciding how religious instruction should be provided. It may be necessary to let different subcommunities decide things in different ways. but it is not for the state to decide on the ‘correct’ interpretation of a religious doctrine.

2.4.2 Proportionality

Finally, the proposed framework satisfies an examination under traditional proportionality analysis. Prof. Robbers describes the proportionality test as follows:

Limits to any fundamental right must be (1) suitable to achieve the goal they are meant for, (2) necessary, which means that there is no other equally suitable means to achieve the goal which is less burdensome for the one whose freedom is limited, and (3) proportionate, which means that the burden caused by the limitation of the freedom must not exceed the positive effect for the community interest caused by the limitation.¹⁰⁵⁴

Prohibiting conspicuous religious garments worn by teachers during instruction of small children below the age of 14¹⁰⁵⁵ would serve the purpose of protecting the negative religious liberty of students and parents’ rights to direct the religious upbringing of their children. The prohibition will not apply to RE classes, and will not apply to any classes in which older students are being taught. Restrictions are imperative only until children are old enough to decide for themselves. Thus such a prohibition is narrowly tailored and burdens the positive religious freedom rights of teachers no more than necessary. The prohibition would apply only to teaching students in lower grades, thus it is not a total ban from teaching at public schools so

¹⁰⁵⁴ Gerhard Robbers, *The Permissible Scope of Legal Limitations on Freedom of Religion or Belief: A German Perspective*, Islamic Headscarf Controversy and the Future of Freedom of Religion or Belief: A Meeting of Experts Strasbourg, France July 28-30, 2005, <<http://www.strasbourgconference.org/papers/Legal%20Limitations.pdf>>, p.3.

¹⁰⁵⁵ The age of religious majority differs in different länder.

the burdens on the religious freedom rights of teachers are not excessive. It would apply to all ostentatious religious symbols, so it would not be discriminatory.¹⁰⁵⁶

It may be argued however, that if all parents expressly agree to and do not object to the have their children being taught by teachers wearing religious garments then their parental rights would not be violated. Children's negative religious freedom below the age of religious majority, which is determined by law to be 14 years, are also not impaired since the state is acting in accordance with the wish of their parents and absent some clear danger posed to their physical or psychological well-being, parents' rights to make decisions on behalf of their children regarding religious questions are protected by the Basic Law. Thus even if the child-teacher relationship includes the possibility that the child is influenced by the professed religious faith by the teacher, what would render this influence constitutionally unobjectionable is that fact that it is in conformity with the wishes of parents. The interest-based autonomy rights of students arguably would not be disproportionately impaired since the development of critical capacities and ability to lead an "examined life" depend not on the outside appearance of a teacher and exposition to the fact that of his/her belonging to a particular faith, but on the content of the instructing the child receives from the said teacher. Such cases might be deemed a permissible exception to the proposed framework necessitated by a more sensitive narrow tailoring.

The next question would be whether independently of the negative rights of parents and teachers, the practice would be in violation of the state's neutrality mandate. Opinions on the question differ. According to the majority of the judges on the German Constitutional Court, as long as the state accommodates the symbolic religious expression of teachers of all faiths and possibly makes clear through a

¹⁰⁵⁶ See Mushaben *supra* note 906, at 12, arguing that banning headscarves amounts to religious and gender discrimination.

disclaimer that it does not endorse any religious faith manifested through the clothing of particular teacher, the constitutional principle of “open” neutrality of the state would not be violated.

2.5 Statutes

After the decision of the Federal Constitutional Court came out, several of the Länder embarked on drafting and adopting legislative bills forbidding the wearing of headscarves by teachers. While various reasons have been pointed by Mahlmann as motivating those in Germany who argue for prohibiting headscarves for teachers at public schools, ranging from hopes to reduce the influence of Islam in Germany, emancipation of women, laicist conceptions of neutrality to frank xenophobia,¹⁰⁵⁷ it seems that the prevailing motive of the anti-veiling laws in Germany is an attempt to preserve the Judeo-Christian values at public schools which are central to German “constitutional identity” while at the same time, banishing the foreign—“the other”—which is exemplified by the Islamic veil.¹⁰⁵⁸ Politicians have argued that the Christian and Islamic symbols should be treated differently because the former are only religious symbols while the latter have a political meaning as well, linking the veil to radical Islam¹⁰⁵⁹ or simply because Islam is not part of the Judeo-Christian tradition of the country, which schools are entitled to transmit to the new generations.

¹⁰⁵⁷ See Mahlmann *supra* note 1003 at 1109.

¹⁰⁵⁸ See Joppke, *State Neutrality and Anti-Veiling Laws In France and Germany*, Conference on Migration, Religion And Secularism A Comparative Approach (Europe and North America) Paris, June 17 – 18, 2005, (visited 2 September, 2005), p. 14, <<http://histoire-sociale.univ-paris1.fr/Collo/Migrations/Joppke.pdf>>. See Sahr, *supra* note 987, at 54.

¹⁰⁵⁹ The Education Minister of Baden-Wuerttemberg stated that: “If the headscarf were an exclusively religious symbol, then there would not be any debate.” (See Joppke, *supra* note 1058, at 19). According to CDU-member , “The bearers of Christian symbols, such as habit wearing nuns, stand in a different tradition and have already proved their neutrality towards the state.”(See Mushaben, *supra* note 906, at 13).

Critics of anti-veiling laws also have different reasons for their position, but the apprehension that banning the veil would also lead to proscribing Christian symbols such as nuns' habits from school is again very notable. For example, this was a concern publicly expressed by the former Bavarian education minister, as well as the Federal President.¹⁰⁶⁰ In a speech commemorating the birthday of Lessing, a most prominent representative of the German Enlightenment, President Rau stated that "a headscarf ban would be the first step on the road toward a laicist state, which relegates religious signs and symbols from public life. That is not my idea of a country that has been shaped by Christianity for many centuries."¹⁰⁶¹

It is not surprising then that the provisions of the Länder statutes enacted in the wake of the decision of the Constitutional court, reveal an attempt to prohibit the headscarf while at the same time continue to allow the Judeo-Christian symbols. The only exception to this pattern is the Berlin statute, which proscribes all religious and political symbols worn by teachers at public school. A major constitutional issue with these statutes is their conflict with the principle of equality guaranteed under Art. 3 of the Basic Law. Privileging some religions, or singling out specific religious for prohibition also runs counter to the state's mandate of religious neutrality.

Such a problematic statute was passed in Baden-Württemberg, after the decision of the Constitutional Court. However, the Federal Administrative Court gave it a "saving" interpretation. In Baden-Württemberg the legislature adopted a law according to which public school teachers are forbidden to "exercise political,

¹⁰⁶⁰ See Campenhausen, *supra* note 1028, at 668.

¹⁰⁶¹ See Joppke, *supra* note 1058, at 18. In a reaction to this speech, Cardinal Lehmann, the head of the German Bishops' Conference, stated that President Rau was wrong to draw parallels between the "political" headscarf and Christian symbols, which were part of German culture and tradition. According to him, "Many women consider the headscarf to be a symbol of discrimination but Christian crosses and religious clothing have not the slightest trace of political propaganda about them. These differing symbols cannot be lumped together as missionary garb." (See Tony Paterson, *Vatican Weighs Into German Row Over Religious Symbols*, Independent (06.01.2004) / HRWF Int. (07.01.2004), <http://www.hrwf.net/html/2004PDF/Germany_2004.pdf>).

religious, ideological or similar manifestations that may endanger or disturb the neutrality of the country towards pupils or parents or the political, religious or ideological peace of the school.”¹⁰⁶² The law seems in particular to target the headscarf as a religious symbol since it especially proscribes conduct that might be perceived by students or their parents as a “demonstration against human dignity, equality according to article 3, the rights of freedom or the free and democratic order of the constitution.”¹⁰⁶³ The conclusion that the law was intended to target the headscarf is also supported by the wording of the statute, which exempts from the foregoing provisions “exhibition of Christian and occidental educational and cultural values or traditions.”¹⁰⁶⁴ The law however specifies that the duty of neutrality does not apply to instructors in RE classes.

The Federal Administrative Court had to issue a second judgment on the Ludin case, after the first one and referred back to it by the Federal Constitutional Court.¹⁰⁶⁵ This time the Land of Baden- Württemberg had already enacted its statute. The Federal Administrative Court dismissed again the complaint of Ludin. The legal basis for the refusal to employ Ludin was to be found in the newly revised education law of Baden-Württemberg. Wearing a headscarf during instruction was in violation of the provision prohibiting manifestations that disturb the religious and worldview view neutrality of the state towards pupils and their parents and endanger school peace.¹⁰⁶⁶ The Court held that it did not need to decide whether the headscarf created the impression of an attitude in contradiction with the principle of equality, liberty and

¹⁰⁶² Schulgesetz as amended on 01.04.2004, § 38 (GBl. S. 178, Nr. 6), (visited 20 September, 2005), <<http://www.uni-trier.de/~ievr/kopftuch/GesetzBadenWuerttemberg01042004.htm>>

¹⁰⁶³ *Id.*

¹⁰⁶⁴ *Id.*

¹⁰⁶⁵ BVerwG 2 C 45. 03 (24.06.2004).

¹⁰⁶⁶ *Id.* at 2.

the fundamental rights or the free democratic order.¹⁰⁶⁷ It did not find it necessary to examine the meaning of the sentence where exception is given to the display of Christian and Occidental values and traditions.

The Court noted the various meanings a headscarf could denote, but reasoned that what was legally relevant was not the message the bearer of the symbol intended to transmit but rather how the symbol was perceived by a large number of the students and their parents.¹⁰⁶⁸ This was the meaning of the second sentence of § 38 (2) of the law. So far as the headscarf is likely to be perceived as a political symbol, it falls under the prohibition of § 38 (2). This part of the reasoning is problematic since it completely ignores the interpretation of the symbol by the teacher and turns her into “an object of external interpretation.”¹⁰⁶⁹ If a significant number of parents have the view that she is proclaiming her allegiance to radical Islam, irrespectively of whether this is true or not, she will be forbidden to wear the headscarf. What additional meanings a religious symbol may have, regardless of the intentions of its bearer should not be a ground for prohibition of the symbol. Rather restrictions may be imposed in the case of young school children in order to protect their negative religious freedom at their most vulnerable age.

The fact that the Federal Administrative Court ruled out the possibility that teachers wearing religious symbols of the Christian or Jewish faith could be exempted from the prohibitive provisions of the statute conforms to that position.¹⁰⁷⁰ According to this Court, the wording of the law does not provide for such an exemption, and neither does substantive constitutional law, in particular Article 3’s requirement of equal treatment of all religious beliefs. With respect to statutory language, the Court

¹⁰⁶⁷ *Id.* at. 20.

¹⁰⁶⁸ *Id.* at a 23.

¹⁰⁶⁹ Joppke *supra* note 1058, at 19.

¹⁰⁷⁰ BVerwG 2 C 45. 03, at 35.

held that the second sentence of § 38 (2) did not provide for such discriminatory preferential treatment of Christianity.¹⁰⁷¹ Rather it referred, in accordance with the Constitution of Baden-Württemberg, to the teaching of values that may have their origin in the Christian tradition, but which are recognized also by the Basic Law regardless of their religious origins. These may not be taught as representing personal religious commitments nor in a missionary manner.¹⁰⁷² The court gave as examples such values as: human dignity (art. 1 GG); general freedom of action (art. 2 GG); freedom of religions including negative confessional freedom (Art. 4 GG); equality (Art.3, GG); and “helpfulness, providing for and general consideration one’s neighbor as well as solidarity with the weak.”¹⁰⁷³ This meaning of Christian values and virtues stemmed also from the provisions of the Land Constitution of Baden-Württemberg providing for the establishment of Christian community schools.¹⁰⁷⁴

Finally while the Constitutional court found that a major fault with the decisions of the Stuttgart education authority was its analysis of the danger of disruption of the religious peace posed by the headscarf worn by Ludin,¹⁰⁷⁵ the Federal Administrative Court ruled that it was within the discretion of the legislature to choose whether to address only a situation of concrete danger, or to intervene at an earlier point with preventive measures.¹⁰⁷⁶ Accordingly, the law was constitutionally unobjectionable. Through its decision the Federal Administrative Court interpreted

¹⁰⁷¹ *Id.* at 37

¹⁰⁷² *Id.*

¹⁰⁷³ *Id.*

¹⁰⁷⁴ See *Denominational School* case, BVerfGE 41 (1975).

¹⁰⁷⁵ “A restriction of the fundamental right practice is possible with unreservedly ensured fundamental rights only in the case of concrete endangerment....The endangerments stated by the attitude authority are only abstract-theoretical nature” (*Headscarf* case, *supra* note 988, at 19.)

¹⁰⁷⁶ BVerwG 2 C 45. 03, at 34.

the statute in a way that saved its constitutionality by reinterpreting legislative intent.¹⁰⁷⁷

Statutes adopted in other Länder demand that teachers do not endanger the religious and ideological peace at school and do not offend the principle of religious and worldview neutrality.¹⁰⁷⁸ A particularly one-sided statute is the one adopted in Bavaria. It says that during instruction teachers are not allowed to wear garments expressing attitudes incompatible with the fundamental values of the constitutional order, including “Christian-occidental educational and cultural values.”¹⁰⁷⁹ It is clear that the statute exempts from the prohibition symbols of the Judeo-Christian traditions and targets the headscarf. Rendering an interpretation of this statute that would make it constitutional might prove harder than in the case of Baden-Württemberg, because inconsistency with Judeo-Christian values is one of the reasons for proscribing a religious symbol.

¹⁰⁷⁷ Ferdinand Kirchhof, the law professor who drafted the legislation, stated that nuns’ habits were “professional uniforms” and so not subject to the prohibition. (See Liza Hall, *German High Court: Headscarf Ban Applies To Christian Nuns*, JURIST, October 10, 2004, <<http://jurist.law.pitt.edu/paperchase/2004/10/german-high-court-headscarf-ban.php>>).

¹⁰⁷⁸ In Lower Saxony, public school teachers’ outward appearance should not put in doubt their “qualification to fulfill convincingly the educational mandate of the schools.” (Gesetz zur Änderung des Niedersächsischen Schulgesetzes und des Niedersächsischen Besoldungsgesetzes, § 51, 29. April 2004 (GVBl. S. 140-142, Nr. 12) (visited 20 September, 2005), <<http://www.uni-trier.de/~ievr/kopftuch/GesetzNiedersachsen29042004.htm>>). The relevant law in Saarland provides that students are to be educated on the basis of “Christian educational and cultural values” while due respect is accorded to non-Christians students. Education must be provided by not violating the principle of neutrality nor endangering the “political, religious or ideological peace of the school” through “political, religious, ideological or similar manifestations.” Gesetz Nr. 1555 zur Änderung des Gesetzes zur Ordnung des Schulwesens im Saarland, § 1, Vom 23. Juni 2004 (Amtsbl. S. 1510, Nr. 33), (visited 20 September, 2005), <<http://www.uni-trier.de/~ievr/kopftuch/GesetzSaarland23062004.htm>>. Legislators have argued that the different treatment accorded to Islam and Christianity is justified because the headscarf is not only a religious but also a political symbol of “fundamentalism, intolerance and the oppression of women.” (*Saarland Introduces Headscarf Ban For Female Muslim Teachers*, efms Migration Report, June 2004, <http://www.uni-bamberg.de/~ba6ef3/djun04_e.htm>). The Hesse law provides similarly that public school teachers should not wear “garments, symbols or other features that objectively may impair public confidence in their neutral tenure of office or endanger the political, religious or ideological peace of the school.” In evaluating the fulfillment of these requirements due regard has to be paid to the Christian and Occidental tradition in land of Hesse. (Gesetz zur Sicherung der staatlichen Neutralität, § 68, § 86, Vom 18. Oktober 2004 (GVBl. I S. 306, Nr. 17), (visited 20 September, 2005), <<http://www.uni-trier.de/~ievr/kopftuch/GesetzHessen18102004.htm>>).

¹⁰⁷⁹ Gesetz zur Änderung des Bayerischen Gesetzes über das Erziehungs- und Unterrichtswesen,

The Berlin statute on the other hand does not discriminate among religions and applies equally to all. It prohibits public school teachers from wearing visible symbols that manifest to the observer belonging to a specific “religious or ideological community” or any “noticeably religious or ideologically imbued garments.”¹⁰⁸⁰ Another strength in that statute is that it provides an exception for teachers in religious or ideological instruction,¹⁰⁸¹ which, as was argued above, is required by a proper balancing of constitutional rights and principles. The problem with that statute is that it applies without differentiation as to the age of students.¹⁰⁸² The relevant statute in Bremen is also neutral in its wording and applies to all religious manifestations by teachers.¹⁰⁸³

In 2003 the parliament of North Rhine-Westphalia rejected a bill prohibiting public school teachers from wearing headscarves, a decision that was explained by the Minister of Education as a “sign of the high degree of toleration of people in our Bundesland” and noting the absence of any conflicts in schools where teachers were giving instructions in headscarves.¹⁰⁸⁴ However, in 2006 a bill similar in wording to the one adopted in Baden-Württemberg was passed by North Rhine-

Vom 23. November 2004, Art. 59 (2), (GVBl. S. 443, Nr. 21), (visited 21 September 20, 2005), <<http://www.uni-trier.de/~ievr/kopftuch/GesetzBayern23112004.htm>>.

¹⁰⁸⁰ Gesetz zur Schaffung eines Gesetzes zu Artikel 29 der Verfassung von Berlin und zur Änderung des Kindertagesbetreuungsgesetzes, § 2, Vom 27. Januar 2005 (Gesetz- und Verordnungsblatt für Berlin S. 92, Nr. 4), (visited 21 September 2005), <<http://www.uni-trier.de/~ievr/kopftuch/GesetzBerlin27012005.htm>>. The prohibition also applies to public servants with government functions in the field of justice administration, and to officials in the sphere of penal law enforcement and the police (§ 1).

¹⁰⁸¹ *Id.*

¹⁰⁸² The issue of the constitutionality of the ban with respect to other civil servants is beyond the scope of this paper.

¹⁰⁸³ It provides that public schools have to maintain a religious and worldview neutrality, to respect the religious feelings of the students and the right of their parents to transmit to them their religious and world-view values. The outward appearance of teachers should not be such as to disturb the religious or ideological feelings of students and to cause tensions likely to disturb peace in schools by injuring such feelings. (Gesetz zur Änderung des Bremischen Schulgesetzes und des Bremischen Schulverwaltungsgesetzes vom 28.06.2005, § 59 b, (Brem. GBl. S. 245), (visited 21 September, 2005), <<http://www.uni-trier.de/~ievr/kopftuch/GesetzBremen26082005.htm>>).

¹⁰⁸⁴ Campenhausen, *supra* note 1028, at ft.8

Westphalia's parliament.¹⁰⁸⁵ Bills have also been introduced in Brandenburg and Rhineland-Palatinate.¹⁰⁸⁶ As of the time of this writing no plans for enacting statutes to regulate the permissibility of religious symbols worn by public teachers are under discussion in Hamburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt, and Thuringia.¹⁰⁸⁷

2.6 ECHR

Those Länder statutes which do not forbid only the Muslim headscarf but all conspicuous religious symbols worn by teachers are in compliance with the jurisprudence of the European Court of Human Rights in view of its decision in the case of *Dahlab v. Switzerland* (2001).¹⁰⁸⁸ Of course, it should be noted that this case involved a primary school teacher, thus it is not certain how the Court would have decided if mature teenagers were concerned.

In the *Dahlab* case the Court declared inadmissible the application of an elementary school teacher who after conversion to Islam had started to wear a headscarf while teaching and was forbidden to do so by the educational authorities in the canton of Geneva. The applicant appealed to the Geneva cantonal government which upheld the measure. The applicant alleged a violation of her rights protected by Art. 9 of the ECHR before the Federal Court which upheld the government decision. The Strasbourg Court by a majority declared her application inadmissible. According to the Court there was no violation of her right to freedom of religious under Art. 9 nor was there a discrimination against her on the ground of sex prohibited under Art. 14.

¹⁰⁸⁵ Erstes Gesetz zur Änderung des Schulgesetzes für das Land Nordrhein-Westfalen vom 13.06.2006, 1. § 57 a).

¹⁰⁸⁶ *Kopftuchverbot für Lehrkräfte in Deutschland*, (visited 21 September, 2005), <<http://www.uni-trier.de/~ievr/kopftuch/kopftuchrechts.htm>>.

There are several similarities between the facts of *Dahlab* case of that of German *Headscarf* case. Similarly to the *Ludin* case there was no explicit statutory provision prohibiting the wearing of religious symbols by public school teachers.¹⁰⁸⁹ However, the Court accepted that was sufficient legal basis to guide the conduct of the applicant in the provisions of the Public School Act requiring respect for the religious beliefs of students and parents and the employment of lay teaching personnel. The Court reasoned that wording of statutes may not be absolutely precise but their application in practice clarifies their meaning.

The Court accepted the measure had the legitimate aims of “protection of the rights and freedoms of others, public safety and public order.”¹⁰⁹⁰ According to the judgement of the Swiss Federal Court, cited in the case, the measure aimed to protect the negative religious freedom of students and their parents, religious harmony within the school and the denominational neutrality of the public school.¹⁰⁹¹

In reaching its conclusion, the European Court noted a decision by the Swiss Federal Court prohibiting the display of crucifix in public primary schools, because this would violate the denominational neutrality of schools.¹⁰⁹² Similarly to the dissenting judges of the German Federal Constitutional Court, the Federal Court of Switzerland noted that: “it is scarcely conceivable to prohibit crucifixes from being displayed in State schools and yet to allow the teachers themselves to wear powerful religious symbols of whatever denomination.”¹⁰⁹³ Although the Strasbourg Court did

¹⁰⁸⁷ Kopftuchverbot für Lehrkräfte in Deutschland, <<http://www.uni-trier.de/~ievr/kopftuch/kopftuchrechts.htm>>.

¹⁰⁸⁸ Application No.42393/98.

¹⁰⁸⁹ Section 6 of the Public Education Act 1940 on which the government had relied for its decision reads, “The public education system shall ensure that the political and religious beliefs of pupils and parents are respected.” According to section 120(2): ‘Civil servants must be lay persons; derogations from this provision shall be permitted only in respect of university teaching staff’.

¹⁰⁹⁰ *Id.* at 12.

¹⁰⁹¹ *Id.* at 4-5.

¹⁰⁹² Federal Court judgment of 26 September 1990, *ATF*, vol. 116 Ia, p. 252

¹⁰⁹³ *Id.*

not comment on this particular argument it held that the Federal Court had properly weighed the rights and interests at stake.

Dahlab, like Ludin, had also been teaching in the headscarf for a certain period without any complaint being voiced by students, their parents, or warning to stop doing so by the educational authorities. According to the Swiss Federal Court this fact did not mean that the negative rights of students and parents had not been affected since “some may well have decided not to take any direct action so as not to aggravate the situation, in the hope that the education authorities will react of their own motion.”¹⁰⁹⁴ Furthermore it noted that the applicant could not avoid questions from her students. According to the court it would be difficult for her to reply without stating her religious beliefs and cite “aesthetic considerations or sensitivity to the cold” as she claimed she did, because children will know that she is “evading the issue.”¹⁰⁹⁵

The Strasbourg Court also took note of the fact that there had been no objections by parents or students and stated that “it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children.” Thus it may be inferred that similarly to the German Constitutional Court, the judges found that there was no conclusive evidence as to the possible effect of teacher’s religious garbs on students. However, considering the very young age of the students—between four and eight—and their impressionability and susceptibility to influence, the judges concluded that the Geneva authorities had not exceeded the margin of appreciation. Thus the absence of conclusive evidence coupled with the margin of appreciation was a reason for the international court to defer to the national authorities.

¹⁰⁹⁴ *Id.*

¹⁰⁹⁵ *Id.*

The reasoning of the Swiss Federal Court presents most persuasively the position of the national authorities and the Strasbourg Court relied heavily on its reasoning in assessing whether the measure was “necessary in a democratic society.” The Swiss Federal Court placed an emphasis on the vulnerable age of the children and the specifics of the relationship between teachers and pupils:

Accordingly, the attitude of teachers plays an important role. Their mere conduct may have a considerable influence on their pupils; they set an example to which pupils are particularly receptive on account of their tender age, their daily contact with them – which, in principle, is inescapable – and the hierarchical nature of this relationship. Teachers are both participants in the exercise of educational authority and representatives of the State, which assumes responsibility for their conduct. It is therefore especially important that they should discharge their duties – that is to say, imparting knowledge and developing skills – while remaining denominationally neutral.”¹⁰⁹⁶

Furthermore the Swiss Federal Court noted that if teachers were allowed to openly manifest the religious affiliation through their clothing this may endanger the religious peace and harmony within schools. Another reason why teachers should abstain from conspicuous manifestation of religious conviction was the religious neutrality mandate of civil servants. The Court noted that in keeping with the principle of proportionality the government had allowed the wearing of small inconspicuous religious signs—such as small pieces of jewelry.

The only problematic part of the national court decision which was also adopted by the Strasbourg Court was the argument that it was “difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.” The Strasbourg Court accepted a single meaning of the headscarf—that of gender inequality—“ it [the headscarf] appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality.” This

¹⁰⁹⁶ *Id.* at 13.

statement by which the Court assumes that it has a monopoly on the symbolic meaning of the headscarf is surely problematic.

XVII. CANADA

1. Students

In 2004 after the French law of March 2004 was passed a survey was conducted throughout Canada that measured the public support for a similar law banning students' religious symbols in Canada.¹⁰⁹⁷ Only about one third of the people surveyed expressed support for such a law. The same percent answered they would support a law banning only the Islamic headscarf, which led the researchers to conclude that this support is "motivated more by a desire to maintain a strict separation between church and state than it is by unease about any one particular religious group."¹⁰⁹⁸ Only in Québec did the support for a general prohibition on religious symbols rise to 51%, which likely is explained by the "more secular attitudes of the Quebec public."¹⁰⁹⁹ A similar law is most unlikely to be enacted in any of the provinces of Canada and such legislation would not be in conformity with the Canadian Charter of Rights and Freedoms. There have been however several incidents, some of which have led to litigation and court decisions, which have dealt with generally applicable dress codes conflicting with students' religiously grounded practices of wearing religious symbols. In general the approach is one of

¹⁰⁹⁷ *Canadians Reject Ban on Religious Symbols or Clothes in Schools*, Center for Research and Information on Canada, 1 July 2004, <http://www.cric.ca/pdf_re/new_canada_redux/new_canada_redux_summary.pdf>.

¹⁰⁹⁸ *Id.*

¹⁰⁹⁹ *Id.* CAIR –Canada expected that the developments in France would have a repercussion in Quebec: "Given the developments in France, there will be renewed calls in la belle province to ban all religious symbols, using the same arguments of la Republique Française." (See Sheema Khan, *Banning Hijab*:

accommodation with a recent exception coming from a ruling of the Quebec Court of Appeal, which however was reversed by the Supreme Court of Canada.

1.1 Legal framework

The Canadian Charter of Rights and Freedoms

Freedom of Conscience and Religion

The right to freedom of conscience and religion is protected by Section 2 (a) of the Canadian Charter of Rights and Freedoms. According to the Supreme Court the essence of the right is:

...the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.¹¹⁰⁰

Freedom of conscience and religion also encompasses freedom of coercion and constraint: “Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others.”¹¹⁰¹

The Supreme Court of Canada has adopted a position similar to the constitutional jurisprudence in the US and Germany, in holding that in order to invoke the protection of the Charter, a claimant does not have to prove that her belief is shared by the majority of believers belonging to her faith or group or recognized by the religious authorities of that group.¹¹⁰² What a court may inquiry into is only the sincerity of the belief held or the religious nature of a practice.¹¹⁰³ Finally in order to

The New Colonialism, CAIR-CAN ANNUAL REVIEW, 2003 – 2004, <www.caircan.ca/downloads/CAIR-CAN_2004.pdf>.

¹¹⁰⁰ *R. v. Big M Drug Mart Ltd.*, *supra* note 158, at 94.

¹¹⁰¹ *Id.* at 95.

¹¹⁰² *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 2004 SCC 47

¹¹⁰³ *Id.*

trigger the protection of the Charter an infringement on the right to religious freedom should not be trivial or unsubstantial.¹¹⁰⁴

The right is not absolute and according to the Supreme Court: “Freedom of religion is subject to such limitations as are necessary to protect public safety, order, health or morals and the fundamental rights and freedoms of others.”¹¹⁰⁵ The balancing between freedom of religion and competing rights and community interests is performed through a limitations analysis under Section 1 of the Charter developed in *R. v. Oakes*.¹¹⁰⁶ In applying the *Oakes* test, the court has rejected a formalistic approach, but has required a close attention to context and consideration of “both the nature of the infringed right and the specific values the state relies on to justify the infringement.”¹¹⁰⁷

Parental Rights

There is no explicit provision in the Charter protecting parental rights to educate their children according to their religious beliefs. However the Supreme Court has found the right to freedom of religion “encompassed the right of parents to educate their children according to their religious beliefs” and that the “right of parents to rear their children according to their religious beliefs” is a fundamental aspect of the right to religious freedom¹¹⁰⁸ or alternatively, such parental rights may be protected under the liberty rights protected under Section 7.¹¹⁰⁹

¹¹⁰⁴ *Id* at 58.

¹¹⁰⁵ *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, 1996 CanLII 237 (S.C.C.), para 72.

¹¹⁰⁶ *R. v. Oakes*, [1986] 1 S.C.R. 103. “First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance”. (*Id.* at 70, internal quotations omitted).

¹¹⁰⁷ *Id.* at 78.

¹¹⁰⁸ *La Forest J in B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, para. CV.

¹¹⁰⁹ *La Forest J. in R. v. Jones*, [1986] 2 S.C.R. 284, 1986 CanLII 32 (S.C.C.), para 38;

Equality

As Foster and Smith have observed, “equality rights serve to complement the right to freedom of religion; in fact the two rights are often intertwined – a double helix with positive and negative strands.”¹¹¹⁰ The right to equality before and under the law is guaranteed by s. 15 (1) of the Charter which also prohibits discrimination and religion is one of the listed grounds.¹¹¹¹ In *Law v. Canada*¹¹¹² the Court held that an analysis of an alleged violation of s. 15 involves three inquiries which are performed again with close attention to the context: whether there is a differential treatment – “distinction, exclusion or preference” between the claimant and others with whom she can claim equality; whether this differentiation is based on one or more of the listed or analogous grounds; whether this differentiation amounts to discrimination in that it impairs or nullifies the human dignity of the claimant, her “right to full and equal recognition and exercise of a human right or freedom.”¹¹¹³

Discrimination may result both from purpose and effect, and the prohibition of discrimination requires the state or the state actor to provide reasonable accommodation short of “undue hardship”. The duty to accommodate may be addressed as a component of the s. 1 analysis—“reasonable accommodation, in this context, is generally equivalent to the concept of “reasonable limits.”¹¹¹⁴

Multiculturalism

¹¹¹⁰ Smith and Foster, *supra* note 173, at 34.

¹¹¹¹ S. 15.(1) of the Charter reads : “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability”.

¹¹¹² *Law v. Canada* (Minister of Employment and Immigration), [1999] 1 S.C.R. 497, 1999 CanLII 675 (S.C.C.)

¹¹¹³ *Id.*

¹¹¹⁴ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.

Finally it is important to the issues discussed that Section 27 provides that interpretation of the Charter should be “in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”

1.2 Analysis

1.2.1 Québec and headscarves

Students wishing to wear religious attire as an expression of their religious identity or as fulfilling a religious mandated of their faith may encounter restrictions imposed by school dress codes and policies. Most incidents related to dress codes have occurred in Québec. Québec’s secularism, its historical and cultural ties to France, and its nationalism have been offered as possible explanations of this fact.¹¹¹⁵ The government has rejected multiculturalism as an official policy and instead had adopted a policy of interculturalism. According to Smith, term is accepted to signify:

a social contract as one where Anglophones and other cultural communities are invited to accept their responsibilities in the development of Quebec culture and in the establishment of the French language. At the same time, the Government promises to respect minorities, contribute to their development and foster their contribution to French culture.¹¹¹⁶

The cases in Canada, similarly to the ones in Europe involve children belonging to religious minorities. In 1995 Québec had its own “headscarf debate.” At the end of 2004 a 13 year old girl was prohibited from wearing a Muslim veil in a private school in Québec and subsequently had to enroll in another school. Two months later another school girl was told that if she insisted on wearing a hijab to

¹¹¹⁵ Sheema Khan, *Why Does A Head Scarf Have Us Tied Up In Knots?*, CAIRN-Canada, September 26, 2003, (visited, 9 November 2005), <http://www.caircan.ca/oped_more.php?id=526_0_10_0_C>. See also Danielle Juteau, *The Citizen Makes an Entrée: Redefining the National Community in Quebec*, 6 (4) CITIZENSHIP STUDIES, 441, 442 (2002) on the citizenship model in Québec: “The national model of citizenship is preferred over the postnational, the republican over the pluralist, the undifferentiated over the differentiated.”

¹¹¹⁶ Smith and Foster, *Balancing*, supra note 185, at 107.

school she has to transfer to another school.¹¹¹⁷ The incidents gave rise to a public controversy. The Québec's Teachers' Federation opposed the wearing of headscarves at school, arguing that the headscarf had become a political symbol of the rising Islamic fundamentalism.¹¹¹⁸ The Conseil du statut de la femme supported the girls who wish to wear the hjiab, contending that respect for the autonomy of girls and women required respect for their decision to identify themselves as belonging or not to a religious community, and that preventing girls from wearing the hijab at public schools would drive them out of the public school system and hinder their integration, and that such a prohibition would also give fuel to the politics of religious fundamentalism.¹¹¹⁹

The Quebec Human Rights Commission issued an opinion in which it held that a general prohibition on students' headscarves was incompatible with the Quebec's Human Rights Charter.¹¹²⁰ In its conclusion about the impermissibility of any blanket prohibitions and about individual cases in which the wearing of headscarves may be temporarily restricted, the Commission was very close to the reasoning and opinion of the French Conseil d'État in 1998. The Commission's report was issued when Quebec's school system was still denominational. Thus the debate about the headscarf erupted against the background of Catholic and Protestant School

¹¹¹⁷ Naheed Mustafa, *The Fear of Hijab: Nothing Strikes Fear In The Western Psyche Like A Piece Of Cloth On A Woman's Head*, (visited, 17 October 2005), <<http://www.soundvision.com/Info/news/hijab/hjb.fear.asp>>.

¹¹¹⁸ *Religious Rites and Symbols in the Schools: The Educational Challenges of Diversity*, Comité sur les affaires religieuses, Ministère de l'Éducation, Brief to the minister of Education, March 2003, (visited October 1, 2005), <http://www.mels.gouv.qc.ca/affairesreligieuses/CAR/PDF/Avis_expressions%20religieuses_a.pdf>, at 10.

¹¹¹⁹ *Réflexion sur la question du port du voile à l'école*, Conseil du statut de la femme, Gouvernement du Québec, March 1995, (visited, 17 October 2005), <<http://www.csf.gouv.qc.ca/telechargement/publications/RechercheReflexionQuestionDuPortDuVoileEcole.pdf>>.

¹¹²⁰ *Religious Pluralism in Quebec: A Social and Ethical Challenge*, 1995. Commission des droits de la personne et des droits de la jeunesse. (visited 25 Feb. 2005) <http://www.cdpdj.qc.ca/en/publications/docs/hidjab_anglais.pdf>.

boards, which were however required by law to accept students from all faiths.¹¹²¹ Therefore there was no discussion of the principle of secularity, which has been addressed only later when the denominational status of schools was removed.

1) Indirect Discrimination

A dress code that prevents all girls from wearing headscarves, although facially neutral, adversely affects the religious freedom¹¹²² and education rights of Muslim girls differently from others to whom it applies and therefore amounts to indirect or “adverse effect” discrimination.¹¹²³ The fact that the substantive right claimed is not entirely negated or compromised does not affect the validity of the claim to adverse effect discrimination. Thus the fact that a girl may have the possibility to enroll in another school where there are no rules prohibiting her from wearing a headscarf does not affect her claim that she has been subject to discrimination in her exercise of the right to public education. Regulations prohibiting garments “marginalizing” the students have been interpreted as applying to the headscarf and according to the Commission, such application of the school regulations amounts to indirect discrimination. The Commission noted that whether the Koran mandated the practice of veiling for women was not within the competence of the public authorities but is a question to be resolved by the Muslim community and it did not affect the validity of the claim of indirect discrimination.¹¹²⁴

1.2.1.1 REASONABLE ACCOMMODATION

Therefore public schools may keep their neutral regulations but they have the duty to make reasonable accommodation of the religious freedom rights of Muslim

¹¹²¹ *Id.* at 9.

¹¹²² The right to freedom of religion includes the right to wear garments because of religious reasons. (*Id.* at 27)

¹¹²³ *Id.* at 26.

girls wishing to wear a headscarf.¹¹²⁵ Accommodation is reasonable when it does not impose undue hardship on the school authorities. The criteria used to judge whether undue hardship would be imposed includes its effects on “discipline, safety and educational effectiveness,” which are considered elements of public order and democratic values named as grounds for limitation of rights in Section 9.1 of the Quebec Charter.¹¹²⁶

1.2.1.2 COERCION AND SYMBOLISM OF THE HEADSCARF

The Commission identified the association of the veil with oppression of women as a central issue in the debate about the Muslim veil in schools.¹¹²⁷ The Commission acknowledged that the headscarf is sometimes “used as an instrumental part of a set of practices aimed at maintaining the subjugation of women and that in some societies women are forced to wear a headscarf, referring to the situation in Algeria at that time. It noted that although so far such an extremist political-religious movement had not developed, many people were concerned that women and girls “consciously or not might not wear the veil out of their own free will.”¹¹²⁸

The Commission referred to the 1989 opinion of the Conseil d’État, and argued that whether the wearing of the headscarf may be in collision with the principle of the equality of the sexes has to be examined in context.¹¹²⁹ The veil is a religious symbol and has to be respected as such. A general ban on the wearing of headscarves cannot be justified by arguing that its symbolism is incompatible with democratic values.

¹¹²⁴ *Id.* at 15.

¹¹²⁵ *Id.* at 27.

¹¹²⁶ *Id.* at 28.

¹¹²⁷ *Id.* at 14.

¹¹²⁸ *Id.* at 15.

¹¹²⁹ *Id.* at 30

[O]ut of respect for the persons who choose to wear the veil, we must assume that this choice is a way of expressing their religious affiliation and convictions. In our view, it would be insulting to the girls and women who wear the veil to suppose that their choice is not an enlightened one, or that do so to protest against the right to equality. It would also be offensive to classify the veil as something to be banished like the swastika for example, or to rob it of its originality by comparing it to a simple hat.¹¹³⁰

Thus symbolism of the headscarf alone cannot serve as a justification for its prohibition. An actually proven and not presumed threat to the equality of the sexes may warrant a regulation or prohibition. Schools had to support girls who did not wish to wear headscarves, although this, according to the Commission would not be a guarantee that “this will change what goes on in the privacy of the home.”¹¹³¹ Another case where a temporary restriction would be justified would be where a campaign for wearing of the headscarf was organized with the purpose of “creating or aggravating tension between student groups, or of inciting discrimination based on sex.”¹¹³²

1.2.1.3 DIVISIVENESS IN SCHOOL

Similarly to the Stasi Commission the Quebec HR Commission was concerned that there may be cases where students are “marginalized” or harassed because of the religious garments they wish to wear.¹¹³³ However, the Commission correctly noted that the responsibility of the school is to prevent such harassment by taking appropriate measures and informing students and teachers that such behavior is unacceptable, instead of penalizing the students that are being harassed by prohibiting them from wearing their religious symbols, which is what the NA Commission in France proposed with respect to Jewish students. Accordingly, the Canadian Supreme

¹¹³⁰ *Id.* at 15

¹¹³¹ *Id.*

¹¹³² *Id.*

¹¹³³ *Id.* at 29.

Court has held that “no undue hardship should result from attitudes that are incompatible with the Charter.”¹¹³⁴

1.2.1.4 HEALTH AND SAFETY

The wearing of the veil may be regulated for reasons of safety in some biology or physical education classes, since all students have to take part in the given programs of instruction, since certain principles are considered non-negotiable in Quebec – “compulsory school attendance, the number of days in the school year, program content and the language of instruction.”¹¹³⁵

In 1997, at the request of Quebec, the Canadian Government amended the Constitution and the application of Section 93 guarantee of denominational rights in Quebec was removed. This change made possible a reform according to which the school system was no longer divided into Catholic and Protestant school boards, but into French language and English language school boards.¹¹³⁶ The reform was a response to the increased religious diversity in Quebec and to the fact that language had “gradually supplanted religion as the dominant cultural metaphor in the province.”¹¹³⁷ This change also brought up the issue of the compatibility of the neutrality of the state and the wearing of religious garb in public schools.

1.2.1.5 NEUTRALITY

In 2003 the Committee on Religious Affairs at the Ministry of Education of submitted a brief to the Education Minister on the issues related to religious symbolism and rites at schools urging a policy of neutrality. The Committee defined neutrality as a duty of the state not to “discriminate in favor of or against any religion,

¹¹³⁴ *Central Okanagan School District v. Renaud*, (1992), 2 S.C.R. 970, 988.

¹¹³⁵ *Religious Pluralism in Quebec*, *supra* note 1120, at 12.

¹¹³⁶ Smith, *supra* note 1116, at 103.

or discriminate in favor of or against religious convictions in relation to atheistic or agnostic convictions, or vice-versa”¹¹³⁸ It noted that the obligation of neutrality was mandated out of respect for the individual’s right to religious freedom, equal treatment, and freedom of expression. Therefore neutrality is a principle imposing an obligation on the state and not on individuals.¹¹³⁹ The Committee’s interpretation thus differs from the one adopted by the NA and Stasi Commission in France, which in their arguments almost went as far as imposing such duty of neutrality also on the students attending public schools. Correctly interpreted interpreted, however, the principle of religious neutrality cannot serve as justification of restricting students’ religious dress at public schools.

1.2.1.6 INTEGRATION

The mission of school to integrate students of immigrant families into Québec’s society does not require the abolition of expression of religious identity at school. According to the Committee on Religious Affairs:

Immigrants and their descendents have to feel at home in Québec society and in its schools, where they must find the conditions that will enable them to express their religious beliefs through rituals, symbols and other means—and all within limits to be defined further on. Integration, therefore, presupposes a certain reciprocity: it requires an effort at adaptation on the part of immigrants, but also openmindedness with respect to cultural and religious diversity on the part of the host society.¹¹⁴⁰

The Committee argued that schools’ mission of teaching students tolerance and responsibility necessary for living in a religiously diverse democratic society and also its mission to foster the personal development of students necessitated the protection of student’s religious expression.¹¹⁴¹ Forbidding such expression out of fear of conflict or due to limited conception of neutrality would be inconsistent with

¹¹³⁷ *Id.*

¹¹³⁸ José Woehrling, *La place de la religion à l’école publique*, cited in *Religious Rites and Symbols in the Schools*, *supra* note 1118, at at 13.

¹¹³⁹ *Id.*

this mission.¹¹⁴² Discussing the relation between integration and the wearing of religious symbols by students in public schools, the Quebec Human Rights Commission has also noted that banning headscarves from public schools may result in “forc[ing] Muslim girls outside of the public school system.”¹¹⁴³

1.2.1.7 LIMITS

Students’ religious as well as secular expression finds its limits in the right to freedom of conscience of others. The school authorities can impose restrictions “if a group of students of the same religious affiliation, whether in the majority or the minority, were to exert such an influence as to make a school’s nonbelieving students or students of other faiths feel ill at ease.”¹¹⁴⁴ Student’s religious expression may not be allowed to take the form of coercion or harassment of other students. Thus is another similarity with the 1989 Conseil d’État opinion, which held that impermissible proselytization may be a ground for limitation on wearing of the headscarf.

Finally, it should be noted that when in 2004 a girl was again excluded from a private school in Quebec because she insisted on wearing a headscarf¹¹⁴⁵ the Quebec Human Rights Commission published a second opinion on the duty to accommodate student’s religious expression at school and stated that this duty applied not only to public but to private schools as well.¹¹⁴⁶ The central question was whether private

¹¹⁴⁰ *Id.* at 41.

¹¹⁴¹ *Id.* at 52.

¹¹⁴² *Id.* at 53.

¹¹⁴³ *Reflections on the Scope and Duty of Reasonable Accommodation in the Field of Religion*, Quebec Human Rights Commission, February 2005, (visited October 16, 2005), <<http://www.cdpcj.qc.ca/en/home.asp?noeud1=0&noeud2=0&cle=0>>, at 3.

¹¹⁴⁴ *Id.* at 56.

¹¹⁴⁵ “*Quebec Identit*” vs. *the Headscarf: Student Expelled for Wearing Hijab*, (September 26, 2003), The Globe and Mail, <<http://www.pluralism.org/news/intl/index.php?xref=Controversy+Over+the+Headscarf&sort=DESC#headline9890>>.

¹¹⁴⁶ *Duty of Reasonable Accommodation*, *supra* note 1143.

schools could rely on Sec 20 of the Quebec Human Rights Charter¹¹⁴⁷ and therefore prohibit the wearing of headscarves without violating the anti-discrimination provisions of the Charter. According to the Commission, the duty of reasonable accommodation applied to private schools as well since: “A non-profit institution without a specific mission connected to an identifiable group sharing a characteristic listed in section 10 of the Charter cannot, therefore seek protection under section 20.”¹¹⁴⁸ Secondly, even institutions to which section 20 applies have the duty “to provide reasonable accommodation, short of undue hardship, in their standards, in a way that takes into account the characteristics of the groups affected by the standards.”¹¹⁴⁹ So a private religious school does not have a free reign to forbid the religious attire worn by students belonging to another religion. Only if the private school can demonstrate that it is serving an identifiable religious group and that the discrimination against students from other religious groups is closely linked to its vocational mission, then the discriminatory restriction would be permissible under the Charter.

The Commission affirmed its position regarding public schools as well expressed in 1995. While in its 1995 opinion the Commission approvingly referred to the 1989 decision of the French Conseil d’État, in its latest opinion the Commission noted that the legal context in Quebec was different from that in France and therefore it will not be possible to transpose the French solution of the 2004 French law banning conspicuous symbols at school into Quebec.¹¹⁵⁰ According to the Commission, the current French interpretation of *laïcité* renders an accommodation of

¹¹⁴⁷ Section 20 provides that: “A distinction, exclusion or preference based on the aptitudes or qualifications required in good faith for an employment, or justified by the charitable, philanthropic, religious, political or educational nature of a nonprofit institution or of an institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory.” (R.S.Q.C-12, Sec.20).

¹¹⁴⁸ *Duty of Reasonable Accommodation*, *supra* note 1143, at 17.

¹¹⁴⁹ *Id.* at 14.

students' religious symbols "a priori incompatible with the constitutional principle of a secular state,"¹¹⁵¹ In Québec such an accommodation is required by the Québec and Canadian human right charters. An example of the way in which educational authorities may foster an understanding and toleration of student's symbolic expression of religious identity is the presentation of a video portraying the life a Muslim girl attending a high school in Toronto wearing her religious dress, as part of the course on Civic Studies in British Columbia.¹¹⁵² The Ministry of Education in British Columbia described the film as a portrayal of "the trials and tribulations of adolescent life through the lens of a Muslim girl attending high school in Toronto ...[who] lives her life as a religious person and wears religious attire."¹¹⁵³

1.2.2 Ontario

According to the Ontario Human Rights Commission, when dress codes come into conflict with religious dress of students, schools have the duty to accommodate them short of undue hardship. According to the Commission when a neutral requirement such a school dress code "has an adverse impact on members of a group of persons who are identified by a prohibited ground of discrimination under the Code" such as religion, then this constitutes "constructive discrimination" under the Ontario Human Rights Charter.¹¹⁵⁴ The dress restriction cannot be maintained unless

¹¹⁵⁰ *Id.* at 4.

¹¹⁵¹ *Id.*

¹¹⁵² *Civic Studies 12, Integrated Resource Package 2005*, Ministry of Education, Skills and Training, Province of British Columbia, <<http://www.bced.gov.bc.ca/irp/civic11.pdf>>.

¹¹⁵³ *Id.* at 152.

¹¹⁵⁴ The relevant provisions of the Code are as follows:

1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status handicap.

4(1) Every person has a right to equal treatment with respect to employment without

school authorities provide reasonable accommodation to the persons affected, short of undue hardship.¹¹⁵⁵

As examples of such required accommodation the Commission gave Muslim headscarves and Sikh turbans or kirpans.¹¹⁵⁶ The Commission noted “uniforms such as school uniforms and work uniforms that have no health or safety rationale can be modified easily to permit the person concerned to wear the required item(s) of clothing.”¹¹⁵⁷

In the case of Ontario Human Rights Commission and Harbhajan Singh Pandori v. Peel Board of Education (1991) 80 D.L.R. (4th) 475 (Ont. Div. Ct.) the Ontario Divisional Court upheld a decision of the Board of Enquiry of the Ontario Human Rights Commission which held that Sikh students and teachers could wear kirpans at school subject to certain safety restrictions. The case involved a balancing between the right to religious freedom and the duty of school to provide a safe school environment.

The Peel Board of Education adopted a no-weapons policy after the occurrence of a number of violent incidents at schools. The Board determined that the policy applied to kirpans as well, because they could be used as weapons, were perceived as weapons and not as religious symbols by non-Sikh students and were an

discrimination because of ...creed...

8. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part [i.e., Part I, entitled Freedom from Discrimination].

10(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

(a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances

[...]

¹¹⁵⁵ Id at 4.3.

¹¹⁵⁶ *Policy on Creed and the Accommodation of Religious Observances*, Ontario Human Rights Commission, (visited 20 October 2005), <<http://www.ohrc.on.ca/english/publications/creed-religion-policy.shtml#idx71>>, sec 7.1.

¹¹⁵⁷ *Id.*

additional safety hazard in an already volatile environment.¹¹⁵⁸ The Board of Enquiry assessed the evidence, according to which no violent incidents had occurred in any school under the Peel Board jurisdiction involving the use of kirpans or in any other school in Canada; no other school board in Canada prohibits the wearing of kirpans; kirpans were prohibited from airplane in Canada and not allowed in courtrooms in Manitoba. It held that the Peel Board prohibition was in violation of Section 10 of the Ontario Human Rights Codes banning indirect discrimination. The Board of Enquiry on wearing of kirpans provided that kirpans needed to be “of reasonable size, worn under the wearer's clothing and not visible, and that they be sufficiently secured so that removal would be rendered difficult.”¹¹⁵⁹ Principles could check whether the conditions were fulfilled, suspend the rights to wear the kirpans if it was misused, or impose temporary restrictions if special measures were required at a particular school because of the high level of violence.¹¹⁶⁰

The Ontario Divisional Court upheld the decision of the Enquiry Board holding that it had properly assessed the evidence and had struck a correct balance between the interests of schools to endure a safe school environment and the religious freedom of Sikh students and staff and the school board would not suffer undue hardship as a result of the accommodation.

As was held in Quebec with respect to the wearing of a headscarf, private schools in Ontario cannot rely on exceptions to the anti-discrimination provisions of the Ontario Human Rights Code to deny admittance to Sikh Students because of their wish to wear turbans. When a school sought to justify its exclusion on the basis of Section 18 which allows for exceptions to the antidiscrimination provision for

¹¹⁵⁸ Ontario Human Rights Commission and Harbhajan Singh Pandori v. Peel Board of Education (1991) 80 D.L.R. (4th) 475 (Ont. Div. Ct.) at para.10.

¹¹⁵⁹ *Id.* at para 1.

¹¹⁶⁰ *Id.*

institutions established on behalf of groups identified in the code, it was held that this exception did not apply to the school and it could not refuse to admit the children.¹¹⁶¹

1.2.3 Alberta – kirpan case

The presence of religious symbols worn by students also assists the school mission to develop understanding and tolerance of different religious renditions. In the case of *Tuli v. St. Albert Protestant Separate School District No. 6* (1985),¹¹⁶² a Sikh boy asked the Alberta Court of Queen's Bench to issue an interim injunction banning the school from suspending or expelling him if he wears his kirpans following his scheduled baptism. The judge granted the injunction, provided that certain safety conditions were met and added that:

To allow the applicant to wear the requirements of his religion upon baptism, including the kirpan, would provide those who are unfamiliar with the tenet of his faith an opportunity to be introduced to and to develop an understanding of another's culture and heritage. In this case, that being the traditions of a very well established, respected and old religion.¹¹⁶³

Thus the waering of religious dress items not only is not inconsisitant with the education process but furthers its aim of educating young people to live in a pluralistic society.

1.2.4 The Quebec kirpan case

The only case that was an exception to the accommodationist approach towards students religious dress in Canada was the decision in *Commission scolaire Marguerite-Bourgeoys v. Singh Multani*, 2004 CanLII 31405 (QC C.A.) in which the Québec Court of Appeal upheld a school board policy that instituted a blanket

¹¹⁶¹ *Sehdev (Litigation Guardian of) v. Bayview Glen Junior Schools Ltd.* (1988), 9 C.H.R.R. D/4881 (H.R. Bd. of Inq.) cited in William F. Foster, William J. Smith, *Equal Opportunity and the School House: Part II--Access to and Benefit from Education for All*, 13 EDUC. & L.J. 173 (2003), at 232.

¹¹⁶² *Tuli v. St. Albert Protestant Separate School District No. 6*, 8 C.H.R.R. D/3906.

¹¹⁶³ *Id.* at para.4.

prohibition of kirpans at school together with all dangerous objects and weapons. It has been suggested that one of the circumstances that has led to this decision was the heightened concern with public safety and security after the 9/11 terrorist attacks.¹¹⁶⁴ However, the Supreme Court of Canada in 2006 set aside this decision and held that the infringement on the religious freedom rights of a Sikh boy through the application of the ban was unjustified since it failed the minimum impairment prong of the *Oakes* test.¹¹⁶⁵

Gurbaj Singh was a Sikh student attending a secondary school in Québec. He was wearing the Sikh kirpan to school, but once he dropped it at the school yard and the principal of the school prohibited him from bringing it to school again. A compromise was reached between the student and his family and the school board (CSMB) and he was allowed to wear the kirpan subject to certain safety conditions. However, the governing board refused to accept this compromise. It determined that the wearing of kirpans was against the code of conduct, adopted by the board pursuant to the Education Act,¹¹⁶⁶ which code prohibited bringing dangerous objects to school. The council of commissioners upheld this decision. The trial judge granted declaratory judgment to the student and his parents and enforced the compromise agreement between the school board and the family.¹¹⁶⁷ The case went to the

¹¹⁶⁴ See Smith and Foster, *Balancing*, supra note 185.

¹¹⁶⁵ See *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6. All of the justices were of the opinion that the decision of the Court of Appeal should be set aside and the decision of the council of commissioners, forbidding the Sikh student from wearing a kirpan to school should be declared to be null. The disagreement among the justices concerns the question of the appropriate standard for judicial review. Three concurring justices defended the position that the appropriate standard for review of the commissioner's decision should be the reasonableness standard of administrative law, while according to the majority the decision should be examined for its compliance with the Charter and subjected to an s1 analysis. It is beyond the scope of the paper to engage into a discussion of the merits of both positions, but since I find the majority position more persuasive (the issue concerns the infringement of a Charter right and the Charter is applicable to the school commissioners' decision) it is the majority's approach to the issue that would be discussed.

¹¹⁶⁶ s 70.

¹¹⁶⁷ *Commission scolaire Marguerite-Bourgeoys v. Singh Multani*, 2004 CanLII 31405 (QC C.A.) at 16. When the 12 year boy returned to school he was accompanied by a police escort and a group of angry parents shouting at him. 30 parents kept their children at home, arguing that the kirpan is a

Superior Court where the Attorney General of Quebec made the following submission: “When it comes to edged weapons, the Attorney General’s position is zero tolerance, including kirpans. This is the only submission I have to make before the Court.”¹¹⁶⁸ The Superior Court however, allowed the student to wear the kirpan subject to similar safety conditions.¹¹⁶⁹

The Québec court of Appeals however held that although there was an infringement on the students right to freedom of religion, reasonable accommodation was not possible since allowing the student to wear the kirpan would under the under the conditions upheld by the Quebec Superior Court, would make require the council of commissioners to reduce the security standards of the whole school community and affect negatively the perception of a safe school environment, and concluded that this would constitute an undue burden.¹¹⁷⁰

The Supreme Court accepted that there was an infringement of the religious freedom right of the student, since the requirements set clearly in *Amselem* were satisfied.¹¹⁷¹ Similarly to the Court to the Courts of Appeals in the *Shabina Begum* case in the UK, the Supreme Court held that when the school forced the student to

dangerous weapon and its presence at school threatened their children’s safety. (See Ingrid Peritz, *Police on Guard as Boy Wearing Kirpan Returns to School*, GLOBE AND MAIL, April 18, 2002, <<http://www.kirpan.ca/Globeandmailarticle.html>>.)

¹¹⁶⁸ *Commission scolaire Marguerite-Bourgeoys*, *supra* note 1167, at 34.

¹¹⁶⁹ The conditions were : “that the kirpan be worn under his clothes; that the kirpan be carried in a scabbard made of wood and not metal, to prevent it from causing injury; that the kirpan be placed in its scabbard and wrapped and sewn in a sturdy fabric pouch, and that this pouch be sewn to the guthra; that school personnel be authorized to verify, in a reasonable fashion, that these conditions were being followed; that the petitioner be required to keep the kirpan in his possession at all times, and that its disappearance be reported to school authorities immediately; that if the present judgment were not respected, the petitioner would definitively lose the right to wear his kirpan at school. “ (*Id.* at 17.)

¹¹⁷⁰ *Commission scolaire Marguerite-Bourgeoys*, *supra* note 1167.

¹¹⁷¹ The claimant has to demonstrate a sincere, not factious or capricious belief in a practice or belief with a religious nexus; a non-trivial or not insubstantial interference with the ability to act in accordance with that belief; the fact that other people of the same religious community may practice the religion differently is immaterial to the claim. (*Multani*, *supra* note 1165, at 34 -35).

choose between following the prescriptions of his religion or attending school it violated his right to attend public school.¹¹⁷²

The Supreme Court accepted that the aim of ensuring a reasonable level of school safety was a pressing and substantial social need.¹¹⁷³ The council of commissioners' decision also passed the first step of the *Oakes* proportionality test since the prohibition of the kirpan which besides a symbols of the Sikh religion also has the characteristics of a weapon is relation connected to protecting students and staff from injury.¹¹⁷⁴ The critical inquiry was whether the prohibition minimally impaired his religious freedom right. To pass this prong of the proportionality test the interference "must be carefully tailored so that rights are impaired no more than necessary" and while courts should allow some leeway to legislators, or to the administrative authorities acting in pursuance of a statutory discretion, the interference should nevertheless be within a range of reasonable alternatives."¹¹⁷⁵ The Supreme Court accepted the reasoning of the Court of Appeals that at the case at bar there was a correspondence between the burden imposed on the authorities by the minimal impairment requirement and the duty of reasonable accommodation in indirect discrimination cases.

However, the Supreme Court rejected the view that that burden was met by the council's decision. The Supreme Court correctly rejected the reliance of the Appeals Court on two cases where courts upheld prohibitions on the wearing of kirpans in courtrooms¹¹⁷⁶ and on airplanes.¹¹⁷⁷ As was noted by the Ontario board of inquiry in *Pandori*, in courtrooms there is an adversarial environment, while in schools there are

¹¹⁷² *Id.* at 40.

¹¹⁷³ *Id.* at 44.

¹¹⁷⁴ *Id.* at 49.

¹¹⁷⁵ *Id.* at 50-51.

¹¹⁷⁶ *R. v. Hothi*, [1985] 3 W.W.R. 256, 18 C.C.C (3d) 31, 1985 CarswellMan 170; (Man. Q.B.)

¹¹⁷⁷ *Nijjar v. Canada 3000 Airlines Ltd.*, 1999 CanLII 4313 (C.H.R.T.).

students and teachers are partners of a community engaging in the common enterprise of education. Furthermore, while restrictions in courtrooms are only temporary in nature, a prohibition on the wearing of kirpans would affect a Sikh student for years.¹¹⁷⁸

In the case concerning airplanes, the Canadian Human Rights Tribunal also distinguished between the school context where there is an ongoing relationship between the student and the school and with that a meaningful opportunity to assess the circumstances of the individual seeking the accommodation” and airplane travel where “[g]roups of strangers are brought together and are required to stay together, in confined spaces, for prolonged periods of time [and] [e]mergency medical and police assistance are not readily accessible.”¹¹⁷⁹

The Court also considered the evidence that there was not a single kirpan related incident at school and the fact that other provinces were successfully accommodating Sikh students. This did not justify an absolute prohibition.¹¹⁸⁰

The argument that the presence of kirpans would diminish the overall perception of safety in the school and that other students would feel that the school was using a double standards by allowing Sikh students to wear kirpans but prohibiting them from wearing knives was also rejected by the Court, which took a position of a forceful affirmation of individual religious freedom rights and Canadian constitutional principle of multiculturalism.

According to the Court the claim that the kirpan was a symbol of violence not only contradicts the religious symbolism of the kirpan but is also “disrespectful to believers in the Sikh religion and does not take into account Canadian values based on

¹¹⁷⁸ *Pandori*, *supra* note 1158, 197.

¹¹⁷⁹ *Nijjar v. Canada 3000 Airlines Ltd.*, 1999 CanLII 4313 (C.H.R.T.).

¹¹⁸⁰ *Multani*, *supra* note 1165, at 67.

multiculturalism.”¹¹⁸¹ Commenting on an excerpt from an affidavit for the respondent, which stated that an example for the perception of discrimination of non-Sikh students is the expert’s observation that some students still regard the right of Muslim girls to wear a hijab unfair because they themselves are not allowed to wear caps or scarves, the Court emphasized that “[t]o equate a religious obligation such as wearing the chador with the desire of certain students to wear caps is indicative of a simplistic view of freedom of religion that is incompatible with the *Canadian Charter*.”¹¹⁸² If there are students who consider it unfair that the Sikh boy may bring his kirpan to school, the school authorities had not discharged their obligation of instilling the value of religious tolerance, which is “at the very foundation of our [Canadian] democracy” and this obligation is not fulfilled by an absolute prohibition of the kirpan.¹¹⁸³

Having found a violation of the minimal impairment prong, the Court nevertheless considered the deleterious effects of the prohibition against its salutary effects with the purpose of affirming the values underlying the Canadian Charter. In holding that the contested measure failed the third prong of the proportionality test, the Court emphasized that,

An absolute prohibition would stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others. This Court has on numerous occasions reiterated the importance of these values....A total prohibition against wearing a kirpan to school undermines the value of this religious symbol and sends students the message that some religious practices do not merit the same protection as others. On the other hand, accommodating Gurbaj Singh and allowing him to wear his kirpan under certain conditions

¹¹⁸¹ *Id.* at 71.

¹¹⁸² *Id.* at 74. Lundy put forward a similar argument with respect to the possible justification of the school’s refusal to accommodate the student’s request to wear a jilbab in the UK case. According to Lundy, it may be regarded as unfair if some students are subjected to the disciplinary rule of uniform while others were exempted from it due to their conscientiously held beliefs. (See Laura Lundy, *Family Values in the Classroom? Reconciling Parental Wishes and Children’s Rights in State Schools*, 19 INTERNATIONAL JOURNAL OF LAW, POLICY AND THE FAMILY 342, 360 (2005).

¹¹⁸³ *Multani*, *supra* note 1165, at 76.

demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities.¹¹⁸⁴

This most recent pronouncement of the Canadian Supreme court will serve as a precedent in any possible future legal controversies regarding the rights of students to wear religious dress symbols in public schools and creates a strong presumption against the constitutionality of measures aiming to restrict such rights.

2. Teachers

2.1 Legal Framework

2.1.1 Provincial Regulation of Teachers' Religious Garb

No statutes prohibiting public school teacher's religious garb or symbols exist at present in any of the Canadian provinces. A religious garb law was passed in Saskatchewan in the early 1929. Similarly to the original enactment of religious garb laws in the United States, it was motivated to a large extent by anti-Catholic animus and a desire to ensure the supremacy of Anglo-Protestant culture and values. The underlying divide was between Protestant and Catholic markers of identity, supplemented respectively by the English and French languages. When a conservative government came to power in 1929 it announced that it would pass legislation to bring "harmony, peace and concord" in public schools.¹¹⁸⁵ The government argued that a complete separation of church and state was necessary regarding public schools, and this was violated by the sectarian influences exerted by religious emblems and

¹¹⁸⁴ *Id.* at 78-79.

religious garb worn by teachers.¹¹⁸⁶ According to a leading member of the Conservative Party public schools had to be regulated in a way, so that children "of whatever race or religion they may profess, shall be at liberty to attend the public schools of the province and get their common school education without having their religion interfered with."¹¹⁸⁷ The religious emblems at issue were crucifixes attached to the school walls and the religious garbs –the habits of Catholic nuns teaching at the schools.

The liberal opposition argued that emblems should be removed only if there were objections voiced to having religious symbols at school or being instructed by teachers in religious garb. The Liberals noted that there were very few Protestant children attending school with Catholic teachers who did not have an option to enroll in another school. It was noted that such a legislation has not introduced anywhere else in Canada and would "stand as a monument to intolerance and bigotry."¹¹⁸⁸

The controversial amendment to the School Act came into force in 1930 and it provided that:

No emblem of any religious faith, denomination, order, sect, society or association, shall be displayed in any public school premises during school hours, nor shall any person teach or be permitted to teach in any public school while wearing the garb of any such religious faith, denomination, order, sect, society or association.¹¹⁸⁹

The reaction of the nuns teaching at public schools was to cover their habits with toga and don a "French widow's bonnet" in order to comply with the new provision.¹¹⁹⁰ The Roman Catholic leaders in the province continued to protest against

¹¹⁸⁵ Raymond Huel, *The Anderson Amendments and the Secularization of Saskatchewan Public Schools*, CCHA, *Study Sessions*, 44(1977), 61-76, (visited, 1 November 2005), <http://www.umanitoba.ca/colleges/st_pauls/ccha/Back%20Issues/CCHA1977/Huel.html>.

¹¹⁸⁶ *Id.*

¹¹⁸⁷ Anthony Appleblatt, *The School Question in the 1929 Saskatchewan Provincial Election*, *Study Sessions*, 43(1976), 75-90, (visited 2 November 2005), <http://www.umanitoba.ca/colleges/st_pauls/ccha/Back%20Issues/CCHA1976/Appleblatt.html>.

¹¹⁸⁸ See Huel, *supra* note 1185.

¹¹⁸⁹ School Act R.S.S. 1930, c.131, section 257 (1).

¹¹⁹⁰ See Huel, *supra* note 1185.

the amendment and to demand it repeal. The reaction in Québec was also very negative because the new amendments were generally considered by French Canadians their as an “an overt attack on their religion and culture.”¹¹⁹¹ When the Liberals in Saskatchewan won the next election in 1934 French Catholics expected a positive response to their demands. However, the new government did not satisfy their expectations and the provision remained in force.¹¹⁹² The provision was given a broad interpretation by the Attorney General to the effect “that the wearing of the customary dress is in itself not a religious garb, provided that the usual adornments are not prominently displayed” and the controversy surrounding the amendment gradually subsided.¹¹⁹³ The amendment was finally repealed with the passage of a new law—the Education Act of 1978—which contained no provision respecting teacher’s religious dress.

In the province of New Brunswick there is in force a specific provision allowing teachers’ religious garb. The Lieutenant-Governor in Council, pursuant to his authority under the Education Act,¹¹⁹⁴ has issued School Administration Regulation - Education Act, N.B. Reg. 97-150, which explicitly states that teacher’s religious garbs or symbols are not prohibited:

Symbols, or emblems distinctive of any national or other society, political party or religious organization shall not be exhibited or employed in or on school property or in school exercises, but nothing herein shall be taken to refer to any peculiarity of the teacher's garb or to the wearing of the cross or other emblem by members of any religious denomination.¹¹⁹⁵

¹¹⁹¹ *Id.*

¹¹⁹² Raymond Huel, *The Anderson Amendments: A Half Century Later*, CCHA, *Study Sessions*, 47(1980), 5-21, <http://www.umanitoba.ca/colleges/st_pauls/ccha/Back%20Issues/CCHA1980/Huel.html#N_1>.

¹¹⁹³ *Id.*

¹¹⁹⁴ Section 57 of the Education Act, S.N.B. 1997, c. E-1.12 gives broad regulatory powers to the Lieutenant –General in Council, including regulations as to the qualifications and responsibilities of teachers and other school personnel.

¹¹⁹⁵ School Administration Regulation - Education Act, N.B. Reg. 97-150, s. 29 (1), <<http://www.ijcan.org/nb/laws/regu/1997r.150/20041104/whole.html>>.

The origin of this exception from the prohibition of religious symbols made for teacher's religious garbs goes back to a compromise reached in 1873 between the government of New Brunswick and the representatives of the Catholic Church in the province. The passage of the Common Schools Act of 1871, whose last section provided that "All schools conducted under the provisions of this Act shall be non-sectarian"¹¹⁹⁶ created a huge controversy in the province since the Roman Catholics population claimed that the Act had denied them their rights and privileges with respect to education that they had enjoyed under the informal system of denominational schools dating back to 1850.¹¹⁹⁷ In 1873 an authoritative representative of the Church approached a government committee in an attempt to reach compromise and one of his demands was that members of the church be licensed to teach at the public schools and be allowed to wear their distinctive religious garb.¹¹⁹⁸ This demand was granted and in 1873 when Regulation 20 prohibiting exhibition of religious and political symbols in the classroom was amended by adding the following "but nothing herein shall be taken to refer to any peculiarity of the teacher's garb, or to the wearing of the cross or other emblems worn by the members of any denomination of Christians."¹¹⁹⁹ Thus firstly the exception for teacher's religious garb was made as a concession to Roman Catholics and was later extended to apply to teachers of all religious denominations.

¹¹⁹⁶ Lawrence M. Bezeau, *Educational Administration for Canadian Teachers* (fourth edition, 2004), Chapter 3, <<http://www.unb.ca/education/bezeau/eact/eact03.html#>>.

¹¹⁹⁷ The constitutional of the act was confirmed by a decision of the judicial committee of the Privy Council in the case of *Maier v. Town of Portland* (1874).

¹¹⁹⁸ The other demands that Catholic teachers pass a special examination to be licensed, that in case the textbooks prescribed by the school board were in conflict with the teachings of the Catholic faith they may be replaced by "the books of the Christian brothers" were rejected. (See Katherine F. Cameron Macnaughton, *The Development of The Theory And Practice of Education In New Brunswick, 1784-1900: A Study in Historical Background*, 1947, (visited 4 November 2005), <http://www.lib.unb.ca/Texts/NBHistory/Education/bin/tei2html_chap.cgi?determine=9>, p. 208-209.)

¹¹⁹⁹ *Id.*

Similarly although there is no explicit statute or regulation allowing teachers to wear religious garb in Newfoundland, the same approach to the issue has been adopted by the Government there as in New Brunswick. The Education Department of Newfoundland encourages school boards to maintain flexible dress codes and not only students but staff members as well “should be allowed to wear symbols, clothing, head coverings, or hairstyles dictated by religious affiliation or cultural background.”¹²⁰⁰

In the province of Ontario, the Ministry of Education has issued policy guidelines “to assist schools and school boards in ensuring that the principles of antiracism and ethnocultural equity are observed everywhere in Ontario's school system.”¹²⁰¹ The policy presented a checklist with examples of measures for implementation of the policy and in the section on employment practices it listed the following measure:

An employment accommodation policy is in place and is meeting the needs (e.g., dress code, religious holidays) of Aboriginal people and members of diverse racial and ethnocultural groups.¹²⁰²

In other provinces where there are no regulations pertaining to teacher's religious garb it may be assumed that it is being accommodated.¹²⁰³ In Quebec, on the other hand, the province most committed to the principle of secularity, although there is no statute or administrative regulation on the issue of teachers' religious garb, the

¹²⁰⁰ *The UN Convention On The Rights Of The Child: How Does Canada Measure Up?*, Canadian Coalition For the Right of Children, (visited 31 October 2005), <www.rightsofchildren.ca/report/un.pdf>, at 31-32.

¹²⁰¹ *Antiracism and Ethnocultural Equity in School Boards: Guidelines for Policy Development and Implementation 1993*, Ministry of Education, Ontario, (visited, 20 November 2005), <<http://www.edu.gov.on.ca/eng/document/curricul/antiraci/antire.html#3.9a>>.

¹²⁰² *Id.*

¹²⁰³ For example an article from the 1960 noted that in Nova Scotia employment of religious teachers at public schools “has met no valid objection, although the opinion has been expressed that the non-sectarian character of the public schools is violated by the religious atmosphere engendered by the religious garb of the teachers.” (See Francis Xavier, *Educational Legislation in Nova Scotia and the Catholics*, CCHA, *Report*, 24 (1957), 63-74, (visited, 14 November 14, 2005), <http://www.umanitoba.ca/colleges/st_pauls/ccha/Back%20Issues/CCHA1957/Xavier.pdf>.) Although

Quebec Human Rights Commission has indicated that restrictions on this type of religious expression may be permissible. The Commission made a distinction between religious expression and conduct which is initiated by students or their parents and expression and conduct initiated by teachers or school authorities in their capacity of representatives of the school.¹²⁰⁴ While the former are an exercise of individuals' positive rights to religious freedom, the latter have to bear the duty of neutrality. State representatives at school have the duty to respect student's negative religious freedom -- not to exert any coercion or pressure on students to conform to religious practices or beliefs and not to subject students to direct or indirect religious discrimination.¹²⁰⁵ Thus the Committee acknowledges that the question about the permissibility of distinctive religious signs worn by teachers is more complex.¹²⁰⁶

The Committee did not declare a principled position on the issue, but identified several factors that should be taken in consideration when determining whether religious symbols influence students' convictions or behavior and therefore infringe upon their negative religious freedom. These factors are: the age of the students, whether they can be considered a captive audience or not; the behavior of the teachers – impartial or proselytizing.¹²⁰⁷

2.2 Analysis

There are two questions that need to be examined: 1) whether the Charter requires that the state impose restrictions on religious attire worn by public school teachers, that is whether a parent (or someone else with standing) could successfully

the article mentions objections voiced to the practice it does not report any single incident in which teachers were actually restricted in wearing religious garb.

¹²⁰⁴ *Religious Rites and Symbols in the Schools*, *supra* note 1118, at 54.

¹²⁰⁵ *Id.*

¹²⁰⁶ *Id.* at 6.3

¹²⁰⁷ *Id.*

challenge the constitutionality of the accommodation of such a practice; 2) whether the Charter requires such an accommodation, that is whether a teacher can successfully challenge a regulation or statute banning teachers' religious attire.

Teacher's rights to freedom of expression and religion have to be balanced against the religious freedom rights of students, parental rights, and the religious neutrality of the public service. This balance has to be made taking into consideration the mission of public schools to teach religious tolerance and respect for diversity.

2.2.1 Neutrality

The only case in which an accommodation of religious dress of public officials was challenged before the courts is that of *Grant v. Canada (Attorney General) (T.D.)*, (1995).¹²⁰⁸ The Federal Court of Canada upheld an order of the Commissioner of the Royal Canadian Mounted Police (RCMP) which allowed the wearing of religious symbols such as the Sikh turban and kirpan as part of the RCMP uniform against a challenge brought by retired officers under Section 2(a), Section 7, and Section 15 of the Canadian Charter of Rights and Freedoms.¹²⁰⁹ It should be noted however, that although the reasoning of the court in this case is informative on the issue of the permissibility of accommodation of teachers' religious garb in relation to the principle of state neutrality it cannot be directly applied because of the existing contextual differences between education and law enforcement.

¹²⁰⁸ F.C. 158, 1994 CanLII 3507 (F.C.). Besides the RMCP, the Canadian Forces is also accommodating visible religious minorities and allows female Muslim members to wear loose fitting non-revealing garments and a hijab. (See Canadian Forces National Report, (visited, 20 November 2005), <<http://www.nato.int/ims/2004/win/canada.pdf>>, p. 2)

¹²⁰⁹ An officer of the RCMP dressed in a full uniform is a traditional cultural symbol of Canada for many Canadians: "He (the masculine image predominates) is an internationally recognized symbol of Canada; representations of such officers are one of the most popular tourist souvenirs that foreign visitors purchase when visiting Canada." (See Fred Bennett, *The Face of the State*, Center on Values and Ethics Papers, (visited, 11 November 2005), <<http://www.carleton.ca/cove/papers/Face.rtf>>, p. 1-2).

Justice Reed considered the expert submissions regarding the nature and signification of religious symbols. According to a Dr. Gualtieri, “they convey messages about the value systems and world view (Weltanschauung) of adherents to the particular religion. A religious symbol may be decoded differently by an adherent to the religion and by someone who is not an adherent.”¹²¹⁰ In his opinion all religions are implicitly striving for domination of others since they are each claiming “the exclusive knowledge of truth concerning fundamental precepts and values.” Therefore, state neutrality towards all religions is the best guarantee for tolerance and religious pluralism, and this neutrality is achieved when “the symbols of the state are not mixed with those of any religion” particularly so in the law enforcement institutions wielding the coercive powers of the state.¹²¹¹ It may be argued that in the public school context, where teachers are engaged not only in transmitting bare information but also in teaching values, the state should be particularly vigilant in monitoring neutrality through the actions and also appearance of its teachers.

Justice Reed, however, reasoned that none of the submissions proved that there was an inherent contradiction when a liberal democracy supports “one or more religious traditions” referring to the United Kingdom and the status of the Church of England. On the one hand, the judge reasoned that in Canada, there is no explicit textual equivalent to the Establishment Clause of the US Constitution, and there is lacking a long constitutional tradition demanding a separation between religious and secular authorities. This argument may be particularly relevant in the education context, bearing in mind the constitutional protection of pre-confederation denominational rights in education which still protect separate public school systems in some provinces. On the other hand, he acknowledged that there is an increased

¹²¹⁰ *Grant v. Canada*, *supra* note 1208..

¹²¹¹ *Id.*

insistence on a religious neutrality of the state, particularly after the adoption of the Canadian Charter of Rights and Freedoms and the ever-increasing religious diversity in Canadian society.

Justice Reed found that there is “no necessary religious content to the interaction” between individuals and police officers with religious symbols.¹²¹² According to him, there was no “compulsion or coercion on the member of the public to participate in, adopt or share the officer's religious beliefs or practices.”¹²¹³ What was only required by members of the public was to observe the symbolic manifestation of the religious affiliation of the officer, which even in the context of law enforcement did not amount to infringement on the religious freedom. It may be argued that in the public school context, if the teacher does not engage in any active proselytizing the mere exposure to and observation of a teacher's religious manifestation does not infringe the negative rights of school children. However, it should be born in mind that at school the teacher functions as an authoritative figure and a role model for small impressionable children. Thus the manifestation of religious symbols even absent a missionary conduct by teacher may still have a proselytizing effect.

The lack of conclusive evidence that members of the public will suffer “a reasonable apprehension of bias” in their dealings with officers bearing religious symbols was the main reason why the court rejected the complaint under Section 7.¹²¹⁴ The court found that the evidence was purely speculative. An argument that students may reasonably apprehend a bias in the grading or attitude of a teacher in favor of a co-religionist or against a student from a different faith is also purely speculative, absent concrete findings to that effect. It may also be argued, as the

¹²¹² *Id.* at 84.

¹²¹³ *Id.*

German Constitutional Court noted, that since there is no conclusive psychological evidence as to the effects religious symbols worn by a teachers have on school children, a mere speculation on the possibility of the occurrence of proselytizing of children does not amount to religious coercion and there is no breach of their negative religious freedom rights.

2.2.2 Multiculturalism

Justice Reed noted that Art. 27 did not accord interpretative help in the resolution of the issue before the Court since it could convincingly support opposing arguments. On the one hand, counsel for the counsel for the commissioner argued the accommodation of Sikh officers was underpinned by multicultural concerns, since it made possible for Sikhs to serve in the RCMP without violating tenets of their faith, and at the same time enhanced “the image of the force as a multicultural one.” On the other hand, the plaintiffs argued that in the context of law enforcement, religious and cultural pluralism and individual religious freedom will be preserved if the state is religiously neutral.

The question is how Section 27 can inform the issue of teacher’s religious garb. Multiculturalism can again support contrasting arguments: respect for the rights of students from different religious convictions is best protected when the face of the state presented by public school teachers is religiously neutral or, conversely, students can best live to learn to live in a multicultural society and respect the religious convictions of others, when they are exposed to such religious diversity at school.

While Justice Reed held that the accommodation was not contrary to the Charter he also noted that he was not prepared to find that had the Commissioner not made an accommodation for officers who wished to wear religious symbols on duty

¹²¹⁴ *Id.* at 93.

he would have been in breach of the Charter. The relationship between the Charter and the issue of teacher's religious garb is a similar one. While regulations such as the one in New Brunswick are unlikely to be found in violation of the Charter if another province such as Québec decides that teacher's religious garb should be restricted at public elementary schools such a decision would also be in compliance with the Charter.

The constitutionality of such a law depends on its compliance with Section 2 (a) and Section 15 (1) of the Charter. Restricting teacher's religious garb would be an infringement on the religious freedom rights of teachers and has to be justified under the *Oakes* proportionality test. Such a law has the objective of protecting the religious freedom of young children as well as parental rights which concerns are "pressing and substantial in a free and democratic society."¹²¹⁵ The Supreme Court has recognized the great influence teachers may have on their young students noting that teachers "might be considered a role model to students"¹²¹⁶ and that "young children are especially vulnerable to the messages conveyed by their teachers."¹²¹⁷ Therefore restricting symbolic religious expression of teachers and their outward identification with a particular faith is a measure rationally related to the objective specified.

Next, the measure should impair the religious freedom rights of public school teachers as little as possible. As was noted in the analysis of US constitutional jurisprudence, it has been argued, that a less restrictive alternative would if the school issues a disclaimer that it does not endorse the religious messages conveyed by teachers' religious garb. Such a measure, however, aims to minimize the state endorsement concerns but does address effectively the concern about religious proselytization of young children. The Supreme Court has noted that a Section 1

¹²¹⁵ *R. v. Oakes*, [1986] 1 S.C.R. 103, at 69.

¹²¹⁶ *Ross*, *supra* note 1105, at 14.

analysis does not require in each and every case for the legislature to use a measure that least impairs the Charter right. Parliament can assess whether the less intrusive measure would achieve the objective as effectively¹²¹⁸ and such a disclaimer would not be as effective.¹²¹⁹ A law that prohibits only the display of ostentatious religious symbols in classes of young students would restrict religious freedom rights of teachers no more than necessary since it would not apply to discreet symbols and to instruction of older students. However, the fact that in other provinces such as New Brunswick, teachers religious garb is allowed would also be a factor in determining whether the legislation meets the minimal impairment requirement. It should be noted, however, that in contrast to the issue of whether students can wear kirpans at school,¹²²⁰ the issue of teachers' religious garb has not been litigated and there is no court pronouncement on its compliance with the Charter.

Finally, the law's benefits should not be outweighed by the law's deleterious effects "as measured by the values underlying the Charter."¹²²¹ The restriction on teacher's religious expression may be quite serious in cases in which the teacher considers the wearing of religious garb as a religious mandate, as in the case of some Muslim women. The harm is mitigated by the fact that the law would apply only to instruction of young children. The benefits of the law would be the protection of young children from religious proselytization and protection of the rights of parents to

¹²¹⁷ *Id.* at 82.

¹²¹⁸ *R. v. Chaulk*, 1990 CanLII 34 (S.C.C.), [1990] 3 S.C.R. 1303; *R. v. Butler*, 1992 CanLII 124 (S.C.C.), [1992] 1 S.C.R. 452; *R. v. Sharpe*, 2001 SCC 2 (CanLII), [2001] 1 S.C.R. 45, 2001 SCC 2

¹²¹⁹ See also *R. v. Sharpe*, 2001 SCC 2 (CanLII), [2001] 1 S.C.R. 45, 2001 SCC 2: "This Court has held that to establish justification it is not necessary to show that Parliament has adopted the least restrictive means of achieving its end. It suffices if the means adopted fall within a range of reasonable solutions to the problem confronted. The law must be reasonably tailored to its objectives; it must impair the right no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account."

¹²²⁰ While in *Peel*, the plaintiff was also a school teacher who wished to wear a kirpan, the court's decision imposed the condition that the kirpan be worn under the clothes, thus the case does not address the permissibility of ostentatious teachers' religious garb. See *Peel* at supra note 1158

¹²²¹ *Thomson Newspapers v. Canada (Attorney General)*, 1998 CanLII 829 (S.C.C.), [1998] 1 S.C.R. 877 at 125.

direct their religious upbringing. On the other hand, as the German Constitutional Court noted, the scientific evidence is not conclusive on the question of the effect of teacher's religious garb on students. In such circumstances of scientific uncertainty and when the legislation balances the rights and interests of competing societal groups and does not have the state as the single antagonist, the Canadian Supreme Court is more deferential towards the legislature.¹²²²

With respect to elementary students, as was already argued, given the vulnerability of their age and the hierarchical relationship between teachers and students, an ostentatious symbolic expression of religious faith by teachers' causes serious concerns. Furthermore, Gunn has observed, it would be an arbitrary distinction to allow a Sikh teacher to wear a turban in class while at the same time prohibiting a devout Christian from giving instruction wear a "badge announcing 'I am born again!' or 'Jesus Saves!'"¹²²³ It would be "unfair" and inconsistent with the Charter jurisprudence to maintain that a distinction may be made between faiths whose religious doctrine mandates religious apparel and those whose religious doctrine does not "prescribe" symbolic religious expression. Neither the legislator nor the courts can legitimately make such distinctions.¹²²⁴

¹²²² See *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 1989 CanLII 87 (S.C.C.), "If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second-guess. When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function. In other cases, however, rather than mediating between different groups, the government is best characterized as the singular antagonist of the individual whose right has been infringed...."

¹²²³ See Gunn, *supra* note 801, at 393-394. The US case of *Downing v. W. Haven Bd. of Educ.*, 162 F.Supp.2d 19 (D. Conn. 2001) proves that this is not just a unlikely hypothetical.

¹²²⁴ One the other hand, it can be argued that distinction should be made between those symbols that are just expression of a religious identity and affiliation and those that much more actively try to influence others and have a much more pronounced proselytizing effect

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Finally it can be demonstrated that accommodation has been incorporated in the standards up to the point of undue hardship since in classes of high school students teachers would be allowed to wear religious garments.¹²²⁷ The Canadian Supreme Court in the case of *R. v. Jones* has noted that reasonable accommodation has to be made issue "to ensure that provincial interests in the quality of education were met in a way that did not unduly encroach on the religious convictions" of the individual.¹²²⁸ In determining whether a reasonable accommodation has been made "it would be necessary to delicately and sensitively weigh the competing interests so as to respect, as much as possible, the religious convictions of the appellant as guaranteed by the

¹²²⁵ See Gunn, *supra* note 801, at 393-394. The US case of *Downing v. W. Haven Bd. of Educ.*, 162 F.Supp.2d 19 (D. Conn. 2001) proves that this is not just a unlikely hypothetical .

¹²²⁶ One the other hand, it can be argued that distinction should be made between those symbols that are just expression of a religious identity and affiliation and those that much more actively try to influence others and have a much more pronounced proselytizing effect.

¹²²⁷ See for example Ontario Human Rights Commission, *Human Rights at Work*, <<http://www.ohrc.on.ca/english/publications/hr-at-work.shtml>>, noting that "The ultimate issue is whether the person who seeks to justify the discriminatory standard, factor, requirement or rule has shown that accommodation has been incorporated into the standard up to the point of undue hardship." See also

Quebec Human Rights Commission, *Reflections*, *supra* note 1143, at 5.

Charter.”¹²²⁹ It could be argued that such a delicate balance has been achieved here between the students religious freedom rights, parental rights and the religious freedom rights of teachers.

3. Conclusion

3.1 Students

In all of the jurisdictions reviewed with the notable exception of France students are generally allowed to wear religious symbols at school subject to certain safety and health conditions. Thus French law of March 2004 prohibiting conspicuous religious symbols worn by students at state schools appears as an anomaly. As was argued above this anomaly cannot be convincingly justified with the principle of French *laïcité* even when viewed in its historical and cultural concept. I would argue that the case-by-case approach developed under the jurisprudence of the Conseil d’État before the adoption of the Law of March 2004 achieved a better balance between the competing rights and interests. The failure to integrate second generation Muslim immigrants and the understanding of integration as assimilation are the contextual factors that would best explain this law.¹²³⁰

In contrast to France, in the US students’ religious clothing is not regarded as endangering the neutrality of the state and does not implicate Establishment Clause concerns. Students’ wearing of items of religious attire is protected as involving hybrid free exercise plus speech rights, as well as separately as a high value form of religious speech, provided that this does not result in a serious breach of school order

¹²²⁸ R. v. Jones, [1986] 2 S.C.R. 284, at 25.

¹²²⁹ *Id.*

and safety. Even if wearing of religious symbols, such as headscarves, is regarded also as a political symbol, this would not lead to their prohibition, contrary to the approach in France and Turkey. Under *Tinker* political expression by student is high value speech and is constitutionally protected. This is the approach taken by courts. Where there have been incidents with students being prevented from wearing religious clothing by school officials, according to the settlements reached, schools have allowed the students back with religious clothing.¹²³¹ Referring to such incidents, the Assistant Attorney General for Civil Rights in a letter to the State Departments for Education noted also that “such practices [prohibiting students’

¹²³⁰ See *Migration and Transcultural Identities*, <<http://www.esf.org/publication/184/ICICE.pdf>>, at 23, on assimilation versus multiculturalism, as two models of integration in France and Canada respectively.

¹²³¹ A recent incident in which a an instructor ordered a 19 year old Muslim girl to take off her headscarf while she was in class at a state funded collage resulted in the resignation of the instructed, after the board of trustees had been considering disciplinary action against him. (*Teacher Resigns after Muslim Scarf Debate*, CNN, Feb 28, 2004, <<http://www.cnn.com/2004/US/West/02/28/muslim.headscarf.ap/index.html>>.) The CAIR lists several other incidents where Muslim students had problem wearing head coverings to school, but they were all resolved with decisions that affirmed the right of students to wear such clothing. (See Mohamed Nimer, *The Status of Muslim Civil Rights in the United States 2001*, <http://www.cair-net.org/civilrights/2001_Civil_Rights_Report.pdf>.) Another incident occurred when a Mississippi school board forbade a student to wear a Star of David as a pendant pursuant to its policy forbidding gang symbols. When the student’s family filed suit with the help of the ACLU, the board changed its policy and provided for exemptions for religious symbols. (See *Jewish Student Allowed to Wear Star of David Pendant as Mississippi School Board Reverses Policy*, ACLU, (visited 28 December 2004), <<http://archive.aclu.org/news/1999/n082499a.html>>). In Louisiana, a school board had refused to enroll several children of the Rastafarian faith, because they refused to comply with the dress code which prohibited head coverings except in very cold weather and “extremes in hairstyle.” After the children’s parents filed a law suit alleging a violation of the children free exercise and free speech rights, the school board permitted the children to enroll and to keep their dreadlocks, provided the head covering were in the school colors and they could be checked “for security purposes.” (See *Free Exercise Clause Triumphs—Lafayette School Board Votes to Admit 8 Rastafarian Children with Headgear and Dreadlocks*, ACLU Press Release, (visited 3 Jan 2005), <http://www.laaclu.org/News/2000/free_exercise_clause_triumphs.htm>). And in 1999 After a student was suspended for wearing a five pointed star at school in violation of the district’s anti-gang policy forbidding the wearing of the pentagram, white power, gang and satanic symbols, the ACLU filed suit challenging the policy claiming it violated the free exercise rights of the student, who was of the Wiccan faith. After a court hearing the district agreed to amend its policy and allow exceptions for students who wear symbols as an profession of their faith. (See *Michigan Student Wins Right To Wear Pentagram In High School*, AP, 03.23.99, <<http://www.freedomforum.org/templates/document.asp?documentID=8588>>.)

religious dress items] are inconsistent with federal law and should not be tolerated.”

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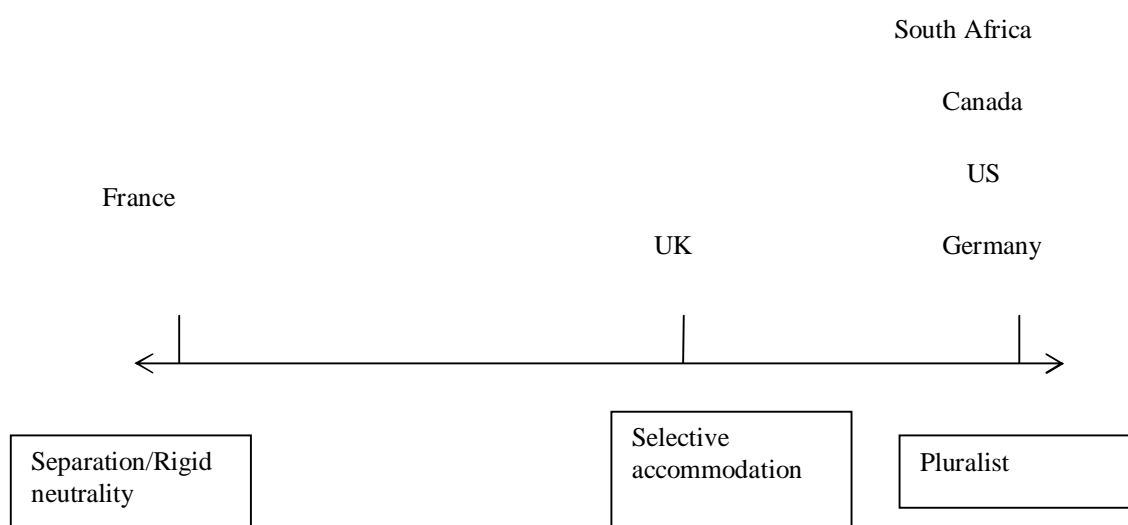
The US approach allowing students to freely manifest their religion through the wearing of religious dress items at school, while imposing restrictions only to prevent serious violations of school order and health and safety risks, maximizes the religious freedom of students and honors their religious identity, while at the same time does not compromise the religious neutrality of public education and helps the school to promote the values of tolerance, respect for diversity, autonomy, and citizenship. The approaches adopted by South Africa and Canada and Germany are similar.

The British approach to students’ symbolic religious expression via dress items and signs of membership is generally one of accommodation. However, the main weakness of the approach is that it favors mainstream interpretations of religious doctrines and is ill-suited to protect the religious expression of minority groups whose beliefs differ from those in the majority of faith. That is demonstrated both in the Shabina Begum case as well as in the recent controversy regarding the wearing of the chastity rings. As Rivers argues, “that the law struggles to deal with minorities-in-minorities. If there is a group within a religion or culture that has a specific understanding of the requirements of their religion, there is a danger that the majority interpretation is taken as normative.”¹²³³

One possible explanation for this tendency may lie in the lack of a separation between church and state. As Soper and Fetzer argue with respects to Muslims in Britain, the established church model encourages Muslims to seek accommodation of

¹²³² Letter by the Assistant Attorney General for Civil Rights to the State Departments for Education, 20 August, 2004, <http://www.adc.org/PDF/DOE_ltr.pdf>.

their religious practices similarly to the accommodations given to other religious and to press for a public role of their religions.¹²³⁴ However, the established church models may have also helped to the institutionalization of the majoritarian religious groups of both Islam and Christianity and the ensuing fact that their claims for accommodation are treated more favorable than those of the minorities within them.



3.2 Teachers

With the exception of France, where the principle of neutrality of the public service prohibits the wearing of religious symbols by civil servants, in all other jurisdictions the question of whether to restrict or not teacher's religious garb in public schools rests within the legal competence of the legislators. The constitutional jurisprudence in these countries would generally sanction both accommodation and prohibition subject to certain restraints imposed by the principles of non-discrimination and proportionality. The best explanation can be found in the opinion

¹²³³ Julian Rivers, *Religious Dress: British Perspectives and OSCE Developments*, <<http://www.strasbourgconference.org/papers/Religious%20Dress%20British%20Perspectives%20and%20OSCE%20Developments.pdf>>, at p.3.

of the German Constitutional Court, which noted that there is no conclusive psychological evidence regarding the effects of exposure to religious symbols worn by teachers on school children. Such constitutional silence on the issue leads to different legal solutions in the federal entities of federal states like Germany and the US. Such a possibility also exists in Canada, although there as well as is in the UK and South Africa the current practice is one of accommodation of the symbolic religious expression of teachers.

What is more with respect to teachers, the UK approach seems to accord more protection to teachers' than to students' religious expression and this result is counterintuitive since teachers should be required to accept reasonable restrictions of their religious manifestation in order to protect the right to freedom of religious of young and impressionable children.

On the one hand it may be argued that the current interpretation of constitutional silence is to be welcomed since state legislatures may serve as local laboratories and experiment¹²³⁵ or may take into account the local traditions in culture and religiosity.¹²³⁶ On the other hand, this may lead to legislation strongly reflecting majoritarian preferences and sometimes prejudices.

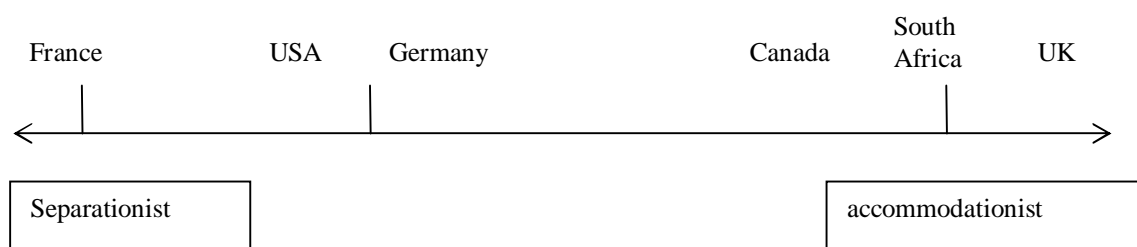
The different concepts of state neutrality influence to a great extent how legislatures and administrative bodies deal with the issue of religious garb of teachers and civil servants in general. Mahlmann distinguishes among three concepts of

¹²³⁴ J. Christopher Soper and Joel S. Fetzer, *Practicing their faith: Muslims and the state in Britain and France*, 12 (4) PUBLIC POLICY RESEARCH 234, (Dec 2005–Feb 2006)

¹²³⁵ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting): "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

¹²³⁶ See *Headscarf case*, *supra* note 988.

neutrality.¹²³⁷ The first one is the laicist model, which mandates relegation of religious symbols outside the public realm. The prime example of this model of neutrality is France.¹²³⁸ The second liberal model, according to him, mandates “non-intervention with private rights and liberties.” Manifestation of religious symbols in the public realm does not contradict state neutrality as long as the state “does not actively foster certain beliefs.” Such is the model of neutrality in the UK. The analysis provided above suggests that the approach developed in South Africa and Canada with respect to teacher’s religious dress is consistent with the same conception of neutrality. The German model of neutrality, Mahlmann calls “open neutrality” and places in between the first two.¹²³⁹ While state mandated religious symbols are in conflict with state neutrality, there is no requirement to banish all religious expression from public space.



I would argue that the approach consistent with the framework proposed in Chapter II that maximizes religious freedom of children and takes into consideration their developing critical capacities would be to restrict all ostentatious religious symbols in classes with young children only. The convention on the Rights of the Child also puts emphasis on the need to take into consideration the “evolving

¹²³⁷ Matthias Mahlmann, *The Constitutionalisation of Secularism in Germany*, Migration, religion and secularism: A comparative approach (Europe and North America) Paris, June 17 – 18, 2005, (visited 11 July 2005), <<http://histoire-sociale.univ-paris1.fr/Collo/Migrations/Mahlmann.pdf>>, at 4.

capacities of the child” and “the age and maturity of the child”.¹²⁴⁰ The point at which children reach an age where it is no longer necessary and justifiable to impose restrictions on teachers’ religious garb may be determined by the legislatures in the different countries, but the age of 14 seems a reasonable one.

There are two caveats that have to be born in mind. First, the history of legal prohibitions on teachers religious garb reveals that they are often primarily motivated not by a concern for the rights of children but by a desire to suppress “foreign” religious influence in public schools – be it the religion of an immigrant community – Islam in Germany or another minority religion against which the majority defines its identity – Roman Catholicism in the US and some Canadian provinces. Second, the burdens imposed by tests of visibility or conspicuousness fall disproportionately on minority religions while accommodating the majority religion and mainstream culture.¹²⁴¹ As the dissenting justice Brennan argued in *Goldman v. Weinberger*:

The visibility test permits only individuals whose outer garments and grooming are indistinguishable from those of mainstream Christians to fulfill their religious duties.... The practical effect of this categorization is that, under the guise of neutrality and evenhandedness, majority religions are favored over distinctive minority faiths.¹²⁴²

This test however, seems to be least intrusive. Tests that inquire whether the wearing of religious symbols is mandated or whether the symbol has a proselytizing character are less legitimate alternatives. The first of these tests would involve an assessment of religious doctrine while the second entails a subjective evaluation,

¹²³⁸ *Id* at 5.

¹²³⁹ *Id.*

¹²⁴⁰ See Convention on the Right of the Child, Art.5 and Art. 12.

¹²⁴¹ See Sahr *supra* note 987, at 61, “It is obvious, that the *discreet* presentation of symbols as opposed to their ostentatious presentation is immediately linked to the fact, that some of these symbols are *culturally common* and well known and therefore not ‘visible’ any more (just decoration), whereas others are foreign and new and for such reason get more attention and ‘visibility.’” See also Kymlicka, MULTICULTURAL CITIZENSHIP, at. 114-115. “...the existing rules about government uniforms have been adopted to suit Christians...existing dress-codes do not prohibit the wearing of wedding rings...an important religious symbol for many Christians (and Jews).”

¹²⁴² *Goldman v. Weinberger*, 475 U.S. 503, 521 (1986).

which even if it relied on the “reasonable observer,” would ignore the intentions of the person wearing the symbol.

CHAPTER 4

RELIGIOUS DISPLAYS AT PUBLIC SCHOOLS

This chapter will examine the constitutional issues arising from the presence or prohibition of religious symbols at public schools. The importance of symbols for religious communities and individual religious believers, as well as for the state cannot be overstated. Symbols have been recognized as powerful purveyors of ideas and meanings.¹²⁴³ Religious symbols are also closely connected with a person's identity. According to Renteln "individuals feel that their identities are connected to symbols and therefore, the preservation of the symbols assumes an enormous importance in their lives. Moreover, there is a tendency to accept the notion that "seeing is believing," which often results in the reification of the symbol.¹²⁴⁴

The chapter will examine constitutional issues arising from permanent and temporary displays of religious symbols at public schools in the chosen jurisdictions. The chapter will address how religious displays engage constitutional principles of state neutrality and equal treatment of religions, students' rights to be free from religious coercion and indoctrination as well as their rights to manifest their religious or philosophical beliefs, parental rights to direct the religious education of their

¹²⁴³ See e.g., Justice Jackson in *West Virginia Board of Education V. Barnette*, 319 U.S. 629 (1943), "Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones." Theologians and anthropologists have also attested to the constitutive power of religious symbols for believers, thus according to Geertz, for instance, religious symbols "function to synthesize people's ethos--the tone, character, and quality of their life, its moral and aesthetic style and mood--and their world view--the picture they have of the way things in sheer actuality are, their most comprehensive ideas of order." (See Frank S. Ravitch, *Religious Objects as Legal Subjects*, 40 WAKE FOREST L. REV. 1011, 1031-1023 (2005).

children and the state's interest in transmitting cultural traditions to the younger generation, as well as its interest in educating citizens prepared to live in a religiously diverse society.

XVIII. FRANCE

The Law of 28 March 1882 which made elementary education free, mandatory and secular.¹²⁴⁵ This also meant that the public school had to become secular and devoid of religious emblems. However, a ministerial circular granted departmental officials “complete latitude to make allowances in this respect for the wishes of the population” and, careful to not to raise hostility, they allowed crucifixes to remain in a number of schools.¹²⁴⁶ However when new schools were built it was ensured that no religious emblems were placed on their walls.¹²⁴⁷ This policy continued until 1906-1907 when the education administration demanded that crucifixes be finally removed from all public schools.¹²⁴⁸

The departments of Bas-Rhin, Haut-Rhin, and Moselle (traditionally Alsace-Lorraine) are an exception to the rule. The departments were annexed to Germany after the Franco-German War of 1870 and when the 1905 Law on the Separation of Church and State came into effect in France they were still German territories. After WWI they were returned to France and the French state allowed the departments to continue to adhere to the Napoleon-Pius VII Concordat of 1801 and its organic articles. The 1905 Law does not apply to these departments and the state does not

¹²⁴⁴ Renteln, *supra* note 411, at 1575.

¹²⁴⁵ Loi du 28 mars 1882, <<http://mjp.univ-perp.fr/france/1882enseignement.htm>>.

¹²⁴⁶ Charles L. Glenn, *Historical Background to Conflicts over Religion in Public Schools*, CONTACT Vol. 15, No. 2, February 2004, <<http://www.iapche.org/ctc15-2insert.htm>>.

¹²⁴⁷ Georges Goyau, *France*, Catholic Encyclopedia, (visited 24 December 2005), <<http://www.newadvent.org/cathen/06166a.htm>>.

¹²⁴⁸ *Id.* Under the Vichy government the prohibition was repealed but was reinstated after its downfall. (See Yassamine El Houari and Déborah Louvel, *Ecole et Religion*, (visited, 24 December 2005), <http://credof.u-paris10.fr/IMG/doc/Ecole_et_religion.doc> , at 8

operate “laic” schools there.¹²⁴⁹ In certain localities such as Sélestat, there are still crucifixes attached to the walls of classrooms.¹²⁵⁰

Thus in France the principle of *laïcité* means that state neutrality demands that no religious symbols and signs be displayed on school walls. As was noted in the previous chapter, however, the exception for the Alsace-Lorraine region does not sit well with the arguments used to justify the blanket ban on student’s symbolic speech.

While the display of crosses and crucifixes on classroom walls would be clearly inconsistent with *laïcité*, France has also recently faced the question of the boundary between religious and cultural or secularized symbols. Controversies reminding of the “December Dilemma” in the US, have centered on the application of the Law of March 2004, which is addressed specifically to students wearing religious signs and not to religious symbols put on display by school authorities.

In 2004 a group of students at a high school in Paris pressured administrators to remove the Christmas tree put up in the entry hall of the school by the principal. The students argued that the display violated the law banning conspicuous religious symbols at public schools.¹²⁵¹ A public controversy erupted. The principal took it down and later restored it after the town mayor declared that it was a “completely secular and pagan” and did not violate the separation of church and state.¹²⁵² This combination of secular and pagan here is a strange one, since sources that would identify the pagan origins of the Christmas tree describe it as a religious symbols used

¹²⁴⁹ Gunn, *supra* note 383, at 18.

¹²⁵⁰ Christian Rioux, School and Secularity - Alsatian Exception: With Their Courses of Religion at the School, the Alsatian ones Are Considered Less Laic than the Remainder of France, 8 June 2005, <http://trans.voila.fr/voila?systran_lp=fr_en&systran_id=Voila-fr&systran_f=100000000000&systran_url=http://www.france-echos.com/actualite.php?cle=5717>.

¹²⁵¹ William J. Kole, *Christmas Trees Come To Symbolize Church-State Debate*, Miami Herald Tribune, 23 December 2004, <<http://www.miami.com/mld/miamiherald/living/religion/10482066.htm?template=contentModules/prieststory.jsp>> .

¹²⁵² *French School Restores “Pagan” Christmas Tree*, Reuters, 18 December 2004, <<http://community.vietfun.com/showthread.php?t=214326>> .

in pagan religious rituals.¹²⁵³ If a Christmas tree would violate neutrality in a secular school because it is a symbol of traditional religion, the same tree should also be offensive to *laïcité* if it is a pagan religious symbol.

In another Christmas incident chocolate candies in the form of St Nicolas and the cross that were traditionally presented as a holiday gift to schools and kindergartens in northern France by the mayor had to be replaced with regular chocolate bars because teachers at a primary school claimed that the gift violated the law of March 2004.¹²⁵⁴

These incidents have not led to any litigation and there are no judicial pronouncements on how to differentiate between religious and secularized/cultural displays. It is safe to predict however, that the display of any symbol with religious connotations, even ones that have acquired secular holiday meaning but have a religious origin would be considered a violation of the secularity of education in France.

XIX. GERMANY

The Federal Constitutional Court dealt with the issue of the constitutionality of permanent displays of religious symbols in a case concerning a ministerial regulation in the predominantly Catholic Land of Bavaria, requiring the placement of a crucifix on the classroom walls in public schools. Bavaria was and still is the only state

¹²⁵³ See *Christmas Tree*, Encyclopedia Britannica Online, <<http://www.britannica.com/eb/article-9082436/Christmas-tree>>, "The use of evergreen trees, wreaths, and garlands to symbolize eternal life was a custom of the ancient Egyptians, Chinese, and Hebrews. Tree worship was common among the pagan Europeans and survived their conversion to Christianity."

¹²⁵⁴ *Saintly Chocs hit by French Ban*, BBC NEWS, 10 December 2004, <<http://news.bbc.co.uk/2/hi/europe/4084947.stm>>. It should be noted that this incident is distinguishable from the US case of *Westfield High School L.I.F.E. Club v. City of Westfield* 249 F.Supp.2d 98 D.Mass., (2003), in which a district court held that disciplining high school students for their distribution to class mates of candy cases with religious messages attached violated their first amendment rights to free speech, since in contrast to what happened in France in this US case the speech was held to be private speech not authored by or sponsored by the school.

requiring the display of crucifixes. The states of Baden Württemberg, North-Rhine Westfalia, Hesse, Rhineland Palatinate, Saarland, and Thuringia permit the presence of crucifixes in classrooms while Brandenburg, Mecklenburg, Western-Pomerania and the city-state of Hamburg prohibit such displays.¹²⁵⁵

1. The Classroom Crucifix case

In its decision, *Classroom Crucifix II* case,¹²⁵⁶ the Constitutional Court found that the statute violated the negative religious freedom of non-Christian students protected by three provisions of the German Basic Law: Art. 4 sentence 1, and their parents protected under Art. 6 sentence 2, taken together with Art. 1 sentence 1. The decision of the Court caused a very strong public reaction and high-ranking politicians, legal scholars, the Catholic Church, and public opinion in Bavaria strongly criticized and even opposed the enforcement of the decision of the Constitutional court.¹²⁵⁷

The controversy started when two students and their parents, followers of the Austrian humanist Rudolf Steiner, objected to the presence of the large crucifix in the students' classroom. The crucifix was 80 centimeters in length, placed on a table at the front of the classroom.¹²⁵⁸ The students' father stated that he opposed the Bavarian regulation because he did not want his children to study under the cross and be required to look at a "bleeding, half-naked, male corpse."¹²⁵⁹ His statement, arousing strong emotions in the majority of the citizens of Bavaria, reveals, similarly to the headscarf debates, the malleability and subjectivity of a symbol's meaning. Initially a

¹²⁵⁵ Auslander, *supra* note 350, at 288-289.

¹²⁵⁶ BVerfGE 93, 1 (16 May 1995).

¹²⁵⁷ Auslander, *supra* note 350, at 292-293.

¹²⁵⁸ Wuerth, *supra* note 36, at 1182.

¹²⁵⁹ Auslander, *supra* note 350, at 302.

compromise had been reached whereby the crucifix was replaced with a smaller cross over the door, but the school authorities refused to do the same in all classrooms in which the children were instructed and also refused to guarantee that the compromise would be permanent.¹²⁶⁰

The parents then took the case to the Bavarian Constitutional court, which ruled against them in 1991, upholding the constitutionality of the law. Only 3 years before that the same court had upheld a provision of the Bavarian Constitution requiring that one of the paramount educational goals shall be “reverence for God,”¹²⁶¹ which however was not to be interpreted as requiring the teaching of a particular understating of the divine nor as establishing a state religion.¹²⁶² When the case reached the Federal Constitutional Court a on appeal, a majority of the justices found the order incompatible with the negative religious freedom of non-Christian students and parents as well as with the state neutrality mandate with respect to religion.

1.1 Majority Reasoning

The Constitutional Court stated that Article 4 (1) protects not only the freedom to hold, manifest, and act according to one’s faith but also the freedom to stay away from rituals as well as symbols representing a faith not shared by the individual.¹²⁶³ It is the judgment of the individuals’ conscience and not the dictate of the state that should determine which symbols an individual would venerate and

¹²⁶⁰ Wuerth, *supra* note 36, at 1182.

¹²⁶¹ Art.131 (2) of the Constitution of the Free State of Bavaria reads “The paramount educational goals are reverence for God, respect for religious persuasion and the dignity of man, self-control, the recognition of and readiness to undertake responsibility, helpfulness, receptiveness to everything which is beautiful, good and true, as well as a sense of responsibility for the natural world and the environment.”

¹²⁶² http://www.bayern.landtag.de/en/bayer_verfassung_dritter_hauptteil.html#2.%20Abschnitt

¹²⁶³ http://www.dordt.edu/publications/pro_rege/crcpi/115750.pdf

which not. The mandatory hanging of the crucifix in the classroom of each elementary school infringed upon the negative freedom of non-Christian students and the parents' right to direct the religious education of their children. Parental rights, guaranteed by Art. 4(1) in connection with Art. 6(2), include the right not to expose one's children to faith convictions which one considers wrong or harmful.¹²⁶⁴

1.1.1 Symbolism of the Crucifix and its influence on students

While it was true, the Court noted, that in a society which makes space for a plurality of religions, individuals do not have the right to be free from every encounter with manifestations, rituals, and symbols of faiths they do not follow, the issue is different when the encounter happens in a state-created situation, like the public school. Article 4 guarantees apply to a situation in which students have a long lasting encounter, which they cannot avoid and are forced to study "under the cross" which confronts them in the form of the symbolic expression of the state.¹²⁶⁵ Thus, the majority rejected the argument of the dissent that the crucifixes displayed were not missionary but simply corresponded to the values of the Bavarian people, since everywhere in Bavaria – on roads, restaurants, private homes, people were being confronted with such displays.¹²⁶⁶ The Court also distinguished the display of the crucifix in the classroom from an earlier case where it held that a crucifix should be taken down from the walls of a courtroom upon the request of a Jewish litigant, but that not all such displays were contrary to the Basic Law. The Court emphasized that schools were a different environment from courtrooms, since the viewers were young

¹²⁶³ BVerfGE 93, 1 at para. 34.

¹²⁶⁴ *Id.* at. 36.

¹²⁶⁵ *Id.* at 39.

¹²⁶⁶ *Id.* at 33.

impressionable children and since exposure to the crucifix was not a short event, but long term and repeated over years.¹²⁶⁷

The Court's majority also rejected the contention that crucifixes or the crosses are not placed at schools for their religious symbolism but as expression of Western culture influenced by the Christian religion.¹²⁶⁸ While affirmation of Christianity as a cultural and educational factor was held constitutional in the *Interdenominational School* case, affirmation of the faith doctrines of Christianity was not permitted. According to the Court, the crucifix was not a cultural symbol but a faith symbol signifying the "release of humans from hereditary debt...[for the] victory [of] Christ over Satan and death."¹²⁶⁹ The crucifix had a missionary character and represented the Christian faith as exemplary and worthy of following.¹²⁷⁰ The missionary character of the cross was particularly significant in the context of elementary public schools where children are not yet sure of their opinions and their capacity to develop their own points of view and to engage in critical thinking are not yet developed.¹²⁷¹ Thus although the display of the cross did not involve any direct coercion to identify with or practice a particular faith, it nevertheless effected children significantly.¹²⁷² School education affects children's "emotional capacity and development" and should be

¹²⁶⁷ *Id.* at 39-40.

¹²⁶⁸ *Id.* at 41.

¹²⁶⁹ *Id.* at 43. Justice Brennan from the US Supreme Court, has similarly argued that the crèche may not be viewed as a traditional or a cultural symbol but is inherently religious one:

Unlike such secular figures as Santa Claus, reindeer, and carolers, a nativity scene represents far more than a mere "traditional" symbol of Christmas. The essence of the crèche's symbolic purpose and effect is to prompt the observer to experience a sense of simple awe and wonder appropriate to the contemplation of one of the central elements of Christian dogma -- that God sent His Son into the world to be a Messiah. Contrary to the Court's suggestion, the crèche is far from a mere representation of a "particular historic religious event." *Ante* at 686. It is, instead, best understood as a mystical re-creation of an event that lies at the heart of Christian faith. To suggest, as the Court does, that such a symbol is merely "traditional," and therefore no different from Santa's house or reindeer is not only offensive to those for whom the crèche has profound significance but insulting to those who insist, for religious or personal reasons, that the story of Christ is in no sense a part of "history" nor an unavoidable element of our national "heritage."

(Brennan, J, dissenting, *Lynch v. Donnelly*, 465 U.S. 668, 711-712 (1984))

¹²⁷⁰ BVerfGE 93, 1 at 46.

aimed at “the full mental and spiritual or emotional development of schoolchildren and the creation of social awareness and conduct.”¹²⁷³ In view of this role of the school, the missionary character of the religious symbol was in contradiction to the negative religious freedom of the students.

1.1.2 Neutrality

The protection of freedom of conscience and religion under Art. 4 (1) imposes a mandate of neutrality on the state with respect to different religious and world views, since only in this way the state can guarantee the peaceful coexistence of a plurality of religions. The neutrality of the state also originates from 3, art. 33 (1) as well as art. 140 in connection with art. 136 (1) and 4 and art. 137 (1) WRV. The mandate of neutrality comprises the principles of equal treatment of and non-identification with the different religions and world views, no matter what the numerical strength or the social relevance a particular religion may have.¹²⁷⁴ The crucifix displayed by virtue of the Bavarian law was not a private religious expression but affirmation and promotion of one particular religion by the state privileging it to the exclusion of all others. Therefore, the Bavarian statute was not in conformity with the state’s neutrality mandate. The court’s majority did not accept the view of the Bavarian Administrative Court that the principle of non-identification of the state could not be respected with the same force at schools as in the “purely secular sphere” because of the traditional importance of religious and philosophical conceptions in education.

¹²⁷¹ *Id.* at at 46.

¹²⁷² *Id.* at at 45-46.

¹²⁷³ *Id.* at at 46.

¹²⁷⁴ *Id.* at at 35.

1.1.3 Balancing

The infringement upon the negative rights of students, the Court held, could not be justified by the argument that the state was giving space to realize the positive religious freedom of Christian students and parents. While it was unavoidable that in a pluralist society these rights may come into conflict, the Basic Law required that the conflict is resolved through the principle of practical concordance, according to which none of them is to be realized to an unreserved extent so that it negates completely the other one.¹²⁷⁵ The conflict, the Court noted, could not be solved according to the majority principle, since the fundamental right of religious liberty was aimed particularly at protecting minorities.¹²⁷⁶ The Bavarian statute which gave full protection only to the positive liberty of Christian parents and students had not achieved a compromise in conformity with the principle of practical concordance. The ordinance could neither be justified under Art.7 of the Basic Law since the state had gone beyond the permissible accommodation of religion by mandating the posting of a specific symbol of the Christian religion and sending a message of state identification contrary to the principles of neutrality.

1.2 Dissent

The dissent argued that the state use of religious symbols valued by the majority of students and parents in public schools was justified because it created a space where these students and parents could actively affirm their convictions and in this way the state promoted religious freedom.¹²⁷⁷ The dissent viewed the symbolism of the crucifix not merely as government expression but also as an expression that

¹²⁷⁵ *Id.* at 50.

¹²⁷⁶ *Id.* at 56.

¹²⁷⁷ *Id.* at 82.

corresponded to and reflected private religious choices, and enabled private religious expression within schools under its supervision.

The balancing of positive and negative rights is one of the major differences between the constitutional jurisprudence of Germany and the US regarding state mandated religious symbolism in schools. While in the US the analysis primarily centers on whether the state sends a message of religious endorsement and thus violates its neutrality mandate, in Germany government symbolic expression is also examined as giving space to as collective private religious expression. The conflict is not only between Art.7 state powers and Art. 4 rights of students and parents, but also one of conflicting Art.4 rights of majority and minority. It should be noted however, that such a view of government symbolic speech is not far from the argument of Justice Scalia in the *McCreary* case.¹²⁷⁸ He argued that nothing in the US Constitution forbade public acknowledgment of the Creator, acknowledgment and respect given by the people as a people through government symbolic speech.¹²⁷⁹ He noted that minority members were protected by the Free Exercise clause and by “those aspects of the Establishemnt Clause not related to government acknowledgement of the Creator.”¹²⁸⁰

Such an approach would result however in a majority capture of government speech resources and minorities would be very unlikely to have access to government speech. Nothing prevents individuals from acknowledging their faith publicly, without the use of such government resources and powers. The dissenting opinion in the *Classroom Crucifix* case gives clear evidence for that by emphasizing the

¹²⁷⁸ *McCreary County v. American Civil Liberties Union of Ky.* (03-1693) 354 F.3d 438, Affirmed (2005).

¹²⁷⁹ *Id.* at 2750-2753, “Justice Stevens fails to recognize that in the context of public acknowledgments of God there are legitimate *competing* interests: On the one hand, the interest of that minority in not feeling “excluded”; but on the other, the interest of the overwhelming majority of religious believers in

omnipresence of the symbol of the crucifix in the *Land* of Bavaria. Given the fact that citizens of Bavaria have a plethora of venues to engage in private religious speech it may not be maintained that their positive rights to religious expression would be seriously burdened if they do not utilize state powers over public education as a government mouthpiece for their convictions.¹²⁸¹

This argument for giving space for majoritarian religious expression through government symbolic speech also trivializes if not completely ignores the effect state symbolic endorsement of the majoritarian religion has on students not belonging to it. Although the dissenting judges argued that what should be decisive for the constitutional analysis was not the single theological meaning of the crucifix imposed by the court's majority but how the Crucifix was perceived by non-Christians.¹²⁸² concluded that in the absence of outright coercion, non-believers were obliged to put up with the display because of the principle of tolerance. The psychological burdens the display of the crucifix placed upon non-Christians were minimal, according to the dissent, and were not unreasonable to be borne.¹²⁸³

being able to give God thanks and supplication *as a people*, and with respect to our national endeavors. Our national tradition has resolved that conflict in favor of the majority.”

¹²⁸⁰ *Id.*

¹²⁸¹ Wallace notes that in the US “[it] is indeed ironic that some who protest the loudest the removal of a nativity scene from the city hall never display such scenes on their front lawns or church grounds.” He also noted that religious believers should not attempt to make the government as a “surrogate for their own efforts to get religious messages into public life” since when government speaks religiously it is likely that its speech would in the long run be perceived as trite and meaningless. (See E. Gregory Wallace, *When Government Speaks Religiously*, 21 FLA. ST. U. L. REV. 1193, 1202, 1256 (1993-1994)). He argues that the fact that other venue for religious expression are available is immaterial for Establishment Clause purposes. In the German Classroom crucifix, however, this is important since the dissent relies on the positive rights to religious freedom and the burden imposed on them by striking down the Bavarian ordinance.

¹²⁸² BVerfGE 93, 1 at 87.

¹²⁸³ *Id.* at at 88-89. See however Beatty at 16, arguing that “The three judges who wrote in dissent gave no recognition to the perception of many non-Christians of the cross as a symbol of heresy, intolerance, even horror.”

I would argue, however, that the psychological harm is not so minimal especially in the public school setting.¹²⁸⁴ As Douglas Laycock has argued, such government speech has “the inevitable result that adherents of the others [religions or world views] will feel their inferior status.”¹²⁸⁵ This concern has particular force in the public school setting. As the majority of the German Constitutional Court noted:

School education is not just for learning basic cultural techniques and developing cognitive capacities. It is also intended to bring the pupils emotional and affective dispositions to development. Schooling is oriented towards encouraging their personality development comprehensively, and particularly also to influencing their social conduct.¹²⁸⁶

The obligation of the state to create conditions for the development of personality that the court speaks about cannot be fulfilled if the state fails to accord equal respect and concern for all students and if it sends an exclusionary message to religious outsiders. Although the Court’s majority does not take up such an argument it is worth noting that such an exclusionary message is particularly incompatible with a constitution whose normativity is based on state and a hierarchy of values, with human dignity at its centre.

Commenting on the issue of non-coercive establishment (favoring a religion through speech and spending) Brudney, argues that the psychological harm that results from the exclusionary message of religious establishment in the form government religious speech is conditioned upon “the description under which one is demeaned and excluded, and the demeaning and excluding agent.”¹²⁸⁷ Firstly, he

¹²⁸⁴ As will be discussed in the next section one of the major criticisms of the Endorsement test, usually applied by the US Courts in religious symbols cases, is that it relies on the perception of the symbolic display by a reasonable observer, which makes the perspective biased towards majoritarian religions and related cultures. Considering the perspective of religious outsiders in the US would make it more difficult for government religious symbols to survive a constitutional challenge precisely because of the focus of the endorsement test on the exclusionary message to outsiders such religious endorsement would convey.

¹²⁸⁵ Douglas Laycock, *The Origins of the Religion Clauses of the Constitution: ‘Nonpreferential’ Aid to Religion: A False Claim about Original Intent*, 27 WILLIAM AND MARY LAW REVIEW, 922 (1986).

¹²⁸⁶ BVerfGE 93, 1 at 46.

¹²⁸⁷ Daniel Brudney, *On Noncoercive Establishment*, 33 (6) POLITICAL THEORY 812, 819 (December 2005).

argues that since religious identity for many people is of fundamental importance, then “one might feel demeaned and excluded at one’s core if one is demeaned and excluded on religious grounds.”¹²⁸⁸ When the state sends a message that their religion is not as worthy as some other religion or doctrine then citizens might withdraw from state institutions and feel alienated from them.¹²⁸⁹ This psychological harm, Brudney argues is belief dependent, namely it depends on whether one believes that one’s proper relation to the political community or the state institutions which come to represent it is one of “connectedness or intimacy.”¹²⁹⁰ The same, Brudney argues, holds true for the argument that one would suffer psychological harm if the state fails to treat religious outsiders with equal respect through symbolic establishment: harm is suffered only if one believes that the state should treat one with equal respect.¹²⁹¹ A similar belief-dependency is related to the philosophical argument that human beings have a fundamental interest in recognition as being worthy and that one suffers physiological harm if the state through symbolic religious endorsement fails to recognize one’s worth. This harm will be suffered, Brudney argues, only if recognition by the state is central to one’s self - respect.¹²⁹² The harm suffered from non-coercive establishment is related to the one’s belief about one’s relatedness to the polity.

If this analysis is applied to public education and the public school as an institution, then it may be argued that for most of the students what Brudney calls the “strong-connection-to-the-polity thesis” holds true.¹²⁹³ Students have a great interest

¹²⁸⁸ *Id.* at 819.

¹²⁸⁹ *Id.*

¹²⁹⁰ *Id.* at 820.

¹²⁹¹ *Id.*

¹²⁹² *Id.* at 823.

¹²⁹³ For the importance and recognition and connectedness in school - “the ways in which an individual feels an affiliation with the community of the institution she/he experiences” in school and the harms of disaffection and alienation, see Greg Thomson, *Swings and Roundabouts: Discourses of Connectedness in Secondary Schools*, thesis for the degree of Master of Education of Murdoch University 2003, <<http://wwwlib.murdoch.edu.au/adt/pubfiles/adt-MU20040820.124631/02Whole.pdf>>.

in recognition as being worthy by the institution of the school and their fellow students. The psychological harm from feeling excluded or demeaned because of one's religious beliefs likely to be suffered from school children cannot be equated to a burden to be suffered in the name of the principle of tolerance. Furthermore, students are part of a school community not by their choice but because of compulsory school attendance mandated by the state. Therefore, the state may not on the one hand demand that children be a part of a school community and at the same time send a message that some of the members of that community are not as worthy as others and their religious or world-view convictions do not deserve the same recognition and respect as those of the majority.¹²⁹⁴

Here it is worth discussing in brief a possible objection to this argument based on the thesis developed by Prof. Smith against a constitutional principle of government absolute neutrality with respect to any "orthodoxy."¹²⁹⁵ Smith acknowledges the possibility of alienating citizens from the political community if the government takes an official stand in matters of belief. However, he argues that there is a competing and "overriding" consideration, namely, that in order to be alienated from the political community there has to be a political community which is represented

¹²⁹⁴ I am not suggesting here a mechanical and automatic application of the endorsement test as articulated by Justice O'Connor to the German constitutional jurisprudence on church and state. As will be discussed in the next section the test so articulated has inherent problems as applied in the US as well—for instance the question of who would be the "reasonable observer" of religious displays at public schools. What I am suggesting is that the basic philosophical rationale underlying the endorsement test as articulated by Brudney has particular force if we view the public school as an institution constituted of a community of students, teachers and parents. The concern about a possible psychological harm caused by state action to students in view of their relationship to other students and members of the school community is not something novel – it has been taken into account by courts in Germany, Canada, the US particularly in cases related to school prayer and religious education.

¹²⁹⁵ See Steven D. Smith, *Barnette's Big Blunder*, Public Law and Legal Theory, Research Paper No. 53, Spring 2003, Social Science Research Network Electronic Paper Collection: <<http://ssrn.com/abstract=417480>>, arguing against the famous pronouncement of justice Robert Jackson in *West Virginia State Board of Education v. Barnette* 319 U.S. 624, 642 (1943) that "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." According to Smith the state does and should prescribe orthodoxies, what it should not do is force citizens to accept them.

by a government that enjoys some allegiance from citizens. Such allegiance, he argues, cannot be formed if the state stands for nothing and is stripped of any declaration of belief on important matters.¹²⁹⁶

A similar dilemma has been posed by Strike in education theory.¹²⁹⁷ He argues that if schools are to be communities, they should be united by some elements of a shared comprehensive doctrine or tradition. This however, poses the problem that allegiance to these values would inform who has full standing in the community and then lead to exclusion or marginalization of some members.¹²⁹⁸ Strike's own answer to this dilemma is that it all depends on the tradition that forms the basis of the school community.¹²⁹⁹ He refers to the following statement of Hilary Putman:

There are two points that must be balanced, both points that had been made by philosophers of many different kinds: (1) talk about what is 'right' or 'wrong' in any area only makes sense against the background of an inherited tradition; but (2) traditions themselves can be criticized.¹³⁰⁰

What these arguments express is that a sense of community and belonging to that community may develop only where there is a unifying core, some common values and purposes which will pull the members together. An absolutely neutral framework agnostic of any values would not serve as a gravitational force binding individuals into a community. On the other hand the nature of the common values or the tradition forming the basis of the community, as well as, the strength of the gravitational force they exert are very important, because they may be such that would serve to exclude from the community members who cannot truly identify with them.

¹²⁹⁶ *Id.* at 21-23.

¹²⁹⁷ Kenneth A. Strike, *Schools as Communities: Four Metaphors, Three Models, and a Dilemma or Two*, 34 (4) JOURNAL OF PHILOSOPHY OF EDUCATION, (2000).

¹²⁹⁸ *Id.* at 619.

¹²⁹⁹ *Id.* at 613. While I take issue with his three models of schools as communities and his characterization of the "liberal instrumentalist" type of school, I agree with the general proposition that school as community and inclusion and autonomy are fully compatible.

¹³⁰⁰ *Id.* at. 631.

Schools may have values that are grounded in the Christian culture and tradition – schools are not value neutral, and no education can be value neutral, as was held in the *Interdenominational school* cases, but there should be minimum elements of compulsion and schools should be open to other values and cultures. An important value that, in my view, should be included in the unifying core of the school community is that of tolerance and equal respect for the sincerely held religious beliefs or world views of its members. The placement of the crucifix only, however, goes beyond the permissible, and one could say necessary, acknowledgment and inculcation of values. The values are expressed through a symbol that is one of the strongest identifiers of a particular religion and thus it is a referent also to the doctrinal position and related practices of that religion, to the exclusion of all others.¹³⁰¹ Therefore, although it is also an expression of some of the unifying values of the community, the very mode of that expression transgress the thin boundary beyond which the inclusionary force of the values becomes exclusionary.

The dissent did not agree that the border between cultural initiation and religious identification had been crossed. It argued that the crucifix besides being a religious symbol was also a symbol of Christianity's influence over the Western cultural traditions.¹³⁰² As such its presence was justified vis-a-vis non-Christians as it served an educational function. Interestingly in a recent public controversy about the state-mandated display of the crucifix in Italian schools, this was the main argument

¹³⁰¹ I should be noted that the issues of the display of the crucifix in public schools have occurred in countries or local communities where the majority of the population belongs to the Roman Catholic Church – Bavaria, Italy, and France. See also, Grech, stating the issues arising from the placement of crucifixes in state schools in Malta in the following way: “The presence of the crucifix that is the symbol of the Roman Catholic religion in the classrooms of state schools has been subject to some polemic. It has been suggested that the presence of the crucifix to the exclusion of any other religious symbols is discriminatory. To what extent a religious symbol offends the sentiments of other religions is debatable. It is however, true that the presence of a religious crucifix in state school classrooms is evidence of the predominance and importance of Catholicism over any other religion in this country.” (Alfred Grech, *Religion, Tolerance and Antidiscrimination in Malta*, <<http://aei.pitt.edu/6034/01/27.pdf>>, at 203.)

on which the Italian Council of State relied to uphold the constitutionality of the display.¹³⁰³ Thus, the question of whether a given symbol is mainly a religious referent or a cultural one is often at the center of the controversies arising from symbolic religious expression by the government. What factors should be taken into consideration when deciding on this question is discussed below after an overview of the aftermath of the Classroom Crucifix decision.

¹³⁰² BVerfGE 93, 1 at 75.

¹³⁰³ The placement of crucifixes in schools has also recently caused a great public controversy. In 2004 a Muslim parent, who is also a vocal leader of a local Muslim organization secured a court order for the removal of a crucifix from the wall of his son's classroom on the ground that it violated the principle of state neutrality and the principle of laicity, which although not expressly stated in the Italian constitution has been derived from several constitutional articles by the Italian Constitutional court. According to the judge the "presence of the symbol of the cross deeply induces in the pupil one understanding of the cultural dimension of the expression of faith, because it manifests the unequivocal will, of the State, be a matter itself of public school, to place the catholic cult to the center of the universe, like absolute truth, without the minimal respect for the role carried out by the other religious and social experiences in the historical process of the human development, neglecting completely their unavoidable relations and their mutual conditionings." (Crocifisso nelle aule scolastiche il Tribunale ordina la rimozione, 25 ottobre 2003, <<http://www.repubblica.it/2003/j/sezioni/cronaca/crocifisso/crocifisso/crocifisso.html>>). The judge's order caused huge nationwide uproar and was soon repealed. Later in February 2005 an Italian judge was suspended for his refusal to perform his judicial duties after he was forbidden to remove the crucifix from the wall of his courtroom. (David Willey, *Italy Judge Barred Over Crucifix*, BBC NEWS, 3 February 2006, <<http://212.58.226.40/1/hi/world/europe/4676300.stm>>). The issue of the constitutionality of the crucifix in public school was taken to the Italian Constitutional Court, which however did not rule on the merits, since it held that the challenged regulations requiring the placement of the crucifix in public schools, dating back to Mussolini's rule and never repealed, were not legislative acts nor specification of legislative acts. (Italian Constitutional Court Order No. 389, December 15, 2004, <<http://www.cortecostituzionale.it/eng/documenti/attivitaacorte/pronunce/abstract/2004/ABSTRACT-389-2004-ENGLISH.pdf>>). It was the Italian Council of State that ruled in 2006 that the posting of the crucifix on the public school walls is not forbidden by the Constitution. The decision stated that although the principle of laicity was common to a number of countries, its particular interpretation could not be detached from the cultural traditions, the history, and the institutional arrangements in the particular nation state. Like every symbol the crucifix could denote various meanings to different people. In a cult place it denoted it was exclusively a religious symbol of veneration, but in a non-religious setting such a public school it is also a cultural symbols denoting "important civic values, mainly those values which underlie and inspire our constitution, our way of living together peacefully." The Council of State declared that the crucifix in classrooms conveyed the religious origin of the values such as of tolerance and mutual respect, affirmation of human rights, autonomy of the moral conscience with respect to state authority, solidarity, denial of every discrimination. These values are the foundation of the Italian civilization and have the status of "fundamental principles" in the Constitutional order. Thus the crucifix had a valuable educational function for students irrespective of their religious convictions. (Consiglio di Stato, Sezione Sesta, Decisione 13 febbraio 2006 n. 556, <<http://www.altalex.com/index.php?idnot=10360>>).

2. *The Aftermath and the new Bavarian Law*

A judge on the Federal Constitutional court was reported as saying during a lecture at the University of Freiburg: “There are more crucifixes hanging in Bavarian schoolrooms now than before the decision.”¹³⁰⁴ The *Classroom Crucifix* decision proved to be one of the most controversial rulings of the German Constitutional Court. The strong negative reaction was immediate. Critics of the decision recalled that the Nazis had started the destruction of the established church-state relationship by removing crosses public school classrooms.¹³⁰⁵ Within days of its publication Church leaders called the decision “an attack on Germany’s Christian heritage.”¹³⁰⁶ The Jewish community however did not make a public statement regarding the court’s ruling.¹³⁰⁷ The Bavarian branch of the Christian Democratic Union called for civil disobedience.¹³⁰⁸ Politicians both from Bavaria and outside it joined in the chorus calling for a boycott of the decision. Chancellor Kohl declared the decision “unintelligible” and “the values of Western culture were in danger.”¹³⁰⁹ Prof. Karst’s observation on how government use of religious symbols is related to political divisiveness in the US holds true for the German case as well:

nothing works quite so well as identifying a symbol that is laden with emotion for a majority of the voters, and portraying the opponent as an enemy of the symbol and all

¹³⁰⁴ GEORG VANBERG, *THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY*, Abstract, Cambridge University Press (2005), 3.

<http://assets.cambridge.org/052183/6476/excerpt/0521836476_excerpt.pdf>, at 4.

¹³⁰⁵ Muehlhoff, *supra* note 15, at 275.

¹³⁰⁶ Vanberg, *supra* note 1304.

¹³⁰⁷ Miriam Widman, *German Jews are Silent on Ban of Crucifixes in Schools*, (August 25, 1995),

<http://www.jewishsf.com/content/2-0-/module/displaystory/story_id/1883/edition_id/28/format/html/displaystory.html>.

¹³⁰⁸ Auslander, *supra* note 350, at 292.

¹³⁰⁹ *Id.* The controversy has been given diverse interpretations such as a manifestation of a conflict between Christian Occident and Islam; between tradition and particularity versus modernity and universalism; between “a new Protestant religious majority, constituted after the unification with the ex-GDR, and a Catholic minority represented by the predominantly Catholic Bavaria.” (Howerd Caygill and Alan Scott, *The Basic Law versus the Basic Norm? The Case of the Bavarian Crucifix Order*, R. BELLAMY AND D. CASTIGLIONE (EDS.) *CONSTITUTIONALISM IN TRANSFORMATION: EUROPEAN AND THEORETICAL PERSPECTIVES*, Oxford: Blackwell, 1996, pp. 93-104, at 103).

who cherish it. To serve these electoral purposes, religious symbols are the answer to a politician's prayer.”¹³¹⁰

In a press release, the Court stated that the head notes had been “misformulated” implying that the ruling declared unconstitutional only such displays of the crucifix or the cross that were mandated by the state. However, this “clarification” did not put to rest the opponents of the decision since, as some commented, the head notes were repeated in the reasoning of the Court.¹³¹¹ In an unprecedented move the vice-president of Court, belonging to the majority in the decision, defended it in an editorial entitled “Why a Judicial Ruling Deserves Respect,” published in a national newspaper.¹³¹² The hypothetical he raised, about the feelings of a practicing Christian in a class with a Muslim majority which decided to hang a verse of the Koran, was arguably an attempt to justify the decision based on the same goal that motivated its objectors—the defense of the Christian heritage and identity. This statement also undermines the proposition the judgment ruled unconstitutional only state mandated displays—since the Muslim majority referred to could only be that of students and their parents attending a particular school, and not a majority in the legislature of a given Land, since as Wuerth notes, local religious minorities in Germany have very little political power over schools.

When the new school year began, the crosses remained in the Bavarian schools. A demonstration organized by the Catholic Church summoned about 30 000 people dressed in traditional Bavarian costumes and carrying large wooden crosses who marched in Munich in protest to the Constitutional court’s ruling.¹³¹³ Analyzing the rhetoric utilized in the demonstration and during the whole controversy, Auslander

¹³¹⁰ See Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 509 (1992). The US Supreme Court however, has declared that political divineness alone may not serve to invalidate government action that is otherwise permissible under the Establishment Clause (See *Lynch v. Donnelly*, 465. U.S. 668, 684 (1984).

¹³¹¹ Wuerth, *supra* note 36, at 1185.

notes the equivalence that was made between defense of the crucifix on the classroom walls and defense of the true definition of the German nation – “a Christian nation, composed of distinctive regions, each with its own particular, but thoroughly German traditions” against the intrusion of the “too modern, too cosmopolitan, and thus no longer German” federal state.¹³¹⁴ As Prof. Karst has argued, religious symbols, because of their diffuse meaning may often serve “as a handy referent for a whole world-view, a whole cultural group”¹³¹⁵ He notes that both winners and losers in legal controversies about government use of religious symbols may easily recognize the symbol “not only as a statement about what the town or school stands for, but also as a recognition of who is in charge: “This is our town;” “This is our school”” or in the case of the Bavarian law “This is our Land.”¹³¹⁶

The Bavarian legislature finally amended the law in December to comply with the Court’s ruling. The new ordinance provides:

Article 7, Section 3: In light of Bavaria’s historical and cultural traditions, a cross is displayed in every classroom. This act symbolizes the desire to realize the highest educational goals of the constitution on the basis of Christian and occidental values while respecting religious freedom. If parents challenge the installation of the cross for genuine and acceptable reasons of faith or secular belief, the school principal shall attempt a compromise solution. If it is not possible to find a solution, the principal shall notify the school authorities and then devise an individual solution that respects the religious freedom of the person who has objected and which balances the religious and secular beliefs of all persons in a class appropriately. In doing so, the will of the majority must be considered as much as possible.¹³¹⁷

The Bavarian Constitutional Court in 1997 ruled that new ordinance conformed to the Bavarian State Constitution.¹³¹⁸ The court reasoned that the law had the purpose of “recognizing the historical and cultural importance of Christianity and

¹³¹² Auslander, *supra* note 350, at 292.

¹³¹³ Auslander, *supra* note 350, at 300.

¹³¹⁴ *Id.*

¹³¹⁵ Karst, *supra* note 1310, at 508.

¹³¹⁶ *Id.*

¹³¹⁷ Vanberg, *supra* note 1304, ATat 3. The law was based to a large extent on a report commission by the Lander of Bavaria and prepared by Peter Badura, former president of the Federal Constitutional Court. (See Wuerth, *supra* note 36, at 1186).

¹³¹⁸ 50 NJW 3157 (1997) cited in Wuerth, 1186.

promoting the religious expression of those who wanted crucifixes in the classroom.” It emphasized that in contrast to the old law it took into account the potential objections to the display by parents and students.¹³¹⁹ The Federal Administrative Court in 1999 upheld the law in principle but decided that in the particular case the plaintiff had the right to have the cross removed.¹³²⁰ The mere fact that the atheist parents did not wish their child to be exposed to the religious influence of the cross was sufficient ground for the headmaster to order its removal.

The huge public controversy and the resistance following the Federal Constitutional Court’s decision has lead some commentators to argue that in a situation like this involving “problems of cultural diversity and the reconciliation of conflicting beliefs,” constitutional scrutiny and resolution may only exacerbate matters and show “how far claims to universality embedded in a particular constitutional order may work to deconstitute the very cultural values which it should protect.”¹³²¹ Constitutional scrutiny of any issue which is emotionally or politically charged for a large segment of the public – often both – does not have the immediate consequence of stopping conflict. Examples of such controversial decisions in the US are for instance desegregation, school prayer and abortion decisions.¹³²² Such decisions resolve value laden issues over which there is a deep disagreement in society. However, these are also issues involving individual rights which are within the province of constitutional adjudication. And in most cases the vindication of these rights is more important than the immediate stifling of social disagreement and debate or even conflict.

¹³¹⁹ *Id.*

¹³²⁰ BVerwG 6 C 18.98, 21 April 1999

¹³²¹ Caygill and Scott, *supra* note 1309, at 93-95.

¹³²² *Brown v. Board of Education* 347 U.S. 483 (1954), *Engel v. Vitale*. 370 US 421 (1962), *Roe v. Wade*, 410 U.S. 113 (1973).

3. Analysis

The Court's decision, as was noted above, drew heavy criticism from the scholarly and political world. I would argue that despite this criticism it is a correct application of the principle of state neutrality to government symbolic expression in public schools. Wuerth has summarized the following main points on which the decision was attacked. The first was that it was a significant departure from earlier decisions without any acknowledgement and defense of the change.¹³²³ Indeed, the Court instead chose to distinguish the present case from the *School Prayer* and the *Interdenominational School* cases but did not do so convincingly. According to Robbers, "The crucifix in class rooms as a symbol of this constitutionally appropriate cultural relationship offends the neutrality of the state just as little as the Christian nature of schools and the general voluntary school prayer."¹³²⁴ Since Christianity belongs to "the cultural traditions taken up by the Grundgesetz" the school, according to Robbers, cannot fulfill the "cultural and educational commission of Article 7 Section 1" if it excludes all cultural and social references that are based on a religious tradition.¹³²⁵ Others have criticized the Court on the ground that its statements about the symbolic meaning of the cross represented a pronouncement on "a theological matter over which the court has no authority."¹³²⁶

¹³²³ Wuerth, *supra* note 36, at 1185. Alloway, commenting on the decision in 1997 argued that the jurisprudential change was so great and radical that it was comparable to the US Supreme Court decision in *Everson v. Board of Education*, and that "if the evolution of the church-state relationship in the United States is any indication, it will not be long before Article 4 is used to curb the rights of religious persons entirely." (Lark E. Alloway, *The Crucifix Case: Germany's Everson V. Board Of Education?*, 15 DICK. J. INT'L L. 361, 383 (1997)).

¹³²⁴ Robbers, *supra* note 1324, at 8.

¹³²⁵ *Id.*

¹³²⁶ Wuerth, *supra* note 36, at 1185.

3.1 Culture or Religion?

Thus in the German *Classroom Crucifix* case, as in the Ten Commandments and holiday display cases in the US, one of the main contentious issues that emerges concerns the boundary between acknowledgement and transmission of cultural traditions and values on the one hand and government endorsement of religion and proselytizing on the other. This issue is typical for all religious symbols displays and is complicated by the fact that it is nearly impossible to ascribe a single meaning to symbols and religious texts, particularly when one takes into account that the same symbol may have very different meanings for different individuals and groups. This factual circumstance also conditions the second issue: what is the proper role of the judiciary in ascribing meaning to a religious symbol.

3.1.1 Classroom Use of the Symbols and Cultural Relevance

One approach to these issues is suggested by Brugger, who argues that the constitutionality of a religious symbol display in the classroom should depend not on the nature of the symbol but on the way it is used at school. Adopting a communitarian theoretical framework of interpretation,¹³²⁷ he argues that if the crucifix is “used actively in classroom instruction or serves as an “object of religious worship” then the display is unconstitutional because of “the need to separate society from state and church from state.”¹³²⁸ If on the other hand, the crucifix serves as a reminder of “a tradition” that has had a great impact on the country’s culture even

¹³²⁷ Brugger argues that communitarian theory, particularly liberal communitarianism underlines the particular constitutional relationship between church and state in Germany and refers to the statement of the Constitutional Court in that “The image of man in the Basic Law is not that of an isolated, sovereign individual; rather, the Basic Law has decided in favor of a relationship between the individual and the community in the sense of the person’s dependence on and commitment to the community, without infringing upon a person’s individual value.” (See Winfried Brugger, *Communitarianism as the Social and Legal Theory Behind the German Constitution*, 2 INT’L J. CONST. L. 431, 433-441 (2004).

¹³²⁸ *Id.* at 450.

though it may send a “faint” message of state support for this “tradition” but “without discriminating against non-believers or believers in other religions or world views” then the display is constitutional.¹³²⁹

In the particular case, the Bavarian Prime Minister argued before the Court that the crucifix during general instruction time was not used as a missionary tool. It was true, he admitted that during religious education classes and during school prayer the crucifix changed its character from a general cultural symbol into a symbol of a particular faith, but he argued that was not of determinative importance for the display’s constitutionality because dissenting pupils could be exempted from religious education and could avoid participation in school prayer.¹³³⁰ It should be noted, however, that students objecting to school prayer do not always leave the classroom and may remain seated or silent and in this case it is clear that a crucifix on the wall sends not only a message of state endorsement of Christianity but also, coupled with the prayer during which an objecting student remains in the classroom, a message of exclusion. The compounding influence of school prayer, religious instruction, and the presence of the crucifix is difficult to ignore. It would be an entirely different matter if the state mandated that a cross be displayed on the wall only in those classrooms in which Christian religious instruction takes place and only for the duration of the instruction. In such a case, the display would be constitutional not burdening students’ negative rights to religious freedom.

Returning to Brugger’s argument, it must be noted, that the substitution of “religion” with “tradition” cannot obscure the fact that it is a religious tradition that he refers to.¹³³¹ The argument does not answer the difficult question when religious

¹³²⁹ *Id.*

¹³³⁰ BVerfGE 93, 1, sec III, para 1.

¹³³¹ On another aspect of the relevance of tradition Ravitch notes that one of the criticism of the US Supreme Court’s use of the “long standing tradition” approach in its jurisprudence on public displays

culture residue ceases to be religious. A particular symbol because of its long and widespread usage may seem too secularized to the those of the majority religion and at the same time remain to much a symbol of religious oppression to the outsiders of that religion.

If Brugger's distinction is used as a test for the constitutionality of religious symbols displays then displays of purely religious symbols of the majority religion will always be constitutional so long as they are not used actively as tools for proselytizing. Such a test completely ignores the inherent effect of symbolic speech on students. As Ravitch notes, religious objects are not just "passive things" but also a powerful medium for conducting religious meaning and cultural meaning.¹³³² Whether the meaning is cultural or religious, or even whether the two can be separated does not only depend on their use in the classroom. Their use at school can only reinforce one meaning but symbols also speak for themselves and convey meanings to both believers and non-believers.

Even when a religious symbol is not employed as means for proselytizing by the school, the religious meaning conducted by the symbol may send a strong message of exclusion to those students who cannot identify with it. A message to the effect that the religious beliefs of some students are more worthy of recognition and respect by the school than the ones held by other students may be also undermining their own sense of worth and dignity, religious beliefs being a core feature of a person's identity, and this would be inconsistent with the paramount importance of human dignity in the Basic Law.

of religious symbols is that "longstanding traditions rarely reflect the practices and beliefs of religious outsiders, and the fact that they have not been challenged may say more about the subordinated role of religious outsiders than it does about longstanding community acceptance of a given practice." (See Ravitch, *supra* note 1243, at 1063). Thus the fact that there is a tradition of displaying crosses in Bavarian schools does not in itself provide an argument for its constitutionality.

¹³³² *Id* at 1020.

Moreover, there is a great risk that students belonging to minority religions will not have the chance to have their symbols displayed because it is unlikely that those symbols would be found to have “great impact on the country’s culture.”¹³³³ If we turn to Prof. Robbers’s argument about the “cultural school” we see that although he accepts Islam as a contemporary culture shaping factor in German society he does not argue that symbols of Islam be placed next to the crucifix. The cultural school should be passing down culture on future generations and “must make room for and support the constant development of culture.”¹³³⁴ Since Islam is a culture-shaping factor in contemporary Germany, he argues that teachers should be allowed to wear headscarves at school and this would be a valuable and educational cultural encounter.¹³³⁵ However, although he maintains that the display of the crucifix is constitutional he does not suggest that verses of the Koran, for instance, should also be placed on the classroom walls.

Furthermore, as Wuerth notes, non-traditional religious minorities in Germany are unlikely to acquire significant state legislative power and thus will not have the opportunity to exercise substantial control over Länder education.¹³³⁶ Wuerth writes that when she asked a member of the Constitutional Court of Bavaria whether he would uphold the constitutionality of a law providing for the placement of non-Christian religious symbols at schools, just as the current one provided for crosses the

¹³³³ It should be noted, as will be discussed in the next section, that there is a lot of good effort in the U.S. to recognize other symbols as well. One may argue however, that in these US cases the state officials who include religious symbols of minority faiths in schools, are not so much motivated by their understanding that these religions have had significant cultural relevance for the US and have had or do have “great impact on the country’s culture” but more from desire to send a message of tolerance, diversity, and inclusion to all children in the public schools within their jurisdiction. By and large, culture is significantly shaped by the majority and by significant minority groups. But I would argue the fact that some students in the school represent a religion that is really underrepresented in the community or the country at large and has had no great cultural impact does not justify the school in excluding the religious symbols of the students professing this religion.

¹³³⁴ Robbers, *supra* note 1324, at 14.

¹³³⁵ *Id.*

¹³³⁶ Wuerth, *supra* note 36, at 1203.

affirmative answer “seemed to come all too quickly.”¹³³⁷ According to Wuerth, the reason for this rapid response lied in the fact that there is no realistic “danger” that the state of Bavaria will legislate for the display of any religious symbols at schools other than Christian ones. On the other hand a number of developments in recent years the US have shown that majorities can be wise enough to care about the principles for religious freedom,¹³³⁸ nevertheless, there is a substantial risk that they can fail to do that especially with respect to unpopular religions.

Thus, an approach that constitutionalizes school displays of the religious symbols of the majority because of their cultural relevance results in a selective promotion of one religion. Brugger acknowledges that the principle of neutrality interpreted from the perspective of what he calls liberal communitarianism rules out such a result. However, he argues that such strict neutrality applies only to “religions and world-views in the sense that they are sources, or organized systems in the case of churches, of fundamental convictions that can and should not be adjudicated or regulated by state authority.”¹³³⁹ However, with respect to religious values or symbols reaching ““above” or “beyond” the genuine core of belief” such neutrality is not mandated.¹³⁴⁰ He argues that in such cases there has been a secularization of the religious element and it has become a common part of cultural life of the community and has acquired meaning beyond the one conferred by the particular religious doctrine. In some cases, he argues, religious symbols and values have become an

¹³³⁷ *Id.*

¹³³⁸ For example, the yamulka case (*Goldman v. Weinberger*, 475 U.S. 503 (1986)) was reversed by a Congressional enactment a year or two later. Oregon created an exemption for peyote use a year or two after the *Smith* decision.

¹³³⁹ Brugger, *supra* note 1327, at 452.

¹³⁴⁰ *Id.*

important element of the “collective moral consciousness and self-understanding of a particular community and thus have assumed the character of a “civil religion.””¹³⁴¹

When is a religious symbol sufficiently secularized? When does it reach enough beyond or above so that its display is constitutional? These hard questions have come before courts in Germany, the US as well as in other countries and they do not receive a satisfactory answer in Brugger’s analysis.¹³⁴²

3.1.2 Nature of the religious objects

A purely religious object, may still have a strong cultural relevance in a community whose majority belongs to the same religion, but this fact does not subtract from its religious meaning. On the other hand, a religious symbol through time may have become strongly secularized so that it is primarily a cultural referent.¹³⁴³ According to Ravitch, the way out of the interpretative dilemma is an approach that centers on the nature of the religious objects themselves and their power.¹³⁴⁴

He distinguishes among three categories of religious objects in religious symbolism cases in the US: “Pure Religious Objects,” “Multifaceted Religious Objects” and “Secularized Objects.”¹³⁴⁵ In the first category he places “objects of veneration, objects used in religious ritual...objects that represent core religious principles...[objects that are] central stories of a given religion.”¹³⁴⁶ These objects, according to Ravitch, rarely have any secular meaning at all and he includes among

¹³⁴¹ *Id.* at 453.

¹³⁴² For a brief description of legal solution of several European countries on the display of crosses or crucifixes in the public school classroom see, Leszek Lech Garlicki, *Perspectives on Freedom of Conscience and Religion in the Jurisprudence of Constitutional Courts*, 476 *BYU LAW REV.* 507 (2001).

¹³⁴³ A good example for that is the Christmas tree in Bulgaria, which is commonly referred to as a New Years’ Eve Tree. Because of the vehement hostility towards religion of the communist regime for 50 years the symbol is almost entirely devoid of religious connotations.

¹³⁴⁴ Ravitch, *supra* note 1243, at 1066.

¹³⁴⁵ Ravitch, *supra* note 1243.

them crèches, crosses, and menorahs.¹³⁴⁷ Multifaceted religious objects according to Ravitch have both secular and religious meanings. They are important to the theology of a particular religion but they are not used in rituals or venerated and may have different meanings both for believers and for non-believers. As an example of such an object, he gives the Ten Commandment displays in the US.¹³⁴⁸ Finally, secularized objects are those that may be related to a religion or a religious holiday but over time have gradually lost their theological relevance – for example - Christmas Trees and Santas.¹³⁴⁹

If we use Ravitch's categories and apply them to the German *Classroom Crucifix* case then the Constitutional Court was correct in stating that the crucifix cannot be reduced to a mere cultural symbol because it is a purely religious object. The Court's majority noted the theological significance of the crucifix. The majority emphasized that although over time many Christian traditions have become cultural bases of the society, "specific faith contents of the Christian religion or a certain Christian denomination including its ritual realizing and symbolic representation must be differentiated from these."¹³⁵⁰ The second set of elements used by Ravitch for defining a pure religious object was also considered by the court – "For the believing Christian it [the crucifix] is accordingly in many ways an object of reverence and of piety."¹³⁵¹

Nevertheless, it may be argued that displays of pure religious symbols at state schools may be constitutional depending on the physical context of the display. As will be discussed in section on religious symbols displays in the US, many of the

¹³⁴⁶ *Id* at 1024.

¹³⁴⁷ *Id.*

¹³⁴⁸ *Id* at 1025.

¹³⁴⁹ *Id* at 1026.

¹³⁵⁰ BVerfGE 93, 1, para.43

¹³⁵¹ *Id.* at 44.

cases concerning the constitutionality of such displays take as a major determining factor the physical context of the display. An overview of the US constitutional jurisprudence reveals that even if a symbol may be characterized as purely religious under Ravitch's categories its meaning may be secularized by displaying it in a context that has a strong secular unifying theme and thus it will not send a message of endorsement.¹³⁵²

In the German *Classroom Crucifix* case the state mandated the display of a single religious symbol – the crucifix and its powerful religious message endorsed by the state in the classroom was correctly found to violate the negative religious freedom of students and to be incompatible with the principle of neutrality. Thus an examination of all three factors—nature of the symbol, physical context of its displays, and classroom use—confirms the position maintained by the majority of the federal Constitutional Court regarding the boundary between transmission of culture and religious promotion.

3.2 Dissenter's Objections

Although Prof. Robbers maintains that the crucifix display is constitutionally unobjectionable he acknowledges that it may violate the negative religious freedom of some students, and argues that the removal of the crucifix in individual cases should be dealt according to the standards laid down in the school prayer decision.¹³⁵³ This points to the second criticism identified by Wuerth, namely that the Court should have only struck down the Bavarian ordinance on the narrower ground that it did not provide a mechanism for removal of the crucifix in individual cases instead of resolving the whole class of cases and declaring that state mandated displays of

¹³⁵² Ravitch, *supra* note 1243, at 1033.

¹³⁵³ Robbers, *supra* note 1324, at 9.

crucifixes is unconstitutional *per se*.¹³⁵⁴ The Federal Constitutional Court has not passed a judgment on the constitutionality of the new Bavarian law that providing for religious or secular objections to the display of the cross.

I would argue that although in the *School Prayer* case the Federal Constitutional Court reasoned that in most cases it was unlikely that a student seeking exemption from school prayer could be placed in an unbearable position of an outsider and be the object of discrimination, the probability that this would happen when upon the objection of a student the cross is taken down from the classroom wall is too great to be ignored. The request to take down the cross puts much more pressure on objecting students than the request to be exempted from school prayer. In the latter case while, the student is set off as different from her peers she does not prevent them from participating in the religious exercise. In the former case, however, the possibility of engendering negative attitude and being subject to great pressure to conform is much stronger—upon the objecting student’s protest the majority of the students are prevented from having the cross displayed. Suffice it to mention that the plaintiffs in the *Classroom Crucifix* decision were subjected to death threats when the public controversy over the Bavarian crucifixes erupted. Such individual solutions then do unconstitutionally infringe upon the negative religious freedom of dissenting students. Furthermore, as Luzzati notes, the Bavarian law’s requirement that compromise solutions should consider as much as possible the majority will “gives an undue regard to the beliefs of the majority which “normally” prevail on others.”¹³⁵⁵ In the constitutional balancing of conflicting fundamental rights numbers should not be the determining factor.

¹³⁵⁴ Wuerth, *supra* note 36, at 1185.

¹³⁵⁵ Claudio Luzzati, *The Strange Case of the Public Display of the Crucifix An Italian Story*, November 14, 2005, <<http://www.tau.ac.il/law/events/Claudia%20Luzzati.doc>>, at 7.

3.3 Solution – a Pluralist Approach

I would argue that a pluralist approach to the issue following the “wall of peace” model advocated by the Québec human rights commission, would be a solution that is in conformity with the Basic Law and at the same time serve the state’s interest in teaching tolerance, which is also a value recognized to be one of the cultural values shaped by the Christian tradition in Germany. The display of any religious or philosophical symbol upon the request of students and parents would not be a violation the state’s mandate of neutrality under the Basic Law since the state would not be identifying with any religion nor would it be treating preferentially any religion. The dissent in the Classroom Crucifix case, implicitly acknowledged that the freedom of exercise rights of students would have been violated had they requested their symbols to be placed alongside the crucifix and been refused.¹³⁵⁶ However, the very fact that the law mandates the display of the symbols of one faith while adherents to other religious or world views are put into the position to request that their symbols would also be displayed without any guarantee in the statutory law or administrative acts places adherents of majority and minority religious in unequal positions and this unequal treatment violates the neutrality of the state.

Under the proposed pluralist approach, the state would be truly giving space to authentic private religious expression, in contrast to the present situation where the crosses displayed represent pure government speech, despite the attempt to translate it into accommodation of private religious practices or only attenuated, secularized shadows of religious beliefs. This also means that there would be no inquiry into the cultural relevance of the given religion. It would serve the mission of the school to teach tolerance and respect for diversity, which is not dependent on how long a

¹³⁵⁶ BVerfGE 93, 1 at 94.

particular religion has been active in the country or how numerous its adherents are. Indeed, in the aftermath of the Constitutional Court's decision several Catholic and Protestant church leaders did advocate that Jewish, Muslim and other religious symbols, depending on the religious composition of the students attending the school should be displayed alongside the cross and "would contribute more to mutual understanding and tolerance than would a naked wall."¹³⁵⁷

On the other hand, the possibility remains of a situation similar to some provincial schools in Canada, where a school community is comprised exclusively by students belonging to one religion. In this case, the display of the symbol of that religion would be constitutional, as long as the opportunity remains for new students to request the symbol of their faith or world view to be displayed.¹³⁵⁸

It should be acknowledged that this approach is not without problems either. Luzzati identifies several thorny issues which have come to plague US courts in the cases dealing with school sponsored speech coming from private parties. According to Luzzati, firstly, someone would have to draw a line between what would count as "religion" and what "religious symbols" may be displayed and what not.¹³⁵⁹ For instance he asks, who and on what criteria would decide whether symbols of Scientology or Satanism should be displayed. The question of what is religion however is not peculiar to the issue of religious symbols at schools. The question is relevant to all cases related to religious freedom rights and church-state relations and so far, a comprehensive and clear cut definition of religion has eluded both courts and legal scholars. As Robbers notes, "German law is at a loss to define religion as a

¹³⁵⁷ Charles L. Glenn, *Historical Background to Conflicts over Religion in Public Schools*, PRO REGE (September 2004), http://www.dordt.edu/publications/pro_rege/crcpi/115750.pdf, at 8.

¹³⁵⁸ See also Muehlhoff, arguing that a voluntary unanimous decision by students, parents and school authorities to post a single religious symbol would be constitutional in Germany. (Muehlhoff, *supra* note 15, 475).

¹³⁵⁹ Luzzati, *supra* note 1355, at 7.

legal term.”¹³⁶⁰ However, courts have provided guidelines.¹³⁶¹ In general, as long as the students or parents ask to display a symbol of a religious organization or philosophical organization whose activities are not forbidden by law the request should be granted.

Secondly, Luzzati argues, the pluralist approach would infringe any way upon the negative religious freedom of those who do not follow any religion. It should be noted that in contrast to principle of neutrality developed under the US Establishment Clause, the neutrality of state with respect to religious and other world views mandated by the German Basic Law does not prohibit state support for all religions, as long as there is no identification of the state with any particular religion.¹³⁶² Furthermore, the “wall of peace” could be constructed in a place within the school building and not in every classroom. Thus no student would be required to receive instruction during the whole day under a religious symbol, minimizing the intrusion into the negative religious freedom of dissenting students.

The third objection of Luzzati to the pluralist approach, a concern, expressed also in the US cases, is that such displays may lead to conflict within schools—they may become a place of “ruthless propaganda or [result] in a religious clash.”¹³⁶³ The prevention of religious conflict at schools is a legitimate concern and it should be within the discretion of school authorities to prohibit such displays if there is real evidence that such conflict has arisen or is being fomented. Such restrictions should be dealt with on a case by case basis, depending on the concrete factual situations.

¹³⁶⁰ Gerhard Robbers, *Religious Freedom in Germany*, *BYU LAW REV.* 663 (2001).

¹³⁶¹ *See Id.* at 633, “The superior courts up to now mainly have decided the following way: Religion as well as ideological creed (*Weltanschauung*) is a certainty about specific statements about the whole of the world as well as about the source and the aim of the life of the human beings. Religion is based on a reality that is transcendent to the human being, whereas ideological creeds take to immanent explanations. An association is a religious or ideological association in the sense of the Basic Law, when its members or followers confess on the basis of a common religious or ideological conviction corresponding ideas about the meaning and the accomplishment of human life.”

¹³⁶² *See Brugger, supra* note 1327, at 451.

The approach should not be discarded for the mere abstract possibility that such conflicts may occur.¹³⁶⁴ Moreover, as stated in *Serif*¹³⁶⁵ and many subsequent cases of the European Court of Human Rights, when faced with tension and conflict “the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.”¹³⁶⁶

Finally it should be recognized that as Wuerth argues, under any approach students from minority religions will always have a particular burden to bear in a school system based on a culture originating in other religious traditions – “Even a simple invitation to bring religious symbols into the classroom puts a unique burden on students of minority or unpopular religions, who must forego their symbols (and risk ridicule) or bring their symbols with them (and run the same risk).”¹³⁶⁷ The question is how to minimize that burden. One way would be that no religious symbols are displayed. The second way would be allow a space within school where all students may have their religious or world-view symbols displayed on equal terms.

XX. SOUTH AFRICA

1. Constitution

Some scholars have expressed the opinion that Section 15(2) which regulates religious observance at public schools refers not only to prayers, collective reading of sacred texts and moments of silence, but also to the exhibition of religious

¹³⁶³ Luzzati, *supra* note 1355, at 7.

¹³⁶⁴ See *Headscarf* case, *supra* note 988.

¹³⁶⁵ *Serif v. Greece*, (1999), at para. 53.

¹³⁶⁶ See, e.g., *Metropolitan Church of Bessarabia and Others v. Moldova*, (2001) at para. 116.

¹³⁶⁷ See Wuerth, *supra* note 36.

symbols.¹³⁶⁸ Such a broad reading of S.15(2) is precluded by the very wording of the provisions. While there is some theoretical debate, as noted in the beginning of Chapter 5 as to whether the classification of prayers and Bible reading as “active” versus displays of religious symbols as “passive” is warranted for the purposes of constitutional analysis, the texts of S.15(2) does not allow the elimination of such a distinction. Section 15(2) provides that the religious observance is “*conducted* on an equitable basis” and that “*attendance* at them is free and voluntary” (emphasize added).¹³⁶⁹ Therefore it cannot be maintained that the display of religious symbols is explicitly permitted by the Constitution. Nevertheless the provisions of S.15(2) illuminate the constitutional principles that any state sponsored religious expression should conform to in public schools – it should treat all believers and non-believers on a equitable basis and should not coerce anyone into acceptance or conformity with a given religious creed, which principles are guaranteed by s 15(1) guaranteeing the right to freedom of conscience, religion, thought, belief and opinion and s.9(1) and (3) guaranteeing equality before the law and prohibiting discrimination on the ground of religion.

The Constitution of South Africa does not contain an explicit establishment clause similar to the one in the US Constitution. Whether nevertheless Art. 15 alone or together with Art.9 should be read to imply a prohibition of symbolic endorsement of religion is a question on which there is no agreement among the justices of the Constitutional Court nor among the scholarly community. In the discussion that follows it will be argued that the interpretation of Art. 15 according to which state favoritism of a particular religion or religions is prohibited is the one in line with other provisions of the Constitution and with its purpose to set the foundation for a

¹³⁶⁸ William F. Foster, Rassie Malherbe, William J. Smith, *Religion, Language and Education: Contrasting Constitutional Approaches*, EDUCATION AND LAW JOURNAL 211, 221 (1998-1999).

new constitutional order breaking away from the discriminatory practices protected by the laws of the past.

2. Permanent display of religious symbols

In South Africa there is no direct law, regulation or policy regarding the permanent display of religious symbols in public schools, apart from their educational use in Religious Studies classes. Since many schools in South Africa have been founded by religious organizations there are still some public schools which display religious symbols associated with a particular religion. The position of the Federation of Associations of Governing Bodies of South African Schools (FEDSAS) is that according to the principle of sphere sovereignty each school community has “the right to determine their own life and world view” which may also include “an expression of the religious orientation of the particular schools community but without discriminating against people in that particular community who do not subscribe to that particular ethos.”¹³⁷⁰

3. Analysis

As was noted, the South African Constitution has no express establishment provision and according to van der Vyver a general prohibition of establishment may not be read into Section 15 since the Constitution itself contains what are instances of establishment and section 15 (2) permitting the conduct of religious observance at state institutions is often cited to contrast the US jurisprudence on that issue.¹³⁷¹ The question of whether the Constitution proscribes establishment was dealt with by the

¹³⁶⁹ CONSTITUTION OF SOUTH AFRICA 1997, Section 15(2) (b) and (c).

¹³⁷⁰ Paul Colditz, National Chairman: Federation of Governing Bodies of South African Schools, (correspondence by e-mail from March 7, 2006).

Constitutional Court in the case of *S v Lawrence* (1997)¹³⁷² in which the constitutionality of the Liquor Act 27 of 1989 which prohibited the sale of wine on Sundays, Good Friday and Christmas Day¹³⁷³ was challenged. According to Justice Chaskalson, writing for the majority, S.15 protects only the free exercise of religion while unequal treatment and discrimination is dealt with by Art.9, the equality provision of the Constitution.¹³⁷⁴ He noted that “endorsement of a religion or a religious belief by the state” would be inconsistent with S.15 only if it has the effect of coercing persons to observe the practices of a particular religion, or of placing constraints on them in relation to the observance of their own different religion”¹³⁷⁵ Three other justices joined in his opinion.

If the view of Chaskalson is accepted then the permanent affixation of religious symbols in state schools, even if they are the symbols of one religion, and most probably these would be Christian symbols, would not run afoul of the constitution. Exposure to the religious symbol would not amount to a direct coercion of the students to observe any religion nor would place direct constraints on students to practice their own faith or no faith at all. However it should be noted that the German Constitutional Court held that the ordinance prescribing the placement of a crucifix in each classroom contradicted not only the state mandate of neutrality but also the negative religious freedom of students.

Although six justices of the South African Constitutional Court found the Liquor Law constitutional, they did not agree on the reasons—they split 4-2, and 5 justices out of the 9 argued that the constitutional provision protecting freedom of

¹³⁷¹ Johan D. van der Vyver, *Constitutional Perspective of Church-State Relations in South Africa*, *BYU L. REV.* 635, 654 (1999).

¹³⁷² (CCT38/96) 1997 (10) BCLR 1348; 1997 (4) SA 1176; [1997] ZACC 11 (6 October 1997).

¹³⁷³ *Id.* at para 6.

¹³⁷⁴ *Id.* at paras. 100-102.

¹³⁷⁵ *Id.* at para. 104.

religion also prohibited state symbolic religious endorsement and favoritism.

Mureinik also argues that such endorsement is inherently coercive:

State endorsement of a religious perspective—be it only the perspective that religion is to be preferred to irreligion—turns those who adhere to that perspective into insiders, and those who do not in to outsiders. That alone puts pressure – governmental pressure, since it comes from the state – on non-adherents which may be considered coercion.¹³⁷⁶

Another reason why art. 15 should be read to prohibit state religious endorsement and preferentialism is given by Du Plessis who argues that the approach of the five justices is the one that promotes better religious tolerance since:

In political terms, a state's evenhanded treatment of divergent religious convictions and the realization of these convictions and their effects in societal life probably does more to evidence (and enhance) positive tolerance.¹³⁷⁷

Smith has also criticizes Chaskalson's approach for espousing "a rather restricted conception of religious liberty in his judgment" since equal treatment of the state of all religions is necessarily linked to the prohibition of state coercion of religious belief—"if the state makes it easier for some to practice their religious, that inequality means that others are not as free to practice theirs."¹³⁷⁸

Although Du Plessis criticizes the US approach as one that leads to freedom from religion rather than freedom of religion,¹³⁷⁹ he also argues that the Constitutional Court of South Africa has been preoccupied with issues of free exercise "at the cost of

¹³⁷⁶ Mureinik, cited in Richard Cameron Blake and Lonn Litchfield, *Religious Freedom in Southern Africa: The developing Jurisprudence*, BYU L.REV. 515, 558 (2001).

¹³⁷⁷ Lourens Du Plessis, *Freedom of or Freedom from Religion? An Overview of Issues Pertinent to the Constitutional Protection of Religious Rites and Freedom in "the New South Africa"*, 2001 BYU L. REV. 439, 453 (2001). See also Francois Venter, *Religious Freedom in South Africa*, Public Law Themes in South Africa and Germany, Alexander von Humboldt Foundation Germany, 8 – 10 September, 2005 <http://law.sun.ac.za/publawconf/papers/FVenter/Religious_Freedom.pdf>, who expresses the following position: "Resort to constitutional rights will probably result in challenges to the constitutionality of many common law and statutory provisions in South Africa, particularly those showing a Christian bias. A number of these provisions will not likely survive constitutional review. I am convinced, however, that a visible trend towards greater interreligious and inter-denominational equality will serve the cause of all religions in a religiously pluralistic society. This, I believe, is the most sensible way of promoting religious tolerance."

¹³⁷⁸ Nicholas Smith, *Freedom of Religion*, in CONSTITUTIONAL LAW OF SOUTH AFRICA, Ed. by, Chaskalson, Kentridge, Klaaren et al., 1st Ed. 1998, at 18, <http://www.chr.up.ac.za/centre_publications/constitlaw/pdf/19-Freedom%20of%20Religion.pdf>.

broadly conceived establishment concerns” and has failed to develop a nuanced jurisprudence on the evenhanded treatment of diversity of religions in South Africa,”¹³⁸⁰ in which the equality provisions of the Constitution could also play a significant role.¹³⁸¹

The approach of the five has been criticized by Blake and Litchfield, who argue that the fact that justices who embraced a form of the endorsement test reached different results on the case at bar was evidence of the weakness of test.¹³⁸² However, there is no guarantee that adoption of the coercion only test of Chaskalson would lead to unanimous decisions, since judicial opinions can differ on what constitutes indirect coercion as they can and often do differ on the application of any other test for constitutionality. A close examination of the arguments of five justices reveals that their approach is better reasoned in terms of a structural and teleological interpretation of the constitution.

Justice Sachs, in his concurring opinion joined by Justice Mokgoro argued that state endorsement of religion may violate S.15 through its symbolic effect—if sends a message that is inclusionary for some and exclusionary for others.¹³⁸³ He referred to the endorsement test of Justice O’Connor and although warning against automatic transplanting of foreign legal doctrines and formulae, argued the dicta of US courts was useful in delineating problems that face any modern day constitutional jurisprudence on the relations between church and state.¹³⁸⁴ Furthermore Justice Sachs emphasized that Justice O’Connor’s concern with the message of state religious endorsement sent to non-adherents to the effect that they are outsiders and not equal

¹³⁷⁹ *Id.* at 450.

¹³⁸⁰ *Id.* at 465.

¹³⁸¹ *Id.* at 450-451.

¹³⁸² Richard Cameron Blake and Lonn Litchfield, *Religious Freedom in Southern Africa: The developing Jurisprudence*, *BYU L.REV.* 515, 5558-559 (2001).

¹³⁸³ *S v Lawrence*, *supra* note 217, at para.138.

and full members of the political community “has special resonance in South Africa” in view of that fact that the in the pre-constitutional regime of apartheid “[r]eligious marginalization in the past coincided strongly in our country with racial discrimination, social exclusion and political disempowerment”¹³⁸⁵

It should also be noted that during the apartheid state education was also not neutral with respect to religion – the curriculum policy followed the so-called Christian National Education (CNE) ideology, which had a “conservative religious and patriotic basis”¹³⁸⁶ and in assembly halls rituals were held that “blurred boundaries between religion and national symbols of flag and anthem.”¹³⁸⁷ Furthermore, Jansen cautions against taking into consideration only what is “visible, dramatic and well-publicized” about the development in South Africa in respect to race, democracy and education since 1994. He notes that considerable research shows that “the display of cultural symbols, the organization of religious symbols” among other school practices, are “all organized in ways that show preference based on race (as well as social class, religion and gender).”¹³⁸⁸

¹³⁸⁴ *Id.* at para 141.

¹³⁸⁵ *Id.* at para. 152. For the privileged position in law of a certain vision of Christianity see also van der Vyver, *supra* note 1371, at 636-637.

¹³⁸⁶ See Jenni Karlsson, *Schooling Space: Where South Africans Learnt to Position Themselves within the Hierarchy of Apartheid Society*, 12 (3) PEDAGOGY, CULTURE AND SOCIETY 327, 328 (2004).

¹³⁸⁷ *Id.* at 336. See also Chidester on religious education in the apartheid era: “Religious education was driven by a particular kind of Christian confessionalism and triumphalism, a confessionalism that required pupils to embrace prescribed religious convictions and a triumphalism that explicitly denigrated adherents of other religions.... In a widely used textbook for Religious Education and Biblical Studies, this Christian triumphalism resulted in claims to a privileged religious ownership of the nation and its public schools by proclaiming that South Africa “is a Christian country and it is only right that our children be taught in the Christian faith—also in our schools.” Abandoning any pretence of tolerance or respect for difference, the textbook asserted bluntly that a “child who follows the Christian faith is more likely to behave in a moral way than a non-Christian or an un-religious child” (internal quotations omitted) (David Chidester, *Religion Education in South Africa: Teaching and Learning About Religion, Religions, and Religious Diversity*, Printed in *Teaching for Tolerance and Freedom of Religion or Belief. Report from the preparatory Seminar held in Oslo December 7-9, 2002* (prepared by Lena Larsen and Ingvill T. Plesner, published by the Oslo Coalition on Freedom of Religion or Belief), <http://folk.uio.no/leirvik/OsloCoalition/DavidChidester.htm#_edn1>).

¹³⁸⁸ Jonathan D. Jansen, *Race, Education And Democracy After Ten Years: How Far Have We Come?*, Prepared for the Institute for Democracy in South Africa (IDASA) July 2004, <<http://www.chet.org.za/issues/raceeducation.doc>>. Without making any conclusive inference from the relation between the achievement of racial and religious equality at schools it should also be noted

Therefore in South Africa state symbolic privilege of Christianity in particular in the words of Justice Sachs, “not only disturbs the general principle of impartiality in relation to matters of belief and opinion, but also serves to activate memories of painful past discrimination and disadvantage based on religious affiliation.”¹³⁸⁹ Thus S.15 in his opinion would also preclude the state from “favouring or disfavouring any particular world-view.”¹³⁹⁰

Under this view the decision of school authorities to display of the symbols of one religion as a crucifix on school walls would amount to a clear endorsement of that religion. The fact that the school community may be mostly composed of believers in that religion does not render the endorsement any less problematic. As Justice Sachs observed one of the main purposes of the Constitution is precisely to protect the fundamental rights of minority groups “who might well be tiny in number and hold beliefs considered bizarre by the ordinary faithful”¹³⁹¹ and what may be invisible or normal in the eyes of the religious majority “might be communicated as oppressive and exclusionary to another who lives in a different realm of belief.”¹³⁹²

In contrast to the US constitutional jurisprudence where a finding that the state sends a message of endorsement of religion is enough for holding a law unconstitutional, according to Justice Sachs, even though state religious favoritism breach Art. 15 of the South African Constitution, it may nevertheless be justified

that a study of the South African Human Rights Commission published in 1999 revealed that schools which de facto remained segregated and had no or a token few of black students, shared several common characteristics, one of them being that they had a “school ethos including sporting codes, *religious activities*, extramural practices and initiation rites which are alien to black learners.” (Salim Vally and Yolisa Dalamba, *Racism, ‘Racial Integration’ and Desegregation In South African Public Secondary Schools*, South African Human Rights Commission, pp.28-29, <http://www.sahrc.org.za/final_combined_school_racism_report.PDF>, emphasis added.)

¹³⁸⁹ *S v Lawrence*, supra note 217, at para 152.

¹³⁹⁰ *Id.* at para. 160.

¹³⁹¹ *Id.*

¹³⁹² *Id.* at 161. Justice Sachs also recognized the problems with O’Connor’s endorsement test related to the identification of the “reasonable observer.” He identified the a reasonable South African of common sense “immersed in the cultural realities of our country and aware of the amplitude and

under the limitations clause of Art. 36 which calls for a contextual proportionality analysis.¹³⁹³ In upholding the constitutionality of the Liquor Act Justice Sachs weighted the symbolic effect of religious favoritism of the Act, which was not accompanied by religious persecution but by indifference, and which was “a relatively insignificant relic of a vanishing era, rather than a pungent symbol of continuing hegemony,” against the consequences of alcohol abuse which the state wished to limit.¹³⁹⁴

When a religious symbol is permanently displayed, the message of religious favoritism which is exclusionary to non-adherents may have to be weighted against the competing interest of the state to give room to the religious expression of the majority in the school community and also to honor the Christian heritage in the country although the latter interest was not referred to in the communication by the SA of governing bodies. The Constitutional Court has also performed a balancing of competing rights so that no right is realized in such a way as to negate other competing rights.¹³⁹⁵

Venter argues for using the principle of *praktische Konkordanz* for optimizing the result of the process of weighing of majority and minority interests, since according to him neither “[e]xplicit favouring of a religion or religious institution amidst religious pluralism cannot be defended in a constitutional state” nor should the state “ignore the historical and social ethos of its population and to act as though

nuanced nature of our Constitution” who does not wish to erase all traces of religion from the public life, nor does he accept the past sectarian practices as natural and proper.

¹³⁹³ *Id.* at 167.

¹³⁹⁴ *Id.* at 171.

¹³⁹⁵ In *Prince v President of the Law Society of the Cape of Good Hope* CCT 36/00 Justice Ncgobo declared that: “The balancing act requires a degree of reasonable accommodation from all concerned.” (*Id.* at para 76). And in his concurrence Justice Sachs states that: “The balancing which our Constitution requires ... avoids polarised positions and calls for a reasonable measure of give-and-take from all sides” (*Id.* at para 161).

religious convictions are irrelevant.”¹³⁹⁶ Similarly Malherbe points to the German *Crucifix Case* as a “good illustration of the principle of voluntariness” holding unconstitutional the state mandate to display the crucifix on school walls since the rights of believers and non-believers were not reconciled.¹³⁹⁷ With respect to the religious observances, he notes that “[i]t is possible in practice to apply the principle of voluntariness fully, to accommodate both the believer and the non-believer, and to ensure equity between different religions or denominations.”¹³⁹⁸ Such accommodation in the case of religious symbols is fully attainable by setting up displays of religious symbols of the diverse religions represented in the school community as well as in the whole of South Africa.

In her dissenting in opinion *S v. Lawrence* Justice O’Regan also expressed her disagreement with Justice Chaskalson’s coercion only test:

I also cannot agree with Chaskalson P when he concludes that because the provisions do not constrain individuals’ “right to entertain such religious beliefs as they might choose, or to declare their religious beliefs openly, or to manifest their religious beliefs”, there is no infringement of section 14 (at para 97). In my view, the requirements of the Constitution require more of the legislature than that it refrain from coercion. It requires in addition that the legislature refrain from favouring one religion over others. Fairness and even-handedness in relation to diverse religions is a necessary component of freedom of religion.

Justice O’Regan argued that although the absent of an establishment clause and the provision of 15(2) for holding of religious exercises at public institutions speak that no strict separation between church and state is mandated by the Constitution,¹³⁹⁹ state endorsement of religious practices has to be voluntary and equitable. Justice O’Regan pointed out two reasons why the South Africa Constitution should be read to forbid “explicit endorsement of one religion over

¹³⁹⁶ Francois Venter, *Religious Freedom in South Africa*, Public Law Themes in South Africa and Germany, Alexander von Humboldt Foundation Germany, 8 – 10 September, pp.11-2, 2005<http://law.sun.ac.za/publawconf/papers/FVenter/Religious_Freedom.pdf>.

¹³⁹⁷ Malherbe, *supra* note 237.

¹³⁹⁸ *Id.*

¹³⁹⁹ *Id.* at 119.

others”: such religious endorsement would result in indirect coercion, and secondly because it is “in itself a threat to the free exercise of religion, particularly in a society in which there is a wide diversity of religions”¹⁴⁰⁰ According to Justice O’Regan, the requirement of equity at least requires that the state “state act even-handedly in relation to different religions.”¹⁴⁰¹ That does not require that the state be committed to “a scrupulous secularism, or ... complete neutrality.”¹⁴⁰² With respect to religious observances “the requirement of equity may dictate that the religious observances held should reflect, if possible, the religious beliefs of that particular community or group”¹⁴⁰³

The requirement of equity with respect to the display of religious symbols at public schools would dictate that not only the symbols of the religious majority be displayed. The permanent display of religious symbols of one religion, which most often would be the symbols Christianity, is an unconstitutional symbolic religious endorsement. On other hand, where like at some schools in Québec, symbols of different religions are displayed in order to teach religious tolerance and celebrate diversity, the displays are in conformity with the provisions of Section 15. It should be noted that in contrast to the US, where such displays should contain secular symbols as well, in South Africa the lack of an explicit establishment clause and the provision for religious exercises at public institutions means that displays that contain only religious symbols, but do not show preferentialism of one religion over others would also be constitutional. According to Plessis the South African Constitution “creates room for the state to take positive measures to ensure an even handed accommodation of religious concerns” and is in that respect different from the US

¹⁴⁰⁰ *Id.* at 123.

¹⁴⁰¹ *Id.* at 122.

¹⁴⁰² *Id.*

¹⁴⁰³ *Id.*

approach which according to him often transforms evenhanded treatment of religion into “state’s ‘non-treatment’ of any religious matters whatsoever.”¹⁴⁰⁴ However to a display that includes not only religious but also cultural symbols would be an approach that best respects the rights of both believers and non-believers since such displays would send a message of inclusion to all members of the school community—both believers and non-believers. This possibility to accommodate the rights of all students, not just those representing the religious majority represents a less restrictive alternative to fulfill the purpose of providing space for the religious expression of the school community and learning about the cultural heritage of South Africa and therefore under a step-by-step proportionality analysis by under Art. 36 (1) the decision of school authorities to display religious symbols of one religion is unconstitutional.

The requirement that the state should not engage in symbolic religious endorsement clearly applies to any national or provincial statutes, as well as to regulations by the education departments. The Federation of Associations of Governing Bodies of South African Schools in its position paper on the draft Religion in Education Policy of the Ministry of Education, maintained that public schools although financially supported by the state are not “state organs or internal parts of the state”¹⁴⁰⁵ and therefore the “postulated” neutrality of the state could not be constitutionally “superimposed” upon them.¹⁴⁰⁶ The Federation claims that as social collectives schools had the freedom to “dispose over their own internal directional choices, in some cases manifested in their mission and vision statements” while

¹⁴⁰⁴ Plessis, *supra* note 1377, at 457-458.

¹⁴⁰⁵ *Comment on the Draft Policy: Religion and Education*, FEDSAS, <<http://www.cla.org.za/index.php?id=26>>.

¹⁴⁰⁶ *Id.* at 8.

noting that “this freedom does not legitimize intolerance and disrespect towards alternative orientations.”¹⁴⁰⁷

In their position paper on the DoE's Policy on religion and education the federation of school governing bodies in South Africa argues that the "postulated "neutrality" of the state" may not be constitutionally "superimposed" on public schools, since they are not "organs of the state" but independent societal non-state organs.¹⁴⁰⁸ However, I would argue, that the constitutional mandate of non-endorsement also binds public schools.

The provisions of the Bill of Rights apply by virtue of s 239 (b) to organs of state which are institutions “exercising a public power or performing a public function in terms of any legislation.”¹⁴⁰⁹ Under the Interim Constitution Van Dijkhorst set a rather restrictive test under which an institution was an organ of state only if it was under effective control by the government.¹⁴¹⁰ However, under the final Constitution institutions that are bound by it need not be an intrinsic part of the government nor subject to the effective legislative or executive control. As Woolman argues:

The Drafters of the Final Constitution have drafted this section in such a manner as to ensure that if the state created the conditions for the exercise of some power of function, then the institutions produced and the individuals so empowered are going to have to answer for their actions in the same manner as those institutions and officials to whom we have no trouble ascribing the appellation "government".¹⁴¹¹

They only have to be fulfilling public functions under a statute and public schools definitely fall within that category. Thus, school governing bodies are bound by Art.15 like all other state organs. In *Western Cape Minister of Education and*

¹⁴⁰⁷ *Id.*

¹⁴⁰⁸ *Id.* at 9, 12-13.

¹⁴⁰⁹ CONSTITUTION OF SOUTH AFRICA, s. 239 (b) (ii)

¹⁴¹⁰ *Directory Advertising Cost Cutters* 1996 3 (SA) 800, 810 (T); *Wittmann v. Deutscher Schulverein, Pretoria & Others* 1998 (4) SA 423 (T), 1999 (1) BCLR 92 (T).

¹⁴¹¹ Stuart Woolman, *Application* in CONSTITUTIONAL LAW OF SOUTH AFRICA, 2nd edition, (2005), <<http://www.chr.up.ac.za/closa/chapters/Chapter%2031%20Application.pdf>> at 31-101.

*Others v Governing Body of Mikro Primary School*¹⁴¹² the Supreme Court of Appeal held that the lower court had erred in accepting Van Dijkhorst's interpretation of what constitutes an organ of state under the Interim Constitution for valid under the Final Constitution as well, and thus "a public school, together with its governing bodyis clearly an institution performing a public function within the meaning of the [School] Act." and concluded that it is an organ of state as contemplated in the Constitution.¹⁴¹³

The South African Federation of School Governing Bodies has also maintained that schools as juristic persons should have their freedom of religion respected by the state and that schools as a "conviction-community (while observing the required tolerance towards those with alternative commitments or convictions)" should be free to exercise their basic commitments confessionally.¹⁴¹⁴ As Smith however argues "it simply does not suffice to proceed on the basis of what a majority at a particular school wants...Merely affording the parents of each child at an educational institution an equal vote to decide which sort or sorts of religious observances will be included and which will be disallowed ignores one of the most important purposes of a Bill of Rights—the protection of minority rights",¹⁴¹⁵

Educational use of religious symbols

In the much debated National policy on Religion and Education religious symbols serve as educational tools. Students in lower grades learn to identify symbols of their own religion and symbols associated with a range of religions in South Africa. In the Intermediate Phase students learn about values and festivals, religious ritual and

¹⁴¹² Case No. 140/05, (27 June 2005).

¹⁴¹³ *Id.* at para 20.

¹⁴¹⁴ FEDSAS, *supra* note 1405, at 35.

¹⁴¹⁵ Nicholas Smith, *supra* note 1378, at 9-11.

customs. In the Senior phase students learn about the spiritual philosophies connected to the values and practices.¹⁴¹⁶ Thus the National Curriculum for Religious Studies for grades 11-12 provides for the study of religious symbols.¹⁴¹⁷ Students are taught to “evaluate the significance of symbols in religion,”¹⁴¹⁸ describe and explain symbols central to different religions, and how the meaning of symbols may change over time.¹⁴¹⁹

This educational use of religious symbols has also raised objections from some religious groups. Rob Mc Cafferty, on behalf of United Christian Action has argued that in the foundation stage children are too young to be introduced to symbols of different religions and generally objected that the outcome of the educational approach is “more than “educational” and constitute[s] an inculcation into another religion at an age where the child is unable to make the necessary distinctions between the religion of the home, the church and now the school.”¹⁴²⁰ The South African Council of Churches has also criticized the Policy for its method of “seek[ing] to grasp systems of belief through their outward manifestations and symbols” and thus “obviate[ing] the need to understand a religion ‘from the inside.’”¹⁴²¹ These objections are part of the general criticism that some religious groups have voiced against the government policy on religion and education and the type of religion education introduced. They argue that religion education violates children’s freedom of religion and parental rights over their religious upbringing since

¹⁴¹⁶ National Policy on Religion and Education, Kader Asmal, Minister of Education, Staatskoerant, 12 September 2003

¹⁴¹⁷ Religion Studies - Curriculum Statement, September 21, 2004, Department of Education South Africa, <<http://www.education.gov.za/main.asp?src=docu&xsrc=540>> p.11.

¹⁴¹⁸ *Id.* at 16.

¹⁴¹⁹ *Id.* at 23.

¹⁴²⁰ Rob Mc Cafferty, *Submission on the Religion and Education Policy Document*, United Christian Action, July 17, 2003, <http://www.christianaction.org.za/media_submissions/uca_Submission%20on%20Religion%20and%20Education%20Document.doc>.

this type of education indoctrinates in secular humanism, teaches the equality of all religions and respect for moral values inimical to the religious beliefs parents want to inculcate in their children.¹⁴²²

The merits of these objections concern the larger issue of Religious Education at public schools which is beyond the scope of this paper, as for the narrow issue of the educational use of religious symbols it should be noted that learning about the symbols of different religions does not send any message of state favoritism of a particular religion or religion in general and nor does it indoctrinate into any religious belief. The purpose and effect of the educational use of religious symbols is to foster tolerance and respect for all members of the school community regardless of their different religious affiliation or absence of such affiliation.¹⁴²³ The introduction of religious symbols of different religions is accompanied by the recognition of the child's own religious affiliation and corresponding symbols and does not affect the religious instruction the child receives from her parents and religious institutions.

XXI. CANADA

At least at present, disputes in Canada regarding state sponsored displays of religious symbols seem to be "less frequent and less passionately contested" in Canada than in the United States.¹⁴²⁴ There is no case dealing with the issue of the constitutionality of religious symbols displays in public schools. The first part of the

¹⁴²¹ South African Council of Churches, *Draft Policy on Religion in Education: Submission to the Department of Education*, 22 April 2003, <<http://www.sacc-ct.org.za/reeducat.html>>.

¹⁴²² See for eg., *Views on the Draft Curriculum 2005 Statements*, Cell Church Online, (visited March 28, 2006), <http://www.cellchurchonline.com/downloads/views_on_the_new_curriculum.doc>.

¹⁴²³ See e.g., Na'eem Jeenah, *Religion and Schools*, Education Rights Project, pp.7,12, (visited, 27 March 2006) <www.erp.org.za/pdf/religion%20booklet_WEB.pdf>.

¹⁴²⁴ See Christopher L. Eisgruber and Mariah Zeisberg, *Religious freedom in Canada and the United States*, 4 (2) Int'l J Con Law, 244, 265 (2006). According to the authors this difference is partly due to the different textual provisions in the constitutions of the two countries, the different level of religiosity of the populations, and the greater fragmentation of political power in the US which they view as an

section will present an overview of the statutes, regulations and practices regarding the display of religious symbols at public schools in different Canadian provinces, and the second part will offer an analysis of a hypothetical case challenging the constitutionality of such displays.

1. Provincial Regulation

1.1 Quebec

The importance of according due recognition to the religious cultural heritage of the majority has been emphasized by the Committee of Religious Affairs in its brief to the Minister of Education. The brief warns of problems if the policy of diversity and respect and promotion of the principle of multiculturalism “compel the traditional majorities to deny their history.”¹⁴²⁵ Recognition of this heritage, according to the brief is also necessary for successful integration of immigrant children in Quebec – “To be welcoming, a host must prepare his or her home, not tear it down.”¹⁴²⁶

The Committee stressed that providing space for religious expression at schools should be done by upholding the principle of equality and the rights to freedom of conscience for all students.¹⁴²⁷ As was noted with respect to religious dress, the Committee properly draws a distinction between private religious speech and speech initiated by school authorities, the latter being subject to the principle of

incentive for more litigation on the part of religious minorities that have lots on the local level. (Id at 268).

¹⁴²⁵ *Religious Rites and Symbols in the Schools*, *supra* note 1118, at 40.

¹⁴²⁶ *Id.*

¹⁴²⁷ *Id.* at 53.

state neutrality and non-discrimination and respect for student's rights to "negative" religious freedom.¹⁴²⁸

Since Catholicism is the predominant religion in Quebec crucifixes or crosses are the symbols most often displayed in Quebec schools.¹⁴²⁹ The Committee questioned the justification of such displays, as well as display of other religious symbols, for its compliance with the principle of religious neutrality of schools, since they could be interpreted as "giving the school a *de facto* denominational status."¹⁴³⁰

With respect to the protection of the negative religious freedom of students the Committee considered that factual circumstances are important. The questions for consideration listed by the Committee address issues similar to those addressed by the courts in the US and discussed in the section II.3 above—whether the symbol is displayed alone or with other secular and religious symbols; whether the display is permanent or temporary; whether the purpose of the display is to proselytize or to educate; what cultural significance the symbol has.¹⁴³¹ The committee has also identified three other factors, which have been considered in the US with respect to teacher's religious dress: "How old are the students? Do they constitute a captive audience? Does the school staff tend to proselytize or is it impartial?"¹⁴³²

The Committee also endorses the distinction between "purely religious symbols and those that have acquired a more cultural character over the years, especially the singing of Christmas carols and the display of Nativity scenes."¹⁴³³ It argues that these symbols should be treated like any other cultural symbol and that they present an opportunity to teach students about the cultural traditions in Québec.

¹⁴²⁸ *Id.* at 54.

¹⁴²⁹ *Id.* at 63.

¹⁴³⁰ *Id.*

¹⁴³¹ *Id.*

¹⁴³² *Id.*

¹⁴³³ *Id.* at 65.

The Committee recommends that schools should designate a place where individuals, presumably both students and teachers, can exhibit the symbols of their faith “in ways that do not lend the school a denominational character.”¹⁴³⁴ This suggestion corresponds to what in the US would be called the opening of a limited public forum where all students would be able to display symbols of their culture and religion. Such displays would not conflict with the state’s obligation of neutrality since the school would be creating a venue for the expression of private speech and they would contribute to the school’s mission to educate for respect and tolerance towards the diverse religions and cultures represented in the students body, in line with the principle of multiculturalism enshrined in the Charter.

The Committee gives as examples “walls of peace” or “walls of respect” in the school building where “symbols representing religious traditions and photographs of the great spiritual leaders” are displayed. In some schools students of different religious are given the floor to talk about the respective religious traditions behind the religious festivals they celebrate at home.¹⁴³⁵ The Committee correctly recommends such initiatives which help to promote dialogue and education especially to certain schools “where problems stemming from ideological confrontation are dealt with by forbidding religious expression in their environment.”¹⁴³⁶

1.2 New Brunswick

New Brunswick has adopted the second alternative approach identified in the discussion related to the German *Crucifix* case – namely, prohibiting the school to display any religious symbols. The prohibition aims at achieving state neutrality with respect to any religious, political, national or ethnic identity. Thus the ministerial

¹⁴³⁴ *Id.* at 54.

¹⁴³⁵ *Id.* at 65.

regulation in force reads that: “Symbols, or emblems distinctive of any national or other society, political party or religious organization shall not be exhibited or employed in or on school property or in school exercises.”¹⁴³⁷

1.3 Ontario

Public schools boards in Ontario do not have any permanent displays of religious symbols or icons in their elementary and secondary schools, in contrast to the separate Catholic school boards, which do set up such symbolic displays. Since the former schools are non-denominational school boards reason that any permanent display of religious symbols would give primacy to a particular religion and would render a sectarian character of the school contrary to their legal status and mission to welcome students of all faiths and none and celebrate diversity.¹⁴³⁸ Holiday celebrations on the other hand may include the displays of religious symbols associated with particular religious holidays--Christmas, Chanukah, Eid.

1.4 Alberta

Although there is no regulation to that effect in Alberta it can be inferred from the Catholic bishops reaction to the proposal for “shared facilities’ that the practice is that public schools in contrast to separate schools, most of which are Roman Catholic are not adorned with religious symbols. In Alberta there was public discussion on the idea that Catholic schools and public schools could share facilities. The idea was

¹⁴³⁶ *Id.* at 66.

¹⁴³⁷ New Brunswick Regulation 97-150 Under The Education Act (O.C. 97-1041), Filed December 23, 1997, <<http://www.gnb.ca/0062/PDF-regs/97-150.pdf>>.

¹⁴³⁸ Communications Office, Kawartha Pine Ridge District School Board, 1994 Fisher Drive, Peterborough, ON K9J 7A1, email correspondence from March 16, 2006. A survey conducted among 15 public school boards also confirmed that no religious symbols are permanently displayed in their schools.

rejected by Alberta's bishop in a letter which among other things explained that in Catholic schools:

religious symbols and artifacts are displayed in each classroom, in the halls, and in signage both inside and outside the building. These are regularly used as teaching opportunities. The shared faith life of the school permeates every part of the building...anything that detracts from this permeation, such as a "shared facility" situation, leads to the loss of something vital to Catholic education."¹⁴³⁹

The Alberta Catholic School Trustees' Association also rejected the idea, because religious symbols will be the "first casualties" and "And once the religious symbols go, that permeation (of Catholic education by Gospel values) also goes with it."¹⁴⁴⁰

1.5 Saskatchewan

In Saskatchewan the controversial Anderson Amendments to the School Act prohibited not only teacher's religious garb but also provided that: "No emblem of any religious faith, denomination, order, sect, society or association, shall be displayed in any public school premises during school hours."¹⁴⁴¹ The amendment was adopted because of the fears of protestant parents that crucifixes, emblems and statues of saints in school controlled by predominantly catholic school boards constituted a sectarian influence and indoctrination.¹⁴⁴² In the 1940's the prohibition of the displays of religious emblems was not fully enforced since administrators feared public protests if they removed the crucifixes from some of the schools.¹⁴⁴³ Schools were covering them in white cloth when inspectors were visiting. Later on, the practice was that if there were no complaints, which could come primarily from

¹⁴³⁹ Thomas Collins, Frederick Henry, Arthe Guimond, Lawrence Huculak, OSBM Luc Bouchard, *Catholic Education: Becoming Salt and Light for the World*, September 4, 2002, <http://www.acsta.ab.ca/resources/pastoral/cath_facilities.htm>.

¹⁴⁴⁰ ACSTA Opposes Sharing Schools, WESTERN CATHOLIC REPORTER, May 17, 1999, <<http://www.wcr.ab.ca/news/1999/0517/sharingschools051799.shtml>>

¹⁴⁴¹ School Act R.S.S. 1930, c.131, section 257 (1).

¹⁴⁴² Huel, *supra* note 1185.

¹⁴⁴³ Raymond Huel, *The Anderson Amendments: A Half Century Later*, CCHA, Study Sessions, 47(1980), 5-21, (visited, 1 November 2005), <http://www.umanitoba.ca/colleges/st_pauls/ccha/Back%20Issues/CCHA1980/Huel.html#N_1>.

protestant parents, inspectors were closing their eyes to the presence of religious insignia.¹⁴⁴⁴ There is no such prohibition in the Education Act currently in force.

1.6 Newfoundland and Labrador

Before 1997 Newfoundland and Labrador had a Christian denominational system and in some denominational schools, mostly the Roman Catholic ones religious symbols were prominently displayed on classroom walls and halls. In 1997 the educational system was reformed and became non-denominational.¹⁴⁴⁵ In some schools there are still religious symbols permanently displayed but this is viewed as an exception and a remnant of the old system.¹⁴⁴⁶ There has been no litigation over this issue and so far no one has objected and/or no one has removed these symbols.¹⁴⁴⁷ The possible explanation for this fact is that especially in smaller communities—like some villages all of the residents are of one denomination, for example, Roman Catholic and so when such symbols are displayed this is not an issue.

1.7 Manitoba

In Manitoba the Public School Act provides that public schools are non-sectarian and it is the opinion of the Ministry of Education that by virtue of that provision the permanent affixation of religious symbols in the public school building

¹⁴⁴⁴ *Id.*

¹⁴⁴⁵ After a provincial referendum in favor of a constitutional amendment to Term 17 of the Newfoundland Terms of Union to replace the existing denominational school system with a single non-denominational public school system the amendment was carried under sec 43 of the Constitution Act, 1982. (See Newfoundland Act 12 & 13 Geo. VI, c. 22 (U.K.), <<http://www.solon.org/Constitutions/Canada/English/nfa.html>>).

¹⁴⁴⁶ Bryce Hodder, Program Development Specialist: Religious Education, Department of Education, Newfoundland and Labrador, (Correspondence by e-mail from March 8, 2006).

¹⁴⁴⁷ *Id.*

is impermissible.¹⁴⁴⁸ Temporary display of religious symbols may be employed for educational purposes as part of a survey course or a study of comparative religious.

1.8 British Columbia

There is no practice in British Columbia to have religious symbols permanently affixed on public school buildings.¹⁴⁴⁹

2. Analysis

2.1 Permanent Displays

The overview of current approaches to religious symbols at public non-denominational schools in the provinces reveals that generally no permanent displays of religious symbols are exhibited. Where some symbols are still displayed this is a remnant of old denominational systems that is considered inappropriate and gradually eliminated. Such an approach is in conformity with the Charter.

If the issue of the constitutionality a permanent display of a religious symbol such as the crucifix, comes before the courts it would most likely be found that it violates Art.2 (a) protecting the right of freedom of conscience and religion. Section 2(a) protects not only religious belief and its manifestations and practice but “equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice also religious-non-belief”¹⁴⁵⁰ The Charter also protects religious minorities from imposition of

¹⁴⁴⁸ David Yeo, (Correspondence by e-mail from March 9, 2006).

¹⁴⁴⁹ Lorne MacDonald, Inquiry Officer, BC Human Rights Tribunal, (Correspondence by e-mail from March 10, 2006).

¹⁴⁵⁰ *R. v. Big M Drug Mart Ltd.*, *supra* note 158, at 123.

conformity to majoritarian religious beliefs and practices. As the Supreme Court has noted:

What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards religious minorities from the threat of "the tyranny of the majority."¹⁴⁵¹

A constitutional challenge of a crucifix displayed on the classroom walls may be examined as a conflict between the positive rights of majoritarian religious groups and the state on whose behalf it acts and students belonging to minority religious groups or those professing no religion at all. A balancing between positive and negative rights to religious freedom is also done under an Section 1 proportionality analysis.¹⁴⁵²

Firstly, however, if courts find that the purpose of a legislative act or governmental action exercising delegated legislative power has an unconstitutional purpose it is not necessary to examine its corresponding impact, since if the purpose of the law is invalid its effects cannot save it.¹⁴⁵³ Thus in *R. v. Big M Drug Mart Ltd.*, (1985), the Supreme Court found that the purely religious purpose of the Lord's day Act offended freedom of religion and had to be ruled out of force and effect without it being necessary to embark onto an examination of its effects.¹⁴⁵⁴

It may be argued that the purpose of a permanent display of the crucifix on classroom walls in public schools is to advance the tenets and doctrine of Roman Catholicism, and to instill reverence towards this religion in impressionable young

¹⁴⁵¹ *Id.* at 96.

¹⁴⁵² See *Multani*, *supra* note 1165, at 26.

¹⁴⁵³ See *R. v. Big M Drug Mart Ltd.*, *supra* note 158, at 8, "Moreover, consideration of the object of legislation is vital if rights are to be fully protected. The assessment by the courts of legislative purpose focuses scrutiny upon the aims and objectives of the legislature and ensures they are consonant with the guarantees enshrined in the *Charter*. The declaration that certain objects lie outside the legislature's power checks governmental action at the first stage of unconstitutional conduct. Further, it will provide more ready and more vigorous protection of constitutional rights by obviating the individual litigant's need to prove effects violative of *Charter* rights. It will also allow courts to dispose of cases where the object is clearly improper, without inquiring into the legislation's actual impact."

¹⁴⁵⁴ *Id.* at 84-88.

children. Such a purpose is inconsistent with the rights to freedom of religion protected by s2(a). As the German Constitutional Court noted in its *Classroom Crucifix* decision compelling public school children to study under the cross is a form of religious compulsion violating the negative right to religious freedom of students not belonging to the Christian faith.

Moreover, it should be noted that the provisions of the Canadian Charter have to be interpreted by virtue of s27 “in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”¹⁴⁵⁵ The permanent display of the symbols of one religion fails to respect the religious diversity in Canada and undermines “the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others”¹⁴⁵⁶ which is an essential mission of public schools. According to the Supreme Court, “The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate.”¹⁴⁵⁷

Arguably it may be accepted that the state is not acting with a religious purpose but with the secular purpose of accommodating the right of religious expression of the majority of the school community who “[i]n seeking to shape the public sphere in this way ... may not see themselves as compelling others to practice their faith” and “may not even consider that they are imposing religion on others; they are simply trying to satisfy their own need to live a life that is religious in all its aspects.”¹⁴⁵⁸ It may also be argued that the religious symbol is placed in order to transmit religious values which are part of the cultural heritage of Canadian society.

¹⁴⁵⁵ Charter of Rights of Freedoms, section 27.

¹⁴⁵⁶ *Multani*, *supra* note 1165, at 78.

¹⁴⁵⁷ *Ross*, *supra* note 1105, at 42.

¹⁴⁵⁸ *Moon*, *supra* note 320, at 567.

While there is no doctrine of state's non-endorsement of religion or irreligion, similarly to the one developed under the First Amendment in the US, the jurisprudence of Canadian Courts, as Moon notes, has clearly shifted from one centered on the issue of "coercion" to one dealing also with the issue of "exclusion"¹⁴⁵⁹ which comes close to the requirement that the state does not symbolically affirm one religion to the exclusion of others. According to him this shift is manifested in the number and the type of acts that courts find as infringing on religious freedom and the wrong addressed is "religious imposition rather than simply religious compulsion, a change in language that signals a potentially significant shift in the scope of the wrong. It may be that religion is imposed on someone even when she/he is not actually required to engage in a religious practice"¹⁴⁶⁰ He also notes that courts have put an emphasis on "inclusion and equal respect in the public sphere."¹⁴⁶¹ For instance, the Supreme Court's statement in *R. v. Big M Mart* that "The theological content of the legislation remains as a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture"¹⁴⁶² comes close to the endorsement test language of Justice O'Connor about the First Amendment proscribing government from sending a message that some are insiders and some outsiders in the political community.

It should be noted that in *R. v. Big M Drug Mart Ltd* the Court noted that "The equality necessary to support religious freedom does not require identical treatment of all religions. In fact, the interests of true equality may well require differentiation in treatment."¹⁴⁶³ However, this does not necessarily mean that state preferentialism towards certain religions is consistent with the Charter. Rather this dictum should be

¹⁴⁵⁹ *Id.* at 567.

¹⁴⁶⁰ *Id.*

¹⁴⁶¹ *Id.*

¹⁴⁶² *R. v. Big M Drug Mart Ltd.*, *supra* note 158, at 97.

interpreted as referring to issues of accommodation related to a substantive theory of equality in contrast to a formal one.

The absence of Establishment Clause does not preclude a finding that the symbolic religious endorsement in the public school setting violates the Charter. The Supreme Court noted in *Big Mart* that:

the applicability of the Charter guarantee of freedom of conscience and religion does not depend on the presence or absence of an "anti-establishment principle" in the Canadian Constitution. The acceptability of legislation or governmental action which could be characterized as state aid for religion or religious activities will have to be determined on a case by case basis".¹⁴⁶⁴

Furthermore, the Court has also noted that the two clauses—the Free Exercise and the Establishment Clause-- are "not two totally separate and distinct categories" but may often overlap.¹⁴⁶⁵ And although "recourse to *categories* from the American jurisprudence"[emphasis added] was declared by the Court as not particularly helpful, as Heerema correctly notes, Canadian courts have often relied for illumination on constitutional issues related to religious freedom on the US constitutional jurisprudence.¹⁴⁶⁶

In the cases dealing with the issue of the constitutionality of opening and closing denomination-specific religious exercises courts have paid particular attention to the situation of religious minorities, the vulnerability of young impressionable children, and mandate to accommodate the multicultural nature of the Canadian society.¹⁴⁶⁷ Therefore even if the purpose of the display is not invalid, it nevertheless infringes upon the religious freedom rights of students belonging to minority religious and

¹⁴⁶³ *Id.* at 124.

¹⁴⁶⁴ *Id.* at 109

¹⁴⁶⁵ *Id.* at 105.

¹⁴⁶⁶ Mark Heerema, *Newfoundland Religion: Term 17(3) of the Newfoundland Act and Its Challenge to the Current Discourse on Freedom of Religion in the Public Sphere*, 14 DALHOUSIE J. LEGAL STUD. 127, 127(2005), ft 53.

¹⁴⁶⁷ *Zylberberg*, *supra* note 154; *Manitoba Assn. for Rights & Liberties Inc. v. Manitoba* (1992), 94 D.L.R. (4th) 678 (Man. Q.B.).

those professing no religion at all. The next question is whether this restriction can be justified under an s1 analysis.

The permanent display of one religious symbol such as the crucifix does not impair religious freedom as little as possible. In the case of *Zylberberg v. Sudbury* the Ontario Court of Appeals found that the experience of Toronto Board of Education manifested there were ways to hold opening exercises which do not give primacy to any religion and are “more appropriately founded upon the multicultural traditions of our society.”¹⁴⁶⁸ Similarly, the experience of Québec schools having “walls of peace” or “walls of respect” manifest that there are less restrictive alternatives to achieve the state purpose which are in conformity with the school mission of teaching for tolerance towards the cultural and religious diversity of Canadian society.

2.2 Holiday Display and Celebrations

In Canada the question of Christmas celebration does not engender that many conflicts as in the US but is still a controversial matter, as some are arguing that political correctness has gone too far. For instance, in November 2005 the town council of Oxford, Nova Scotia passed a motion declaring that December will be the Christmas season and calling schools to call their holiday concerts Christmas concerts.¹⁴⁶⁹ In 2002 the Toronto mayor declared that the “special events staff went too far with their political correctness” in calling the decorated pine tree in the city square a “holiday tree”—the tree has always been and will be a Christmas tree.¹⁴⁷⁰ Similarly the Manitoba’ Premier declared that legislature could “be inclusive without

¹⁴⁶⁸ *Zylberberg*, *supra* note 154, at 63.

¹⁴⁶⁹ *Christmas Proclamation Under Fire From Jewish Group*, CBS NEWS, December 1, 2005, <<http://www.cbc.ca/story/canada/national/2005/12/01/christmasoxford051201.html>>.

¹⁴⁷⁰ *It's A Christmas Tree: Mayor Mel*, November 22, 2002, <<http://wx.toronto.ca/inter/it/newsrel.nsf/0/fddac3d9b68618f685256df60045f064>>.

being silly" in renaming to a Christmas tree the decorated spruce tree in the Legislatures lobby which for the last 11 years was named a "multicultural tree."¹⁴⁷¹

The position of the Ontario Peel District School Board of education is that schools should openly celebrate Christmas as well as the main religious holidays of all students represented in the school community. According to the Board Director, "All students and staff must feel welcome and included for learning to be successful....That atmosphere cannot be created if a single faith is celebrated or no faiths are honored."¹⁴⁷² The position was expressed in a letter to school principles out of a concern that schools were not celebrating Christmas for fear of creating a feeling of exclusion among religious minority students.

2.3 Religious symbols as educational tools

In some provinces, similarly to the UK model, religious symbols are used as educational tools in RE programs which are non-confessional. In Ontario, a public school board can offer an optional religious education program of a cultural nature. The program should respect the religious freedom rights of students guaranteed by the Charter and should not endorse any particular religion by treating it with priority in the program.¹⁴⁷³ The Ontario Curriculum for secondary education contains a course on World Religions.¹⁴⁷⁴ Completing the course students should be able to "identify the origin and significance of various practices, rituals, symbols, and festivals; demonstrate an understanding of the role of sign and symbol in various religions" and

¹⁴⁷¹ "Multicultural Tree" reverts to a "Christmas Tree" in Manitoba, December 14, 2004, <http://www.religioustolerance.org/xmas_conflict2.htm>

¹⁴⁷² Roger Belgrave, *Christmas OK at Public Schools*, The Brampton Guardian online, December 17, 2003, <<http://www.northpeel.com/br/news/story/1569699p-1843317c.html>>.

¹⁴⁷³ Rights and Symbols at School, supra note ??? at 98.

¹⁴⁷⁴ Ministry of Education, The Ontario Curriculum Grades 11 and 12, Social Science and Humanities, <<http://www.edu.gov.on.ca/eng/curriculum/secondary/sstudies1112curr.pdf>>.

of the “the connections between symbols and practices in specific religions.”¹⁴⁷⁵ Students are taught to “analyse the diverse origins of symbols associated with specific civil and religious festivals, celebrations, and commemorations.”¹⁴⁷⁶

Similarly in Newfoundland and Labrador the Religious Education program, from which student may exempted upon a written parental request,¹⁴⁷⁷ teaches students about the origins and meanings of religious symbols, their relation to religious celebrations.¹⁴⁷⁸ The Ten Commandments may be used among other references to sacred texts to “explore some of the teachings and laws of Christianity” and how they have influenced the development of morals, ethics and values.¹⁴⁷⁹ Religious symbols and imagery are also studied in their cultural context in British Columbia in a course of Comparative Civilizations.¹⁴⁸⁰

XXII. UNITED KINGDOM

In the UK, crosses are often displayed in state funded church schools. However, in the other types of publicly funded schools religious symbols are not displayed.¹⁴⁸¹

Religious symbols are used for educational purposes in Religious Education classes. For example the Bracknell Forest agreed syllabus for Religious Education for 2000-2005 provides that “Pupils should have the opportunity to develop their understanding of symbolism as a way of expressing meaning and learn about religious

¹⁴⁷⁵ *Id.* at 132.

¹⁴⁷⁶ *Id.* at 137.

¹⁴⁷⁷ SCHOOLS ACT, 1997, cS-12.2 s10(1).

¹⁴⁷⁸ *Religious Education: Grades 4-6, A Curriculum Guide*: October 2000, Government of Newfoundland and Labrador, Department of Education, <http://www.ed.gov.nl.ca/edu/sp/elementary/religious_ed/rel4_5_6.pdf>, at 4,10, 13.

¹⁴⁷⁹ *Id.* at 40.

¹⁴⁸⁰ *Comparative Civilization 12, Integrated Resource Package* 1997, Ministry of Education, Skills and Training, Province of British Columbia, <<http://www.bced.gov.bc.ca/irp/comciv12.pdf>>

¹⁴⁸¹ Andrew Copson, Education and Public Affairs, British Humanist Association, 1, Gower Street, London WC1E 6HD, (Correspondence by e-mail from March 6, 2006).

symbols.”¹⁴⁸² Thus in RE classes pupils view religious symbols of the religious represented in the class and learn about their meaning and their significance for the respective faith. It is also recommended that students learn “how symbols communicate complex ideas such as truth, freedom, justice, in different ways using everyday familiar situations” and see how the complexity of meaning of various religious symbols and gestures specific to six religious religions (Christianity, Buddhism, Hinduism, Islam, Judaism, and Sikhism).¹⁴⁸³ It is also recommended that symbols are studied in relation to religious festivals connected to seasonal change and life cycles.¹⁴⁸⁴

XXIII. USA

In the United States the public display of religious symbolism have caused great societal controversy and litigation. In cases of government sponsored displays the issues revolve around line drawing between recognition of cultural and historic traditions and their transmission to the future generation at public schools on the one hand and state’s endorsement and promotion of religion in general or one particular religion on the other hand.

The first part of the section will present an overview of case law related to government sponsored religious displays at public schools and the second part will discuss issues related to private symbolic speech. I will argue that a pluralist approach will best conform to the constitutional requirement of disestablishment of religions and protection of religious freedom. This approach is consistent with case law related

¹⁴⁸²Bracknell Forest agreed syllabus for Religious Education for 2000-2005, <<http://www.bracknell-forest.gov.uk/religious-education-bracknell-forest-agreed-syllabus-2000-2005.pdf>>, at 18.

¹⁴⁸³ *Id.* at 42.

¹⁴⁸⁴ *Id.* at 24. For another example of this approach see Medway RE Guidance Part 2, <<http://www.medway.org.uk/sacre/MASG.Part%202.pdf>>.

to government displays, while it calls for a measure of reinterpretation of the application of the religious clauses to school sponsored private speech.

In 2000 school officials in Pennsylvania placed a display featuring the Ten Commandments and also granted equal access to any religious organization to the display. However, soon after atheists, Wiccans and other religious groups added documents to the school display the school took down the entire display.¹⁴⁸⁵ The action of the school manifests that its genuine purpose was not to open a forum with which to educate children about different religions and foster toleration and appreciation of religious diversity but rather the promotion of Christianity.

The Supreme Court has made an important distinction “between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”¹⁴⁸⁶ In a number of cases the central issue turns on the kind of speech the religious symbols displayed represent – symbolic speech of the school, student’s private speech, or the so called “school sponsored speech” and also on the type of forum in which the symbolic expression takes place.

1. Government speech

1.1 Displays of symbols belonging to one religion

When the expression is government speech and religious symbols displayed belong to one faith only and are not accompanied by related to them secular symbols courts usually find the practice as an endorsement of religion and therefore unconstitutional. Thus a law similar to the one in Bavaria mandating the display of a

¹⁴⁸⁵ Tarik Abdel-Monem, *Posting the Ten Commandments as a Historical Document in Public Schools*, 87 IOWA LAW REVIEW 1043, 1043, ft.183 (2001-2002).

crucifix in each classroom would represent an unconstitutional endorsement of religion in the US. For instance, in *Washegesic v. Bloomington Public Schools*¹⁴⁸⁷ the Sixth Circuit Court of Appeals held that the display of a portrait of Jesus Christ hanging alone in a hallway outside a school gymnasium violated the Establishment Clause since failed all three prongs of the *Lemon* Test.¹⁴⁸⁸ The court noted however that the case “would be different if the school had placed representative symbols of many of the world's great religions on a common wall.”¹⁴⁸⁹

While in Germany, Canada and France the display of a crucifix at public schools has caused debate, this practice seems not to be widespread in the predominantly Protestant US. What has been disputed in the US is the display of the Ten Commandments. According to the Bible, the commandments constitute the pronouncements of God on Mount Sinai revealed by God to Moses. There is no standard version of the Ten Commandments,¹⁴⁹⁰ however in the US the version in King James Bible, sometimes in an abridged form, is the one most often displayed and it reads:

“And God spake all these words, saying,”
 1.Thou shalt have no other gods before me.
 2.Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth: thou shalt not bow down thyself to them, nor serve them: for I the LORD thy God *am* a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth *generation* of them that hate me; and showing mercy unto thousands of them that love me, and keep my commandments.

¹⁴⁸⁶ Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990).

¹⁴⁸⁷ 33 F.3d 679 (6th Cir. 1994).

¹⁴⁸⁸ *Id* at 683. (See also *Joki v. Board of Educ. of the Schuylerville Central School Dist.*, 745 F.Supp.823 (N.D.N.Y.19990) holding that a crucifixion mural in a high school auditorium violated the Establishment Clause by sending a message of government endorsement of Christianity).

¹⁴⁸⁹ *Id* at 684.

¹⁴⁹⁰ Jews number the Commandments differently from Christians and consider the first Commandment to be: “I am the Lord, your God, who brought you out of the land of Egypt, out of the house of bondage.” Another difference is that Jews consider the Sixth Commandment to read “Thou shall not murder” since the e Hebrew Bible makes a distinction between murder and killing and while murder is always a crime while killing may sometimes be justified as in self-defense for instance. (See A Hebrew - English Bible according to the Masoretic Text and the JPS 1917 Edition, <http://www.mechon-mamre.org/p/pt/pt0505.htm>).

3. Thou shalt not take the name of the LORD thy God in vain; for the LORD will not hold him guiltless that taketh his name in vain.
4. Remember the sabbath day, to keep it holy. Six days shalt thou labour, and do all they work: But the seventh day is the Sabbath of the LORD thy God: in it thou shalt not do any work, thou, nor thy son, nor thy daughter, thy manservant, nor they maidservant, nor they cattle, nor thy stranger that is within thy gates.
5. Honour they father and they mother: that they days may be long upon the land which the Lord they God giveth thee.
6. Thou shalt not kill.
7. Thou shalt not commit adultery.
8. Thou shalt not steal.
9. Thou shalt not bear false witness against they neighbor.
10. Thou shalt not covet thy neighbour's house, thou shalt not covet thy neighbour's wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor any thing that is thy neighbour's.¹⁴⁹¹

A 1978 Kentucky statute required the posting of a copy of the Ten Commandments in public school classrooms. The copies were purchased with private donations and the statute required that on the bottom of each display there should be a note in small print reading that “[t]he secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.” The Supreme Court held *per curiam* in *Stone v. Graham*, 449 U.S. 39 (1980), that the law violated the First Amendment Establishment Clause since it had no secular purpose, failing the first prong of the *Lemon* test.¹⁴⁹²

The Court rejected the argument of the state that the notation expressed the secular purpose of the law, since “The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.”¹⁴⁹³ The Court noted that the Ten Commandments did not speak only about morality in general, but also about

¹⁴⁹¹ The Holy Bible: King James Version. 2000, The Second Book of Moses, Called Exodus 20, The Ten Commandments, Deut. 5.1-21, <<http://www.bartleby.com/108/02/20.html>>.

¹⁴⁹² *Stone v. Graham*, 449 U.S. 39 (1980). According to the “*Lemon* test” the statute must have a secular legislative purpose; its principal or primary effect must be one that neither advances nor inhibits religion; and the statute must not foster an excessive governmental entanglement with religion, so that if a statute violates any of these three principles, it must be struck down under the Establishment Clause. (*Lemon v. Kurtzman*, 403 U.S. 602 (1971))

¹⁴⁹³ *Id.*

worshipping God, avoiding idolatry—that is the duties of believers. Finally, it was irrelevant that the displays were sponsored by private contributions since their posting under the mandate of state law provided official support of the state government to religion which is forbidden by the First Amendment.

In the Court’s view if “the posted copies of the Ten Commandments [were] to have any effect at all, it [would] be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments.”¹⁴⁹⁴ In the dictum, however, the Court noted that the display might have been constitutional if the Ten Commandments had been “integrated into the school curriculum ... in an appropriate study of history, civilization, ethics, comparative religion, or the like.”¹⁴⁹⁵ The Court did not discuss the presence of elements of religious coercion, which according to current Establishment Clause doctrine are not necessary for finding a constitutional violation, and invalidated the statute on the ground that it had an impermissible religious purpose.

Justice Rehnquist in his dissent criticized the summery rejection of the secular purpose of the statute presented by the legislature and accepted by the lower courts. According to Rehnquist the Establishment Clause did not require “that the public sector be insulated from all things which may have a religious significance or origin.” and that the state had decided to make students aware of the secular impact the religious text has had over history and government.¹⁴⁹⁶

This decision did not end the controversy surrounding public religious displays. The display of the Ten Commandments in public buildings, including

¹⁴⁹⁴ *Id.*

¹⁴⁹⁵ *Id.*

¹⁴⁹⁶ *Id.* at 46.

schools continued to be a contentious issue.¹⁴⁹⁷ The so-called “Hang Ten” movement arose after several school shootings in 2000 where students were both victims and perpetrators.¹⁴⁹⁸ Legislators and grassroots activists called for instilling religious morality in school in order to combat school violence.

In 2005 the Supreme Court granted certiorari and reviewed the constitutionality of displays of the Ten Commandments at two counties’ court houses in Kentucky - *McCreary*¹⁴⁹⁹ and a display of the Ten Commandments on the grounds of Texas capitol Hills – *Van Orden*¹⁵⁰⁰. Significantly, the Supreme Court refused to review three decisions of the U.S. Court of Appeals for the 6th Circuit ruling unconstitutional displays of the Ten Commandments at public schools. Two of the cases concerned the placing of Ten Commandments monuments on the grounds of four new high schools in an Ohio county – *Johnson v. Baker*, No. 03-1661,¹⁵⁰¹ and *Adams Cty./Ohio Valley School Bd. v. Baker*, No. 04-65.¹⁵⁰² The third case concerned a display of the Ten Commandments in the classrooms of schools in a Kentucky county - *Harlan County v. ACLU*, No. 03-1698.

Two justices of the plurality which upheld the constitutionality of the 10 Commandments monument on Texas Capitol Hill in the *Van Orden* case, specifically distinguished the present case from *Stone* and emphasized the peculiar context of public elementary and secondary schools and the particular vigilance of the Court in supervising the constitutional boundary between state and religion in this context. Justice Rehnquist, after arguing that religious displays may be permissible given their

¹⁴⁹⁷ A number of courts of appeals have dealt with the constitutionality of Ten Commandments displays at public property. *See* *Freethought Soc’y v. Chester County*, 334 F.3d 247 (3d Cir. 2003), *King v. Richmond County*, 331 F.3d 1271 (11th Cir. 2003); *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003); *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002); *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000).

¹⁴⁹⁸ Tarik Abdel-Monem, *supra* note 1485.

¹⁴⁹⁹ *McCreary County*, *supra* note 1278.

¹⁵⁰⁰ *Van Orden v. Perry* (03-1500) 351 F.3d 173, affirmed.

¹⁵⁰¹ cert. denied, 125 S.Ct. 2988 (2005).

historical and legal relevance for American society and government, noted that “There are, of course, limits to the display of religious messages or symbols.”¹⁵⁰³ Such limits were to be found in the classroom context: “[Stone] stands as an example of the fact that we have “been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools” and noted the “particular concerns” that arise in this context.¹⁵⁰⁴ He also emphasized that whereas public school students in *Stone* due to the compulsory nature of school attendance were being confronted with the text of the Ten Commandments every school day the same was not true with respect to visitors to the Texas State Capitol grounds.¹⁵⁰⁵ The concurring opinion of Justice Breyer also emphasized that “on the grounds of a public school...given the impressionability of the young, government must exercise particular care in separating church and state.”¹⁵⁰⁶ In his dissent Justice Stevens argued that *Stone* was not confined to the school setting and should be extended to all government displays of the Ten Commandments.¹⁵⁰⁷

In *ACLU of Kentucky v. McCreary County, Kentucky*, 2003 FED App. 0447P (6th Cir.) the Court of Appeals for the Sixth Circuit held that displays of the Ten Commandments in school classrooms and in counties’ courthouses violated the Establishment Clause because the state failed to meet the first requirement of the *Lemon* test and had a predominantly religious purpose. Two separate requests for certiorari were filed with the Supreme Court and it upheld the decision of the Sixth Circuit Court regarding the court houses in a 5-4 split decision and denied certiorari with respect to the school display. The courthouses’ displays were very similar to the

¹⁵⁰² 125 S.Ct. 2989 (2005).

¹⁵⁰³ *Van Orden*, *supra* note 1500.

¹⁵⁰⁴ *Id.* (internal quotations omitted)

¹⁵⁰⁵ *Id.*

¹⁵⁰⁶ *Id.*

¹⁵⁰⁷ *Id.*

school one and the legislative history was also identical. Thus the reasoning in *McCreary* can be applied also to the school display. Moreover, as the justices have noted again in the *Van Orden* case the school context requires a particular vigilance in examination of the compliance of the government with the Establishment Clause.

The initial displays in the courthouses and the school classrooms of the two Kentucky counties consisted only of framed copies of the Ten Commandments.¹⁵⁰⁸ After the ACLU of Kentucky sued the counties seeking preliminary injunction against maintaining the displays the legislatures of both counties authorized new expanded displays by nearly identical resolutions. The new displays included eight other documents as well and they all had a predominantly religious message.¹⁵⁰⁹ The District Court however, granted preliminary injunction finding a lack of a secular purpose of the displays. The counties then modified the displays again and besides the Ten Commandments quoted in full from King James Bible included were also: “the entire Star Spangled Banner, the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the National Motto, the Preamble to the Kentucky Constitution, an excerpt of the Congressional Record containing the Ten Commandments, Kentucky Statute § 158.195 regarding the posting of historical displays and a School Board Resolution.”¹⁵¹⁰ The Resolution noted that the documents would positively influence the “moral character of the students” and that they “have had particular historical significance in the development of this

¹⁵⁰⁸ See *ACLU of Kentucky v. McCreary County*, *supra* note 343.

¹⁵⁰⁹ “The documents were the “endowed by their Creator” passage from the Declaration of Independence; the Preamble to the Constitution of Kentucky; the national motto, “In God We Trust”; a page from the Congressional Record of February 2, 1983, proclaiming the Year of the Bible and including a statement of the Ten Commandments; a proclamation by President Abraham Lincoln designating April 30, 1863, a National Day of Prayer and Humiliation; an excerpt from President Lincoln’s “Reply to Loyal Colored People of Baltimore upon Presentation of a Bible,” reading that “[t]he Bible is the best gift God has ever given to man”; a proclamation by President Reagan marking 1983 the Year of the Bible; and the Mayflower Compact” (*Id.*).

¹⁵¹⁰ *Id.*

country.”¹⁵¹¹ It also provided for a procedure permitting anybody to post other historical documents with the permission of the Harlan County Board of Education. The Court of Appeals held that the display had a “patently religious purpose” and also represented government endorsement of religion since there was no “analytical connection” between the 10 Commandments and the other historical documents, no “unifying historical or cultural theme that is also secular.”¹⁵¹²

The court also employed an endorsement analysis and agreed with the lower court that, the displays sent a message of religious endorsement since there was no “analytical connection between the Ten Commandments and the other patriotic documents and symbols” and a reasonable observer could not related the Ten Commandments “with a unifying historical or cultural theme that is also secular.”¹⁵¹³ The court emphasized the specificity of the school context determined by the impressionability of young children, their susceptibility to peer pressure, and their tendency to imitate teachers as role models.¹⁵¹⁴

The Supreme Court majority in *McCreary* accepted the reasoning of the court of appeals with respect to the court houses’s displays. The Supreme Court confirmed the principle of government neutrality between “between religion and religion, and between religion and nonreligion” as the touchstone in the analysis of the compliance of government religious displays with the First Amendment. The Court refused to abandon the *Lemon* test and emphasized that the first prong of secular governmental purpose was necessary in order to uphold the principle of neutrality since:

By showing a purpose to favor religion, the government “sends the ... message to ... nonadherents ‘that they are outsiders, not full members of the political community,

¹⁵¹¹ *Id.*

¹⁵¹² *Id.*

¹⁵¹³ *Id.*

¹⁵¹⁴ *Id.*

and an accompanying message to adherents that they are insiders, favored members...¹⁵¹⁵

Although some deference is due to the legislature's avowed purpose, the secular purpose must be "genuine, not a sham, and not merely secondary to a religious objective."¹⁵¹⁶ The majority also held that in inferring the legislative purpose courts are not limited to examining only the last of a series of governmental acts related to the challenged act, since reasonable observers are familiar with the context into which the display has arisen.¹⁵¹⁷

From these several cases it may be concluded that government displays of the Ten Commandments in public schools will be held unconstitutional unless there are used as a curriculum aid or are integrated in a display with other symbols pursuing a primary purpose which is genuinely secular. The emphasis on neutrality in recent US jurisprudence is what brings closer the situation in the US, Germany and Canada, despite the textual differences in the constitutional texts.

Of course, in the US as well as in the other jurisprudences there are voices which dispute such an application of the principle of neutrality. In his dissent justice Scalia rejected the concept of government neutrality that the majority maintained was necessitated by the Establishment Clause. According to Scalia, neither the text of the Constitution, nor the original understanding of the Framers, nor contemporary societal understanding justified reading into the Constitution a mandate of state neutrality between religion and irreligion.¹⁵¹⁸ Further, it was true that the state was to be neutral between different religions with respect to state financial aid to religion or when the free exercise of religion is at stake, but such a principle of neutrality "applied in a

¹⁵¹⁵ *McCreary County*, *supra* note 1278, at 2733

¹⁵¹⁶ *Id.* at 2735

¹⁵¹⁷ *Id.*

¹⁵¹⁸ *Id.* at 2750.

more limited sense to public acknowledgment of the Creator.”¹⁵¹⁹ Relying on historical practice he asserted that, “the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.”¹⁵²⁰ Adherents to non-monotheistic religious minorities have their beliefs protected by the Free Exercise Clause and by those aspects of the Establishment Clause “that do not relate to government acknowledgment of the Creator.”¹⁵²¹

The emphasis on the original intent of the Framers, a peculiarly American feature of constitutional jurisprudence, may not be the best tool of interpretation of such an old and very hard to amend constitution. According to Eberle, Justice Story has most accurately described the prevailing sentiment when the Establishment Clause was drafted – it was designed “not to countenance, much less to advance, Mahometanism, Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects.”¹⁵²² Eberle notes that Story and others in the nineteenth century thought that Christianity was part of the common law of the country. Given this historical understanding he asks a very pertinent question: “Yet, if we were being true to originalism, we would have to ask: would we tolerate such overt, invidious discrimination as was commonly practiced at this time?”¹⁵²³

Scalia also framed the issue as a conflict between competing interests - “On the one hand, the interest of that minority in not feeling “excluded”; but on the other, the interest of the overwhelming majority of religious believers in being able to give

¹⁵¹⁹ *Id.* at 2752.

¹⁵²⁰ *Id.* at 2753.

¹⁵²¹ *Id.* at 2756.

¹⁵²² R. Cord, Separation of Church and State: Historical Fact and Current Fiction 13 (1988) in Eberle, 2005 at 35.

¹⁵²³ *Id.* at 35. See also Frederick Mark Gedicks, *Spirituality, Fundamentalism, Liberty: Religion at the End of Modernity*, 54 DE PAUL L. REV. 1197, 1213-1214 (2004-2005), describing the so-called Protestant Establishment of the late 19th and early 20th century in the US and the imposition of “civil and social disability on non-Protestants and (especially) nonbelievers.” (*Id.*).

God thanks and supplication *as a people*, and with respect to our national endeavors.”¹⁵²⁴ According to him the conflict between these interests has already been resolved in favor of the majority by the “national tradition.”¹⁵²⁵ One would think however, that it is the constitution not “tradition” that should resolve such conflicts. Moreover, it is especially inappropriate to resolve conflicts between interests of religious majorities and minorities on the basis of the “national tradition” since it is the majorities that are the shaping force of traditions. The framing the issue as one involving the conflicting interests between religious majorities and minorities and not between the state and individuals is an approach similar to the one that was taken by the German constitutional court in the School prayer case where it again lead the justices to resolve the conflict in favor of the majority.

Finally, it should be noted that some of the Supreme Court justices have argued that the government may speak religiously as long as it does not engage in religious coercion. The more restrictive coercion test espoused by justices Thomas and Scalia would define coercion as nothing short of “actual legal coercion” that is “coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*”.¹⁵²⁶ Such a coercion test is similar to the arguments of the dissenting justices in the German *Crucifix* case. This similarity lends force to the argument that were the Establishment Clause interpreted to prohibit only such forms of coercion that it would amount to a redundancy, since such coercive action of the state are clearly prohibited under the Free Exercise Clause.¹⁵²⁷

Justice Kennedy’s form of coercion test is broader and would hold that the Establishment Clause prohibits government speech which indirectly or directly

¹⁵²⁴ *McCreary County*, *supra* note 1278, at 2757.

¹⁵²⁵ *Id.*

¹⁵²⁶ *Van Orden*, *supra* note 1500, (Thomas, , concurring in judgment).

“coerce[s] anyone to support or participate in any religious or its exercise” or the government speech is so plainly religious that it amounts to proselytizing. In the public school context, permanent displays of the religious symbols of one religion would seem to be indirectly coercive since they would amount to proselytism of a captive audience consisting of impressionable children. Wallace argues that forced exposure to government religious speech should not be the standard for finding coercion since in this case public schools should be swept clean of all religious references as well as public parts, courtrooms halls, and even the inscription “In God We Trust” should be removed from the US currency, since in all these situations adults or children would be “forced to hear unwelcome religious messages from the government.”¹⁵²⁸ Such an interpretation of “forced exposure” is indeed too broad and does not take proper account of the type of the government speech and the context in which it takes place.

As the German Constitutional Court noted there is a difference between an adult exposed for a short period of time to a religious symbol in the courtroom and an impressionable school child exposed to this symbol for extended periods of time over years. The missionary effect of a religious symbol is strongest when it is displayed to a captive audience of young and impressionable children and when the display features prominently the symbol of one religion.¹⁵²⁹

It should be noted that the Court of Appeals did not consider the fact that Resolution with respect to the school displays provided procedure permitting anybody to post other historical documents with the permission of the Harlan County Board of

¹⁵²⁷ See *Allegheny*, *supra* note 88, at 628 (O'Connor, J., concurring), *Lee*, *supra* note 58, at 618 (Souter, J., concurring).

¹⁵²⁸ Wallace, *supra* note 1281, at 1265

¹⁵²⁹ Even Justice Scalia concedes that when government uses a religious symbols in a proselytizing manner it would run afoul of the Establishment Clause. (See *Van Orden*, *supra* note 1500, Scalia, J., concurring).

Education. However, as argued with respect to the German Crucifix case, whenever a patently religious symbol is displayed by the state with the justification that it is culturally or historically relevant, the symbols that will get displayed will almost certainly be only those of the majoritarian religion.

1.2 Displays of symbols of different religions

Common displays of symbols belonging to different faiths are typically posted by schools during the winter holidays. Every year as the holidays approach, public schools across the US are faced with the so-called “December dilemma” – “the challenge of acknowledging the diverse religious beliefs of their students while avoiding the kind of divisiveness that the constitutional mandate of separation of church and state is designed to prevent.”¹⁵³⁰ Policies regulating holiday displays about Christmas and Hanukkah as well as their celebration within school have proven to be a thorny issue in school communities.¹⁵³¹ The Rutherford institute has called some of these policies and the litigation that has arisen in response to others the “war against Christmas.”¹⁵³² In December 2005 the House of Representatives voted in favor of a resolution to protect the symbols and traditions of Christmas.¹⁵³³ When a member of the House suggested that the sponsor amend the language to include also

¹⁵³⁰ *The “December Dilemma”: December Holiday Guidelines for Public Schools*, Anti-Defamation League, (visited January 21, 2006), <http://faculty.weber.edu/rwong/edu3200/articles/DecDilemma.doc>.

¹⁵³¹ See Marc W. Brown, *Christmas Trees, Carols and Santa Claus: The Dichotomy of the First Amendment in the Public Schools and How the Implementation of a Religion Policy Affected a Community*, 28 JLEDUC 145 (1999) for a narration of the problems and community divisions facing Williamsville School District, New York, with one of the most diverse school population in the US.

¹⁵³² *Christmas under Siege: A Report on the Elimination of an American Tradition*, The Rutherford Institute 2005, (visited January 21, 2006), <http://www.rutherford.org/pdf/christmasundersiege.pdf>.

¹⁵³³ Expressing the sense of the House of Representatives that the symbols and traditions of Christmas should be protected. (Introduced in House) [\[H.RES.579.IH\]](http://www.rutherford.org/pdf/christmasundersiege.pdf)

the words of 'Kwanzaa,' 'Ramadan,' and 'Chanukah' so that the resolution be more inclusive the sponsor of the bill refused.¹⁵³⁴

The Supreme Court has not ruled directly on the constitutionality of the display of religious symbols as part of holiday decorations at public schools. However, in *County of Allegheny v. American Civil Liberties Union*,¹⁵³⁵ in examining the constitutionality of a menorah and Christmas tree display on government property the Court noted that “when located in a public school, such a display might raise additional constitutional considerations.”¹⁵³⁶ Lower courts have upheld holiday displays paying particular attention to the context of the display which is critical in avoiding a message of endorsement of a particular faith. Courts have upheld displays that combine religious symbols of different faiths together with secular holiday symbols, which are temporary in nature and serve an educational purpose.

In *Florey v. Sioux Falls School District 49-5*,¹⁵³⁷ the Eighth Circuit Court of Appeals upheld the constitutionality of a school district policy which allowed the display of religious symbols that are a part of a religious holiday provided that the displays are temporary and are used as a “teaching aid resource.” The policy gave as examples symbols such as “as a cross, menorah, crescent, Star of David, crèche, symbols of Native American religions” and the holidays suggested for recognition were “Christmas, Easter, Passover, Hannukah, St. Valentine's Day, St. Patrick's Day, Thanksgiving and Halloween.”¹⁵³⁸

In *Clever v. Cherry Hill Township Bd. of Educ.*,¹⁵³⁹ the District Court of New Jersey upheld the constitutionality of a school district policy requiring that calendars

¹⁵³⁴ *Breaking News: GOP House Top Priority? Christmas Vote!*, National Jewish Council, December 15, 2005, <<http://www.njdc.org/issues/detail.php?id=491&iss=2>>.

¹⁵³⁵ 492 U.S. 573 (1989).

¹⁵³⁶ *Id.* at 629 (footnote No. 69).

¹⁵³⁷ 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980).

¹⁵³⁸ *Id.*

depict religious, national, and ethnic holidays and permitting seasonal displays containing religious symbols. The policy also required that a list of resources be available in the school library to offer additional education about the holidays.¹⁵⁴⁰ The court held that representations of items such as a cross, a crescent, the Ten Commandments, as well as, images of Confucius, Jesus Christ, and Buddha passed all the prongs of the *Lemon* test noting that “If our public schools cannot teach this mutual understanding and respect [about religious symbols and holidays], it is hard to envision another societal institution that could do the job effectively.”¹⁵⁴¹ The court also noted that a school’s consistent exclusion or limitation of the celebration of religious holidays may be sending to students, exposed to the festive season everywhere outside the school, a message of hostility towards religion which the Establishment Clause forbids.¹⁵⁴²

Such displays come close to the pluralist approach advocated in section X of the chapter. In the discussion of the approach an attempt was made to answer to some of the objections voiced against it. In the US, especially when it is the school and not the students that displays symbols of different religious and cultural traditions an additional criticism based on the Establishment Clause has been put forward by Justice Brennan in *Allegheny*. According to him:

The uncritical acceptance of a message of religious pluralism also ignores the extent to which even that message may offend. Many religious faiths are hostile to each other, and indeed, refuse even to participate in ecumenical services designed to demonstrate the very pluralism Justices Blackmun and O'Connor extol. To lump the ritual objects and holidays of religions together without regard to their attitudes toward such inclusiveness, or to decide which religions should be excluded because of the possibility of offense, is not a benign or beneficent celebration of pluralism: it is instead an interference in religious matters precluded by the Establishment Clause.¹⁵⁴³

¹⁵³⁹ 838 F. Supp. 929 (D. N.J. 1993).

¹⁵⁴⁰ *Id.* at 932.

¹⁵⁴¹ *Id.* at 940. A crucifix or a three-dimensional nativity scene could not be displayed under the school policy. (*Id.*)

¹⁵⁴² *Id.*

¹⁵⁴³ *Allegheny*, *supra* note 88, at 646.

I would argue however, that the state in the role of educator in public schools has the right and some would say also the duty to educate for tolerance,¹⁵⁴⁴ and to attempt to prevent hostility between different faith communities to take root in the attitude of children towards their fellow students.

The Rutherford Institute has favorably commented on such a type of school policy for achieving the dual purpose of providing information on minority religious holidays which “might otherwise seem foreign” and also for allowing “straightforward recognition and celebration of the traditions of “majority” religions that are too often the losers in policies designed to teach multiculturalism.”¹⁵⁴⁵

This concern is typical for all of the jurisdictions examined. Members of the Christian religious majority sometimes object that the protection of the constitutional rights of religious minorities, especially immigrants, and to the multiculturalist state policies related to religious expression in the public sphere impermissibly interfere with the acknowledgment and transmission of the cultural and religious heritage of the country.¹⁵⁴⁶ For example in Canada, the Québec Committee of Religious Affairs has argued that while the growing religious diversity requires that schools accord an equal space to religious and cultural symbols of minorities groups, the symbols of the

¹⁵⁴⁴ Christian Moe, Religious Human Rights and Religion in Schools, “Religion in Schools: Problems of Pluralism in the Public Sphere” Kotor, Montenegro, 22-24 April, 2005, <<http://kotor-network.info/papers/2005/Rights.Moe.htm>>. Moe argues that international human rights instruments impose a duty on the state to educate about tolerance. One such instrument is the 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief voting by state for against united states.

¹⁵⁴⁵ *Christmas under Siege: A Report on the Elimination of an American Tradition*, The Rutherford Institute 2005, (visited January 21, 2006), at 8, <<http://www.rutherford.org/pdf/christmasundersiege.pdf>>.

¹⁵⁴⁶ For instance the whole of Italy was swept by protests when a local court ruled in favor of a Muslim parent who argued that the crucifix on the wall of his son’s classroom violated his right to education free of religious indoctrination. The statement of the Labor Minister of the Italian government expressed the view shared by a large number of the Catholic majority in the country – “It is unacceptable that one judge should cancel out millennia of history”. (See *Storm Over Italy Crucifix Ruling*, BBC News, October 26, 2003, <<http://news.bbc.co.uk/2/hi/europe/3215445.stm>>). The

majority that are a part of the cultural tradition of the society should not be neglected as this may cause resentment and opposition to the recognition and respect of minorities.

The US case of *Skoros v. City of New York*, 2006¹⁵⁴⁷ may not a typical example because the plaintiff was a Roman Catholic and the history of conflicts of religion in US public schools reveals that there was a considerable anti-Catholic animus in the years of the de facto Protestant establishment, but it shows how members of the Christian majority may negatively react to public recognition of religious minorities when they perceive that Christianity is marginalized though liberal multicultural policies. The plaintiff in the *Skoros* said before the media that she did not expect “a judge in New York state would rule in favor of Christians....It's too liberal. They're worried about hurting everybody's feelings.”¹⁵⁴⁸ The case is also interesting because it brings to light some of the inherent problems of the use of the Endorsement test in religious symbolism cases.

In *Skoros* the US Court of Appeals for the 2nd Circuit upheld the constitutionality of the policy of the Department of Education in New York City regarding holiday displays in public elementary and secondary schools against a First Amendment challenge. The policy permitted the temporary display of symbols such as “Christmas trees, Menorahs, and the Star and Crescent” which it characterized as secular, but did not allow the display of crèches which it regarded as purely religious symbols. Since the displays should not appear to promote a particular religion or culture, the holiday symbols should be placed “simultaneously with other symbols or

decision of the local court was reversed after the nationwide protest. (See discussion in Section XII, 1 (a) supra.)

¹⁵⁴⁷ *Skoros v. City of New York*, 04-1229 (2nd Cir, Feb. 2, 2006). The US Supreme Court denied certiorari on 20.02.2007, after relisting it several times.

¹⁵⁴⁸ Weblog: *Menorah, Crescent and Star Secular, Says Judge*, CHRISTIANITY TODAY MAGAZINE, 16 February 2004, <<http://www.christianitytoday.com/ct/2004/107/42.0.html>>

decorations reflecting different beliefs or customs.”¹⁵⁴⁹ The plaintiff – a Roman Catholic parent sued on behalf of her children alleging a violation of their rights under the Establishment and Free Exercise Clause and alleging also a violation of her parental rights to direct the religious upbringing of her children protected by the First and Fourteenth Amendments.

Under the Establishment Clause, the plaintiff argued that the presence of a crescent, a star and a menorah but the absence of a crèche constituted an impermissible endorsement of Judaism and Islam and disapproval of Christianity. The Court of Appeals subjected the policy to the three prongs of the Lemon test. The court accepted that the stated purpose of the policy to promote tolerance and respect for diverse customs is a permissible secular purpose.¹⁵⁵⁰ In light of the Supreme Court decision in *McCreary County v. ACLU* the Court inquired as to how the stated purpose would be perceived by a “objective observer” and concluded that even though the department mistakenly characterized the menorah and the star and the crescent as secular symbols, its purpose would still be perceived as a good faith attempt to comply with Establishment Clause jurisprudence and not to promote any particular religion.¹⁵⁵¹

When examining the effects prong of the Lemon test the court conducted an endorsement analysis and held that in view of the fact that the displays included the menorah and the star and the crescent together and shared space with a great number of secular symbols “even the youngest elementary schoolchild would understand that the message being conveyed was not the endorsement of Judaism or Islam but a recognition of the diversity of winter holiday celebrations among different

¹⁵⁴⁹ *Skoros*, *supra* note 1547, at 2-3.

¹⁵⁵⁰ *Id.* at 34.

¹⁵⁵¹ *Id.* at 51-52

cultures.”¹⁵⁵² The displays at the school where plaintiff’s children were enrolled included also decorated a Christmas trees with a star at the top, Kwanza candelabras, stockings with gifts, snowflakes, Christmas wreaths and in one classroom there were booklets explaining the meaning and the origins of Christmas, Hanukkah, Kwanza, and Ramadan.¹⁵⁵³

The court also rejected the claim that the characterization of the menorah and the star and the crescent as secular symbols constituted an impermissible entanglement of church. This characterization had no effect on private speech and therefore involved no monitoring of non-governmental activities.¹⁵⁵⁴ The policy did not involve government imposition of an official view of what constitutes a religious symbol on any sectarian institution or private individual or group.¹⁵⁵⁵ The court also concluded that the displays did not coerce anyone to accept any religion and that Skoros had no parental right claim independent of the Establishment and Free Exercise claims which the court had found to be without merits.¹⁵⁵⁶

One of the points of disagreement between the majority opinion and the dissent is the question of who is the relevant objective observer for the purposes of the judicial inquiry at both the purpose and the effect prong of the Lemon test. According to the majority opinion in the case at bar the relevant objective observer was “an adult who, in taking full account of the policy’s text, history, and implementation, does so mindful that the displays at issue will be viewed primarily by impressionable schoolchildren.”¹⁵⁵⁷ The majority correctly reasoned that not all school children are

¹⁵⁵² *Id.* at 61.

¹⁵⁵³ *Id.* at 10-15.

¹⁵⁵⁴ *Id.* at 67.

¹⁵⁵⁵ *Id.* at 69.

¹⁵⁵⁶ *Id.* at 77.

¹⁵⁵⁷ *Id.* at 41.

mature enough to take full account of the text, history, and implementation of the policy.¹⁵⁵⁸

The dissent however, maintained that the “objective observer” should be “elementary and secondary students in the New York City public school system” and “parents of such students who experience the displays through and with their children and who have knowledge of the history and context of the policy and displays.”¹⁵⁵⁹ According the dissent despite the immaturity of elementary students failing to incorporate their perspective into the “reasonable observer” disregards the primary audience for which the message of the display is addressed to.

This difference of opinions regarding the identification of the “objective observer” however may be less substantial than it appears. Firstly, although the dissent rightfully points out that school children are the ones that are the target audience of the display and it is their perception of it and their feelings of inclusion or exclusion that should be central to the endorsement analysis, the “objective observer” identified by the majority does not loose sight of this. Secondly, no matter how the “objective observer” is identified in the public school contexts, the perception of elementary children are inevitable judged by adults as a proxy. The effects upon the children whether they are identified themselves as the “objective observer” or whether it is the adults who are “mindful that the displays at issue will be viewed primarily by

¹⁵⁵⁸ When the issue is one of extracurricular activities and the access of religious groups to promote such activities, courts have tended to regard the parents of the school children as the “reasonable observer” because any involvement in such activities would require parental consent. Thus in *Rusk v. Crestview Local School District*, 379 F.3d 418 (6th Cir. 2004) the Court of Appeals for the Sixth Circuit held that the relative youth and impressionability of the students who received flyers from religious non-for-profit community groups, were not relevant to the “objective observer analysis, since the primary target were parents, acquainted with the purpose of the flyers which is not to promote religious beliefs. Even if students were viewed as the reasonable observers for purposes of the endorsement test the Court held that in view of the Supreme Court decision in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) “elementary school students’ possible misperceptions of endorsement are an insufficient basis for finding an Establishment Clause violation.” It should be noted however, that the situation is distinguishable from situations where the issue is the perception of a symbolic displays, since here there is no prior parental approval involved.

¹⁵⁵⁹ *Skoros*, *supra* note 1547, at at 2, dissenting opinion.

impressionable schoolchildren” are still evaluated by adults who take into account what the effects of the display would be on children. In the particular case, the majority is more persuasive in holding that given the different religious and secular symbols displayed, children would not perceive an exclusionary message towards the Christian religion. Moreover, the case concerns government speech aiming to teach children about diversity and tolerance. The case might have been different, had the school opened a public forum, where children may display symbols related to their religious holidays. If such were the case, and the school permitted Jewish children to display the menorah but did not allow a Christian child to display a crèche then the Christian child may indeed feel exclusion and a denial of its equal worth and recognition.

Other problems with defining the “objective observer” have also been pointed out by legal scholars and some of the justice son the Supreme Court. Since the perception of the “objective observer” of the government religious display is the key to the Endorsement test, the question is whose perception counts. The major criticism amounts to the claim that perception of endorsement cannot be separated from the particular convictions, religious or secular of the individual exposed to the religious symbol; the endorsement is ultimately in the eye of the beholder.¹⁵⁶⁰ Wallace claims that since no “objective” observer may be justiciably constructed what ultimately counts are the justices own predispositions and therefore “the endorsement test can be essentially reduced to the exercise of a judge’s own intuitions and biases”¹⁵⁶¹ and is

¹⁵⁶⁰ Marshal puts the question in the following way: “Is the objective observe (or average person) a religious person, an agnostic, a separations, a person sharing the predominant religious sensibility of the community, or one holding a minority view” (Willam P. Marshall, “*We Know it When We See It*” *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 573 (1986)).

¹⁵⁶¹ Wallace, *supra* note 1281, at 1221.

therefore largely indeterminate.¹⁵⁶² Such a criticism however, may be mounted against a number of other judicial tests whose application closely depends on the particular facts of the case.¹⁵⁶³

It has also been argued that these intuitions and biases are most likely to be skewed towards majority religious practices.¹⁵⁶⁴ According to McConnell “[m]essages affirming mainstream religion . . . are likely to be familiar and to seem inconsequential. As Justice O’Connor has interpreted her approach, if a practice is ‘longstanding’ . . . , it is unlikely to ‘convey a message of endorsement. . . . In our culture, most ‘longstanding’ symbols are those associated with Protestant Christianity.”¹⁵⁶⁵

Whatever the merits of the criticism with respect to cases outside of the public school context,¹⁵⁶⁶ the “particular vigilance” of courts with respect to compliance of government speech with the Establishment Clause in the public school context, so far has proved effective in guarding against a majority bias. As the *Skoros* case demonstrates, courts have even been criticized for a “minority bias.”

Returning to *Skoros*, it should be noted that the majority explicitly stated that it did not make any pronouncement on the question to whether the Establishment

¹⁵⁶² See also Justice Brennan, concurring in part and dissenting in part in *Allegheny*, *supra* note 88, at 643 “I shudder to think that the only ‘reasonable observer’ is one who shares the particular views on perspective, spacing, and accent expressed in JUSTICE BLACKMUN’S opinion, thus making analysis under the Establishment Clause look more like an exam in Art 101 than an inquiry into constitutional law.”

¹⁵⁶³ As Wexler observes, the “intermediate scrutiny” standard applied to cases involving content-neutral speech restrictions, gender classifications, and restrictions on commercial speech has been criticized on that account, but nevertheless works well in practice. See Jay D. Wexler, *The Endorsement Court*, 21(263) JOURNAL OF LAW & POLICY 263, 282 – 283. (2006).

¹⁵⁶⁴ See for example, B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 494, 521 (2005).

¹⁵⁶⁵ See Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 154 (1992).

¹⁵⁶⁶ Wexler notes that such criticism is very persuasive when one considers the fact that the majority opinion in *Van Orden* “contains not a shred of consideration of how, for example, a Hindu, a Buddhist, a Zoroastrian, a Jew, or an atheist might perceive the monument in question.” (Wexler, *supra* note 1563, at 286).

clause mandated the exclusion of the crèche from holiday displays.¹⁵⁶⁷ And I would argue that given the context of the display exclusion of the crèche was not necessary. However, the majority noted relying on *Marchi v. Bd. of Coop. Educ. Servs.*,¹⁵⁶⁸ that when the government policies the constitutionality of its own speech it must be given some leeway “even though the conduct it forbids might not inevitably be determined to violate the Establishment Clause.”¹⁵⁶⁹ The educational authorities aiming to avoid a violation of the Establishment Clause decided not to display any symbols depicting deities and the court agreed that “the crèche conveys its religious message more representationally and less symbolically than the menorah and the star and crescent” and for this reason its religious significance may be more obvious to impressionable school children. The court therefore concluded that an objective observer would read into the decision of the education authorities to exclude the crèche a good faith attempt to comply with the Constitution and would not perceive that it had the purpose of endorsing Islam and Judaism.¹⁵⁷⁰

In another case – *Sechler v. State Coll. Area Sch. Dist.*,¹⁵⁷¹ a district court upheld the constitutionality of an elementary school holiday display against a challenge under the First Amendment alleging that the school established religion and sent a message of hostility towards Christianity.¹⁵⁷² The court relying on *County of Allegheny* in which the display whose constitutionality was upheld included a Menorah and a Christmas tree held that there, “need not be symbols of other religions to counterbalance something like a Menorah before the message is reasonably

¹⁵⁶⁷ *Skoros*, *supra* note 1547, at 4

¹⁵⁶⁸ See *Marchi v. Bd. of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 478 (2d Cir.), cert. denied, 528 U.S. 869 (1999).

¹⁵⁶⁹ *Id.* at 476.

¹⁵⁷⁰ *Id.* at 51-52.

¹⁵⁷¹ 121 F. Supp. 2d 439 (M.D. Pa. 2000).

¹⁵⁷² The display included items associated with Chanukah, with Kwanzaa, a book about different celebrations throughout the world including several Christian ones, a book on Polish culture and the influence of Christianity on it, a “Giving Tree.” (*Id.* at 444).

perceived as one of inclusion.”¹⁵⁷³ The court also noted that, although in the minority, there still were some symbols with specifically Christian connotation and some which could have both secular and religious meaning (such as the “Giving Tree” and the white doves), and when placed in the context of the overall holiday program, no hostility towards Christianity was communicated.¹⁵⁷⁴

Thus a display of the religious symbol of one faith only will be clearly in violation of the Establishment Clause. When secular symbols and religious symbols are displayed together unified by a secular objective the display will be constitutional and educational authorities enjoy large discretion as to what symbols to choose as representing a given religious tradition, provided the overall message is not one of endorsement¹⁵⁷⁵ On the other hand, it seems that permanent displays of symbols of several religions, but without the presence of secular symbols will be considered an endorsement of religion, in contrast to what would be the finding in such cases in all of the other jurisdictions except France. In *Allegheny* the Court noted that:

The mere fact that Pittsburgh displays symbols of both Christmas and Chanukah does not end the constitutional inquiry. If the city celebrates both Christmas and Chanukah as religious holidays, then it violates the Establishment Clause. The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone.¹⁵⁷⁶

¹⁵⁷³ *Id.* at 451.

¹⁵⁷⁴ *Id.* at 451-452. It should be noted however, with respect to the above discussion regarding the disputes as to the relevant objective observer for application of the endorsement test in school settings, that in the case at bar the plaintiff was a church pastor invited as member of the general public to view the school holiday program and display and he sued only at his own behalf. Therefore the court concluded that for the purpose of the plaintiff’s complaint the display was to be viewed as a display on public property and the court did not examine what the effect of the display would be on young and impressionable children. (*Id.* at 450).

¹⁵⁷⁵ See also O’Connor’s concurring opinion in *Allegheny*, *supra* note 88, at 636-637. arguing that whether the state could have chosen a “more secular” symbol to represent the holiday is immaterial for the Endorsement analysis. By analogy, it may be argued that whether the state could have chosen a “more religious” symbol should also not affect the constitutionality of the display.

¹⁵⁷⁶ *Allegheny*, *supra* note 88, at 615. See also Justice Brennan, concurring in part and dissenting in part, “I know of no principle under the Establishment Clause, however, that permits us to conclude that governmental promotion of religion is acceptable so long as one religion is not favored. We have, on the contrary, interpreted that Clause to require neutrality, not just among religions, but between religion and nonreligion.” (*Id.* at 645).

On the other hand, if a school introduces a course on education about religion, one that the non –confessional and does not teach religious as truth, but engages in a academic study of comparative religion then the use of religious symbols for the education purposes of the course would also be permissible.¹⁵⁷⁷

2. School-sponsored speech

When religious symbols are placed on school grounds not by the school authorities themselves but by students or their parents, but the symbolic expression represents school-sponsored speech, courts have reviewed school action restricting the religious symbolic speech relying on *Hazelwood*.¹⁵⁷⁸ Courts of appeals, however, have reached divergent opinions as to whether *Hazelwood* allows view point or only subject matter discrimination.

In *Fleming v. Jefferson County School Dist. R-1*,¹⁵⁷⁹ the Tenth Circuit Court of Appeals held that *Hazelwood* allowed for view-point discrimination of school-sponsored speech provided that it was reasonably related to legitimate pedagogical concerns. In 2000 several months after the shooting in the Columbine High School in which two students shot to death several other students and one teacher and finally killed themselves, a tragedy that shocked the whole country, the school decided to reopen and take measures so that the school building poses a lesser psychological challenge to returning students. An art project was initiated to allow students to create abstract artwork on tiles that would be installed in the school halls. Students' parents, rescue workers and other community members who responded to the tragedy were invited to participate in the project under the supervision of school staff members. The

¹⁵⁷⁷ See *Abington School Dist. v. Schempp*, 374 U.S. 203, 226 (1963), "It might well be said that one's education is not complete without a study of comparative religion and its relation to the advance of civilization."

¹⁵⁷⁸ *Hazelwood School District et al. v. Kuhlmeier et al.*, 484 U.S. 260 (1988)

school principal issued the following guidelines: “there could be no references to the attack, to the date of the attack, April 20, 1999, or 4/20/93 [sic], no names or initials of students, no Columbine ribbons, no religious symbols, and nothing obscene or offensive.”¹⁵⁸⁰ The purpose of the restrictions was to retain a positive school environment and not to turn the school halls into a memorial of the shooting, and “*to prevent the walls from becoming a situs for religious debate, which would be disruptive to the learning environment*”(emphasis added).¹⁵⁸¹

Tiles were to be screened for compliance with the guidelines and parents were informed that if they wished to create tiles with inscribed religious messages and symbols on them, the tiles would not be affixed to the schools walls and would be returned to them for personal use.¹⁵⁸² The plaintiffs, whose child was one of the students who died in the shooting, sued the school district alleging a violation of their free speech rights and the Establishment Clause. The district court ruled for the plaintiffs and found a violation of their free speech rights, but the Court of Appeals reversed and held that the symbolic speech in question was a school sponsored speech and the school district guidelines were “reasonably related to legitimate pedagogical concerns” under *Hazelwood*.¹⁵⁸³ The Supreme Court has denied certiorari.

The appellate court rejected the view that the project constituted a limited public forum, since the school district “created and enforced restrictions on what participants were allowed to paint, supervised the painting sessions, and screened out inappropriate tiles.”¹⁵⁸⁴ The district school had shown “affirmative intent to retain editorial control and responsibility over the tile project” and there was no intent to

¹⁵⁷⁹ 298 F.3d 918 (10th Cir. 2002), *cert. denied*, 537 U.S. 1110 (2003).

¹⁵⁸⁰ *Id* at 921.

¹⁵⁸¹ *Id* at 933.

¹⁵⁸² *Id* at 921.

¹⁵⁸³ *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 274-276 (1988).

¹⁵⁸⁴ *Fleming v. Jefferson County School Dist. R-I*, at 929.

open it for indiscriminate use by the public – therefore it constituted a non-public forum.¹⁵⁸⁵

The court reasoned that since there are three types of speech that may occur in the school setting: students’ private speech, governed by *Tinker*; government speech; and school-sponsored speech governed by *Hazelwood*—“student speech that a school ‘affirmatively promote[s],’ as opposed to speech that it ‘tolerate[s].’”¹⁵⁸⁶ Since the tiles were not a temporary displays but would be permanently affixed on the school walls, and since the level in which the school exercised supervision over the financing, the creation, and the selection of appropriate tiles, the Court concluded that the speech bore the imprimatur of the school and a reasonable observer would perceive it as a school sponsored speech.¹⁵⁸⁷

The Court took the position that under *Hazelwood* schools were allowed to make view-point based distinctions in exercising editorial control over school-sponsored speech, a position not shared by other circuit courts of appeal.¹⁵⁸⁸ It found that the restrictions on religious speech were reasonably related to the legitimate pedagogical concern of avoiding “divisiveness and disruption from unrestrained religious debate on the walls.”¹⁵⁸⁹ The court noted that had the school district been required to remain view-point neutral, it would have to allow also the posting of tiles with messages such as “God is hate” once it allows a tile saying “God is Love.”¹⁵⁹⁰

Similar issues arose in the case of *Bannon v. School District of Palm Beach County*,¹⁵⁹¹ in which the Court of Appeals for the 11th circuit held that a high school

¹⁵⁸⁵ *Id.*

¹⁵⁸⁶ *Hazelwood*, 484 U.S. at 270-71, 108 S.Ct. 562.

¹⁵⁸⁷ *Id.* at 930-931.

¹⁵⁸⁸ See *Id.* at 928-929.

¹⁵⁸⁹ *Id.* at 932.

¹⁵⁹⁰ *Id.* at 932. See also *Gernetzke v. Kenosha Unified School District No. 1*, 274 F.3d 464 (7th Cir.2001)

¹⁵⁹¹ 387 F.3d 1208, 193 Ed. Law Rep. 78, 17 Fla. L. Weekly Fed. C 1113 (11th Cir.(Fla.) Oct 12, 2004) (NO. 03-13011), certiorari denied - *Bannon v. School Dist. of Palm Beach County*, 126 S.Ct. 330, 163

principal did not violate a student's right to free speech and free exercise by directing her to remove the religious symbols and words she painted on a mural as a participant of a school-wide beautification project. The school directed students that they could not paint anything that "could be profane or offensive to anyone."¹⁵⁹² Bannon, a student, painted several murals with religious messages.¹⁵⁹³ After the murals attracted the attention of the media, and caused discussion and controversy among students and teachers, the principal requested that Bannon repaint the religious symbols and words such as "God" and "Jesus." Bannon filed suit alleging a violation of her free speech and free exercise rights.

The Court found that the project was a nonpublic forum, the speech at issue was a school-sponsored speech and applied the *Hazelwood* standard. In contrast to the 10th Circuit Court of Appeals, it interpreted *Hazelwood* in allowing content-based but not viewpoint-based restrictions on school sponsored speech.¹⁵⁹⁴ In the case before it the Court found that the school had engaged in permissible content-based regulations, since Bannon's messages were not expressing a religious view-point on a secular topic, but were "inherently religious messages."¹⁵⁹⁵ It distinguished from *Lamb's Chapel* and *Rosenberger* on the basis that these cases did not involve school-sponsored speech and speakers were prevented from otherwise permissible topics from a religious perspective.¹⁵⁹⁶ The Court relied on the language of *Rosenberger* where the Supreme Court noted that the university had not forbidden the subject matter of religion and therefore its prohibition was based on the viewpoint of the

L.Ed.2d 43, 73 USLW 3557, 74 USLW 3194, 74 USLW 3201, 202 Ed. Law Rep. 26 (U.S. Oct 03, 2005) (NO. 04-1207).

¹⁵⁹² *Id.* at 1211.

¹⁵⁹³ The messages were: "Jesus has time for you; do you have time for Him?," "God Loves You. What Part of Thou Shalt Not Didn't You Understand? God."; "Because He ♥ed, He Gave." (id at 1211).

¹⁵⁹⁴ *Id.* at 1215.

¹⁵⁹⁵ *Id.* at 1216.

¹⁵⁹⁶ *Id.*

speaker.¹⁵⁹⁷ In Brannon's case, in contrast, the school restricted the expression because of its content with the purpose of preventing disruption in the school activity, which is a legitimate pedagogical objective.¹⁵⁹⁸

In *Seidman v. Paradise Valley Unified School District No. 69*¹⁵⁹⁹ however, the U.S. District Court for the District of Arizona held that a school district had violated the free speech rights of parents by forbidding them to display tiles containing religious greetings on a permanent school display. The school organized a fund-raising project "Tiles for smiles" and invited parents to purchase tiles which would be permanently affixed on the school hallways. The school announced that parents could have the tile bear a message of their choosing while the school reserved to rights to make "minor modifications."¹⁶⁰⁰ The Seidmans applied for tiles that would bear the messages "God Bless Quinn, We Love You Mom & Dad," and "God Bless Haley, We Love You Mom & Dad."¹⁶⁰¹ The school refused their application along with several other applications bearing religious messages on the ground that it wished to prevent liability under the Establishment Clause. The Seidmans filed suit alleging a violation of their free speech rights.

The court, found that the forum was a non-public one and that the speech was school-sponsored. The court however disagreed with the 10th circuit and interpreted *Hazelwood* to require view-point neutral regulation of school-sponsored speech.¹⁶⁰² According to the court a broad exclusion of religion as a category does not render the policy view-point neutral "if it discriminates on the basis of viewpoint by permitting the presentation of views dealing with the same subject and excluding those presented

¹⁵⁹⁷ See, *Rosenberger v. University of Va.* (94-329), 515 U.S. 819, 832 (1995), "By the very terms of the prohibition, the University *does not exclude religion as a subject matter* but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints."

¹⁵⁹⁸ *Bannon*, *supra* note 1591, at 1216.

¹⁵⁹⁹ 2004 WL 1727859 (D. Ariz. August 2, 2004).

¹⁶⁰⁰ *Id* at 1102.

from religious standpoint.”¹⁶⁰³ Since the school had allowed the inscription of message of “love, praise, encouragement, and recognition of students” and the Seidmans messages fell into that category, the reason they were excluded was their religious view-point. The court held that although avoiding a violation of the Establishment Clause was a compelling state interest that could justify content-based discrimination the language of the message would not send a message of state endorsement of religion or Christianity.¹⁶⁰⁴ The court noted however, that had the messages been proselytizing or exhorting, the school district would have been justified in their prohibition. However, the display at issue did not create a proselytizing or coercive environment.¹⁶⁰⁵

The Court also addressed the concern that is a recurring issue in such cases—namely, if the school is required to be view-point neutral whether by permitting the message “God bless Quinn” it should also permit a message with a blessing from Allah, or one declares that there is no God to bless anybody. The court admitted that school hallways were not the place for such a debate, but since the school had not set clear limits to the scope of the forum and had excluded religious speech on allowed topics it had violated the First Amendment.

What these cases illustrate is the difficulty in striking the balance between student’s rights to freedom of expression and freedom of exercise on the one hand and the state’s interest in maintaining a positive school environment. Should all religious speech be erased from schools when it bears an association with the school authorities and is classified as “school-sponsored speech”?

¹⁶⁰¹ *Id.*

¹⁶⁰² *Id.* at 1109.

¹⁶⁰³ *Id.*

¹⁶⁰⁴ *Id.* at 1112-1123.

¹⁶⁰⁵ *Id.* at 1114.

Firstly, it makes sense to maintain that school authorities may impose view point restrictions on speech in with the purpose of furthering legitimate pedagogical objectives. For example, it is hard to maintain that is a school sponsors an event for promoting abstinence from drug use, the school is mandate to display not only student artwork that shows the negative effects of drug use and promotes a drug-free life but only artwork that glorifies drug use. Prohibiting the latter clearly constitutes view-point discrimination but it is completely defensible as a constitutional exercise of editorial supervision on the part of the school authorities.

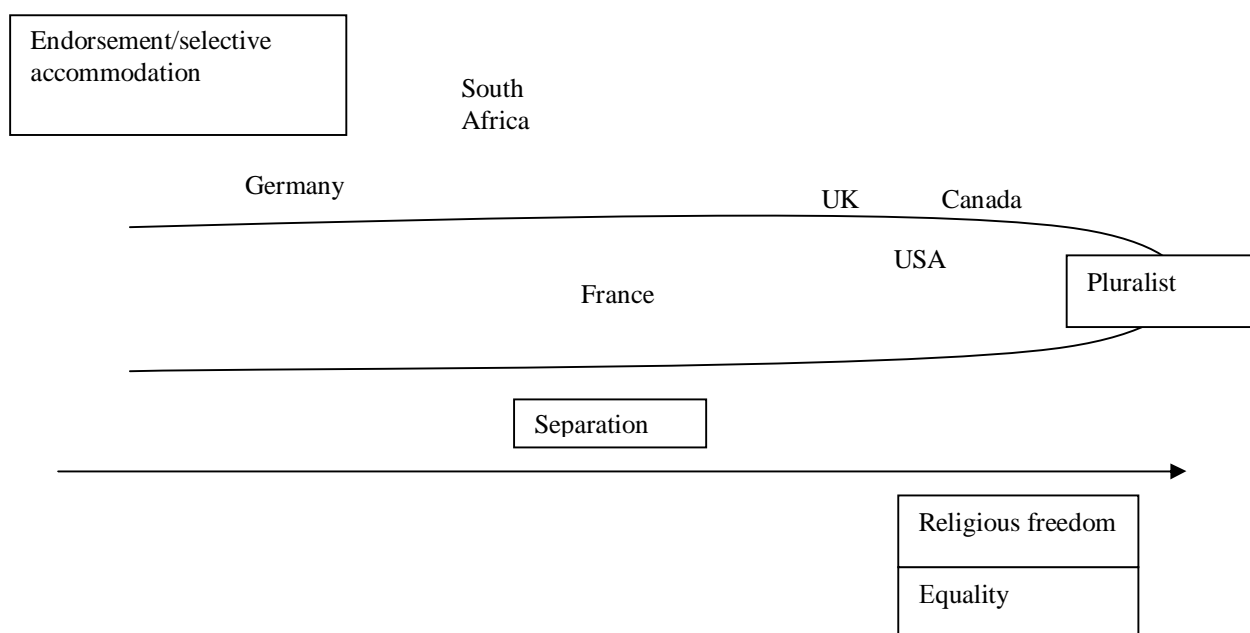
On the other hand, I would argue that a rational test for determining the relationship between the view point discrimination and the legitimate pedagogical purpose is too permissive. Even in the school context, and even with respect to school-sponsored speech the school authorities should be required to bear a higher burden of proof in justifying view-point based restrictions on speech. The requirement of a “reasonable relationship” does not adequately protect religious and expressive rights of student. I would argue that an intermediate level of scrutiny requiring the authorities to show an important pedagogical concern that is substantially furthered by the imposition of view-point restrictions is a better way of striking the balance. It is less exacting then the strict scrutiny test normally applied to view-point restriction outside the school setting thus taking into account the peculiarity of the school as a public domain, but at the same time is better attuned with traditionally high protection that constitutional jurisprudence in the US accords to the right to freedom of speech.

Considering the cases discussed above, I would argue that even in these situations school authorities should permit the religious expression through symbol or words, provided that it may legitimately prohibit any expression that is deeply offensive to other students – especially when this is a permanent display and may lead

to the creation of an atmosphere of intimidation to some students or may be perceived that the school lends support to such offensive attitude. On the other hand, I do not think that there is great danger to the school peace, absent concrete and particular evidence, when a student reads from one corner a blessing from God and from another corner of the wall a blessing from Allah. After all if it is the mission of schools to prepare citizens for life in a pluralist society then the school should not attempt to erase all plurality and sanitize the whole school experience to prevent the abstract possibility that expression may lead to discussion, controversy, and debate.

XXIV. CONCLUSION

A pluralist approach to the issue of religious symbols displays at public schools is the one that best serves to protect the religious freedom rights of students and at the same time contributes to the interest of state authorities in cultivating tolerance for religious diversity. An approach that allows the display of the religious symbols of the local or national majority only, is an impermissible endorsement of religion though which the state schools fail to show equal respect and concern of all students.



I think that in the school setting symbolic speech expressed through wearing of religious dress items, or placing of religious symbols in a public forum set up by the school should not be restricted because school authorities have the possibility to emphasize the positive aspect of the message conveyed by these symbols and in this way they can teach about the value of toleration in a religiously diverse society. While a student may feel offence simply by the site of a crescent next to the cross, or the portrait of Buddha next to the portrait of Mohammed or Christ, it is the task of school to turn this into a lesson for toleration of the difference and at the same time the opportunity of young students to express their religious identity through symbols would strengthen their self-esteem.

CHAPTER 5

IMPLICATIONS FOR RECENT DEVELOPMENTS IN BULGARIA

So far in Bulgaria has not seen extensive developments in the field covered by the thesis, nevertheless a short analysis addressing some recent troubling developments which show the risk of misunderstanding and misapplication of precedents developed elsewhere would be useful. As Machado notes his discussion of the nature of the protection of religious freedom in Europe:

religious freedom is to be regarded not only as an international value-protected solely by international law, but also as a transnational value. This means that the international community has a stake in the way each country deals with the religious

freedom of its citizens and residents. In other words, this has long ceased to be exclusively a constitutional law problem that each state is to solve as it pleases. The understanding of religious freedom as a transnational value legitimizes the practice of constitutional and international cross-fertilization between national and international courts, much facilitated by new communications technologies. Thus, in solving many of the problems it faces, a national court should consider the way national courts from other countries have dealt with similar situations.¹⁶⁰⁶

The analysis will attempt to prove that the proposed pluralist approach is consistent with the relevant provisions of the Bulgarian Constitution and their interpretation by the Bulgarian Constitutional court, although current practice on regulation of religious symbolism in public schools in certain respects fails to meet the principle of maximization of religious liberty and equality of all students in the public schools.

1. Constitution

The first chapter of the Bulgarian Constitution contains the fundamental principle on which the constitutional order is built. These fundamental principles included the equality of all persons in their dignity and rights and the prohibition on discrimination in the enjoyment of rights on the basis of race, nationality, ethnic self-identity and religion among others.¹⁶⁰⁷ The separation of religious institutions from the state and the free practice of any religion are also enshrined as fundamental principle of the Constitution.¹⁶⁰⁸ The content of the right to freedom of religion is specified in the second chapter on fundamental rights and duties of the citizens. Article 37 of the Constitution provides that:

- (1) The freedom of conscience, the freedom of thought, and the choice of religion and of religious or atheistic views are inviolable. The state shall assist

¹⁶⁰⁶ Jonatas E. M. Machado, *Freedom of Religion: A View from Europe*, 10 ROGER WILLIAMS U. L. REV. 451, 470 (2005).

¹⁶⁰⁷ CONSTITUTION OF THE REPUBLIC OF BULGARIA, Art.6

¹⁶⁰⁸ CONSTITUTION OF THE REPUBLIC OF BULGARIA, Art.13.

the maintenance of tolerance and respect among the believers from different denominations, and among believers and non-believers.

(2) The freedom of conscience and religion shall not be practiced to the detriment of national security, public order, public health and morals, or of the rights and freedoms of others.

The Bulgarian Constitutional Court has held that the right to freedom of conscience, belief and thought is a value of high order. The right to freedom of religion includes the right of free choice of religion and free exercise of religion “through print, speech, creation of religious communities and associations and their activities within the communities and outside them as a manifestation in society.”¹⁶⁰⁹ The Court also noted that, as a party to the International Covenant on Civil and Political Rights, Bulgaria has undertaken “to respect the freedom of parents, respectively custodians of children, to provide for the religious and moral education of their children in conformity with their own convictions.”¹⁶¹⁰ These rights are not absolute, but are subject to limitations prescribed by law and necessary for the protection of national security, public order, public health and morals, or of the rights and freedoms of others.

According to the Constitutional Court the state has the duty to provide conditions for the free and unencumbered exercise of the right to freedom of religion of any Bulgarian citizen. Secondly, the state has the duty to “assist for the maintenance tolerance and respect among the believers belonging to different denominations, as well as, between believers and those who do not believe in any

¹⁶⁰⁹ Decision No. 5 from 11 June 1992, on constitutional case No. 11 from 1992.

¹⁶¹⁰ *Id.*

religion.”¹⁶¹¹ Thirdly, the state has the duty not to interfere in the internal affairs of religious communities and organizations nor in their public manifestations.¹⁶¹²

2. Statutory Regulation

The law on Religions regulates in more detail the exercise of freedom of conscience and religion. It provides that freedom to hold beliefs is a “basic, absolute, subjective, individual and inviolable” right.¹⁶¹³ The law protects the right to manifest one’s religion individually or in community with others, in public or in private and that restrictions or privileges based on one’s belonging to a religion or refusal to belong to a religion shall be forbidden.¹⁶¹⁴ The law also provides for equality of all religions and for a separation of the religious institutions from the state.¹⁶¹⁵ Furthermore, the law states that “religious convictions are not a ground for refusal to comply with the duties imposed under the Constitution and the law.”¹⁶¹⁶ The Law protects parental rights over the religious upbringing of their children and provides that children below the age of 16 may not be included in the activities of religious communities and organization unless their parents expressly consent to that, while children below 18 may not participate in such activities if their parents have expressly stated their disagreement.¹⁶¹⁷

The Law for the Protection Against Discrimination prohibits direct and indirect discrimination on the basis of religion, among other enumerated grounds.¹⁶¹⁸

¹⁶¹¹ *Id.*

¹⁶¹² *Id.*

¹⁶¹³ Law on Religions 2002 (as amended in 2006), Art. 2 (1).

¹⁶¹⁴ Law on Religions, Art.2(20, Art.3 (1).

¹⁶¹⁵ Law on Religions, Art. 4(1).

¹⁶¹⁶ Law on Religions, Art. 3 (2).

¹⁶¹⁷ Law on Religions, Art. 6 (2) and Art. 7 (5).

¹⁶¹⁸ Law for the Protection Against Discrimination (2003), Art. 4

School authorities are obliged to take effective measures to prevent all forms of discrimination at school caused by actions of the school teaching and administrative staff or students.¹⁶¹⁹ Public education in Bulgaria is secular.¹⁶²⁰ Citizens have the right to education and restrictions or privileges on the basis of religion with respect to this right are prohibited.¹⁶²¹

The proposed pluralist approach to religious symbolism in public schools is in conformity with the constitutional regulation of religious freedom and equality, and the relationship between religious institutions and the state. The pluralist approach maximizes protection of the fundamental rights of students and their parents, and at the same time honors the principle of neutrality of the state and its obligation to promote tolerance in a society characterized by religious and philosophical diversity. The recent practice of the Bulgarian authorities, however, is not in conformity with this approach.

3. Symbolic religious expression in public schools

There is no statutory framework permitting or mandating the holding of religious exercises in public schools and no such practice exists in Bulgarian schools. What has recently become a source of public debate is the permissibility of religious attire worn by students. Bulgaria too has had its “headscarf debate.” The wearing of headscarves by women and girls belonging to the significant Muslim minority in the country is not a common practice. Until recently, only elderly Muslim women were covering their heads for religious purposes. However, the situation is changing now, and there are more and more young Muslim girls who are donning the headscarf. This

¹⁶¹⁹ Law for the Protection Against Discrimination (2003), Art.30

is largely a result of the successful campaign for religious revival of the young Muslim population in the Rhodopi region of Bulgaria carried out by a local non-governmental organization called Union for Islamic Development and Culture. The leaders of the organization are young men educated in Jordan.

In the fall of 2005 two female students in a High School in the city of Smolyan started attending classes with headscarves. The headteacher approached them and warned them that wearing headscarves is inconsistent with the school Regulations for the School Activities adopted by the school authorities under Art. 38, para.1 of the Law on Education. The School Regulations provide for a mandatory school dress code for the students - black pants/skirt, white blouse, red vest, school emblem. The schoolgirls were told to come to school in proper uniform. After her talk with the students the headteacher was visited by representatives of the Union for Islamic Development and Culture who argued she was interfering with the personal convictions of the two schoolgirls.

The headteacher sent a letter to the Regional Educational Inspectorate expressing her concern the behavior of the two schoolgirls created tension among the students and this might result in an uncontrollable situation at the school. The Educational Inspectorate appointed a commission which had to check the facts and the circumstances of the issue. The commission stated that the wearing of headscarves and long ritual dress does not violate the provisions of the Regulations for Application of the Law on Education (RALE) but it is up to the school authorities to take a decision and sanction the students if it finds that the School Regulations have been violated.

¹⁶²⁰ Law on Education from 1991(as amended in 2006), Art. 5.

¹⁶²¹ Law on Education, Art.4.

The school did not sanction the student however, it kept making oral demands that they stop wearing the headscarves. The Union for Islamic Development and Culture (the Organization) filed an application to the Bulgarian Commission for Protection against Discrimination alleged that the Professional Economics High School discriminated against students practicing Islam. Later on the two girls wanted to join in the proceedings but they were not allowed to because of procedural irregularities. The Commission's decision was extraordinary. It not only found that the school authorities insistence that the schoolgirl do not wear headscarves was not an indirect discrimination on the basis of religion, and that they had not unjustifiably infringed the religious freedom rights of the two Muslim students and not restricted their access to education on the basis of religion, but that the Organization had violated the anti-discrimination law by carrying out actions which represent "incitement to discrimination" and imposed a fine on it. Furthermore, the Commission imposed a fine on the school authorities and the Ministry of Education because, according to the Commission, they had allowed direct discrimination by not sanctioning the non-compliance with the school uniform.

The reasons for the decision given by the Commission are highly unconvincing. The Commission accepts that it is the right of every person to manifest his/her religion or convictions in his/her private life but says:

"it is inadmissible that they be imposed on the whole society through ostentatiousness and media events. Spirituality is an intimate sphere of each person, which may not be exploited in the public space neither by parents, not by any other persons or organizations."¹⁶²²

The Bulgarian constitution as interpreted by The Constitutional Court as well as the law on Religions guarantee not only the manifestation of one's religion and spirituality in private but also in public, a guarantee which the Commission somehow

neglected to mention. Furthermore it is not clear how in this particular case the two girls, by wearing headscarves at schools and talking to the media have tried to impose their convictions on the whole Bulgarian society. Nor was there any evidence that they have proselytized anyone at school.

According to the Commission the request for accommodation for the two schoolgirls made on their behalf by the Organization “transgresses the boundary of tolerance and offers a formula which would place in position of unequal treatment all other students, who do not accept the wearing of headscarves and other ritual dress during school lessons.”¹⁶²³ The Commission reasoned that were the claims of the applicants satisfied this would lead to direct discrimination of all students, who do not agree that those who violate the established school uniform should be tolerated and such students – students practicing another religion or atheists would be placed be placed in unequal position with respect to those professing Islam.

In effect the position of the Commission is that these other students would be discriminated against because of an exemption from the school uniform given to other students, from which exemption which exemption they themselves do not desire or wish to use. In this relation, it is worth pointing out the response of the Canadian Supreme Court in the *Multani* case, when it presented with the argument that “some students still consider the right of Muslim women to wear the chador to be unfair, because they themselves are not allowed to wear caps or scarves.”¹⁶²⁴ The Court emphasized that, “To equate a religious obligation such as wearing the chador with the desire of certain students to wear caps is indicative of a simplistic view of freedom of religion that is incompatible with the Canadian Charter.”¹⁶²⁵

¹⁶²² Decision of the Bulgarian Commission for Protection against Discrimination, 28.07.2006.

¹⁶²³ *Id.*

¹⁶²⁴ *Multani*, *supra* note 1165, at 72.

¹⁶²⁵ *Id.* at 73.

The Commission pointed out that the basic issue before it was about the limits of the freedom of thought, conscience and religion. The Commission referred to the permissible limitation on freedom of conscience and religion provided for in the Bulgarian Constitution as well as those under Art.9 of the European Convention on Human Rights. According to the Commission the wearing of headscarves in public schools should be prohibited for the protection of public order, since “the creation of tension and instability through demonstration of religious belonging is impermissible.” However, apart from the concerns of the headteacher that the wearing of headscarves *might* lead to tension at school, there was no concrete evidence of disruption of the school order. Thus although the Commission identified one of the permissible grounds for limitation of religion freedom under the Convention, it totally ignored the most important element – the requirement that the restriction should be “necessary in a democratic society”. There was no proportionality analysis done by the Commission.

The Commission also stated that the wearing of religious dress at school is incompatible with secular education. This view was also taken publicly by the Minister of Education who stated that the wearing of religious symbols has no place in the public secular school. Those who wear such symbols should attend private schools. For the reasons presented in the discussion on the French headscarf debate such a dichotomy between the secularity of education and the wearing of religious symbols by students is untenable.

The Commission also reasoned that in the particular case the representatives of religions having a mandatory element in their dress are not placed in an unfavorable position, since these two students accepted voluntarily to receive their education in the Professional Economics High School “Karl Marx” – Smolyan and in

this way by their own will accepted the School Regulations providing for the particular dress code. This argument is similar to the one relied upon by some of the law Lords in the *Shabina Begum* case. However, it should be noted, that even if one accepts it in the *Shabina Begum* Case, it is difficult to accept it here. Firstly, the school in the UK had already made considerable efforts after consultations with the religious communities, to accommodate as the religious dress requirements of Muslim female students. No such efforts were made in the Bulgarian case. Furthermore, in the Bulgarian case, there is no other public or private educational institution that would permit the wearing of headscarves and would provide the equivalent specialized economics education.

The Commission referred also the decision of the European Court of Human Rights in the *Sahin* case. Firstly, as was already argued with the respect to the French law from 2004 in Chapter XII, this case was decided on the basis of unique factual circumstances which are clearly distinguishable from the Bulgarian situation. So, I would argue that the close attention paid the contextual factors by the European court should lead one to reject this case as having precedential value for the Bulgarian case. What is most surprising though, is the conclusion the Commission draws from this case regarding the obligation of the Bulgarian state. According to the Commission:

The transposition of the decision of the European Court to the particular case means that the competent authorities not only did not take adequate measures for the protection of the secular character of education at public schools, but have also subjected to unequal treatment all students who comply with the established rules under the Law on Education and the RALE for the activities at the high school.¹⁶²⁶

Such a conclusion is obviously erroneous. The fact that the European Court of Human Rights has found that the restriction on the religious freedom rights of

¹⁶²⁶ Decision of the Bulgarian Commission for Protection against Discrimination, 28.07.2006.

students in universities in Turkey is not incompatible with the European Convention on Human Rights, within the particular factual context, and giving a large margin of appreciation the state because of the lack of European consensus on religious attire in public schools in the states parties to the Convention, in way no means that the Court has interpreted Art.9 of the Convention as imposing a positive obligation on all state to ban religious attire worn by students in such schools.

The Commission also touched upon the element of coercion. However, it did not argue that the two girls were exerting pressure on other Muslim girls to wear headscarves but argued that they themselves had been “unduly influenced.” From the fact that the application was submitted by a non-governmental organization, not by the two schoolgirls the Commission concluded that influence had been exerted upon the two girls to start wearing the headscarves.”¹⁶²⁷ One can easily however, come to a different conclusion from this fact. Namely, that the girls had sought assistance from the Organization for protection of their rights and did not have the courage to file the application themselves, which afterwards they did, but was not admitted. There was no evidence before the Commission that the girls had been coerced. One of the girls stated in an interview, that the decision to wear headscarves is hers only, since “such a decision comes from the will of the person and from the genuineness of her heart.”¹⁶²⁸ There is also no evidence that the girls have been influenced through the activities of the Organization against the wish of their parents.

Finally, the Commission found the applicant organization had sought to impose at a secular school morals not accepted by the others who comply with the internal regulations established by the School Regulations and somehow the Commission related that to General Comment No.22 of the UN Human Rights

¹⁶²⁷ *Id.*

Committee,¹⁶²⁹ which clarifies that when the right to freedom of religion is limited for the protection of morals, the limitation “must be based on principles not deriving exclusively from a single tradition.”¹⁶³⁰ The Commission somehow suggested that the Organization had acted inconsistently with the ICCPR. How the Covenant is addressed to the activities of an NGO and how that NGO is limiting the freedom of religion and belief of others is not clear from the decision of the Commission.

The decision of the Commission against discrimination was not appealed by the Organization and generated significant public support, although it is in contradiction with the constitutional and statutory protection of freedom of religion and equality in Bulgaria. Furthermore, it is ironic that an anti-discrimination commission could issue a decision which not only did not rule that the state is under obligation to protect and not discriminate against the religious beliefs of the girls, but that it also found the state in violation of the anti-discrimination law for not being firm enough with its discriminatory policy.

In September 2006 a hundred Muslim women who are Turkish citizens requested to be enrolled in the Plovdiv University of Medicine in Bulgaria and expressed their desire to attend lectures wearing headscarves. The Rector of the University after one week of consultations with the education and health ministries rejected their request, stating that education in Bulgaria is secular and may not be subjected to “doctrines, ideologies, religion, and politics.”¹⁶³¹ As a result of these incidents the Bulgarian Minister of Education has publicly announced that the Education ministry will initiate a legislation that would prohibit the wearing of

¹⁶²⁸ Йовка Йовчева, *Забрадите - фанатичен каприз или религиозно право*, сп. Обектив, бр. 134, юли 2006.

¹⁶²⁹ CCPR/C/21/Rev.1/Add.4, General Comment No. 22, p.8.

¹⁶³⁰ *Id.*

¹⁶³¹ Боряна Джамазова, *Не е ясно ще се стигне ли до регламент за религиозните символи в българските училища и ВУЗ*, < <http://www.mediapool.bg/show/?storyid=121483&srcpos=22>>.

religious symbols both in public schools and universities. This position has the support of a number of higher education institutions in Bulgaria and even of a human rights organization such as the Association for European Integration and Human Rights, whose chairperson, a well-known human rights lawyer, stated that one has to have in mind that “many” European state universities ban the wearing of religious symbols.¹⁶³² This statement does not reflect the fact that with the exception of three countries in the Council of Europe – Turkey, Albania and Azerbaijan, all other states do not have such prohibitions applicable to higher education institutions.¹⁶³³

Nevertheless, amendments to the Law on Education and the Law on Higher Education are also supported by deputies of the parliamentary legislative committee and the parliamentary committee on religions, but firmly opposed by Chief Mufti in Bulgaria. While the Minister of Education admits the issue of religious symbols is a little bit different in universities when compared to the same issue in schools, he argues that higher education should be “emphatically secular” and that “its visible aspect should also be in conformity with the Bulgarian national traditions.”¹⁶³⁴ A justification of restrictions of religious freedom of students in universities on the ground of a lack of conformity with “national traditions” is warranted neither by the Bulgarian Constitution nor by the international instruments to which Bulgaria is a party. The statement of the minister again suggests that arguments based on tradition may be used to erode the protection of individual liberties. Finally, it should be noted that at the same time when preparations for drafting a law banning religious attire in state schools are underway, there is also a growing support, public discussions and preparation for the drafting of a law that would make confessional religious education

¹⁶³² Екатерина Терзиева, *България потъна дълбоко в дебата за религиозните символи*, 11 September 2006, <<http://www.socialnoprava.info/article1575.html>>.

¹⁶³³ Leyla Şahin, *supra* note 418, at 55.

in eastern Orthodox Christianity a part of the regular curriculum. One wonders how the religious garb of students violates the secularity of state schools, while at the same time, confessional religious instruction provided by the state school is in conformity with that principle.

¹⁶³⁴ Таня Петрова, *И ученици, и студенти без забрадки и кръстове*, СЕГА, 30.8.2006, <<http://www.segabg.com/online/article.asp?issueid=2400§ionid=16&id=0000101>>.

CHAPTER 6

CONCLUSION

The basic proposition of the paper has been that a pluralist approach to the regulation of religious symbolism in public schools is the one that maximizes religious freedom and equality, taking into consideration the specific features of the public school which make it a special domain. This approach aims to ensure that authentic space is provided for religious expression by all who wish to engage in it, without coercing anyone directly or indirectly to participate or identify with symbolic messages which are in conflict with their own beliefs. The approach aspires to inclusiveness of all students as members of the school community by according equal respect and recognition to their beliefs which represent an essential feature of their identity. It aims to teach students to tolerate and appreciate those different from them. It aims to avoid the extremes of banishing all religious expression from public schools or selectively accommodating the expression of some religions, which most often would be the dominant ones and/or turning the government into their mouthpiece. A pluralist approach avoids these extremes through giving robust protection to private religious expression and limiting government religious expression to one that is purely educational and that treats all religious and secular beliefs equally and ensures that a multiplicity of voices will be heard.

The framework conditioned by the pluralist approach governing religious symbolism in public schools may be summarized as follows.

1. Religious Exercises

Such a framework would provide for moment of silence for opening or closing of the school day, organizing religious observances only for those parents or students who have so requested. Similarly, if the school has assemblies at the beginning of each day, and a passage from different religious and secular philosophic texts are read by the teacher on different days, this would serve the purposes of teaching tolerance about religious and philosophical diversity in society. In order to mitigate the objections of some parents that this may relativize the beliefs they want to inculcate in their children, such exercises may be introduced in upper level classes for more mature students. Another alternative is leave this entirely to the private initiative of the students and make reasonable efforts to make facilities available for voluntary religious observances as broadly as possible on an equal access basis.

2. Religious attire

Religious apparel worn by students should be allowed in public schools, since such an act is protected by the right to freedom of religious and freedom of expression. The only permissible limitations would stem from valid pedagogical concerns. One such concern would be likelihood of immediate disruption of school order, but only where it is the student's behavior that causes disruption. The school should be careful not to legitimize and enforce a practice of a heckler's veto. Another legitimate ground for restriction would be the health and safety of students, and restrictions on these ground should be narrowly tailored and cause a minimum impairment of the right to religious expression. Religious dress items may be restricted when they seriously inhibit the teaching process, for example when the whole face of the student is invisible. Religious and secular messages on student's

dress may be prohibited also if they are grossly diminishing and insulting other students on the basis of feature that is part of the core identity of other students –such as race, ethnicity, religion, sex or sexual orientation. Such limitations should be always strictly construed.

Teachers' religious dress may and should be subject to more restrictions since besides an individual manifestation of religion it also represents religious speech by the state. Therefore, when teachers instruct young children in order to prevent influence on their religious beliefs, teachers should be required not to wear conspicuous religious symbols. On the other hand, when instructing more mature students, who are not so vulnerable to influence by teachers as role models and persons who stand in a relationship of authority over them, religious dress of teachers should not be restricted since it would contribute to the education of students for life in a multicultural society.

3. Displays of religious symbols

Displays put up by the state of the symbols of one religion also should be forbidden as they infringe on the state mandate of neutrality and send a message of exclusion to all those students who do not belong to that religion, and most often this would be the majoritarian religion. On the other hand the school authorities may designate a place where all students can display symbols – images, texts and objects reflecting their religious or philosophical convictions. Such “walls of respect” will contribute to enhancing toleration towards the plurality of beliefs in the student community. The school may also use symbols of different religious as part of extracurricular activities dedicated to holiday celebration or in classes in education about religion in order to familiarize students with the symbolic expression or different

religions and cultures. In this way the state would send a message of inclusion and show equal respect for the beliefs and dignity of students in the school community and will teach a lesson of tolerance.

While this approach has not been fully implemented in all of the studied jurisdictions, its adoption would be largely feasible since it is compatible with the core constitutional and statutory provisions governing the right to freedom of conscience and religion, the right to equality and the right to education. Moreover, the adoption of this approach would eliminate some of the major problem in their systems.

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