The Conflict Between the Right to Education and Religious and Cultural Rights: A Comparative Study

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Abstract

This thesis explores the relationship between the right to education and the manner in which it interacts with freedom of religion and other rights which serve to protect minorities. The thesis examines the manner in which this relationship is managed in three jurisdictions: France, Germany and India. This thesis argues that the unique role of courts in the jurisdiction concerned, as well as historic and social specificity plays a role in the manner in which the relationship is coordinated. Further, it identifies certain types of argumentation used by courts which incorporate these features in judgements which implicate this relationship. It argues that a proper balance between the freedom of religion and of minorities on one hand, and the educational entitlements on the other, is necessary to achieve an optimal outcome to the relationship. The thesis also examines the permissible degree of regulation of private schools in Germany and France to suggest an approach which may be applied when considering the regulation of minority run educational institutions in India.

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INTRODUCTION

i. Background and Research Question

National constitutions often incorporate social entitlements within their provisions. These entitlements are articulated in a wide variety of ways depending on the country involved. Among the panoply of entitlements which have found their way into national constitutional texts, the focus of this thesis is the manner in which educational entitlements interact with freedom of religion and other rights which serve to protect minorities. Specifically, I seek to explore the ways in which the right to education[1] has manifested itself in national constitutions and the manner in which the right has conflicted with the rights of minorities, whether such minorities are based upon religion, language, or culture. In a country like India with its history of sectarian conflict, minority group rights[2] serve as an additional protection to protect the language and cultural traditions of minority groups from excessive state and private interference.[3] In the cases of France and Germany, two of the countries under study, education is a government function, as well as a zone of public life where dominance over time has shifted from religious authorities to a secularized state.[4] In other parts of this thesis, I demonstrate how education was had been the responsibility to a number of social and religious institutions (and in some cases, continues to be) in India prior to being a responsibility of the state.

Religion and education implicate primarily two kinds of rights and corresponding claims. The first are claims based upon the freedom of religion or belief, the specific content

[1] In the first chapter of the thesis, I explore the different ways in which national constitutions express educational entitlements. While some choose to do so in the form of a 'right to education', like India and France, the German Basic Law is silent about the nature of the entitlement, and the provision of education is considered a public service, where there is also room for private involvement under a certain set of conditions which may be determined by the sub-national unit of the Land.

[2] *See* Ind. Const., Arts. 25,26,27,29,30.

[3] Ronojoy Sen, *Secularism and Religious Freedom*, in Sujit Choudhury, et. al. (eds.), THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (Oxford University Press, 2016), *passim*.

[4] Renata Uitz, FREEDOM OF RELIGION 109 (Council of Europe, 2007) (hereinafter Uitz, FREEDOM OF RELIGION).

of which is dependent upon the jurisdiction in question. The second kind of claim is the constitutional protection of education as an entitlement. This second variety protects the "right of groups or individuals to 'establish and operate state-independent primary and secondary schools according to their own religious, philosophical, or pedagogical principles', and the freedom of parents 'to choose the school they want their children to attend'"[5]

The central question which drives this thesis is one whose antecedents lie in debates around the constitutional protection of minorities in India, and the manner in which it interfaces with the right to education. Although much of the Constitution of India is derived from the provisions of the Government of India Act, 1858, and the Government of India Act, 1935, the sub-chapter (within fundamental rights protections) dedicated to the protection of minorities was included in the final draft of the Constitution, with near unanimity, but extensive debate in the Indian Constituent Assembly.[6] The sub-chapter in its final form contained a set of robust protections which would come to safeguard cultural minorities from excessive state intervention in its cultural and educational institutions. Two of the central provisions of the sub-chapter on cultural and education rights of minorities[7] are reproduced below:

> *"Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same."*[8]

[5] Marcel Maussen & Floris Vermeulen *Liberal equality and tolerationfor conservative religious minorities. Decreasing opportunities for religious schools in theNetherlands*?, 51 (1) Comparative Education, 87, 88 (2015).
[6] Vivek Reddy, Minority Educational Institutions, in Sujit Choudhury, et. al. (eds.), The Oxford Handbook of the Indian Constitution (Oxford University Press, 2016) (Chapter 51 in eBook) (hereinafter Reddy, Minority Educational Institutions).
[7] This term is derived from the title of the sub-chapter dedicated to the protection of minority interests.
[8] Article 29 (1), INDIA CONST.

> *"All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice."*[9]

At first glance, it is not intuitively clear how such a set of textual provisions dedicated to the constitutional protection of minority educational and cultural rights would result in the conflict which is the subject of this thesis. This is made clearer by the long journey of the right to education as a constitutional right in Indian legal history. Originally incorporated as a directive principle of state policy in the text of the constitution adopted in 1949, the provision read as follows:

"*The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years*."[10]

The text of the Indian constitution clarifies that directive principles of state policy are not "*enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."*[11] In the later chapters of this thesis, I describe in some detail the evolution for the demand for a constitutional right to education which would be more enforceable by courts, and taken more seriously by lawmakers.[12] However, the constitutionalisation of the right to education occurred in 2002, with Article 21A being added to the Part III of the Indian constitution containing enforceable fundamental rights. The newly added provision read as follows:

[9] Article 30 (1), INDIA CONST.
[10] Article 45, INDIA CONST. (now repealed by section 3 of the Constitution (Eighty-Sixth Amendment) Act, 2002, and replaced by analogous provisions on Provision for early childhood care and education to children below the age of six years).
[11] Article 37, INDIA CONST.
[12] See Chap. 3.

> "*The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine*"[13]

The constitutional right is now made operational by a statute known as the Right of Children to Free and Compulsory Education Act, 2009 (RTE Act), which contains a number of provisions which include the affirmative action like reservation of a certain proportion of seats in each class to persons from economically weaker sections of society[14], as well as the setting of standards in infrastructure and pedagogy.[15]Indian constitutional jurisprudence contains a rich jurisprudence on the constitutional status of minority educational institutions. A commentator notes that with respect to cases concerning state regulation of minority educational intuitions, the "Court examined these laws only from the perspective of minority educational institutions, instead of examining them from the standpoint of academic freedom".[16] This resulted in such institutions becoming "an oasis of educational autonomy for minority educational institutions while non-minority educational institutions were deprived of this right and subjected to extensive State regulation."[17] However, it is to be noted that this observation is made on the basis of the legal position as it stood prior to 2009, when there was no concomitant right which was being pitted against the rights of minority educational institutions, as well as the fact that the commentator lumps together regulations imposed upon institutions of primary, secondary, as well as higher education.

With the passage of the RTE Act, minority educational institutions which catered to children between the ages of six and fourteen claimed that their inclusion within the ambit of the legislation abrogated their autonomy and dented their ability to conserve their distinct

[13] Article 21A, INDIA CONST.
[14] Section 12 (1) (b), (c), RTE Act.
[15] Schedule I, RTE Act (pursuant to sections 19 and 25, RTE Act)
[16] Reddy, Minority Educational Institutions.
[17] Id.

culture. Minority educational institutions also claimed that the introduction of non-minority students was deleterious in maintaining their minority character. These claims found articulation in a series of two cases in 2012 and 2014. In 2010, a group of petitioners representing the Society for Unaided Private Schools of Rajasthan, as well as certain other groups representing minority schools, approached the Supreme Court of India. The group of unaided schools claimed a violation of their right to freedom of trade and occupation[18], while the group of minority schools claimed that their right to "establish and administer educational institutions of their choice"[19] was under threat as a result of the regulations imposed by the RTE Act. Our current focus is limited to the groups of petitioners who alleged that their cultural and educational rights as minorities was threatened by the legislation. The court departed from its previous jurisprudence permitting a wide degree of state regulation in minority schools (in contrast to minority higher educational institutions). In doing so, it held that the inclusion of unaided minority educational institutions within the ambit of the RTE Act violated their right to establish and administer educational institutions, as contained in Article 30 (1) of the Constitution.[20] However, minority educational institutions which received government funding would continue to be within the realm of the RTE Act. The 2014 case[21] was brought by a similar group of petitioners with nearly identical claims, and the court went a step further and held that both aided and unaided minority schools would be exempt from the operation of the RTE Act.

This brings us to the central question which serves as the inspiration behind this thesis – can the rights under Article 21A on the right to education be balanced with the rights of minority educational institutions under Article 30 (1) to establish and administer such

[18] Article 19(1) (g), INDIA CONST., which reads:
"All citizens shall have the right... to practise any profession, or to carry on any occupation, trade or business."
[19] Article 30 (1), INDIA CONST.
[20] Society for Unaided Private Schools of Rajasthan v. Union of India (2012) 6 SCC 1, at paragraph 19 (Society).
[21] Pramati Educational and Cultural Trust v. Union of India (2014) 8 SCC 1 (Pramati).

institutions? In doing so, is it possible to arrive at a jurisprudential middle ground where the true intent of the cultural rights protection of minorities can be reconciled with the duty of the State to ensure the meaningful realization of the right to education? I also seek to examine the kinds of obligations which are placed upon both aided and unaided minority educational institutions, and whether the permissibility of an exemption from such obligations is better understood through a comparative lens.

ii. The Selection of Cases for Comparative Analysis

The preceding section describes in some detail the nature of the question which this thesis aims to answer. In this section I provide a brief explanation of the cases selected from India, France and Germany for the purpose of comparative analysis. I also explain how these cases are meaningful for a comparative inquiry.

I provide a description of the Indian cases before the Indian Supreme Court which resulted in the research questions which underlie this thesis in the preceding section. Through these cases, the judgments for which were made available in 2012 and 2014, the thesis examines the relationship between the right to education as a constitutional right, and the cultural and educational rights of minorities in India. *Pramati* and *Society* are illustrations of the manner in which courts in India have understood the relationship between education and minority rights claims. They also provide a crucial answer to two important frames of inquiry which is relevant to the third chapter of this thesis – first, how are private educational institutions to be regulated by the state? Second, what are the conditions under which minority educational institutions can be exempted from such regulation.

With respect to the first frame of enquiry, I examine cases from France and Germany which have addressed the question of the place of religion in the classroom. The limitation of this analysis stems from the fact that claims by religious minorities are framed in terms of the

freedom of religion. This is unlike the situation in India, where claims are presented in right to education terms in clash with the rights of minorities. Such a framing is made more complicated by the kinds of parties before courts in litigation involving the right to education in India. In both *Pramati* and *Society*, the petitioners were groups of unaided private schools, as well as groups of minority schools. The respondents were a number of state governments and the federal government. The court therefore was less concerned with a claim from a rights holder (the child or the parent)[22], but rather with the way the government had operationalized the right to education.

It is important to point out that the idiom of educational entitlements in France and Germany take on very different forms than that of constitutional educational entitlements in a country like India. While in France, the set of laws collectively named after Jules Ferry, the minister who pushed for their adoption in 1881-82, govern public education, the constitutionalization of the right to education occurred through the Preamble of the 1946 constitution.[23] The school education system Germany is seen as a responsibility of the state at the federal level. Lander have jurisdiction over the establishment of private schools. However, the provision of education is not formulated as a *right* to education which is granted to a citizen of the German state, but rather as a service which the state provides. In addition to this, the Basic Law in Germany also provides for the setting up of private schools[24] if a certain set of preconditions are met. The closest the FCC has come to articulating a language of rights in Germany occurred in a 2012 case, when it stated that "*only when [non-governmental schooling] is fundamentally available to all citizens without regard to their financial situation*

[22] This dilemma is touched upon in chapter 3 of the thesis.
[23] The provision reads "the Nation guarantees equal access for children and adults to instruction, vocational training and culture. The provision of free, public and secular education at all levels is a duty of the State". See Préambule De La Constitution Du 27 Octobre 1946 [Preamble to The Constitution Of 27 October 1946], § 13, available at https://www.legifrance.gouv.fr/Droit-francais/Constitution/Preambule-de-la-Constitution-du-27-octobre-1946.
[24] Article 7 (4), GERMANY CONST.

can the [constitutionally] protected educational freedom actually be realized and claimed on an equal basis by all parents and students".[25] The effect that this has upon the legal discourse is discussed later in the thesis.

These conflicts take a variety of forms across jurisdictions – in India, it primarily concerns the degree to which the government can regulate minority-run educational institutions, in France, the conflicts have taken the form of the kinds of religious expression which are permissible in public school, as well as the extent to which private schools (where the expression of religious affiliation by students is permissible) are regulated by the government. In Germany, it also adopts similar contours, with much of the cases involving education rights and minority rights implicating the rights of parents to send their children to a school of their choosing which is capable of imparting the kind of religious education which is desired.

These broad contours of the subject matter of cases in these three jurisdictions involving the relationship between the right to education and religio-cultural rights are revealing. First, it is clear that cases in India involve regulation of minority-run institutions which implicate *access*, *quality* and the *infrastructure* involved in expression of the right to education. Second, in Germany and France, these conflicts center around the place of religion in the classroom, as well as the extent to which schools are subject to regulation.

Historic and sociological specificity has an effect upon both the characterization and outcomes of the conflict between the right to education and religio-cultural rights. I explore some of the historical reasons behind the manner in which both the characterization and judicial outcomes have occurred in the three jurisdictions chosen. It is also true that the relation of courts with the coordinate branches of government, and the manner in which they conduct

[25] C. L. Glenn, *Germany*, in C. L. Glenn and J. de Groof, eds., BALANCING FREEDOM, AUTONOMY AND ACCOUNTABILITY IN EDUCATION (Vol. 2) 209–228 (Nijmegen: Wolf Legal Publishers, 2012), quoted in Scheunpflug, *Non-governmental religious schools in Germany*.

constitutional review in their respective jurisdictions influences the outcomes in cases which implicate the relation between education and religio-cultural rights.

Education is seen as a state service in both France and Germany. However, while the French Constitution, as well as certain other statutes provides for a right to education, it is difficult to definitively state that the German legal regime provides for such a right. However, the place of religion in the classroom is a battleground for legal contestation. This is why I believe that an examination of the relationship between the education entitlements (even if it is articulated as a state service, rather than as a right) can provide guidance in other jurisdictional contexts. With respect to France, this thesis examines the ban on attire which invokes a religious association, as well as the nature of regulation of private schools, which, in most cases, receive public funding. Anecdotal evidence points to many seeking out private schools, where the expression of their religion through the wearing of symbols like the headscarf, are permitted.

With respect to Germany, I explore the place of religion in the classroom by looking at cases on the possibility of opting out of school prayer, the establishment of denominational schools, as well as the display of religious symbols such as crucifixes in classrooms, as well as the series of Headscarf cases.

The aim of examining these cases is to locate, within these cases, reasoning which respond to certain frames of inquiry within which meaningful comparative analysis is possible.

iii. Methodology

The methodology followed for this thesis is doctrinal. By this, I mean a system of description and analysis where "arguments are derived from authoritative sources, such as existing rules, principles, precedents, and scholarly publications".[26] However, some parts of this thesis are also interdisciplinary, in that it seeks to "secure a deeper understanding of law as a social phenomenon, including research on the historical, philosophical, linguistic, economic, social or political implications of law"[27].

[26] Rob Van Gestel and Hans Wolfgang Micklitz, *Revitalizing Doctrinal Legal Research in Europe: What About Methodology?*, European University Institute Working Papers Law (2011)/05, available at http://cadmus.eui.eu/handle/1814/16825.

[27] H. Arthurs, *Law and Learning: Report to the Social Sciences and the Humanities Research Council of Canada by the Consultative Group on Research and Education in Law* 66 (1983), quoted in Terry Hutchinson, *The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law*, Erasmus L. R. 130, 132 (2015), available at https://www.elevenjournals.com/tijdschrift/ELR/2015/3/ELR-D-15-003_006.

CHAPTER 1: KEY CONCEPTUAL ISSUES

The relationship between a social entitlement like education, which is often constitutionally guaranteed, and religious and cultural rights, is fraught with conceptual difficulties. This chapter provides a preface to the analysis which follows the various parts of this thesis by highlighting such difficulties. It also encourages the reader to keep in mind certain idiosyncrasies which exist in the respective jurisdictions, while pointing out the commonalities which permit meaningful comparative analysis.

Education: A Divergence in Domain

The three countries chosen for the purpose of analysis for this thesis provide differing formulations of the concept of education. In France, the Preamble to the 1958 Constitution guarantees "equal access for children and adults to instruction, vocational training and culture."[28] It also states that the "provision of free, public and secular education at *all levels* is a duty of the State" (emphasis author's).[29]Article 34 also provides that statutes would lay down basic principles of education. The German Basic Law states that the "entire school system shall be under the supervision of the state."[30] While this particular provision is not explicit in the ambit of the state's regulatory powers with respect to schools, the chapter on Germany in this thesis provides a fuller explanation of the division of powers between the federal and Lander governments with respect to the school system. The regulation of the conditions of admission and requirements for graduation in higher educational institutions is a concurrent legislative power[31] in the hands of both the Federation and Land, yet it is made clear that Land can diverge from federally legislated provisions in this regard.[32] The Indian Constitution provides that the

[28] Preamble, FRANCE CONST.
[29] *Id.*
[30] Art. 7, GERMANY CONST.
[31] Art. 74(1), GERMANY CONST.
[32] Art. 72(3), GERMANY CONST.

"State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine".[33]

This proves the divergences in these jurisdictions on the precise *domain* of educational entitlements. While the French constitution operationalizes its educational entitlements at all levels (primary, secondary, and higher education), the German Basic Law provides that the school system is under federal supervision. In practice, Lander legislatures regulate much of the school education system, and as described earlier, also have legislative supremacy with respect to higher educational institutions. Constitutionally, a right to education in India is only available to children between the ages of six and fourteen years. This means that the domain right is limited to the primary educational level, and does not extend to secondary or higher education. While litigation continues to come before courts on secondary and higher education claims, these are not articulated within the constitutional right to education framework. The present thesis focuses on school education, and does not attempt a survey of the constitutional framework governing higher education in the countries under study.

The Articulation of Education as a Right or Public Service

The textual provisions which are mentioned in the preceding parts of this chapter make it clear that educational entitlements are protected by countries in a variety of ways. Dieter Beiter notes that while some countries protect the right to education by enshrining it as "*a fundamental right, enforceable at law, others do so in the form of a "directive principle of state policy", which constitutionally obliges the government but is unenforceable. There are also states whose constitutions do not afford explicit recognition to the right to education. But, even in*

[33] Art. 21A, INDIA CONST.

these instances, education is seen as a vitally important public function.".[34] In the countries under study, the framing of the educational entitlements is done in different ways. The French Constitution provides for "equal access for children and adults to instruction, vocational training and culture."[35], while clarifying that it is a duty of the State to provide for free, public and secular education at all levels. There are a number of statutes which govern the provision of education in France. Article L. 111-1 of the Education Code provides that the "*right to education is guaranteed to everyone to enable them to develop their personality, to raise their level of initial and continuing education, to integrate into their social and professional life and to exercise their citizenship.*"[36] As previously mentioned, the text of Article 21A of the Constitution provides for the State ensuring the availability of "free and compulsory education to all children of the age of six to fourteen years". The Indian law does not make clear who the holder of the right is, and whether it belongs to the parent or the child. This results in a confusion regarding standing before courts, and whether parents can bring judicial proceedings against the government, and in what cases. As pointed out by Uitz[37], Article 2, Protocol 1 of the European Convention on Human Rights provides that the instrument provides that "*in the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.*"[38]

The German Basic Law, while placing the entire school education system under the supervision of the state, also makes it the primary responsibility of the Land to operationalize the provision

[34] Klaus Dieter Beiter, THE PROTECTION OF THE RIGHT TO EDUCATION BY INTERNATIONAL Law 24 (Martinus Nijhoff Publishers, 2006)
[35] Preamble, FRANCE CONST.
[36] The original French text reads "*Le droit à l'éducation est garanti à chacun afin de lui permettre de développer sa personnalité, d'élever son niveau de formation initiale et continue, de s'insérer dans la vie sociale et professionnelle, d'exercer sa citoyenneté*", see Education Code of France, available at https://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=5084B2CFC946227FC751981AA2364AD3.tpdila19v_1?idArticle=LEGIARTI000027682584&cidTexte=LEGITEXT000006071191&dateTexte=20170727
[37] Renáta Uitz, FREEDOM OF RELIGION 111 (COUNCIL OF EUROPE, 2007).
[38] European Court of Human Rights, *Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights*, available at http://www.echr.coe.int/Documents/Guide_Art_2_Protocol_1_ENG.pdf.

of the service of education. The Basic Law also provides for the setting up of private schools in case it demonstrates compelling pedagogic or religious reasons. In 1972, in the Numerus Clausus case[39], the Federal Constitutional Court examined the validity of a number of restrictive registration requirements which had led to a great deal of confusion and uncertainty among applicants for places in universities in Hamburg and Bavaria. The court held that Article 12(1), which provides that "all Germans shall have the right freely to choose their…place of training"[40] to impose a duty on the state to provide schooling.[41] Currie quotes the court stating that "the constitutional protection of basic rights in the field of education is not limited to the protective function against governmental intervention traditionally ascribed to the basic rights." He traces the reasoning to the actual realization of the right in question, because "the right would be worthless without the actual ability to make use of it, the entitlement of every German to carry out his chosen study program if he demonstrates the requisite qualifications . . . is not in the discretion of the lawmakers".[42]While this decision came in the context of restrictions on access to higher education, the court's usage of the language of rights is found again in a 2013 decision[43] on restrictive tuition fees in the Land of Bremen. The First Senate held that a "right to free and equal access to higher education at institutions created by the state derives from the freedom of occupation[44] in conjunction with the right to equality before the law[45] and the principle of the social state (*Sozialstaatsprinzip*)"[46]. The usage of the rights idiom in this manner does not occur with claims which are brought on behalf of religious minorities in the context of school education.

[39] BVerfG 33, 303 (1972).
[40] Art. 12(1), GERMANY CONST.
[41] David P. Currie, *Positive and Negative Constitutional Rights*, 53 (3) U. Chi. L. Rev. 864, 871 (1986) (hereinafter, Currie, *Positive and Negative Constitutional Rights)*.
[42] BVerfG 33, 303, 330 (1972), quoted in Currie, *Positive and Negative Constitutional Rights*, at 871.
[43] BVerfG, Order of the First Senate of 08 May 2013 - 1 BvL 1/08.
[44] Art. 12(1), GERMAN CONST.
[45] Article 3(1), GERMAN CONST.
[46] Federal Constitutional Court, *"In-State-Residents" (Landeskinder) Provision in Former Bremen Act on Study Accounts Unconstitutional*, Press Release No. 39/2013 of 28 May 2013 for Order of 08 May 2013, available at http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2013/bvg13-039.html.

The articulation of education entitlements in these three countries occur in different ways, and the central question to ask is whether the divergent framing influences the manner in which claims under the available entitlements are brought before courts. There is no clear answer to this question, since much of the claims which are brought before courts, or even arguments which are put forth in France and Germany when questions involving education entitlements and rights of religious minorities are concerned – are framed in religious freedom terms. Courts and authorities are tasked with squaring these claims with principles like laicite, equality, and liberty. This makes the task of comparative analysis difficult. This is one of the reasons why this thesis engages with the kinds of justifications which are used by courts and other institutions to engage with claims which implicate education and religious freedom.

Nature of Claims

In India and France, where the constitutional text frames educational entitlements in rights terms, there is still a divergence in the way in which issues concerning religious freedom of minorities are concerned. This is made more complex because the subject of the disputes in these two countries are different. In India, claims to religious freedom in the context of education are brought by groups of minority-run schools which claim that their right to establish and administer educational institutions are eroded by their inclusion in any government regulation aimed at broader access to these schools and maintenance of minimum standards.[47]

On the other hand, in France, claims involving religious minorities in the context of the classroom are usually framed in liberty terms. These cases involve students claiming a right to

[47] See Societies for Unaided Private Schools in Rajasthan v. Union of India (2012) and Pramati Educational and Cultural Trust v. Union of India (2014).

wear religious symbols in the classroom, or similar claims by teachers.[48] In Germany, the kinds of claims which have been brought which involve education and religious minorities are of a wide nature, and involve issues relating to the display of religious symbols in classrooms[49], the wearing of attire of a religiously symbolic nature by pupils attending school, as well as that of instructors. Questions have also come before courts on the denominational nature of schools.[50] A further issue which has come before courts is the issue of whether religious prayer should be made compulsory in public schools.[51]

Therefore, the kinds of claims which appear before courts which involve the educational entitlements and claims of religious freedom are of very different nature, and this makes the job of comparative analysis difficult. However, as stated previously, this can be resolved through an examination of the kinds of reasoning which are used by courts and other institutional authorities when dealing with claims of such nature.

Private Schools and Their Role in The Debate on Religious Freedom and Education

One of the key concerns in this thesis is the unsatisfactory manner in which constitutional questions on the relation between the religious autonomy and freedom claims by cultural minorities is squared against the right to education in India. As I will demonstrate in the forthcoming chapters, the exclusion of all minority administered institutions (both private and public) from the ambit of legislation[52] concerning the right to education has consequences on the ability of all persons to access such institutions, as well as the kinds of minimum norms

[48] See *Comm'n De Reflexion Sur L'application Du Principe De Laïcité Dans La Republique, Rapport Au President De La Republique* (Dec. 11, 2003) (Stasi Commission Report), available at http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/034000725.pdf (in French).
[49] 93 BVerfGE 1; For example, in the Headscarf II case, see BVerfGE, Order of the First Senate of 27 January 2015 - 1 BvR http://www.bverfg.de/e/rs20150127_1bvr047110en.html.
[50] 41 BVerfGE 29.
[51] 24 BVerfGE 289.
[52] The Right of Children to Free and Compulsory Education Act, 2009 (Hereinafter RTE Act)

and standards relating to infrastructure and pedagogy. Such an exclusion occurred following a judgment of the Supreme Court of India in 2014[53], which reversed the previous position[54] which only exempted private minority administered educational institutions from the ambit of legislation. Minority schools in India are of two kinds – aided and unaided. Aided minority institutions receive varying degrees of financial support from the state, while unaided institutions are run wholly using private funds.[55] Following the exemption of both aided and unaided minority schools from the ambit of the RTE Act, any regulation relating to curricular, pedagogic, and infrastructural standards ceased to apply to both aided and unaided private schools. The ramifications of this are discussed later in this thesis.

Private schools in France and Germany can be established under certain conditions. In France, as I discuss in later chapters of this thesis, schools sign contracts with the government under which they either have varying degrees of autonomy to develop their own curriculum (within the broad framework of the national curriculum), as well as to be able to recruit their own personnel, depending upon the nature of the contract signed, and the amount of financial assistance received.[56] Generally, the greater the level of assistance received from the government, the higher is the degree of state control over curriculum and recruitment.

In Germany, private schools can be established, subject to the approval of the state, and any conditions imposed by the Land[57] in which the school is sought to be established. However, any application for the establishment of private schools should demonstrate religious or pedagogic innovation for such an application to be successful.[58] However, the degree of state regulation on such schools is fairly high. Such regulation includes conditions for the

[53] (2014) 8 SCC 1.
[54] (2012) 6 SCC 1.
[55] Geeta Gandhi Kingdon, *The private schooling phenomenon in India: A review* 3, CSAE Working Paper WPS/2017-04, available at https://www.csae.ox.ac.uk/workingpapers/pdfs/csae-wps-2017-04.pdf/ (2017).
[56] Gabriel Langouet & Alain Leger, *Public and private schooling in France: an investigation into family choice*, (15:1) Journal of Education Policy 41 (2000)
[57] Article 7 (4), GERMAN CONST.
[58] Annette Scheunpflug, *Non-governmental religious schools in Germany – increasing demand by decreasing religiosity*? 51(1) Comparative Education 38, 42 (2015).

appointment of teachers, as well as pedagogic and infrastructural standards.[59] Teachers are granted some degree of autonomy with respect to teaching methods, but the "material and competences which are important to the educational process at primary school are laid down in curricula, education plans or framework plans" [60], the standards for which are "binding for all Länder".[61] Therefore, with respect to private schools, there is a variance in the degree of regulation which the government exerts in the three countries under study. While minority schools, whether aided or unaided, are completely exempt from the ambit of the RTE Act, and therefore, from most forms of government regulation in India, it is clear that in the case of schools in France and Germany, there is a high degree of regulation when it comes to schools which are both private and public.

Private Schools: Incidence and Demographics

Private schools form a part of the school education systems of all the countries under study. The legal regime governing private schools has an impact upon the kinds of persons who choose such schools, since it would appear that in France[62] and Germany[63], there are reasons to believe that religious reasons play a role in parents choosing private schooling. However, this hypothesis has lesser weight in Germany, due to the fact that religious instruction and the setting up of denominational schools is perfectly within legal limits even in public schools.[64]

[59] Id.
[60] Brigitte Lohmar and Thomas Eckhardt (eds.), *The Education System in the Federal Republic of Germany 2013/2014: A description of the responsibilities, structures and developments in education policy for the exchange of information in Europe* 110, Secretariat of the Standing Conference of the Ministers of Education and Cultural Affairs of the Länder in the Federal Republic of Germany (2015), available at https://www.kmk.org/fileadmin/Dateien/pdf/Eurydice/Bildungswesen-engl-pdfs/dossier_en_ebook.pdf.
[61] Id., at 111.
[62] Gabriel Langouet & Alain Leger, *Public and private schooling in France: an investigation into family choice*, (15:1) Journal of Education Policy 41, 46 (2000).
[63] Annette Scheunpflug, *Non-governmental religious schools in Germany – increasing demand by decreasing religiosity*? 51(1) Comparative Education 38, 47 (2015).
[64] Id, at 47.

The public school system in India is among the most extensive in the world. A 2016 report claimed that "the proportion of private schools rose from 19.49% in 2007-08 to 22.74% in 2014-15. Around the same period, the share of enrolment of children between the ages of 6-14 in private schools rose from 19.3% to 30.8%."[65] Unfortunately, there is no disaggregated data on the percentage of minority schools within this available data to determine the extent to which such schools form part of the overall number of minority schools.

In Germany, between 2002 and 2010, there has been a rise in the number of private religious schools, with the percentage of such schools within the total number of schools going up from 4.1 to 5.7. Statistics for France in relation to the incidence and percentage of private schools within the broader schooling system is discussed in the chapter on the jurisdiction.

[65] Ajey Sangai, et. al., *Regulation of Private Schools in India*, Vidhi Centre for Legal Policy (2016), available at https://static1.squarespace.com/static/551ea026e4b0adba21a8f9df/t/59072cb95016e1dcad96714d/1493642441404/Report+on+Regulation+of+Private+Schools_Final.pdf, citing National University for Educational Planning and Administration, *Elementary Education in India: Trends 2005-06 and 2015-16*, available at http://dise.in/Downloads/Trends-ElementaryEducation-2015-16/ElementryEducationInIndia2015-16.pdf and ASER Centre, *Trends Over Time 2006-2014*, available at http://img.asercentre.org/docs/Publications/ASER%20Reports/ASER%20TOT/fullasertrendsovertimereport.pdf.

CHAPTER 2: GERMANY: THE CONTOURS OF THE CONFLICTS BETWEEN EDUCATION AND RELIGION

Introduction

In this chapter, I explore the relationship between educational entitlements (as contained in the German Basic Law, as well as certain Land constitutions and legislative instruments), and claims put forward by religious minorities relating to freedom of religion. First, I explain the nature of the duty incumbent upon the state to provide education as a public service, while also permitting a regime of private schools, as enshrined in the Basic Law, while also discussing certain cases concerning access to education in Germany. I am mindful of the fact that unlike in India and France, the other countries under study in this thesis, there does not exist a 'right to education' in the constitutional framework. The subsequent sub-section discusses a line of cases which concerned claims brought by different kinds of petitioners which involve the place of religion in the classroom. Thereafter, I consider the kinds of regulations and conditions applicable to private schools in Germany, and the final sub-section is dedicated to excavating the kinds of reasoning which are applied by courts and national authorities when navigating questions concerning religion in the classroom. A source of further complexity in this discussion of the German legal regime regulating the relationship between religion and the classroom is the wide amplitude granted to Lander in determining rules governing permissible expressions of religiosity in the classroom. Illustratively, there is great variance in the position of teachers in public schools wearing attire which is likely to disclose a religious affiliation.[66]

[66] For a list (updated till 2013), see Institute for European Constitutional Law, *Prohibition of headscarves for teachers and public servants in Germany*, University of Trier, available at https://www.uni-trier.de/index.php?id=24373&L=2.

Educational Entitlements in Germany

Article 7, Section 1 of the GG declares that 'the entire school system shall be under the supervision of the state'.[67] This implies that there is a general requirement to attend school based upon the power of the state to bring up children within the state, which is treated on an equal footing with the right of a parent.[68] Children over the age of six need to attend school till the age of 18, full time for nine years, and thereafter for another three years either part-time, or should be enrolled in a vocational school.[69] Robbers argues that this provision should be interpreted as a guarantee to be able to attend school as an organized institution with a minimum duration that conveys certain learning and educational goals in a variety of subjects,[70] but does not guarantee an individual's right to education at the federal constitutional level.[71] Therefore, while the public school system is supervised by the federal government, the responsibility regarding the fulfilment of the educational obligations of the state is fulfilled by the respective Land governments.[72] It is for this reason that I avoid the use of rights terminology with respect to education, since it is understood as a state service. Moreover, the precise content of the rules which determine the exact operationalization of any possible education rights is entirely dependent upon the Land in which she is resident. Therefore, while some Lander have chosen to incorporate a specific right to education within the text of their constitutions[73], others choose to do so through statutory law. Lander legislatures are granted the power to determine

[67] Article 7, § 1, GERMANY CONST.
[68] BVerfG 16 October 1979, BVerfGE 52, 223, 236, quoted in Gerhard Robbers, RELIGION AND LAW IN GERMANY 281 (Wolters Kluwer Law & Business; 2nd ed., 2013) (hereinafter, Robbers, RELIGION AND LAW)
[69] Robbers, RELIGION AND LAW 281, at para 634.
[70] Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court], 75 Entscheidungen Des Bundesverfassungsgerichts [BVerfGE] [Decisions of The Federal Constitutional Court] 40, 77.
[71] Jenny Gesley, "*Germany*", in Constitutional Right to an Education in Selected Countries 15, Law Library of Congress (2016), available at https://www.loc.gov/law/help/constitutional-right-to-an-education/constitutional-right-to-education.pdf.
[72] See also, Article 30, GERMANY CONST.
[73] See, for instance, the constitutions of Lander like Brandenburg, Thuringia, Berlin, Bremen and Lower Saxony.

the location and nature of the school to be established. It also has the power to, within the curricular framework discussed in Chapter 1, make decisions about the matter to be taught, as well as exam regulations.[74] The exercise of this power is guided by the conditions provided in Article 7 of the Basic Law.[75]

Educational entitlements in Germany should be understood as being supervised by the federal government, but being implemented by the governments of the respective Land. Certain Land constitutions incorporate the right to education in within their constitutional text,76 and questions of access to education are important, since it is one of the rubrics within which this paper discusses the conflict between the right to education and the religio-cultural rights. Constitutional courts in Lander have been called upon to interpret when the right to education is violated. A number of judgments indicate that the right to education, although variously worded across Lander constitutions, would not be violated as long as equal access to existing schools is guaranteed.77 Therefore, judicial proceedings aimed at securing a ruling to allow a petitioner to access a school of her choice fail since the right does not oblige the state or schools to create additional capacity or to establish a certain type of school.78 The claim to the right to attend a specific school succeeds in the event that the school that was picked by the parents is the only available school of that type in the school district, the selected school has available capacity, and there are no provisions in the education law that would prohibit the admission of the student in the particular case.79 However, much of the available case law is from specific

[74] Inke Muehlhoff, *Freedom of Religion in Public Schools in Germany and in the United States* 28 Ga. J. Int'l & Comp. L. 405, 455 (2000) (hereinafter Muehlhoff, *Freedom of Religion in Public Schools in Germany and in the United States).*

[75] Ibid.

[76] For example, Niedersächsische Verfassung [Constitution of Lower Saxony], May 19, 1993, Niedersächsisches Gesetz- Und Verordnungsblatt [NDS. GVBLl.] [Lower Saxony Gazette of Laws and Ordinances] 1993, at 107; Verfassung Von Berlin [Constitution of Berlin], Nov. 23, 1995, Gesetz- Und Verordnungsblatt Für Berlin [BLN GVBL.] [Berlin Gazette of Laws and Ordinances] at 779, as amended, art. 20.

[77] Verfassungsgericht des Landes Brandenburg [VerfGBbg] [Constitutional Court of the State of Brandenburg], Feb. 25, 1999, Docket No. VfGBbg 41/98.

[78] Supra n. 6.

[79] Supra n. 6, at 16.

Lander constitutional courts, since the Land is in charge of the implementation of the educational entitlements from the state through Article 30 of the GG.

Freedom of Religion and the Education System in Germany: The Faultlines

Article 4 of the GG provides that there shall be an inviolable *freedom of faith and of conscience, and freedom to profess a religious or philosophical creed*, and that *the undisturbed practice of religion shall be guaranteed.*[80] Article 3 (3) of the Basic Law read with Article 4, presents two kinds of obligations on the state, the first of which is to tolerate religion and religious belief[81] and second is the duty to treat all people equally regardless of their religious or ideological beliefs.[82]The interplay between religious expression and the nature of the public-school system is a curious one in Germany. In keeping with the secular nature of the German republic, its school system is required to furnish the possibility of both religious and non-religious expression in its schools.[83] Religious education is a constitutionally mandated part of the curriculum[84], with many Lander permitting the relevant religious authorities to impart such education. An important feature of this is the 'denominational' (*Konfessionalität*) character of this kind of education, which requires that the government provide religious education according to the belief of the student.[85] At first, it appears that this can be at odds with the right of parents to impart religious knowledge to their children in accordance with their right to educate children[86] and their freedom of religion.[87] However, the paragraphs below will

[80] GERMANY CONST. Art 4 (1), 4(2).
[81] Muehlhoff, *Freedom of Religion in Public Schools in Germany and in the United States,* at 442.
[82] BVerfGE 19, 206 (216);
[83] Article 7(4), GERMANY CONST.; Annette Scheunpflug, *Non-governmental religious schools in Germany – increasing demand by decreasing religiosity?* 51(1) Comparative Education 38, 42 (2015) (hereinafter Scheunpflug, *Non-governmental religious schools in Germany*).
[84] GERMANY CONST.Art 7(3).
[85] See Scheunpflug, *Non-governmental religious schools in Germany*.
[86] GERMANY CONST. Art 6(2).
[87] GERMANY CONST. Art 4 (1), 4(2).

illustrate how the principle of state neutrality in the country with respect to matters concerning the relationship between the freedom of religion and the state commitment to education. In particular, I focus on a number of issues: first, the question of the presence of religious symbols like the crucifix in the classroom, second, on the establishment of interdenominational schools with a focus on Christian ideology, the third is the question of school prayer, and finally on the ban on the wearing of headscarves by public school teachers, and finally.

The question of the display of religious symbols in the classroom is one which has aroused much popular sentiment in Germany. In a case originating in Bavaria, the FCC ruled that a crucifix could not be exhibited in classrooms in state run primary schools.[88] A central justification provided for the decision was that it ran counter to state neutrality in matters of religion or belief and also infringed upon the rights of persons who did not belong to the Christian faith. Kommers notes the intense opposition to the case, with many local political parties leading marches and candlelight vigils against the decision.[89] The Land of Bavaria still permits the exhibition of a crucifix in public primary schools. However, school authorities are required to take down the crucifix in case a student objects to this on religious grounds.[90]

The *Interdenominational Schoo*l case in 1975[91] highlighted some of the other fault-lines between religion and education, in which the Land of Baden-Wurttemberg amended its constitution to establish Christian schools as the uniform type of public school in the state. The complainants objected to their children being educated along religious precepts.[92] The court held that the democratic Land legislature is tasked with resolving the tension between Article 7 and Article 4 of the Basic Law. Reconciling the positive and negative aspects of the legal

[88] 93 BVerfGE 1.
[89] Donald Kommers, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 472 (2nd ed., Duke University Press, 1997).
[90] Id.
[91] 41 BVerfGE 29.
[92] Donald Kommers, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 467 (2nd ed., Duke University Press, 1997).

interests protected by the Basic was left to the Land legislatures.[93] A school which provides an objective discussion of all religious and ideological beliefs, even from a primarily Christian view, and respects the principle of tolerance would not offend the freedom of religion.[94] I will examine some the reasoning used in this judgment and others which implicate the history of the country in some paragraphs below.

A second issue which arose in Germany was the question of school prayer and the possibility of students to opt out of it.[95] The Federal Constitutional Court held that "public schools can offer the possibility to pupils to freely manifest their religion by prayers or services, while stating that there always has to be an atmosphere of tolerance towards anyone in the school, especially those who form a minority or who opt out of such services".[96] Robbers states that in this case, "the right not to belief or manifest collides with the positive right to actively manifest his or her religion or belief. The solution is to allow school prayer and opting out of it in an actively upheld atmosphere of tolerance".[97]

Two further issues merit discussion in this context, the first being the absolute ban on the headscarf by teachers in public schools, and the second being the display of religious symbols in classrooms in public schools. The issue of a teacher in a public school wearing a headscarf has been addressed by the FCC in two cases, in 2003 (hereinafter *Headscarf I*) and 2015 (hereinafter *Headscarf II*) respectively. In the 2003 case[98], the applicant in the Land of Baden Württemberg was found to be unfit to be a school teacher on account of her refusal to give up her headscarf. The court acknowledged that Article 4 (1) and (2) rights encompassed the right to wear a headscarf, but that it was incumbent upon the Land legislature to create an

[93] Uitz, FREEDOM OF RELIGION 110.
[94] Ibid.
[95] 24 BVerfGE 289.
[96] Gerhard Robbers, *The Permissible Scope of Legal Limitations on The Freedom of Religion or Belief in Germany* 19 Emory Int'l L. Rev. 841 (2005).
[97] Ibid.
[98] BVerfG, Judgment of the Second Senate of 24 September 2003 - 2 BvR 1436/02.

appropriate statutory basis for any regulation which would curtail such a right.[99]The court in the case elaborated upon the proper construction of the concept of state neutrality in religion, stating that[100],

> "*..the religious and ideological neutrality required of the state is not to be understood as a distancing attitude in the sense of a strict separation of state and church, but as an open and comprehensive one, encouraging freedom of faith equally for all beliefs. Article 4.1 and 4.2 of the Basic Law also contain a positive requirement to safeguard the space for active exercise of religious conviction and the realisation of autonomous personality in the area of ideology and religion. The state is prohibited only from exercising deliberate influence in the service of a particular political or ideological tendency or expressly or impliedly identifying itself by way of measures originated by it or attributable to it with a particular belief or a particular ideology and in this way itself endangering religious peace in a society*."

The court also continues to engage with the concept of 'concrete danger', holding that a curtailment of the applicant's right to religious freedom could not be curtailed in the absence of evidence of a concrete threat.[101] Uitz notes that the court refused to rule out headscarves as

[99] Uitz, RELIGIOUS FREEDOM at 128.

[100] Supra n. 35, at para 43-44.

[101] See supra n. 35, at paras 57-58, which state:

> "*The school authority and the non-constitutional courts present the view that the complainant's intention to wear a headscarf as a teacher constitutes a lack of aptitude because pre-emptive action should be taken against possible influence on the pupils, and conflicts, which cannot be ruled out, between teachers and pupils or their parents should be avoided in advance; at present this view does not justify encroaching upon the complainant's right under Article 33.2 of the Basic Law, which is equivalent to a fundamental right, nor the accompanying restriction of her freedom of faith. No tangible evidence could be seen in the proceedings before the non-constitutional courts that the complainant's appearance when wearing a headscarf created a concrete endangerment of the peace at school. The fear that conflicts might arise with parents who object to their children being taught by a teacher wearing a headscarf cannot be substantiated by experience of the complainant's previous teaching as a trainee. The current civil service and school legislation in the Land Baden-Württemberg is not adequate to permit a prohibition on teachers wearing a headscarf at school and in lessons on the grounds of abstract endangerment. The mere fact that conflicts cannot be ruled out in future does not, in the absence of a*

posing a threat *per se*.[102] The second headscarf case in 2015[103] continues to engage with the concept of 'concrete danger', while also adding to the court's jurisprudence on state neutrality and the concept of attribution.[104] Following the judgment of the court in Headscarf I, the Land North Rhine-Westphalia included a clause in its law governing public schools which prohibited teachers from publicly expressing views of a "political, religious, ideological or similar nature which are likely to endanger, or interfere with, the neutrality of the Land with regard to pupils and parents, or to endanger or disturb the political, religious and ideological peace at school"[105] Within the ambit of impermissible conduct was that which could suggest to parents or students that "a teacher advocates against human dignity, the principle of equal treatment, fundamental freedoms or the free democratic order."[106] The amendment also made the permissible the carrying out of the "educational mandate in accordance with the Constitution of the Land and accordingly presenting *(Darstellung*) Christian and occidental educational and cultural values or traditions".[107] Two teachers, who took up proceedings through a constitutional complaint after one of them changed her attire to a more 'neutral' one, while the other was dismissed from service. The court held that an absolute ban on the headscarf was impermissible. It did so on three grounds. It first held, unsurprisingly, that Articles 4 (1) and 4(2) permitted "educational staff at interdenominational state schools the freedom to cover their head in

legal basis designed for this purpose, justify deriving from the general civil-service-law requirement of aptitude an official duty on the part of the complainant to give up exercising her religious conviction by wearing a headscarf."

[102] Uitz, RELIGIOUS FREEDOM, at 130.

[103] BVerfG, Order of the First Senate of 27 January 2015 - 1 BvR 471/10.

[104] For an excellent account of the FCC's approach with respect to attribution and neutrality, *see* Claudia Haupt, *The "New" German Teacher Headscarf Decision*, Int'l J. Const. L. Blog (Mar. 17, 2015), available at http://www.iconnectblog.com/2015/03/the-new-german-teacher-headscarf-decision.

[105] BVerfG, Order of the First Senate of 27 January 2015 - 1 BvR 471/10 - paras. (1-31), available at http://www.bverfg.de/e/rs20150127_1bvr047110en.html , quoting excerpt from press release no. 14/2015 of 13 March 2015 at A II.

[106] Id.

[107] BVerfG, Order of the First Senate of 27 January 2015 - 1 BvR 471/10 - paras. (1-31), http://www.bverfg.de/e/rs20150127_1bvr047110en.html, at para 2.

compliance with a rule perceived as imperative for religious reasons."[108] Second, it held that in the absence of a specific danger, the Land legislature of North Rhine Westphalia could not validly justify a restriction on the right on the rights of the applicants. The court here however refused to rule out the possibility of the imposition of a ban of outward expressions of religious affiliation in the event of a situation where a concrete danger could be identified, although it held that it would have to be for a specific time and not applied to a specific case. Third, it held that the privileging of Christian religious symbols was not valid, and if a ban on the expression of religious affiliation were to put into place in order to protect the peace at school, the neutrality of the state would require that such a restriction apply to all religions and ideologies without distinction. When examining the reasoning employed by the court here, one must countenance that the approach of the court is animated by the effect of the headscarf upon the audience, and not from the viewpoint of the applicant, which has the effect of considerably narrowing her scope of claim.[109] This often has the effect where a court is stuck, as one commentator, puts it, "between secularisation and multiculturalism."[110] It is to be noted that unlike in France, the wearing of attire which denotes religious affiliation by students is not a controversial legal topic.[111]

[108] Ibid, headnotes.
[109] Uitz, RELIGIOUS FREEDOM, at 132.
[110] Ibid.
[111] Doutje Lettinga and Sawitri Saharso, *Outsiders Within: Framing and Regulation of Headscarves in France, Germany and The Netherlands*, 2(3) Social Inclusion 29, 34 (2014).

Non-governmental educational institutions can be established in Germany, subject to the regulations imposed by the Basic Law[112] and laws imposed by specific Lander. However, there are three broad legal regulations imposed upon the establishment and administration of such schools. First, all non-governmental schools that conduct examinations are restricted with respect to their tuition fee, since economic discrimination on such basis.[113] In reality the Lander subsidise anywhere between 60% and 90% of the costs of a school.[114] Second, non-governmental schools can only be established if they show religious reasons or explore pedagogical innovation for the governmental school system, which, as a matter of empirical observation, limits the number of actors who are capable of successfully obtaining permission on the basis of Land legislation.[115] Article 7 (4) also provides that approval is subject to the private school not being "inferior to the state schools in terms of their educational aims, their facilities, or the professional training of their teaching staff."[116] It is also important that "segregation of pupils according to the means of their parents will not be encouraged"[117] by the establishment of the school. The text of the provision also states that it necessary to secure the "economic and legal position of the teaching staff" prior to seeking approval.[118] Third, the state support provided to non-governmental schools let Lander impose a range of regulations which are also applicable to similar public schools. These include the "appointment of such teachers who have passed a state-approved examination, teacher salaries, building standards,

[112] German Const., Article 7(2).
[113] Scheunpflug, *Non-governmental religious schools in Germany*.
[114] Ibid.
[115] Scheunpflug, *Non-governmental religious schools in Germany*.
[116] German Const., Article 7(4).
[117] Id.
[118] Id.

state inspections, use of the federal state curriculum, and exclusive use of state approved textbooks."[119]

Most Lander do not have in place regulations on dress codes for either pupils or teachers in private schools. For instance, the regulation from Lower Saxony on this matter reads as follows:

> "..the outer appearance of schoolteachers may not create any doubts concerning the teachers' qualification to fulfill convincingly the educational mandate of the schools (par. 2). *This does not apply for teachers in private schools*."[120] (emphasis author's)

Most cases which involve a legal challenge on the right of a teacher to wear headscarves or other kinds of attire which has the possibility of denoting religious affiliation occur as a result of challenges passed to legislation governing public schools or labour codes as passed by individual Lander. The Labour Court of Dortmund, in a decision from 2003, invalidated a dismissal of an employee of a kindergarten who did not take off her headscarf in the course of her employment, holding that an "employee under a private contract of employment is not as much a representative of the state as a public servant is."[121]

Conclusion

There are three broad strands of reasoning in the decisions of the FCC in its decisions concerning the issues highlighted above. The first is the obvious requirement of state neutrality in matters concerning religion and the kinds of dimensions it takes, which also incorporates elements of Article 3(3) jurisprudence. Neutrality, according to Robbers, "embraces the

[119] Scheunpflug, *Non-governmental religious schools in Germany*.
[120] Gesetz zur Änderung des Niedersächsischen Schulgesetzes und des Niedersächsischen Besoldungsgesetzes vom 29.04.2004, available at https://www.uni-trier.de/index.php?id=24373&L=2#c48119.
[121] Dagmar Schiek, *Just a Piece of Cloth? German Courts and Employees with Headscarves*, 33 (1) Indusrial. L. J. 68, 71 (2004).

principles of non-identification and nonintervention."[122] The second kind of justification is one which is based in the federal division of powers and responsibilities between the federal government and that of the Lander. This is evident in the *Interdenominational School* case, as well as the *Concordat* case in 1957, which went to the extent of validating a deviation by the Land of Lower Saxony from the terms of an international treaty (German-Vatican Concordat of 1933) with respect to the establishment of an interdenominational school.[123] This move violated the requirement of Christians being placed in confessional schools. The judgment of the FCC in the *Interdenominational School* case also averred to this line of reasoning when referring to the history of Article 7 of the Basic Law as one which leaves Lander to be independent with respect to the ideological and denominational character of schools. Third, the court engages in a balancing exercise which is somewhat different from the traditional proportionality analysis which is associated with the majority of German law jurisprudence. In this, the court emphasizes the rights of Lander to engage in this process of balancing in ensuring that the rights of the parties are not interfered with, but leaves itself to be the arbiter of the validity of that exercise. Across the range of cases from *Headscarf I* and *Headscarf II*, to the *Interdenominational School* case, we find that the court encourages the Lander legislatures to engage in a balancing exercise which grants appropriate weight to all considerations. It however is mindful of external considerations as well, such as the privileging of Christian symbols in *Headscarf II* which violated Article 3 of the Basic Law, and the theoretical validity of a ban on external displays of religious affiliation by public school teachers, provided that the ban is applied across the range of religions.

It is curious that while schools with a Christian outlook as well as Christian prayer is seen as legally valid in the Interdenominational School and School Prayer cases respectively,

[122] Gerhard Robbers, *Religious Freedom in Germany*, (2001) BYU L. Rev. 643, 649 (2001).
[123] Ibid, at 471.

the privileging of Christian religious symbols in schools when applying a ban on religious symbols is invalid in both *Headscarf II* and the *Crucifix* cases. It is the imposition of additional conditions, such as the presence of all ideologies while imparting religious knowledge in the Interdenominational School case (as well as the possibility of taking a class in Ethics), and the possibility of opting out of school prayer, which lends constitutional validity to these decisions made by the respective Land.

These three kinds of justifications are useful for comparative enquiry since they are emblematic of the German position on secularism, which accounts for its historic specificity. In a later chapter, I explore the ways in which these justifications can be used by a comparative lawyer in examining the ways in which courts in her own jurisdiction treat the relationship between educational entitlements and religious freedom.

CHAPTER 3: FRANCE: THE INTERACTION BETWEEN RELIGIOUS FREEDOM, LAICÏTE AND THE RIGHT TO EDUCATION

Introduction

In this chapter, I explore the relationship between educational entitlements, as enshrined in the French Constitution, as well as certain other legislative instruments like the Education Code, and claims put forward by religious minorities relating to freedom of religion. In the first sub-chapter, I unpack the entitlements conferred by the right to education in France. Thereafter, I examine the decision of the Council of State with respect to the ban on headscarves in 1989, followed by the decision of the Stasi Committee in 2004. I also examine the issue of access to public schools and the ability of both students and teachers to be able to display religious symbols in the classroom. This exercise is undertaken in order to better understand the kinds of claims which are brought by religious minorities with respect to the place of religion in the classroom. Finally, I examine the kinds of regulations which are permissible upon private schools in France.

Laicite in France

In order to better appreciate the logic in the decisions of both French courts and authorities when dealing with the interaction between the educational duties and entitlements which are contained in the Constitution, as well as its statutes, it is necessary to unpack the concept of laicite. The Constitutional Council has previously held that that "freedom of conscience must

be recognized as one of the fundamental principles accepted by the laws of the Republic"[124]. Selton argues that following the 1905 Law on the Separation of the Church and State, the conception of laicite has acquired two distinct dimensions. He claims that contemporary formulations of the concept lend laicite a dimension so as to give rise to a negative duty to "not officially recognise any religion, while also enabling a positive obligation on the part of public authorities to ensure religious freedom".[125] Further, the principle in practice is capable of subsuming within it a number of exceptions, as is evident in the varying notions of the concept of laicite in its application to the overseas territories of France, as well as the continuing validity of the Concordat in regions like Alsace Mosell. These exceptions have given rise to a "laïcité ouverte, which implies simple neutrality, rather than hostility or indifference toward religion".[126] In cases which involve public order issues[127], the conception of laicite takes a narrower dimension. For instance, the Council of State upheld a decision against a woman who was wearing a headscarf in a photograph for the purpose of official identification, since "the interest in public order outweighs the interest in religious freedom"[128]. In cases which do not implicate questions of public order, a "wide latitude is granted in the interpretation of the exceptions to the secularism principle, for instance, in cases like the broadcast of religious

[124] Conseil Constitutionnel, Liberté d'Enseignement et de Conscience, Rec. Cons. Const, 23 November 1977; Gaurav Mukherjee, *An Analysis of the Conseil Constitutionnel Decision in the Alsace Mosell Case* (essay submitted in partial fulfilment of course requirements in French Constitutional Law and Its Influence Abroad, Central European University, 2017) (hereinafter Mukherjee, *An Analysis of the Alsace Mosell Case*).

[125] Herman T. Salton, *France's Other Enlightenment: Laïcité, Politics and the Role of Religion in French Law* 5(4) Journal of Politics and Law 30,32 (2012) (Hereinafter Salton, France's Other Enlightenment); Mukherjee, *An Analysis of the Alsace Mosell Case.*

[126] Id., at 35; Mukherjee, *An Analysis of the Alsace Mosell Case.*

[127] Conseil d'État, Rapport Public: Un Siècle de Laïcité. Paris: Documentation Française (2004); See also, illustratively, Conseil d'État, Association Internationale Pour la Conscience de Krishna, 14 May 1982; Mukherjee, *An Analysis of the Alsace Mosell Case.*

[128] Conseil d'État, 27 juillet 2001, Recueil des Décisions du Conseil d'État, Lebon, 400, quoted in Elisa Beller, *The Headscarf Affair: The Conseil d'État on the Role of Religion and Culture in French Society* 39 (4) Texas Int'l L. J. 581, 621 (2004).

programming on public television networks and parental right to choose religious education for their children."[129]

[129] See Salton, France's Other Enlightenment, at 33; Mukherjee, *An Analysis of the Alsace Mosell Case.*

Educational Entitlements in France

The right to education is constitutionally guaranteed in France. The Preamble of the Constitution of 1946[130], which is incorporated by reference into the preambular text of French Constitution of 1958 provides that "*the Nation guarantees equal access for children and adults to instruction, vocational training and culture."* It also states that "*The provision of free, public and secular education at all levels is a duty of the State*."[131] The constitutionalisation of the right to education did not occur till 1946, but it had been widely accepted[132] as a legal principle since much earlier.[133] In 1881 and 1882, the set of laws collectively named after Jules Ferry, the minister who pushed for their adoption came about, which continue to govern public education today. The Law of 28 March 1882 introduced compulsory schooling for all boys and girls between the ages of six and thirteen[134].

Freedom of Religion and the Education System in France: The Faultlines

In this section I highlight some of the tensions between the right to education and religious freedom in France. I focus primarily on three issues, the first is the question of discrimination in access to public schools, the second is the issue of the display of religious symbols in the classrooms of public schools, and the third is the question of the question of the wearing of personal religious attire in the classroom of public schools. Finally, I also touch upon the regional specificity of the Alsace Lorraine region where the French conception of secularism

[130] Preamble to The Constitution of France, 27 October 1946, § 13.
[131] France Const. (1958), Preamble.
[132] Nicolas Boring, "*France*", in Constitutional Right to an Education in Selected Countries 13, Law Library of Congress, available at https://www.loc.gov/law/help/constitutional-right-to-an-education/constitutional-right-to-education.pdf. (hereinafter Boring, *France Right to Education*), where the author notes that "...in 1833, the French government adopted a law requiring every town in France to open a public primary school for boys. In 1850, towns were required to provide public primary schools for girls as well."
[133] Boring, *France Right to Education, at 14*.
[134] Boring, *France Right to Education, at 14.*

is applied in new and interesting ways, to the extent that the French state is permitted to provide financing to the recognized religions, as well as provide funding to churches.

The French public education system is secular in nature, and access to the educational system cannot be discriminatory based upon religion. This is confirmed in a decision of the Council of states in 1989, which held that "any discrimination in access to education founded on religious convictions or beliefs" was prohibited based on the principle of the secular character of public education[135].

Since the public education system is secular, French law requires that an instructor be devoid of any appearances of belonging to a particular religious affiliation.[136] Therefore the wearing of any attire which draws attention to a religious affiliation is impermissible. Students continue to possess the right to wear religious insignia and clothing in the classroom. However, this needs to be exercised with due respect for pluralism must not disrupt the teaching activity to be undertaken by the school. Mancini notes that the "intervention of the French government progressively restricted the right to wear the headscarf in the public schools, introducing the notion according to which certain symbols may be deemed 'by their nature, elements of proselytism', and per se 'so ostentatious that their meaning is precisely to separate certain pupils from the rules of the communal life of the school.'[137]Thus, the precise meaning of the term 'ostentatious' is shrouded in legal uncertainty, and

The Council of States in 1989 accepted a partial ban on the wearing of religious attire

[135] Opinion of The Council of State of 27 November 1989 on the Wearing of The Veil at School, availale at http://www.conseil-etat.fr/content/download/635/1933/version/1/file/346893.pdf.

[136] C., 2 juin 1908, Girodet c/Morizot, Leb., p; 507; C.E., 8 dcembre 1948, Delle Pasteau, Leb., p. 463; C.E., 3 mai 1950, Delle Jamet. Rec., p. 247.G. Burdeau, Les libertdspubliques.

[137] Susanna Mancini, *The Tempting of Europe, the Political Seduction of the Cross: A Schmittian Reading of Christianity and Islam in European Constitutionalism*, in Susanna Mancini and Michel Rosenfeld (eds.), CONSTITUTIONAL SECULARISM IN AN AGE OF RELIGIOUS REVIVAL 111, 116 (Oxford University Press, 2014) (Mancini, *The Tempting of Europe*).

in schools, stating the following:

"*In schools, donning by students of signs through which they manifest their adherence to a religion is not, as such, incompatible with the principle of laïcité, or the extent that it constitutes the exercise of the freedom of expression and the manifestation of religious belief, but that this freedom should not authorize students to display signs of religious adherence which, by their nature, by the conditions in which they would be worn individually or collectively, or by their ostentatious character or claim, would constitute an act of pressure, of provocation, of proselytism or of propaganda, will infringe upon the dignity or liberty of students or other members of the education community, endangering their health and security, disturbing the flow of activities of teaching and the educational role of the teachers, eventually would trouble the order in the establishment or the normal functioning of public service*"[138]

The ban on religious attire in public schools is in addition to the complete ban on the display of religious symbols (like crucifixes) which had already existed. The ban on the full face veil in public place, separate from the one which was under challenge in 1989[139], sustained a challenge at the European Court of Human Rights[140], despite there being widespread academic disappointment at the decision.[141] Interestingly, an unintended consequence of such a ban is the high number of Muslim students who now attend Catholic schools, due to the permissibility of religious symbols and attire in such schools.[142]

[138] Murat Akan, *Laïcité and multiculturalism: the Stasi Report in context*, 60(2) British Journal of Sociology 237 (2009).
[139] Law no. 2010-1192 of 11 October 2010 (Journal Officiel 12 October 2010).
[140] Case of S.A.S. v. France, Application no. 43835/11, 1 July 2014.
[141] Jill Marshall, *S.A.S. v France: Burqa Bans and the Control or Empowerment of Identities*, 15 (2):. Hum. Rt. L. Rev. 377, *passim* (2015).
[142] Katrin Bennholdsept, *French Muslims Find Haven in Catholic Schools*, The New York Times, 29 September 2008, available at http://www.nytimes.com/2008/09/30/world/europe/30schools.html.

Private Schools in France: Degrees of Autonomy and State Regulation

Apart from the robust public education system in France, there is a private sector which accounts for around 17% of the total enrolled students at the primary level, and 20% at secondary.[143] The private schooling system in France is based upon what is called the Debré Law of 1959, which creates a unified public educational service. Therefore, while it allows for the public funding of private schools, subject to the regulatory conditions imposed upon the receipt of such funding, it is the state which holds the authority to award diplomas and school certificates.[144] By signing a contract with a public authority, private schools become eligible to receive financial support from the state.[145] Under current law, there are two kinds of contracts which public-funded private schools can sign with the state: the 'simple contract' and the 'contract of association'.[146] 'Simple contracts' grant greater autonomy to schools, but concomitantly, schools which sign these kinds of agreements receive lesser amounts of funding than schools which sign 'contracts of association'.[147] The 'simple contract' authorizes a certain liberty in the development of academic programs and leaves recruitment and training of teaching personnel to the school authority. Under the 'contract of association', there is a requirement of strict adherence to the academic programs as deployed in state schools. The countervailing benefit granted to schools which opted for this is that teachers in such schools are hold the status of public employees (*fonctionnaire*), and are recruited, trained, monitored

[143] Giuseppe Bertola and Pierre Courtioux, *School Choice and Performance: Private Education in France*, available at https://conference.iza.org/conference_files/ESSLE2015/bertola_g332.pdf.
[144] Gabriel Langouet & Alain Leger, *Public and private schooling in France: an investigation into family choice*, (15:1) Journal of Education Policy 41, 43 (2000).
[145] Id.
[146] Alexandre Kirchberger, *Muslim identities and the school system in France and Britain: The impact of the political and institutional configurations on Islam-related education policies*, available at https://ec.europa.eu/migrant-integration/librarydoc/muslim-identities-and-the-school-system-in-france-and-britain-the-impact-of-the-political-and-institutional-configurations-on-islam-related-education-policies.
[147] *Ibid.*

and graded by governmental academic services. The 'contract of association' assures a higher level of financial support from the State, as well as regional and local authorities. Most private-owned schools have some sort of an agreement with the state, with the overwhelming majority signing a 'contract of association'.[148] Salaries paid to teachers, as well as the day-to-day expenses of running the school are managed from public monies.[149] While it is true that the teachers hired by these private schools are required to observe the 'specific ethos' of their schools, the schools' appointments are vetted by a special public commission.[150] A document available from the *Ministère Éducation Nationale* states that "private schools are subject to regulation and must respect the national curriculum".[151] It also states that "exams are set at the national level", while noting that "a small number of pupils are taught in private schools that have not signed a public contract."[152] Only about 2.8% of students who attend a private school are in totally autonomous private schools (*école privée hors contrat*).[153]

Therefore, private schools in France (in this I exclude the private schools which avail of no public funding due to its low numbers) are subject to certain kinds of regulations on account of the acceptance of state funding. This includes the adoption of the national curriculum and the lower levels of autonomy of admission criteria (including the exclusion of religion based criteria).[154]

This arrangement is known to favour Catholic run establishments, while institutions run by members of other religions have found it difficult to obtain state support for its activity. This may be on account of what is described as *auxiliary conditions* such as the existence of an established central authority being an additional condition for the state to be able to fulfil

[148] *Ibid.*
[149] *Supra* n. 2.
[150] *Supra* n. 5, at 22.
[151] Ministère Éducation Nationale, *School Education in France* (2012), available at https://cache.media.eduscol.education.fr/file/dossiers/07/3/2013_School_Education_in_France_244073.pdf.
[152] *Ibid.*
[153] Philippe Bongrand and Maria Vasconcellos, LE SYSTÈME ÉDUCATIF 56, (La Découverte, Paris, 2013).
[154] Supra n.1,

the requirement of equality and non-discrimination while interacting with religious organizations which look to fulfil public educational roles.[155] There is no central Islamic religious authority in France, and this may explain the puzzling lack of proliferation in Islamic private schools. France's only Muslim private school opened in Lille in 2003, and has since been lauded for its quality.[156]

Conclusion

The key to understanding the manner in which the French jurisdiction conducts the relationship between educational entitlements available in its constitution and claims of religious freedom presented by minorities is to unpack the concept of laicite. As explained in previous parts of this chapter, laicite takes on several forms, and contains within its fold many exceptions to it. However, central to its project is the provision of a zone in the life of a student they "are free to consider all ideas and possibilities, temporarily free from the constraints imposed on them by the religious and social mandates of their community and family...or a 'religious coercion free zone'"[157] This chapter explores the ways in which laicite manifests itself in the management of the religious claims, as well as the limitations on the exhibition of religion in the classroom.

[155] Uitz, FREEDOM OF RELIGION, at 115.
[156] France 24, *France's first private Muslim school tops the ranks*, France24, 29 March 2013, available at http://www.france24.com/en/20130329-france-first-private-muslim-school-tops-ranks-averroes.
[157] Steven G. Gey, *Free Will, Religious Liberty, And A Partial Defense of the French Approach to Religious Expression in Public Schools* 42 Houston L. Rev. 1, 62 (2005).

CHAPTER 4: INDIA: THE SUBVERSION OF CONSTITUTIONAL INTENT BEHIND MINORITY RIGHTS PROTECTION

Introduction

In this chapter, I examine the relationship between the right to education and the rights of religious minorities as expressed in the constitutional provisions on educational and cultural rights. In the first sub-section, I provide a brief overview of the evolution of the right to education in India. This segue becomes necessary in order to better understand the antecedents of a right which achieved the status of an actionable fundamental right in 2002. The historical overview is also important since it highlights the central role which many of India's leading statesmen and thinkers over time had accorded to the availability of education for all Indians. The reader will find echoes of similar French debates about the role of education in instilling republican values and its centrality in constructing a citizen who is capable of exerting her agency and participating fully in political life. The next sub-chapter provides an overview of the content of the right to education, with subsequent sub chapters being dedicated to the relationship between the right to education and the rights of religious minorities, as it finds expression in the cases chosen for analysis.

The Right to Education in India: A Chequered History (1824-2009)

The history of education narrative is marked by the lack of a unified voice in addressing issues like the ideas of India, whether or not the masses should be educated, and whether or not women should be included in the educational agenda. Sabyasachi Bhattacharya went to the extent of describing the education discourse as a *surrogate for political debate.*[158] It may be useful to provide a suitable relief to this dilemma to post-Reformation Europe, where there was a similar public discourse on the role of education in the citizen's life and how to best achieve its reform to actualize her full potential. At the time when reason and virtue were seen as being central to public life in post-Renaissance Europe, education reform was seen as important to combating dissatisfaction with political life.[159]

Central to political reform, education *freed man from the slavery of his natural, fallen condition and brought man's potential genius into society: it led to meritocracy, overcoming the phthisis of aristocracy, and ultimately induced liberty*[160]. If there are antinomies in the Indian education narrative, this apparent confusion can be located in the multifaceted role that education had to play in the direction of the nation. The paragraph below is concerned with the development of education in India following the correspondence from Elphinstone to the Secretary to the Education Society in 1824. It traces the gradual evolution of the primary domain of education as one which was invested in the creation of a class of subjects who could

[158] Sabyasachi Bhattacharya, *Introduction*, in EDUCATING THE NATION: DOCUMENTS ON THE DISCOURSE OF NATIONAL EDUCATION 1880-1920 (Kanishka Publishers, 2003) (hereinafter Bhattacharya, EDUCATING THE NATION).

[159] John Milton, *Tractate on Education* (The Harvard Classics 1909–14).

[160] John Hall, *An Humble Motion To The Parliament of England Concerning The Advancement of Learning* (1649), available at http://quod.lib.umich.edu/e/eebo/A45023.0001.001?view=toc.

serve as an interface between the erstwhile colonial masters and their subjects, to one which foresaw the creation of a class of citizens (as opposed to mere subjects) of a nation-state which was to emerge in the future. A distinct limitation in our analysis is the inability to place the developments described below within a neat chronological framework.

Shining through Elphinstone's famed address to the Education society was concern about access to education and its impact upon the levels of overall literacy in the 'native' population existed[161]. Whether or not the provenance of this thought is egalitarian is unclear, yet the minutes reveal an intellect which worried about how to best permeate English education without upsetting the traditional pedagogic systems which had meet with some success in provinces like Bengal.

In a separate vein, Elphinstone was of the opinion that the existing efforts of organisations like the Bengal Education Society should not be abandoned altogether. The effort to dismantle the existing system of learning and an active discouragement of the usage of the vernacular is very evident however in Macaulay's address some years later[162]. Early education efforts in India also battled against two different but linked problems: the stranglehold of the past marked by social custom such as child marriage and widow burning; contrasted with the problem of creeping normalization of the condition of Empire[163]. This was met with vigour from nationalists who sought to battle this advent of 'colonial hegemony'.[164] Some scholars have

[161] Mountstuart Elphinstone, *Minute on Education dated March 1824*, available at http://cco.cup.cam.ac.uk/chapter.jsf?bid=CBO9780511873669&cid=CBO9780511873669A012.

[162] See Natalie Robinson Sirkin and Gerald Sirkin, *The Battle of Indian Education: Macaulay's Opening Salvo Newly Discovered*, 14(4) Victorian Studies pp. 410, 412 (Jun., 1971).

[163] K.N. Pannikar, *Culture and Ideology: Contradictions in Intellectual Transformation of Colonial Society in India*, 22(49) Economic and Political Weekly 2115 (Dec. 5, 1987), which mentions the related concern of the relevance of scriptural sanction as a pre- condition for changing the social norms in vogue and the task of determining the desirability of state intervention in private cultural matters which were hitherto untouched.

[164] *See* Krishna Kumar, THE POLITICAL AGENDA OF EDUCATION 15 (Sage Publishers 2004)

seen this as a push back against the idea of creating the 'colonial citizen', who would see herself as being above the 'masses', and deserving of a meagre share in the colonial state's power.[165]

The nationalist effort was marked by a movement toward three well-articulated goals. The first was a renewed focus on the agency of the Indian in making education policy, the second was the promotion of the vernacular, and the third was inculcation of patriotism through education. Simultaneously, it became apparent that public education having remained a low priority among the heads of public expenditure by the governments of various Presidencies.[166]

There continue to remain a doubt on whether the question of the lack of educational access was seen as primal in the minds of Indian political representatives of the time. Jyotirao Phule's address to the Education Commission in 1882 seemed an aberrant voice when expressing anguish at the pro-higher class policy of the government, and their lack of initiative in correcting this imbalance.[167] The din over the lack of access to education was often blamed on the government's apparent disinterest in creating a demand for learning[168] that had little connection with the life of the average citizen[169], and this culminated in the call for free and compulsory primary education, led most notably by Gokhale. His Compulsory Primary Education Bill 1911, drafted along the lines of its British equivalent of 1876, marked a very important moment in the history of education in India. Summarily dismissed by the Imperial Legislative Council, the Bill would have allowed a municipality or district board could make

[165] Id.
[166] Supra n. 39, at 17.
[167] Jyotirao Phule, *Address to Education Commission, 1882*, Document No. 45, in Bhattacharya, EDUCATING THE NATION).
[168] Conversation between Dvarka Nath Ganguli and Jyotendro Mohun Tagore, Document No. 51, in Bhattacharya, EDUCATING THE NATION).
[169] Aubinash Chandra Banerjee, Statement to Education Commission, 1882, Document No. 54, in Bhattacharya, EDUCATING THE NATION).

primary education compulsory for every individual. The reason why the Bill was so relevant was that it allowed for similar legislation to be passed through the Legislative Councils of other regions. Its intended effects of course remain unrealized to this day. In the period that followed, more autonomy was granted to the respective legislative councils in formulating localized plans of education.

Perhaps the most notable achievement of the period was the greater inclusion of marginalized communities within the fold of education, though by no means at a desirable level. The Sargent plan of 1944 advocated free compulsory primary education in the post-World War II period, and the period after independence saw the constitution of the Kher Committee to operationalize this plan. Disappointingly, the Constituent Assembly Debates resulted in the relegation of a fundamental right to education (as it was conceived in an interim draft of the Constitution) to a non-justiciable directive principle, primarily due to the high levels of expenditure, which would be incurred in the realization of the right. Our paper echoes Ambedkar's view the DPSPs were intended to serve as Instrument of Instructions for the achievement of the goals of a democratic republic.[170] These principles established the priors of a democratic society that was capable of meaningfully enjoying the fundamental rights guaranteed in Part III of the Constitution.

[170] Constituent Assembly Debates, available at http://parliamentofindia.nic.in/ls/debates/debates.htm.

The right to education is contained in Article 21A of the Constitution of India. This was inserted into the constitutional text in 2002, and the manner in which the right is operationalized is through the Right of Children to Free and Compulsory Education Act, 2009 (RTE Act).[171] Previously, the Supreme Court of India, in a case concerning admissions to higher educational institutions, had held that there existed a fundamental right to education for all[172], confirming in its judgment that:

"*The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The State Government is under an obligation to make endeavor to provide educational facility at all levels to its citizens*."

Thereafter, the court clarified that such right "extended only to primary education between the ages of 6 and 14."[173] Thereafter, for a seven year period, the right to education continued to be a fundamental right, but in the absence of any enabling legislation, the enforceability of the right was in question.[174] This situation is what Tushnet describes as "a weak remedy, with the declaration of the strength of a right without a concomitant remedy."[175]

[171] Gaurav Mukherjee, *Exorcising the Ghosts of Judgments Past: The Case Against Excluding Minority Institutions from the RTE Act* (2014) 7 Indian Journal of Constitutional Law 1 (hereinafter, Mukherjee, The Case Against Excluding Minority Institutions).

[172] Mukherjee, The Case Against Excluding Minority Institutions; *Mohini Jain v. Union of India* (1992) 3 SCC 666, at paragraph 12.

[173] *Unnikrishnan v. State of Andhra Pradesh* 1993 (1) SCC 645; Mukherjee, The Case Against Excluding Minority Institutions.

[174] Mukherjee, The Case Against Excluding Minority Institutions.

[175] See generally Mark Tushnet, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW (Princeton University Press, 2008); Mukherjee, The Case Against Excluding Minority Institutions.

This discrepancy was noted in the 165th Report of the Law Commission[176] of India, and was also "part of the Statement of Objects and Reasons (SOR) for the Eighty Sixth Amendment Bill in 2001."[177] The SOR noted the "resounding failure of the directive principle in achieving both learning outcomes for the majority of the populace, as well as having failed to make an impact upon enrolment rates, as well as the high levels of dropouts." As I have stated elsewhere, the "SOR noted the absence for provision for free and compulsory education for all children up to the age of fourteen years within ten years of promulgation of the Constitution as contained in Article 45 of the CoI[178], even though more than fifty years had elapsed since its commencement."[179] Prior to the existence of the right to education as a fundamental right, there was no actionable right available to either a child or a parent with respect to their right to attend a school. Cases which came before courts primarily involved service matters relating to the hiring of teachers in government schools, but were mostly decided using the unenforceable directive principle of state policy concerning the state endeavouring to secure the secure the primary educational access to children. The Right to Education Act was enacted in 2009, which granted to 'all children between the ages of six and fourteen years' free and compulsory education. The sections below I highlight some of the key aspects regarding the right to education which are relevant to understand some of the uncertainties which continue to plague the interpretation if the right to education in its conflicts with the religio-cultural minority rights.

The subject of the educational right available in the Indian constitution is not clear,

[176] Law Commission of India, ONE HUNDRED AND SIXTY FIFTH REPORT ON FREE AND COMPULSORY EDUCATION FOR CHILDREN 18 (1998); Mukherjee, The Case Against Excluding Minority Institutions.

[177] Statement of Objects and Reasons, The Constitution (Eighty-Sixth Amendment) Act, 2002, (12th December, 2002) Available at http://indiacode.nic.in/coiweb/amend/amend86.htm; Mukherjee, The Case Against Excluding Minority Institutions.

[178] The unamended Article 45, read:
"Provision for free and compulsory education for children - The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."

[179] Mukherjee, The Case Against Excluding Minority Institutions.

since it can be argued that it rests with either the parent, the child, or both. Courts and lawyers being responsible for an obfuscation on the proper holder of the right.[180] This may be a peculiar feature of the constitutionalising of an exhortation which had previously been part of an unenforceable part of the constitutional text. While the constitutional text provides that 'all children' shall be the holders of the right to education, there is yet to be a definitive legal pronouncement on the justiciability of the right, or the manner in which litigation based upon the right would proceed. Internationally, the holder of the right to education is usually the parent, but not the child.[181]

There are two possible scenarios which can be envisaged in the event that the question is subject to legal determination. The first is that the court definitively states that a child is the bearer of the right. This would mean that any child between the ages of six and thirteen could approach a court through a constitutional writ in the event that they are denied into a public school of their choice, or a private school which is part of the RTE scheme. However, the judicial determination of this claim would not be so simple. This is on account of the fact that public schools in India choose to admit students based upon a system of lottery.[182] It is difficult to allege the denial of a right if it is mediated by blind chance. Geographical proximity plays a part in this determination as well. Admission to private schools is based upon a complex web of state-based rules[183] which have little common ground. The second conclusion to which the Court could arrive at is that the bearer of the right (acting either independently or on behalf of a child between the ages of six and thirteen) could claim a violation. Section 10 of the RTE

[180] Oral arguments which the author had been part of also appear to indicate this confusion, with both judges of the Indian Supreme Court and the counsel before them in the Pramati case averring to lack of certainty regarding the holder of the right to education. See, *Proceedings and Transcripts of oral hearings in Pramati Educational and Cultural Trust v. Union of India before the Supreme Court of India dated 26 February 2014* (On file with author).

[181] Uitz, FREEDOM OF RELIGION 112.

[182] See Section 11(1) of the RTE Act, 2009.

[183] This is because education occurs in the concurrent list in the Indian Constitution.

Act casts a moral responsibility on parents to send their children to school. While the Act does not impose penalties upon parents, there were calls from some quarters to do so in order to improve enrolment rates and depress dropout statistics. The RTE Act states that the appropriate government shall ensure that children are in school, implying that in the event of the denial of admission, the government of the particular stat in which the denial occurs, shall be responsible. This is not made clear through the text of the legislation, but is seen in practice, with state governments being named as respondents in a number of cases concerning the right to education.

The RTE Act casts three types of obligations on schools: 1) affirmative action obligations (through which unaided schools are required to reserve 25% of the class size to socially and economically disadvantaged students)[184], 2) obligations to comply with certain minimum infrastructural regulation (this includes basic facilities like access to separate toilets for boys and girls, access to clean drinking water), and 3) pedagogic regulation of schools (whereby all schools are required to comply with a state mandated curriculum, as well as modern methods of teaching and evaluation as decided by the federal government).[185] The first kind of obligation "has been the arena for fierce legal contestation[186], but is held to be constitutionally valid, yet the obligations imposed by the latter has received relatively lesser attention."[187] The obligations which are incumbent upon the government include the certification of schools which are not set up by the government, as well as the setting of curriculum and inspections as regards the fulfilment of license conditions as set out in the

[184] Section 12(1)(b), RTE Act.

[185] These are found in Schedule I of the RTE Act, and the standards can be traced to Sections 19 and 25 of the Act; Mukherjee, The Case Against Excluding Minority Institutions.

[186] See Rajeev Dhavan and Fali Nariman, "The Supreme Court and Group Life: Religious Freedom, Minority Groups and Disadvantaged Communities" in B.N. Kirpal, Ashok Desai, et. al., (eds.) SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT 265 (2000), for a concurring opinion.

[187] Mukherjee, The Case Against Excluding Minority Institutions.

provisions of the RTE Act.

Freedom of Religion and the Education System in India: The Faultlines

The constitutionality of the Right to Education Act has been challenged twice before the Supreme Court of India, in Societies for Unaided Private Schools in Rajasthan[188] (2012) (2J) (hereinafter, Societies) and Pramati Educational and Cultural Trust v. Union of India[189] (2014) (5J) (hereinafter, Pramati), where petitioners made three broad sets of arguments. First, that the constitutional amendment under Article 21A imposed regulatory burdens that limited the autonomy of private persons to establish and maintain a school business. Second, that the State cannot impose obligations on private persons to accommodate students from socially and educationally backward backgrounds. And third, the right to free and compulsory education restricts the rights of a cultural minority to establish and maintain schools. On the first two questions, the Supreme Court held that the RTE Act did not compromise the autonomy of private businesses. The Pramati opinion held that minority institutions - whether Government-aided or not, did not fall within the purview of the RTE. This would imply that minority schools are permitted to charge any fees, prescribe any admission criteria and discriminate against any class of citizens without being answerable to any authority.

Society and Pramati framed the challenges primarily as a conflict between different guaranteed rights. On one hand, it was the constitutional guarantee that children would receive free and compulsory education, against the right of private persons to practice any profession or carry on trade or business. On the other, it posits the right to education against the cultural right of minorities to establish and regulate institutions autonomously. The majority opinion in Society does not address the conflict squarely. CJ Kapadia contrasts the absolute duty of the state to

[188] (2012) 6 SCC 1.
[189] (2014) 8 SCC 1.

provide education against the restricted entitlement to freely practice a profession. Instead of utilizing existing precedent that used public welfare arguments to trump private rights contra Dworkin, he resorted to adjudicating over the 'reasonableness' of the obligation. The opinion regards the right to education as more absolute than the right to profession, arguing that the latter could be reasonably restricted under the scheme of the Constitution (19(6)).

Over these two pronouncements, I see two ways in which the conflict of rights potentially plays out. The first case - of the private schools, is one where the Court attempts to balance rights between rights-bearers. Within the balancing act, I notice that there is no pre-determined ordinal ranking between the rights. In some way (here, using the language of limitations), the rights are reconciled, to allow them to occupy and operate within a common space, on a level field. The second case - of the minority institutions reflects another approach. Under this scheme, a conflict between rights is resolved by recognizing one to be an exception to the other right. The right of cultural minorities to perpetuate their culture through educational institutions did not supercede the guarantee to provide free and fair education. It simply occupied a different ontological space untouched by Article 21A, in one of the ways that the rights could "hang together", though arguably the way the Court chose to read them together were perhaps not in the "right way". No question of ordinally ranking these rights even arises here.

The RTE Act was enacted in 2009 and seeks to operationalize a right contained in Part III of the CoI by imposing reservation and regulation obligations upon educational institutions. The existence of a fundamental right to education for all was confirmed in 1994[190], with the

[190] The Supreme Court in Mohini Jain v. Union of India (1992) 3 SCC 666 in 1992 emphasized the existence of right to education. Note the following observation at paragraph 12 of the judgment:

> "*The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The State*

SC clarifying subsequently that such right extended only to primary education between the ages of 6 and 14.[191] The first case to consider the constitutionality of the RTE Act was the *Society for Unaided Private Schools of Rajasthan v. Union of India*[192] (hereinafter Society). I restrict the scope of this judgment's analysis to the parts involving the balancing of competing rights.

The aim in this section is to provide a thick descriptive account of the manner in which the SC has addressed the issue of competing fundamental rights in the context of primary education. I believe that Society is theoretically different from preceding jurisprudence on educational institutions due to the passage of the Eighty Sixth Amendment to the CoI, as well as the enactment of the RTE. While its previous judgments may have influenced the SC, its reasoning in the cases following Society presents an original voice in the judicial disputes involving education rights. I therefore have subjected to greater scrutiny the judicial reasoning which emerges from the majority opinion in Society, as well as the unanimous verdict of Patnaik, J in Pramati.

At the very outset in Kapadia's majority opinion in Society, he establishes the role of universal education in *strengthening the social fabric of democracy through provision of equal opportunities to all.*[193] The use of non-justiciable DPSPs to restrict fundamental rights is on

Government is under an obligation to make endeavour to provide educational facility at all levels to its citizens."

[191] Unnikrishnan v. State of Andhra Pradesh 1993 (1) SCC 645.
[192] AIR 2012 SC 3445.
[193] Society, at para 5.

shaky constitutional ground.[194] Yet, drawing on certain anecdotal examples[195], the SC explained how the RTE sought to operationalize and ensure the availability of the right to education as contained in the Directive Principle of State Policy (DPSP).[196] By doing so, the SC correctly distinguishes the right as available under the DPSP from the enactment of Article 21A. The SC then sought to engage with the issue of the right to education when it comes into conflict with a) the right of a non-minority private unaided educational institute to carry on any occupation, trade or business under Article 19(1) (g), CoI; b) the right of a linguistic or religious minority group to establish and administer educational institutions under Article 30(1)[197], CoI.

Addressing question a), Kapadia, J notes the contradiction inherent in non-minority private unaided institutions claiming infringement of a right to freedom of trade, when it has been held that education is a charitable activity.[198] However, the judgment then states that this right in not absolute in nature, and may be *subjected to social control under Article 19(6)[199] in the interest of general public.*[200] The reservation rule embodied in Section 12(c), RTE Act, was therefore deemed to not be unreasonable, since a denial of access to education implied not only

[194] While it is not wholly without precedent to employ DPSPs to dilute the Part III rights, as the SC did in cases like In Re Kerala Education Bill and

[195] The court cites reasonably restricting the right to equality of public employment opportunity in Article 16, CoI being restricted by the obligation to obligation of the State to promote with special care the economic and other interests of the weaker sections (Article 46)

[196] Society, at para 9.

[197] **Article 30**. (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

[198] See TMA Pai; quoted in Society, at para 9.

[199] **Article 19(6)** - Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, 2[nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

[200] Society, at para 10.

a deprivation of an individual's right to live with dignity, but also her right to freedom of speech and expression enshrined in Article 19(1)(a).[201]

The Court also held that an additional safeguards existed in the form of the reimbursement rule in the RTE Act, by which private unaided schools "are entitled to be reimbursed with the expenditure incurred by it in providing free and compulsory education to children belonging to economically weaker sections of society, to the extent of per child expenditure incurred by the State in a school specified in Section 2(n)(i) or the actual amount charged from the child, whichever is less".[202] What is more significant is the rigorous treatment which Kapadia, J subjects the right to education to. First, in pointing out that the right to education is the only right which places a burden on a parent[203], as well as the state, he places this right in a special corner, interference with which would not occur lightly. Second, the judgment correctly distinguishes between primary and higher education. This was an exemplary display of judicial craft because it allows for the overruling of certain principles[204], based largely on the idea that merit and affirmative action pull in divergent direction.

Answering question b), Kapadia, J points out that the right available to a linguistic or religious minority group to establish and administer educational institutions under Article 30(1) is an absolute right, unlike the rights to freedom in Article 19, which may be subject to reasonable restrictions.[205].It justified such a stance based upon the words "of their choice" in the text of

[201] Society, at para 10.
[202] Society, at para 10.
[203] See Article 51A(k), CoI.
[204] The Court in TMA Pai held that the right to establish and administer an educational institution must be in consonance with principles of charity, autonomy, voluntariness, anti-nationalisation of seats in the institution, and co-optation. A discussion the import of these terms is beyond the scope of this paper.
[205] Society, at para 18. See also, Sidhajbhai Sabhai v. State of Bombay (1963) SCR 837.

the provision.[206] Establishing the unqualified nature of the right, the court held the RTE Act, including its reservation rule in Section 12(1)(c) would be inapplicable to unaided minority educational institutions.[207] Curiously, the court created a distinction (which it overruled in Pramati) between aided and unaided minority educational institutions based upon Article 29 (2), which disallows denial of admission into *any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.* Therefore, the RTE Act continued to apply to state aided educational institutions established and administered by minorities.

The question before the constitution bench in Pramati related to whether or not parliament had damaged the basic structure of the CoI by the enactment of a) the Constitution (Ninety Third Amendment) Act (inserting Article 15(5)[208]) and b) the Constitution (Eighty Sixth Amendment) Act (inserting Article 21A). With a), the enabling nature of the provision ensured that it was considered to not be an exception to Article 15(1)[209], and therefore not damaging to the basic structure of the CoI. Further, the court grounded its reasons in the fact that educational access was a distant reality for many sections of socially and economically backward classes, as well as persons belonging to the Scheduled Castes and Scheduled Tribes (hereinafter, SC/ST).[210] In its discussion on whether the exclusion of both aided and unaided minority institutions from the ambit of Article 15(5) violated the equality clause, as well as Article 29(2).

[206] Society, at para 17.

[207] Society, at para 19.

[208] **Article 15(5)** - Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.

[209] See similar reasoning followed to uphold the validity of Articles 15(4) and 16(4) in State of Kerala v. N.M. Thomas (1976) 2 SCC 310 and Ashoka Kumar Thakur v. Union of India respectively.

[210] Pramati, at para 24.

Stressing upon the need to preserve the minority character of an institution which would be destroyed in the event that non-minority students were admitted.[211]

What is interesting is the distinct counter-majoritarian tone of the court when it insists that the import of Article 30(1)[212] when read with Article 15(5) is to ensure greatest autonomy and preservation of minority character to a minority administered educational institution, irrespective of it having received state funds.

The challenge to the constitutionality of Article 21A was orchestrated by a group of private schools and aided minority institutions, who insisted that Article 21A cast an obligation only upon the State[213], not private institutions, and that the admission of non-minority children to a minority educational institution went counter to the established jurisprudence of the SC.[214] Therefore response to question b), Patnaik, J used reasoning similar to the majority judgment in Society and stated that admitting a small number of students belonging to socially and economically backward classes would not abrogate the right to freedom of trade. It also countenanced concerns about the horizontal application of duties which essentially belonged to the state by pointing out that the ambit of Article 21A was broad enough for the government to specify the "manner" in which the right to education would be realized.

The reasoning of the court in excluding minority institutions from the ambit of the RTE Act is however on more ambiguous territory, since it simply made reference to the need to preserve

[211] Pramati, at para 25, following TMA Pai, para 149.

[212] **Article 30. Right of minorities to establish and administer educational institutions**. (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

[213] This was buttressed by the argument that the SOR for the Eighty Sixth Amendment Act only made reference to Article 21A and not to Article 15(5). Further evidence of this was provided in the form of the affidavit filed to such effect by the Union of India in the Society case (on file with authors).

[214] See In Re Kerala Education Bill 1959 1 SCR 995.

the minority character of the institution. The SC insisted that the observations of Sikri, CJ (as he then was) in *Kesavananda*[215] on the bar against Parliament legislatively removing the rights of minorities implied that minority rights were part of the basic structure of the Constitution. I believe this is problematic on three grounds. The first is that the Court clearly overlooked its own jurisprudence which has repeatedly held that a "sprinkling" of non-minority students would in no way impact the minority character of an institution. A marked refusal to explicitly state what constitutes "sprinkling" only adds to the judicial confusion over the issue, and is detrimental to judicial discipline and corrosive toward the doctrine of *stare decisis.*

Further, I believe that the court accorded a primacy to Article 30(1) which is not founded on existing authority. Locating the constitutive elements of the basic structure in individual articles is a specious practice[216], and risks conflating Article 13 fundamental rights review with a review of damage to basic structure. It also runs contrary to established jurisprudence in allowing for certain degrees of regulation of minority, in so far as general standard setting is concerned. Notably, the Indian Supreme Court has traditionally been more permissive of regulation in the field of school education, and has previously held that restrictions which originate in labour law need to be adhered to by minority educational institution, as long as it does not take away the minority group's right to administer the institution[217]**.** The Supreme Court has also held that the need to "framing by-laws"[218] governing the operation and management of certain minority owned schools as being valid, while also holding that the state

[215] AIR 1973 SC 1451

[216] Sudhir Krishnaswamy, DEMOCRACY & CONSTITUTIONALISM 49 (Oxford University Press 2010)

[217] Christian Medical College Hospital Employees' Union v. Christian Medical College Vellore Association (1987) 4 SCC 691.

[218] St. Johns Teacher Training Institute v. State of Tamil Nadu (1993) 3 SCC 595.

government is within its rights to take over a minority administered school in the event of mismanagement.[219]

Conclusion

In the preceding sections, I discuss the precise content of the right to education under the Indian constitution, while also examining the relationship between this right and the rights granted to minority educational institutions. Over the course of the two decisions of the Indian Supreme Court, it is clear that the exclusion of minority educational institutions from the RTE Act is at odds with the jurisprudence of the court, as well as the intention of the framers.

[219] Bihar State Madrasa Education Board v. Madrasa Hanifa College (1990) 1 SCC 428.

CHAPTER 5: WHAT DOES THE RELATIONSHIP BETWEEN EDUCATION RIGHTS AND RELIGIO-CULTURAL RIGHTS SAYS ABOUT COMPARATIVE ENQUIRY

The preceding sections of this thesis trace the broad contours of the interactions between the right to education as found in the national constitutional documents and religious and cultural rights. As we see, in India, the case law has focused on the question on the degree of government regulation in areas like access to education and the imposition of certain minimum pedagogic and infrastructural standards in educational institutions run by minorities. In France and Germany, these questions are principally on four grounds: access to religious instruction in schools, the display of religious symbols in public schools, funding for private religious schools, and the wearing of religious attire by teachers in public schools. The conflict between a socioeconomic right like the right to education and civil-political religio-cultural rights manifests itself in different ways in different jurisdictions. While in India, which is a jurisdiction which incorporates a strong set of individual and group religious rights protections, it also embraces provisions which envisage robust minority rights protection. These two sets of rights works in tandem, and serve to protect minority run educational institutions from extensive governmental regulation in a number of areas. In contrast, German courts employ the freedom of religion contained in the Basic Law, read with its provisions on equality, in order to manage possible conflicts between the religio-cultural rights and the freedom of religion. In France, wide amplitude is given to the legislature and executive in the framing and execution of laws. However, the French commitment to laicite and its right to education should also be complied with.

The real question, therefore, is whether comparative study is useful in helping understand why some of these conflicts arise in a jurisdiction like India. Are there any

commonalities between Germany, France and India which are useful for the comparative lawyer? The key to this question lies in the reasoning deployed in the adoption of legislation, as well the typologies of juristic argumentation behind some the judicial decisions of courts in these three jurisdictions. This does not mean that I treat the cases on the conflict between education rights and religio-cultural rights to be identical in these countries. In fact, they implicate legal regimes and peculiar understandings of the nature of the relationship between the two categories of rights. However, I argue that there are commonalities which are helpful. Below, I argue that these categories of judicial reasoning imbricate certain peculiarities in the socio-legal landscape of the three jurisdictions. I argue that the outcomes of some of the cases are better understood through the manner in which the relation between law and religion is manifested in that country.

Categories of Reasoning

There are two categories of reasoning which are common the judicial reasoning deployed in the jurisdictions chosen. The first is one which attempts to justify the reaching of a judicial conclusion through the use of balancing. Balancing is not uncommon in modern constitutional systems, and acquires a wide range of forms in different jurisdictions.[220] In Germany, for instance, the use of balancing usually takes the form of first examining the scrutiny of whether a particular action is based in law, is necessary to achieve the ends sought, and whether there is a least restrictive means available.[221] A second line of reasoning employed is the deferment to local authorities. This is evident in the kinds of reasoning used by the German court in several cases ranging from the Interdenominational case to Headscarf I and II, as long as such a deferment does not result in the abridging of other rights such as Article 3 equality rights.

[220] Alec Stone Sweet and J. Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 Columbia Journal of Transnational Law 68 (2008).
[221] Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 University of Toronto Law Journal 383 (2007).

The Conseil D'Etat reasoning on the upholding of the headscarf bans is however one which defers to the legislature and may be emblematic of the broader kind of role which French courts see themselves playing, as well the kind of role other institutions expect it to play. It is true that both of these kinds of reasoning also implicate the peculiar notions of secularism which has come to evolve in these jurisdictions. Therefore, while laïcité requires that "religion must be kept out of the public sphere including state schools, the German concept of neutrality holds that laïcité leads to a denigration of religion which is incompatible with state neutrality."[222]

State Regulation of Private Schools: A Comparative Picture

The broader point which this thesis makes is that in France and Germany, the establishment and administration of private schools, is subject to a wide degree of regulation. In France, these regulations relate to the administering of school programs, as well as restrictions on the ability to discriminate on religious grounds while considering admissions to these schools. In Germany, the very need for the establishment of private schools is a matter of assessment which is left to specific Lander to determine on the basis of provisions in the Basic Law. Further, the receipt of state funding is conditional upon the acceptance of a wide variety of regulations. These include the restrictions on discrimination on the grounds of economic discrimination (by the capping of school fees), the need to show pedagogic innovation or strong religious reasons for the establishment of such schools, as well as the adoption of curricular and infrastructural standards which are applicable to public schools.

The kinds of regulation spoken of above are precisely the kinds of legislative standard-setting which the RTE Act, 2009 attempts to introduce. As described in a preceding section,

[222] Myriam Hunter-Henin, Law, RELIGIOUS FREEDOMS AND EDUCATION IN EUROPE 115 (Ashgate Publishing, 2011)

the kinds of regulation which the RTE Act introduces are primarily of three kinds. The first problem relates to *access*, which the legislation addresses through mandated quotas for children from economically weak households. India has a well identified problem with access to primary education, with a large number of children being unable to access any kind of schooling. It also has problems with the retention of children in school following enrolment, with the country being home to the highest number of out-of-school children in the world. Both of these documented problems disproportionally affect children who come from low income households. With the enactment of the RTE Act in 2009, the federal Indian legislature made an attempt to include private schools within the ambit of the legislation to ensure that a certain percentage of the class size in private schools (both minority run and privately run) was made available to children from economically weaker households. The second kind of regulation which the RTE Act, 2009 sought to impose were *educational and pedagogic standards*, which includes adherence to the National Curricular Framework, a document prepared from time to time by the federal government, as well as requirements like a minimum student-teacher ratio in the schools covered under the ambit of the legislation. Finally, it also sought to impose *infrastructural standards* in Indian schools, such as the requirement to have separate toilets for boys and girls, drinking water facilities, a separate kitchen shed, as well as others like the size of a classroom and the requirement to have a playground in every school. Some have argued that infrastructural standards have imposed onerous requirements of schools which may not have the necessary financial ability to meet them. The shutdown such schools or the refusal of state certification, critics argue[223], amounts to the undoing of a lot of progress such schools

[223] Geeta Kingdon, *Schooling without learning: How the RTE Act destroys private schools and destroys standards in public schools*, The Times of India Blog, 26 August 2015, available at http://blogs.timesofindia.indiatimes.com/toi-edit-page/schooling-without-learning-how-the-rte-act-destroys-private-schools-and-destroys-standards-in-public-schools/

have made in enrolling students in areas with little or no access to other kinds of schools.[224] Such arguments deserve careful consideration. However, as a former colleague of the author points out[225], most of these are based on sensationalist news reportage, since there have been negligible instances of closures of private schools on account of non-adherence to the RTE Act. Further, Mysoor also points to the need for such regulation in order to ensure a safe and non-hazardous learning environment in schools, and the basis of many of the critics of the RTE lying in the assuming that the autonomy of schools and the power of the state to regulate them pull in divergent directions.[226]

The Deployment of Principles: Laicite, Neutrality, Secularism, and Minority Rights

While managing the relationship between educational entitlements and religious rights of minorities, institutional authorities in the jurisdictions under study deploy principles such as laicite in France, state neutrality toward religion in Germany, and minority rights in India. In the cases discussed in France, this principle finds expression in three ways. First, public educational institutions which are religious in nature are impermissible. Second, the display of any religious affiliation in public schools upon the person of the instructor, or in the adornments upon the school premises, is not allowed. Third, educational institutions which are private in nature receive state funding, and the expression of religious affiliation by students and teachers is permissible.

[224] Monalisa Das, *Are good low cost private schools bearing the brunt of a faulty RTE Act?*, The News Minute, February 25, 2015, available at http://www.thenewsminute.com/article/are-good-low-cost-private-schools-bearing-brunt-faulty-rte-act-23009.
[225] Dolashree Mysoor, *Guest Post: Is RTE based regulation choking quality education?*, Law and Other Things, 13 October 2015, available at http://lawandotherthings.com/2015/10/guest-post-is-rte-based-regulation/.
[226] Ibid.

In Germany, state neutrality is a common theme running through some of the decisions which are discussed in this thesis. For instance, in the Headscarf cases, the court is moved by a concern for neutrality in the ban on personal attire of teachers in public schools which could denote religious affiliation.

In India, constitutional problems such as the exclusion of minority run educational institutions from the ambit of a social welfare legislation are also decided, at least in large part, by the operation of minority rights. These minority rights, as articulated in the Indian constitution, are textually embedded exceptions to the principle of secularism, which was "originally based on the 'equal respect' theory where the State respects and tolerates all religions"[227], and is most likely an aspect of what one scholar described as the 'reformatory justice' aspect of the principle.[228]

However, a central dilemma is the manner in which the deployment of these principles has consequences which are not capable of being foreseen at the time of their formulation. Scholars have noted how a number of Lander in Germany have enacted laws which "prohibit Islamic symbols but specifically permit Christian ones in the public schools, including nun's habits"[229], while there exists a great deal of ambiguity as to what constitutes an 'ostentatious' symbol of religious affiliation in France. Similarly, when formulating the robust set of minority rights protections, the framers of the Indian constitution will not have envisaged the manner in which it is used to bypass secular social legislation like the RTE Act.

[227] Reddy, Minority Educational Institutions.
228 Rajeev Dhavan, *The Road to Xanadu: India's Quest for Secularism*, in Gerald Larson (ed.) RELIGION AND PERSONAL LAW IN SECULAR INDIA (Indiana University Press 2001).

[229] Mancini, *The Tempting of Europe*, at 119.

The Application of Jurisdictional Learnings to the Indian Problem

The purpose of comparative constitutional enquiry is often to respond to functional questions. The approach adopted by courts and lawmakers in different jurisdictions "*can help identify the consequences of different reasonably justifiable interpretations plausibly open to the decision maker*."[230]Additionally "*participating in transnational constitutional discourse may strengthen both the quality of decisions and the power of reason-giving as a mechanism of accountability for politically independent judges*."[231]

This thesis calls for a reevaluation of the Indian law on the exclusion of minority run educational institutions from the ambit of government regulation on education. The law as laid down in the Pramati case is based on a misreading of the court's jurisprudence, as well as a misunderstanding of the intent of constitutional framers.[232] While minority rights were intended to provide a set of robust protections at a time when the country was locked in sectarian conflict, the purpose of such a protection was not to put all institutions set up and administered by a minority beyond regulatory purview.[233] The preceding chapters of this thesis discuss how Germany adopts an approach to the relationship between its educational obligations to persons resident within its territory with the freedom of religion through the use of a balancing process. Such a process is often left to the legislatures of the various Lander, with the FCC stepping in when there is a judicial proceeding which calls for a review of the constitutional validity of such a process of balancing. I also previously discuss how historic specificity is included as an implicit part of the reasoning used by German courts when discussing whether interdenominational schools with a primary Christian focus is permissible

[230] Vicki Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience* 51 Duke Law Journal 223, 258 (2001).
[231] *Ibid*, at 259.
[232] See Mukherjee, *The Case Against Excluding Minority Institutions*, *passim.*
[233] Ronojoy Sen, *Secularism and Religious Freedom*, in Sujit Choudhury, et. al. (eds.), The Oxford Handbook of the Indian Constitution (Oxford University Press, 2016).

or not. As pointed out, the discretion of the Lander with respect to how its educational obligations are to be carried is broad, but circumscribed by the requirement to treat all religions equally, as well as to balance the negative and positive aspects of the freedom of religion as contained in the Basic Law. Similarly, in France, the relationship between the secular public education system and the freedom of religion manifests itself through its fault lines. Much of these lie in the attire worn by students and teachers in public schools, with French courts as well as lawmakers deferring to legislative judgment on the any bans imposed upon the display of materials which disclose a religious affiliation. Once again, discourses of this nature implicate the complicated history of the relationship which France has had with the display of religion in its public spheres. I suspect that judicial deference to legislative decisions to impose a ban upon public displays of religion may have a connection with the kind of role which courts play in France, both in its own eyes, as well as the broader public, as well as its political institutions. [234]Similarly, in Germany, it may be that the FCC is seen as an institution which serves as a check to political power.[235] This may be one of the reasons why it has consistently ruled on polarizing issues like invalidating the presence of crucifixes in classrooms. Further research is necessary before such a link between the perceived role of the judiciary in these jurisdictions and their approaches in cases concerning the relationship between educational entitlements and religious rights can be conclusively is established.

The regulation of non-governmental (interchangeably private) schools in France and Germany is extensive. As demonstrated in previous chapters, Germany requires that private

[234] See, *generally*, Xavier Philippe, *Constitutional Review in France: The Extended Role of The Conseil Constitutionnel Through the New Priority Preliminary Rulings Procedure* 53 Annales Universitatis Scientiarum Budapestinensis de Rolando Eot 65 (2012).

[235] Gertrude Lübbe-Wolff, *Constitutional Courts and Democracy: Facets of an Ambivalent Relationship*, in K. Meßerschmidt and Oliver-Lalana (eds.), RATIONAL LAWMAKING UNDER REVIEW: LEGISPRUDENCE ACCORDING TO THE GERMAN FEDERAL CONSTITUTIONAL COURT 19 (Springer, 2016).

schools ensure educational and infrastructural standards which are akin to those applicable to public schools. French law also imposes obligations of such nature.

The current Indian law on the relationship between minority run educational institutions and the right to education is guided by the Pramati case, which ruled that all minority educational institutions would be outside the ambit of the RTE Act, 2009. In doing so, the Court not only overlooked its own jurisprudence, but also subverted the intention of the constitutional protection granted to minority run educational institutions.[236] The Court also stated that the constitutional scheme grants to minorities a freedom which is subject to very few limitations.[237] The court held that the constitutional right to education was not one such limitation. Such a sweeping exclusion is problematic for many reasons which I have referred to in the preceding sections. The ruling does not address the lack of a federal level definition of how a minority run institution is to be identified (which creates ambiguity at the time of certification), and also ignores the previous case law of the Indian Supreme Court which has permitted regulation of minority run institutions. Further, it makes no attempt to balance the right to education with the rights of religious minorities. I demonstrate in this paper how courts and lawmakers in France and Germany encourage the balancing of the state's educational obligations with the freedom of religion. While the exact nature of such an exercise involves an appreciation of the historical specificity behind the understanding of how this relationship should be managed, the acknowledgment that a conflict can arise is the starting point behind the successful management of the relationship. The thesis also shows that private schools of the kind run by minority groups in India are subject to a number of regulations which ensure teaching standards, pedagogic uniformity and infrastructural requirements.

[236] Mukherjee, The Case Against Excluding Minority Institutions.
[237] Pramati, at para 162.

Through its judgment in the Pramati case, the Indian Supreme Court left all minority run educational institutions out of the ambit of the RTE Act, 2009. This ensures that such institutions do not have to comply with any of the access or reservation requirements in the legislation, while also permitting completely any deviations from the infrastructural and pedagogic standard sought to be imposed. Recent scholarship[238] has recognized this problem, which also runs against the grain of previous cases. A comparative analysis shows how such a position is inimical to the realization of educational rights. Indian law requires a reorientation with respect to its position on the exclusion of all minority run educational institutions from the ambit of the RTE Act.

[238] Reddy, *Minority Educational Institutions*.

CONCLUSION

In this thesis, I explore the relationship between state educational entitlements available to children resident in the state, and the bundle of religious and cultural rights which are present in different forms in the chosen jurisdictions. My thesis was driven by problems which are specific to India – the manner in which the right to education and the rights of religious minorities can be balanced. In doing so, I sought to examine the experience of France and Germany in managing the claims of religious minorities to religious freedom in the classroom. With respect to Germany, the provision of education as a state service, with constitutional provisions also permitting the establishment of private schools, the expression of religion in the classroom is tempered in most cases with the requirement of neutrality, while being mindful of its historic tradition as being a Christian country. This implies that in many cases, there is a tacit approval which is granted to Christian symbolism, such as the legality of the wearing of a nun's habit by a public school teacher being permissible in certain Land, while simultaneously banning items of religious affiliation of other religions, like the headscarf. Similarly, in France, the display of ostentatious religious symbols and attire is impermissible even for students in a classroom. This kind of selectivity is of course, subject to political and historical forces, while also implicating the complex notion of the distinction between the private and the public sphere in the French imagination. However, the most instructive from the jurisdictions studied has been the uniform regulation which is applicable to both private and public schools in both Germany and France. Illustratively, one of the lines of enquiry is the kind of regulation permissible upon schools in France and Germany. This is meaningful because it is illustrative of the respective jurisdiction's approaches to the regulation of

education. Both of these jurisdictions fix rules relating to curriculum and infrastructure which are equally applicable to public and private schools. However, when it comes to the expression of religion in the classroom, the rules applicable to public and private schools are different in France, with the expression of religious affiliation in attire and worn objects being permissible in private schools.

In the country chapters, I explore the ways in which these two kinds of rights interact with one another, while also exploring the kinds of judicial reasoning employed in proceedings where the interaction between the two are implicated. I also identify the permissible degree of government regulation upon private schools. In doing so, I identify three categories of reasoning which are used by courts when addressing this interaction. The first is balancing, which involves a judicial determination of the respective weights of various rights and interests at stake in such a determination. The second is judicial deferment. Deferment may be to a local or federal authority, and may include within it the reasoning that a local legislative authority is better placed to make decisions which may be scrutinized against applicable constitutional standards. Both of these kinds of reasoning arise as a result of the historical and sociological specificity in the concerned jurisdictions.

While in Germany, interdenominational schools with a Christian focus are constitutionally permissible due to its history, the evolution of the French notion of laicite requires that all displays of religious affiliation is kept out of the public sphere. In India, I argue that the Pramati case, which is the current law on the relationship between the right to education and religious and minority rights, eschews any engagement with the kinds of balancing which is required when two valuable rights and interests are in interaction with each other. Such an approach is also out of touch with the historic intent behind the framing of these provisions. It may well be that the Indian Supreme Court sees itself a counter-majoritarian institution which

must attempt to rebuff any and all kinds of regulatory requirements on minority educational institutions. These instincts are well placed. However, it is also imperative that it be tempered by the observance of judicial discipline in respecting its own jurisprudence, as well as acknowledge the preparatory work of the constitutional text. An exercise of this nature would demonstrate the misguidedness of its current approach. It may also do well to examine how the relationship between education rights and entitlements, and religious freedom is managed in other jurisdictions.

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