TEACHING *OF* OR *ABOUT* RELIGION?

PRESENCE OF RELIGION IN PUBLIC SCHOOL

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Executive Summary

There are three different models of religious education in public schools in Europe: the teaching of religion, teaching about religion and lack of religious education per se. This paper evaluates these models by the comparative analysis of three legal systems: Norwegian, Polish and French. The general objective is to find how states ensure the protection of human rights, such as parental educational rights, freedom of religion, non-discrimination and children's rights, in different models and which solution surpasses others. Evaluation of the alternative solutions led to the conclusion that all systems have flaws, most of them in the implementation of the model in a non-discriminatory way. Overall, the recommended model of religious education is teaching about religion or religious facts in an objective way, although it must allow opt-outs.

Introduction

The purpose of the introductory chapter is to present the context in which religious education should be analyzed. It describes both the most important interests and forces that affect the system of education, as well as depicts the rights that are at stake. Additionally, it explains the purpose of the research and the main question which is to be answered; and presents the selection of jurisdictions, which will be analyzed in the comparatist exercise, along with the justification of the selection. Lastly, it briefly presents the methodology used in the study.

Background and research question

Education is a battlefield in the game of power. It is (or at least can be used as) a very practical tool to influence people, whole generations, and their opinions. A tool to shape future citizens according to the values that are present in the common society or values that the current authority believes in. The one who controls the minds of society has an obvious dominant position. State or the one who controls teachers and religious or non-religious curriculum (i.e. sexual and ethnic relations, science, civic duty) enjoys a huge discretion in this respect. The state's desire to win the battle for the hearts and minds of people is as understandable as controversial. Nevertheless, it is still present.

In the field of religious education, the battle is perhaps more sophisticated and it is more like a chess match. Here, a new powerful player arises – the religion. Although, one could say that it was present there all the time since faith has always influenced the people's behavior in general. Education was also primarily a function performed by religious orders before it was taken over by the state. Historically, churches' position was, in some states, monopolistic. Nonetheless, even now in regard to all aspects related to humans beliefs, churches and religious

organizations enjoy a strategic location. Religious education does not deviate here from this general rule. As noted by Garlicki, religious education is "one of the fundamental elements of religious freedom"[1], thus state obligation to respect it is indisputable. The questions of who organizes the educational institution, where the funding comes from, who conducts the teaching and how the curriculum should look like in relation to religion or ethics are the primary issues. In my thesis, I presume that the answer to these questions depends on the model of the relationship between the church and the state that has been developed historically. In my paper, I will look at the issue through the prism of the ECHR. I, therefore, assume that, in accordance with the European margin of appreciation, states have wide discretion in establishing these relations. The main problem that I consider, as was noted by Garlicki, is of the secondary nature to the above questions: the teaching *of* or *about* religion – what is the scope of the permissible religious education in public school and which model is ensuring the realization of state obligations and protection of people religious and educational rights. All those aspects are although interconnected and, in order to see the whole picture, cannot be separated.

The main purpose of the present research, therefore, is to answer the question: what the states' practices should be to ensure respect for the rights of all parents and their children (including non-believers) in public religious education systems. Thus, what are the state positive obligations in this regard in each model and how different models ensured religious autonomy? The variety of different relations between the churches and states entails a variety of solutions. Is it possible under those circumstances, considering different models of church-state relations resulted in the different historical backgrounds of every country, to create one European non-discriminatory standard minimum, as established by the jurisprudence of the ECtHR for religious education? At least two major questions follow this reflection: is there a

[1] Garlicki, Lech (2001), Perspectives on Freedom of Conscience and Religion in the Jurisprudence of Constitutional Courts. *Brigham Young Law University Review*, 494.

right to secular education and ethics lessons in public school *per se*?; whether the general European standards of teaching religion or religious facts in public schools are even possible? Since that stated aim may seem to be overambitious, some clarifications are needed. This paper will not answer the question of how the ideal system should look like. Perhaps such a solution is not even possible or perhaps different systems can serve the same goal. All systems, although, shall meet the minimum requirement of non-discrimination on the ground of beliefs. Therefore, what this paper does is challenge the existing solutions in terms of their adaptation to ensure full and adequate religious education in a way that respects and protects the rights of all, believers (minority, majority religions) and non-believers, rights of churches parents and children. Perhaps, therefore, the more important question I shall try to answer is whether the fight for the hearts and minds of society between different actors does not lead to the violation of individual rights?

In my research, as mentioned before, I would like to pay special attention to non-believers' rights in the public education sphere. Since neutrality of the state is widely recognized in many European countries the secularity (but nor secularism) of the public education should be, to some extent, a common standard as well. In practice, however, one does not stem directly from the other. The historical background, the character of the dominant religion, political/religious majority, the provisions of the constitution or the concordat – all could possibly influence the model of religious education inside the country and result in a never-ending battle for a dominant position in this area.

From the human rights perspective, two rights are at stake here: freedom of religion (art. 9 of the European Convention) and right to education (art. 2 Protocol 1 of the European Convention). The first enjoys a very strong position and protection since it is one of the crucial foundations of a democratic society and constitutional liberalism. The obligation of the state to

refrain from interfering in religious freedom has been shaped in the first place in the first constitutional Bill of Rights in the world. Moreover, the internal part of religious freedom (*internum*) is absolute and cannot be limited by the state. The right to education was historically recognized[2] later and was categorized as part of social, economic and cultural rights. This does not mean, however, that one is more important than the other and has a dominant position.

Relationship between at least four different actors (with different rights, powers, obligations and entitlements) should be noticed when analyzing clash between parental educational rights and freedom of religion: child (and its freedom of religion), parents (and their liberty to ensure religious education), state (and its obligations related to right to education and freedom of religion), religious organizations (and their interests in providing religious education, and their religious autonomy). In this context, what should be especially important is the state's duty to prevent discrimination in public schools.

The selection of jurisdictions for a comparative analysis

In the network of correlations and obligations presented in the preceding subsection, we can identify various actors, from which the most influential are state and religious organizations. As it will be explained in detail in the first chapter below, there are, various possibilities to organize relationships between the state and religious organizations/communities, but their interests in relation to education and freedom of religion generally maintain the same. As noted by Garlicki "acceptation of universal standards is not tantamount to the acceptation of uniformity".[3]

[2] Recognition on the level of although, does not mean that all s

[3] Garlicki, L. (2015). The Strasbourg Court on Issues of Religion in the Public Schools System. In H.-J. Blanke, P. C. Villalón, T. Klein, & J. Ziller, *Common European Legal Thinking* (pp. 321-341). Heidelberg, New York, Dordrecht, London: Springer, 322.

Therefore, in order to find the common European standard (on the ground of the ECHR), I have chosen for comparative analysis three countries that modeled their state-church relationships differently but have legal systems that guarantee in their constitutions the separation of church and state which directly affect their religious education systems: France, Norway, and Poland. All three are members of the Council of Europe and are bound by the European Convention on Human Rights. However, due to their different historical backgrounds, they shaped their relationships with churches in various ways. This selection allows assuming that to all countries apply the same wide margin of appreciation and that they can be compared to the existing European standard.

However, since these countries have established different church-state relations models they have created different systems of religious education in public schools. In Norway, there is one objective subject "about religions and beliefs" (mandatory, but opt-outs are allowed). In the Polish system representatives of religious associations teach their religions in separate subjects and non-believers can participate in ethics lessons. But both religion and ethics classes are voluntary. In France, a system of church-state relations unique on a global scale has emerged - *laïcité,* which is a variant of secularism. Religious teaching was excluded from the system of French public schools. Recent changes in 2017, however, introduced some elements of religious education to the curriculum of various school subjects, but there is still no religious lessons per se (neither teaching *of* or *about* religion in a separate school subject).

Polish and Norwegian systems have changed significantly after the ECHR judgments - Folgerø and Others v. Norway and Grzelak v. Poland. By adapting domestic law to comply with ECtHR rulings, they have taken different directions. These two cases are going to be grounds to examine how countries are trying to implement the theoretically unified European standard. The grounds for comparative analysis shall include: What difficulties have these

countries encountered? How did domestic law change? Whether the changes led to the cessation of violations of the rights of minorities? Both countries have a long-lived history of stable and strong churches that played a great role in state policy.

Therefore, countries that I have chosen shaped religious education differently: religion is not taught at all in public schools (France), it is taught in one subject in an objective and non-discriminatory manner that is compulsory for all (Norway), and religious associations teach their religions in public schools and non-believers attend ethics lessons, but religious education is fully voluntary (Poland). Their positive obligations remain although, the same. This paper examines how different jurisdictions meet this challenge.

Methodology

The methodology that will be used during research includes analysis of primary and secondary written sources, focusing especially on doctrinal. Therefore both will be examined: the domestic jurisdictions of selected countries, as well as the international standards within and outside Europe established by the ECtHR and the UN. Some parts of this paper require also interdisciplinary approaches, such as to the analysis of the historical background or sociological/cultural context.

Chapter 1 – Theoretical framework

Education is in the interest of the state. It can shape citizens that are supporting the common values, providing to the society, increase the number of well-educated individuals that encourage development, respect of rule of law and the legal system. However, the strategic goal of every state can be different (which values or legal system the state wants to promote?). Parents in education see a tool for providing what is best for the good of their children, to secure their future. In respect to more specific religious education, the other important actor is appearing: religious organizations. Religious education can be seen as something more than simply gaining knowledge – it can be a part of 'upbringing' children into religion or shaping their morals. There are, thus, three powerful players in this game: state, church, and parents – the child rights are somewhere in the middle and shall be protected by (at least) parents and state.

In this chapter, I explain their strategic positions and their correlations starting with the most powerful players. Firstly I show the state position in relation to religion, in general, presenting the principle of neutrality in a constitutional democracy in a liberal context. Secondly, I analyze education as part of the public sphere. In the next part, I shortly explain the church autonomous (religious autonomy) position and state autonomy in regard to church or religious ideologies. This will lead us to the challenge of how to model state and church relations. Since both institutions have (or can have) a great influence on the lives of individuals, their correlations are crucial. Zakaria in his paper stated that in constitutional liberalism the state and church separation is required.[4] Although, analysis of/or analyzing the different

[4] Zakaria, Fareed. *The Rise of Illiberal Democracy*, Foreign Affairs, 1997, 76(6), 22-43, 26.

democratic legal systems within Europe depicts a variety of potential relations, form established churches to strict secularism or *laïcité*.

The major question in this network of relations is how those different systems can ensure the equal protection of the rights of the individuals. Here I will examine the scope of the parental educational rights that shall be protected and state positive obligations in this regard. The state execution of its power when providing education (including religious education) is directly related to the state positive obligations to respect human rights (here right to education and freedom of religion). Since the individuals use religious organizations to enjoy their rights the religious organizations' role is also important, although their interests may be different can fit in this picture. The level of religion influence depends strictly on church-state relations. Religious institutions *per se* do not have the right to give religious education rather than they are involved in doing so because of the rights of the parents/their kids to receive education by their own convictions.

1.1.Principle of State Religious Neutrality

The notion of neutrality presented in this paper shall be understood as a philosophical and political concept that roots in Dworkin's[5] and Rawls'[6] theories of liberalism. In the liberal vision of the state, it seems both natural and reasonable that each branch of national power (but especially legislative) should refrain from interfering in an individual's decision about way of 'good life' that she/he has chosen. It cannot impose or promote one religion or philosophical doctrine (favor or disfavor one), as well as it cannot forbid a specific worldview. In Rawls' theory, all citizens should be able to identify with or accept the 'political reason' of law/state

[5] Dworkin, Ronald. 'Liberalism' in Stuart Hampshire (ed), Public and Private Morality, Cambridge University Press, 1978.
[6] Rawls, John. *Political Liberalism*, Columbia University Press, 1993.

decision. According to some scholars, state neutrality is linked to other values fundamental in a democratic society, such as freedom, autonomy, plurality, tolerance, and non-discrimination.[7] It is a safeguard and corollary of an individual's freedom in choosing its beliefs. As well as the adequate response for a call to respect pluralism.

Political decisions do not exist in a vacuum. As Kis noticed, state practice neutrality must be challenged in relation to a specific situation; actions cannot be "neutral towards everything".[8] He classified (following Dworkin's theory) two 'objectionably non-neutral' state actions: discrimination based on religion or beliefs (neutrality as non-discrimination) and practices that were justified by reasons, *inter alia* religious reasons, not shared by all citizens (neutrality as shared reasons). But what should be highlighted is that refrain from discriminatory acts is just the first step in this state obligation. It should protect every person from discrimination and act against it (horizontal aspect).

Ringelhelm underlined that what must be examined when ensuring state neutrality is the aim and justification of state action, not its effect *per se*.[9] In a modern pluralistic society, state policies must be independent of religious reasons, although the full neutrality of state action effects cannot be ensured in practice. In relation to the freedom of religion, Ringelhelm recognized on the European level three different models of neutrality: 'as absence of coercion' (Lautsi and Others v Italy[10]), 'as absence of preference' (Folgerø and Others v Norway[11]), and 'as exclusion of religion from the public sphere'[12] (Ebrahimian v France[13]). She concluded that

[7] See *inter alia* Kymlicka, Will. 1989. "Liberal Individualism and Liberal Neutrality". *Ethics,* 99(4), 883-905.
[8] Kis, Janos. 'State Neutrality' in Michel Rosenfeld and Andras Sajo (eds), The Oxford Handbook of Comparative Constitutional Law (Oxford University Press 2013), 319.
[9] Ringelheim, Julie. 'State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach' (Oxford Journal of Law and Religion, Vol. 6, no.1, 2017), 4.
[10] Lautsi v. Italy, Appl. No. 30814/06 (ECtHR, GC, 18 March 2011).
[11] Folgerø and Others v. Norway, Appl. No. 15472/02 (ECtHR, 29 June 2007).
[12] 'Public sphere' should be understood as presented in the next part of this chapter.
[13] Ebrahimian v France : Application no 64846/11 (ECtHR, 26 November 2015).

only the last model can provide full and adequate protection of human rights and ensure state neutrality.

State and church separation can but does not always mean state neutrality. Durham and Scharffs recognized 5 different models of state neutrality, from which only three support the separation – neutrality as state inaction (1), neutrality as a state impartiality and "blindness" in relation to religion matters (2), and state as a monitoring body over the marketplace of ideas with the competence in setting the rules (3).[14] In all three models "state plays a minimalist role"[15]. State neutrality can also entail equal treatment of all similar (religious) entities in similar situations/under similar conditions (fourth model). Recognition of substantive differences between religious organizations and their treatment call for unification, which not necessarily means full state and church separation. According to the fifth model, state positive obligations related to fundamental rights can be understood as a requirement of adopting the state policies to the cooperationist regime.[16] Authors recognized that different model can entail different perceptions of the principle of neutrality, for example, accommodation system would use 'substantive equal treatment' neutrality (substantive differences are possible since the positions of churches are different).

The neutrality of the state can be ensured in different models within different church-state relations as long as the state does not impose or forbid a specific worldview. Although, a direct form of positive or negative identification violates neutrality. Since state should not identify its actions with a specific religion, the question that arises is whether religious organizations can fulfill public functions and tasks (such as related to the positive state

[14] Durham, W. C., & Jr., B. G. *Law and religion : national, international, and comparative perspectives.* New York: Aspen Publishers, 2010, 121.
[15] Ibid. 121.
[16] Ibid. 121.

obligation to provide education, including religious education). When answering the question of a proper role of religious organizations in public sphere Sajó and Uitz recognized a variety of solutions in states' practices and their correlation with state-church relations.[17] Furthermore, they underlined that principle of neutrality is not enough in a contemporary world in defining the role of religious organizations in the public sphere.

1.2.Church and State Autonomy

A simple statement, for example in the constitution, of state neutrality does not entail necessarily separation of the church and state, as well as does not mean autonomy from the religious ideology. Moreover, neutrality does not imply secularity. Degree of church-state separation varies irrespective, to an extent, of the constitutional language. On the one end, it could lead to cooperation, as will be explained in the next subchapter, and on another to 'hostile separation', as in the Soviet Albania, which entails the elimination of religion. However, separation of church and state, according to Temperman, leads to the assumption that both institutions shall be independent of each other. It can be the next step toward ensuring real state neutrality. Temperman recognized three potential, overlapping implications of the state-church separation: mutual independence, government independence, and church autonomy. One could argue that mutual independence clause included in article 25 para 3 of the Polish Constitution[18] leads to the actual separation, although, state practices analyses show different conclusions. Therefore, I find crucial to identify the actual meaning of the concept of *autonomy*, firstly by explaining the state autonomy in regard to church and religious ideology.

[17] Andras Sajó and Renata Uitz 'Freedom of Religion' in Michel Rosenfeld and Andras Sajo (eds), The Oxford Handbook of Comparative Constitutional Law (Oxford University Press 2013), 925.
[18] Art. 23 para 3: The relationship between the State and churches and other religious organizations shall be based on the principle of respect for their autonomy and the mutual independence of each in its own sphere, as well as on the principle of cooperation for the individual and the common good.

The independence or autonomy of the government in the context of separation from religion is usually mentioned in relation to states like France or Turkey, which, by creating constitutional provisions, wanted to free themselves from the influence of the church or the dominant religion. The final product of those changes was secularism as a state of affairs between religious organizations and the state; where the state became sovereign from religion. This was also a fact in many other countries through the project of building the nation-state. Additionally, all secular states are sovereign and autonomous from religion no matter the model of state-religion relationships they establish. In cases of France and Turkey, it was crucial to establish the actual independence of the public authorities from religion, because the position of the church prevailed or was dominant in society and in politics, which highly interferes in the public sphere. Therefore, here state independence means the clear cut between policy and religion, which, to juxtapose, is combined in a theocracy.

The concept of church autonomy can be seen as the opposite; a desire to protect religions from state interference. Religious autonomy is the right of religious groups or communities. One of the first examples can be probably the United States Free Exercise and (Non) Establishment Clause, although, in Europe this idea roots in German law's constitutional provisions, "right of self-determination for churches"[19] articulated in article 137 (III) of the Weimar Constitution. State interference in public affairs may lead to influence the religious dictates – in cases of strong religions with large capacity the state's need to control it increase. According to the German legal concept it is up to religious organizations how to define its mission or internal procedures. State powers are limited to the legal recognition of churches/religions (determine its legal position) or their relations in the public sphere.[20]

[19] Durham, W. C., & Jr., B. G. (2010). *Law and religion : national, international, and comparative perspectives.* New York: Aspen Publishers, p. 372.
[20] Sajó, Andras, and Renata Uitz. "Freedom of Religion." *In The Oxford Handbook of Comparative Constitutional Law*, by Michel Rosenfeld, & Andras Sajó. Oxford University Press, 2013, 925.

Durham presented a detailed definition of religious autonomy: "the right of religious communities to decide upon and administer their own religious affairs without government interference; a right of self-determination for religious communities".[21] The substantive scope of religious autonomy includes the determination of fundamental beliefs, core ministry, and main administrative functions. Religious autonomy in relation to state can have also additional aspects (such as recognition as legal entity, recognition of religious marriage, education). Overall, what religious autonomy entails legally is the lack of state jurisdiction in religious matters. According to Durham, religious education (in the teaching of model, curriculum, selection of teachers) can be categorized as part of religious autonomy that state cannot influence. It can be true in private religious schools but principle of state neutrality entails neutrality of public schools that lacks religious organizations. State positive obligation related to education system can require some level of state supervision over it; moreover, obligations from religious freedom entails protection from indoctrination.

1.3.The public sphere and public school. Education as a public function.

The state can influence religious autonomy and regulate matters limited to it "as far as these matters affect the public order",[22] *inter alia* create regulations related to the legal status of religious organizations. Religion has never been only private or public matter, it combines both spheres. Education, on the other hand, as noted by Modeer, came a long way towards

[21] Durham, W. C., & Jr., B. G. (2010). *Law and religion : national, international, and comparative perspectives.* New York: Aspen Publishers, p. 370.
[22] Sajó, Andras, and Renata Uitz. "Freedom of Religion." *In The Oxford Handbook of Comparative Constitutional Law*, by Michel Rosenfeld, & Andras Sajó. Oxford University Press, 2013, 925.

'publicization' and now is seen as a public function.[23] In my paper, I focus specifically on public education (public schools system), which is part of the public sphere.

Although, definition of the public sphere could be seen as self-evident in the narrow sense (everything which is 'not private'), in the context of long discussion about division between public and private regarding the religion and law in general and principle of state neutrality, it is getting blurry in relation to public functions. As noted by Sajo and Uitz, in reality, answer to the question of who can exercise public powers and whether religious organizations can be authorized to do so, varies from state to state. The principle of neutrality alone cannot provide sufficient guidelines to state common European standard (or even standard minimum). Each state has shaped these relations in a different way by perceiving various functions of the state through the prism of being "public" or "private" (one good example could be marriage) and through the different historical backgrounds.

As noted by Garlicki, the principle of neutrality, as understood in many European countries, does not oblige the state to separate education (and curriculum) in public schools from Christian values.[24] In this regard, Europe, even France, did not follow the American standard of the wall of separation between religion and state. The division created by Ferrari during his deconstruction of the public sphere can be useful here. In his paper, he highlights that the public sphere is made up of three separate but overlapping distinctions: common space, political space, and institutional space.[25] The public school can be seen in different dimensions: firstly as a common space (place of communication process, where plurality and freedom of expression shall prevail); secondly as a political space (place free from manifestation of

[23] Modeer, K. A. Public and Private, a Moving Border: A Legal-Historical Perspective. In S. Ferrari, & S. Pastorelli, *Religion in Public Spaces. A European Perspective* (pp. 25-34). Burlington: Ashgate, 2012.
[24] Garlicki, Lech. Perspectives on Freedom of Conscience and Religion in the Jurisprudence of Constitutional Courts. *Brigham Young Law University Review*, 2010, 503.
[25] Ferrari, Silvio. Religion in the European public spaces: A legal overview. In S. Ferrari & S. Pastorelli (Eds.), Religion in public spaces. A European perspective (pp. 139–156). Burlington: Ashgate, 2012, 149.

religion, where therefore freedom of religion shall be limited inter alia by prohibition of wearing religious symbols, as in France); thirdly as an institutional space (place of religious neutrality toward every religious or non-religious beliefs, therefore free from for example display of religious symbols). Ferrari notes another possible distinction inside the public sphere: different categories of participants. On the example of public school, we can recognize the difference in the relation of students/pupils (who act in their capacity as individuals) and teachers (who act in their capacity as civil servants) that share the same public sphere but the standard that applies to them is different in many countries.

Therefore, since I have presumed in the previous subsection state neutrality is necessary, here I accept that public school is an institutional public space in which different actors can act with different specific capacities (for example in relation to the right to manifest his/her religion). Public school can be still a common space for free public debate but where the state is required to refrain from favoring one particular religion

1.4.Diversity of State-Church relations

Churches can be powerful and influential actors on the political scene. No wonder that, over the centuries in Europe, secular authorities have preferred to unite with them instead of clash in the struggle for power, until global trend overturned toward separation, starting from Reformation and later Enlightenment with Lock's social contract. Major religious organizations, especially the Catholic Church in Europe, also preferred to seek power this way (although we have a rich history of religious wars), because it was easier to gain followers. Through the baptism of one person (the king) they *de facto* gained influence over the entire region, accordingly to the Reformation principle *cuius regiu, eius religio*. But state recognition of one religion entailed religious persecution of minorities and religious wars within churches and between them.

Church-state relations have a direct impact on the collective dimension of freedom of religion (religion practices usually are communal). The relation between state and church was a product of a strictly political decision. It was highly influencing the church's political domination and a number of followers inside the country (thus its power and finances), to the end when religion was nationwide. Durham and Scharffs created a detailed loop of church-state relations that include: absolute theocracy, established churches, religious status systems, historically favored and endorsed churches, preferred set of religion, cooperationist regimes, accommodationist regimes, separationist regimes (*laïcité*), secular control regimes, abolitionist states.[26] On the one side of the loop there is positive state identification with religion and on the opposite negative identification. The middle part – non-identification – is recognized as the optimal religious system with high level of equality. Generally, I recognize, following Dorsen, at least four major models of these relations: state churches, secularism, separation, and coexistence.[27]

1.4.1.State religion

Established churches, state religions or church supremacy were common and natural in most European countries' legal systems before the 19th century. Under this approach state, by officially recognizing one religion, has an actual impact on the religious system but *vice versa* church can influence the political sphere and control state actions – it can be a mutually beneficial relationship. There are different models within this system: from religious monopoly (alike theocracy) by toleration of other recognized set of religions, to equality of churches. Now, state churches are exceptional, and the best example is probably the UK. Anglicanism, historically, was an established English religion, and today this relation maintains (the Queen

[26] Durham, W. C., & Jr., B. G. (2010). *Law and religion : national, international, and comparative perspectives.* New York: Aspen Publishers, pp. 116-121.
[27] Dorsen, Norman, Michel Rosenfeld, András Sajó, Susanne Baer, and Susanna Mancini. *Comparative constitutionalism : cases and materials.* West Academic Publishing, 2016, 1291.

is the head of the Church of England) although it is far less significant. Bishops and religious authorities can participate in parliamentary debates in House of Lords, but they are not key actors in the government.

This approach was highly criticized for the possibility of discrimination of other religions or beliefs, however, especially in last years, the United Kingdom does not have significant problems with pluralism.[28] Although it seems that this relationship gives the church a dominant position, in practice, today, this is not exactly true. Paradoxically, in some countries where the main principle is the separation of church and state, the influence of religion on politics is much greater – as we can see in the example of Poland.[29]

In this context, recent changes in the Norwegian legal system seems especially interesting. Norway for the last 500 years had an established church - the Evangelical-Lutheran religion, accordingly to the previous article 2 of the Constitution was "the official religion of the State".[30] This 1814 Constitution, after vivid debates, was recently amended. The new provisions, regulated the separation of the church and state by acknowledging the Church of Norway as an independent entity, came in force on January 1st, 2017.[31] Although like in Finland, such church still has many links with the government, it is recognized as a folk church (people's church).[32] Such an approach could be recognized as an endorsed system. One could argue whether such disestablishment equals *de facto* church-state separation or rather it provides the cooperationist model of this relationship. Nonetheless, in the last 20 years Swede,

[28] Eberle, Edward. *Church and State in Western society. Established Church, Cooperation and Separation.* ASHGATE, 2011, 115.
[29] Sajó, Andras. "Preliminaries to a Concept of Constitutional Secularism." *International Journal of Constitutional Law*, no. Issues 3 and 4 (2008): 618.
[30] Article 2. All inhabitants of the Realm shall have the right to free exercise of their religion. The Evangelical-Lutheran religion shall remain the official religion of the State. The inhabitants professing it are bound to bring up their children in the same.
[31] Norway's seventh periodic report to the Human Rights Committee, 2017, para 10.
[32] Martinez-Torrón, Javier, and Jr. W. Cole Durham. *Religion an the Secular State. National Reports.* Washington: Servicio de Publicaciones Facultad de Derecho Universidad Complutense de Madrid, 2010, 11.

Finland, and Norway decided to resign from the established church model, thus it is the current trend in Europe, we will see if it will translate into a global trend.

*1.4.2.*Secularism and *laïcité*

The Catholic Church's political monopoly was disrupted by Protestant Reformation that was followed by European religious wars and schism. The trend has started to overturn even faster towards neutrality during Reformation and when Locke's vision of tolerance (lack of state interference in religious activities)[33] superseded. A drastic legal change in Europe, antagonistic towards the Catholic Church, has started firstly during the French Revolution, and a century later, in 1871 it arose again during Bismarck's unification of Germany. The model of 'hostile neutrality'[34] or secularity (*laïcité*), which emerged again in France specifically excluded churches from the public sphere. Churches were recognized as private entities without financial support from the government and without public duties.[35] The idea of *laïcité,* as explained in Salton's paper, emerged in the context of education. Before it, the French schooling system was exclusively Catholic (state religion as a source of intolerance).[36] French secularity is tightly linked to the Enlightenment and French Revolution, but it developed and evolved under the Third Republic. It is understood as "freedom *from* religion" rather than "freedom *of* religion". This unique, far-reaching secularity principle maintains in the French legal system until today and is criticized for being anti-religious, although the preliminary idea was only to ensure separation and equality in the spirit of the French Declaration.

[33] Locke, John. *A Letter concerning Toleration and Other Writings. Indianapolis*: Liberty Fund, 2010.
[34] Dorsen, Norman, Michel Rosenfeld, András Sajó, Susanne Baer, and Susanna Mancini. *Comparative constitutionalism : cases and materials.* West Academic Publishing, 2016, 1292.
[35] Sajó, Andras, and Renata Uitz. "Freedom of Religion." *In The Oxford Handbook of Comparative Constitutional Law*, by Michel Rosenfeld, & Andras Sajó. Oxford University Press, 2013, 924.
[36] Salton, Herman. "France's Other Enlightenment: Laïcité, Politics and the Role of Religion in French Law." *Journal of Politics and Law*, 2012, 31.

Secularism emphasizes freedom *from* religion. Durham noted that to some extent it can be similar to the establishment church model, but here it is the state secular ideology that is imposed.[37] It is essential in this respect to divide two different concepts rooted in the 'secular' notion (and in the process of secularization *per ipsum*): 'secularism' and 'secularity'. Durham noted that the first one is "an ideological position that is committed to promoting secular order"[38], therefore is historically linked with the French concept of *laïcité*. "Secularity", on the other hand, is related to church and state relations that provides separation and neutral framework for the existence of various religion (as in American legal order). Bielefeldt highlighted the division between "political secularity" and "doctrinal secularism". He noted that while the first one serves non-discrimination and facilitates religious pluralism, the second "lead to a shrinking space"[39].

The unique French example of secularism, although it was born as an anit-clerical movement to remove religion from the public sphere, as noted by Daly evolved, starting from 1905 Law, into more liberal (as understood by Rawls) form that centers on religious freedom.[40] French classic model of secularism is not the only one, as we can see i.e. in Chile. The principle of *laïcité* was developed also by the Italian Constitutional Court in 1989 and forward. The term secularism is elder of the French *laïcité* and should be understood differently. According to Sajó, in legal constitutional theory, it can be defined as a reflection of: "no specific position on the truth of religion nor any preliminary position regarding the proper place of religion in

[37] Durham, W. C., & Jr., B. G. (2010). *Law and religion : national, international, and comparative perspectives*. New York: Aspen Publishers, p. 120.
[38] Ibid. 121-122.
[39] Bielefeldt, Heiner, Nazila Ghanea, and Michael Wiener. *Freedom of religion or belief : an international law commentary*. Oxford University Press, 2016, 36.
[40] Daly, Eoin. "Religious Liberty and the Rawlsian Idea of Legitimacy: The French Laicite Project between Comprehensive and Political Liberalism." *Religion & Human Rights: An International Journal*, 2010: 11-42, p. 17.

society"[41] and it should not be identified as secular humanism. In this meaning, it can be understood as the principle of state neutrality. Bielefeldt underlined that concept of secularity can be defined in a variety of ways: as a commitment to pluralism with respect to all religions; as 'a policy of deliberate non-commitment in this area'; or as an anti-religious attitude.[42] Secularity in a positive sense, according to Bielefeldt, is not a goal per se, rather a way of ensuring non-discrimination of all religions and beliefs in the state.

1.4.3.Separation

The principle of separation of state and church usually requires recognition on the constitutional level. The United States clause of non-establishment of religion, called by Jefferson and the Supreme Court 'wall of separation',[43] can be found in the First Amendment to the Constitution, and can be read together with the Free Exercise Clause. This is a clear example of the difference between separation as a "state of affairs" and freedom of religion as a right. Government actions cannot entail formal recognition of any religion. Although, Durham noted that there is also 'an accommodationist stream' shared by scholars, more friendly toward religion.[44] The preliminary idea, also inspired by Enlightenment ideals, was to limit Federal Government powers and ensure state non-interference. The Establishment Clause was further developed in Supreme Court jurisprudence (firstly in 1947 judgment Everson v. Board of Education[45]) since Constitution does not provide definitions of 'religion' or 'establishment', and this ambiguity required verification.

[41] Sajó, Andras. "Preliminaries to a Concept of Constitutional Secularism." *International Journal of Constitutional Law*, no. Issues 3 and 4 (2008): 607.
[42] Bielefeldt, Heiner, Nazila Ghanea, and Michael Wiener. *Freedom of religion or belief : an international law commentary*. Oxford University Press, 2016, 35.
[43] Jefferson, Thomas. "Jefferson's Letter to the Danbury Baptists: The Final Letter, as Sent." In *The Library of Congress Information Bulletin: June 1998*. The Library of Congress, 1998.
[44] Durham, W. C., & Jr., B. G. (2010). *Law and religion : national, international, and comparative perspectives.* New York: Aspen Publishers, 133.
[45] Everson v. Board of Education, 330, (U.S. 1947).

As long as the state with the codified non-establishment clause on the constitutional level remains impartial it can be seen as a secular. Although, Temperman noticed that definition of separation is wider: "it endeavors to maintain the autonomy of the state by freeing it from religious interference whilst it denotes a promise to respect the internal autonomy of religions".[46] It is worth noticing that church internal autonomy does not mean that it remains impartial in relation to the public sphere, but only that state cannot influence its internal matters. Otherwise, the strong autonomous position of the church can entail a willingness to influence the most important issues related to state policy or the private sphere of individuals. Provisions regulated state-church separation or secular character of the state are included in part of the post-communist European constitutions, and sometimes they are recognized by constitutional court jurisprudence. Separation clauses are related to both state and church autonomy and ensure their functioning in a non-bias way. Normally, separation is understood as mutual independence or mutual-non-interference.[47]

1.4.4.Coexistence and cooperation

The last model of state and church relationship is based on the German approach called "cooperationist".[48] The state did not recognize one dominant religion as an official established a church, although it acknowledges it as a special entity. This doctrine entails state duty to not interfere in religious affairs and respect church autonomy. The government can acknowledge and cooperate with more than one religious organizations – all of them, however, should be treated without discrimination (non-preferentially).[49] Through analysis of the state practices,

[46] Temperman, Jeroen. *State-Religion Relationships and Human Rights Law. Towards a Right to Religiously Neutral Governance.* Boston: Martinus Nijhoff Publishers, 2010, 116.
[47] Ibid. 128.
[48] Dorsen, Norman, Michel Rosenfeld, András Sajó, Susanne Baer, and Susanna Mancini. *Comparative constitutionalism : cases and materials.* West Academic Publishing, 2016, 1293.
[49] Temperman, Jeroen. *State-Religion Relationships and Human Rights Law. Towards a Right to Religiously Neutral Governance.* Boston: Martinus Nijhoff Publishers, 2010, 93.

we can conclude, following Temperman, that this model leads to a modern 'form of state-religion identification'.[50]

With 'acknowledging act' state usually obliges itself to support one religious organization (or all of them), *inter alia* financially, or, as in the German model, facilitates collection of taxes. Regulation of church funding and providing protection in this way is typical for a state church model, although it is also common in this model. This cooperation is usually ensured by official agreement and can go beyond simply financial support and include *inter alia* special position of the priests or recognition of religious marriages. A specific example could be the concordat between Poland and the Vatican, which regulates the Catholic Church position in the state. Although, 'positive cooperation' between state and religious organization does not lead to allowing religion to interfere in public administrative functions.[51] Concordat with the Vatican, as the international agreement has a special position in the legal system, thus through such recognition not only ensures state cooperation but also the special position of Catholic Church.

1.5.Parental educational rights

In this matrix of interdependencies and correlations, we should place two more actors whose significance from the perspective of human rights is the most important - the child and his/her parents. Although it is the child who enjoys the right to education (and right to freedom of religion) *per se*, the execution is usually conducted through his/her parents or guardians. Thus, parents in this context enjoy a specific position - not only by taking care of the child's right to education but also by their own independent rights related to education and religious

[50] Temperman, Jeroen. *State-Religion Relationships and Human Rights Law. Towards a Right to Religiously Neutral Governance.* Boston: Martinus Nijhoff Publishers, 2010, 109.
[51] Sajó, Andras, and Renata Uitz. "Freedom of Religion." *In The Oxford Handbook of Comparative Constitutional Law*, by Michel Rosenfeld, & Andras Sajó. Oxford University Press, 2013, 924.

teaching (parental educational rights). In this context, the clash between the freedom of religion and the right to education is particularly visible.

The state should respect and protect parents or legal guardians liberty to 'ensure religious and moral education of their children', as stated in, *inter* alia, art. 18 (4) of ICCPR or art. 13 (3) of ICESCR. In the European Convention, parental educational rights in this sphere are protected in paragraph 2 of the art. 2 Protocol 1 (right to education). This right applies to and is especially relevant for minority religions, atheists and agnostics. Parents may be concerned that during compulsory education in a public school their child will be taught different religions (or religion in general) in a way that leads to indoctrination or alienation.[52] Those provisions shall ensure pluralism in the public school system, as required in democratic societies.

But from the historical point of view, those provisions can be seen as another power-tool to influence the child so it will in his/her future life follow religion preferred by parents. Such a solution is contrary to the spirit of The United Nations Convention on the Rights of the Child, which follows Korczak's reasoning: "children are not prospective humans, they are already human beings" and "children are not the people of tomorrow, but are people of today"[53]. Schweitzer went even further and stated: "to accept children's right to religion as a human right means viewing them as human beings of equal value and as deserving our respect, in all dimensions, including religion".[54] Article 14 of the Convention on the Rights of the Child ensures both a child's right to freedom of religion and obligation to respect parental rights to

[52] Bielefeldt, Heiner, Nazila Ghanea, and Michael Wiener. *Freedom of religion or belief : an international law commentary*. Oxford University Press, 2016, 205.
[53] Korczak, Jan. *The Child's Right to Respect. Janusz Korczak's legacy. Lectures on today's challenges for children.* Strasbourg: Council of Europe Publishing, 2009, 7.
[54] Schweitzer, F. 2016. The Child's Right to Religion. Religious Education as a Human Right? In M. L. Pirner, J. Lahnemann, & H. Bielefeldt, *Human Rights and Religion in Educational Context* (pp. 161-170). Springer, 169.

direct a child in his/her exercising of the right. Schweitzer states that religious education is, therefore, part of the child's right to freedom of religion rather than parental educational rights.

What can be important in some specific European contexts is that in the Catholic doctrine the parental educational rights change to parental duties. According to Catholic doctrine stated *inter alia* in "Corpus Christi", the family is the "first school" and the "first church" – parents and guardians have a duty to ensure religious education of their children, it is their mission. John Paul II noted that parents are "appointed by God as the first and principal educators of their children and that their right [to choose an education in conformity with their religion] is completely inalienable".[55] In this context, it is an obligation of both state and church to provide sufficient institutional framework, which will facilitate the fulfillment of parental duties. Similar primary parental responsibility in providing education can be observed as well in some European Court's judgments, i.e. Folgerø and Others v. Norway: "It is in the discharge of a natural duty towards their children – parents being primarily responsible for the "education and teaching" of their children – that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education".[56]

Therefore, children, as all human beings, have the right to freedom of religion or belief. According to the Convention on the Rights of the Child[57] those rights (child and parents) are correlated – should be seen in conjunction and should be properly balanced. Thus, one could ask whether such religious education shall be in line with parent's or children's convictions,

[55] John Paul II (1997, March/April). Parental Rights and Responsibilities in Education. *Catholic Dossier*, pp. 35-41.
[56] Folgero and Othres v. Norway, 15472/02 (ECtHR June 29, 2007), para 84e.
[57] Article 14 (1) States Parties shall respect the right of the child to freedom of thought, conscience and religion. (2) States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

which is particularly important when they do not share the same beliefs. Bielefeldt noted that what should be taken into account, during case-by-case balancing exercise, is 'the evolving capacity of the child'.[58] Van Bueren stated directly that the child shall enjoy the right to change in this regard.[59] The European Court stated in Konrad v. Germany that "parents may not refuse a child's right to education on the basis of their convictions".[60] In Eriksson v. Sweden, the Court recognized that only parents (not a child) had a victim status under the parental educational right (second sentence of Article 2 Protocol 1).[61]

Relationship between at least four different actors should be noticed when assessing parental educational rights: child (and its freedom of religion), parents (and their liberty to ensure religious education), state (and its obligations related to right to education and freedom of religion), religious organizations (and their interests in providing religious education). In this context, what should be especially important is the state's duty to prevent discrimination in public schools.

The case of atheists and agnostics seems particularly complex. Providing non-discrimination for this group may require the introduction of an opt-out system. According to Toledo Guiding Principles, a child's right to education can include religious education – presented in an objective manner – and it can be an important part of it, especially in order to promote freedom of religion and beliefs, democratic and tolerant society.[62] Parents may have serious concerns that teaching any religion will lead to discrimination – especially when it is conducted by a church or religious organization (teaching *of* religion; religious instruction). In

[58] Bielefeldt, Heiner, Nazila Ghanea, and Michael Wiener. *Freedom of religion or belief : an international law commentary*. Oxford University Press, 2016, 67.
[59] Van Bueren, Geraldine. (2004). The Right to Be the Same, The Right to Be Different: Children and Religion. In W. C.-L. Tore Lindholm, *Facilitating freedom of religion or belief : a deskbook* (pp. 561-569). Leiden, Brill: Martinus Nijhoff Publishers.
[60] Konrad v. Germany . 35504/03 (European Court of Human Rights (Decision), September 11, 2006), para 1.
[61] Eriksson v. Sweden , App. No. 11373/85 (ECtHR June 22, 1989), para 93.
[62] Santoro, Simona & Ferrari, Silvio & Durham Jr, Cole. 2008. *The Toledo Guiding Principles on Teaching about Religion and Beliefs in Public Schools*. Security and Human Rights. 19. 76-77.

such situations, the state should provide an alternative, for example, in the form of ethics lessons. But is it necessary as well if the religious classes are fully voluntary?

In cases when religious education is ensured by teaching one subject in a neutral way (teaching *about* religion; information about religions or beliefs), there may also be doubts among parents, *inter alia* in relation to a whole or a part of the material presented in class. In such situations, the state should allow the resignation of the whole or part of the course without discrimination (opt-out). Although, states encounter many obstacles in this area (for example, how in a non-discriminatory manner exclude children from participation in specific class? How to ensure the protection of negative aspects of the right to religion and beliefs?).

Religious education often entails the study of psalms, singing hymns, prayers, learning dogmas of faith (by heart), nativity plays, participation in retreats in the church – all of this could be qualified as practicing a religion that parents want to avoid. A specific tool that should guarantee the enjoyment of the rights is the institution of opt-outs. Parents can decide that their child will not attend religion classes at all or that he/she will not attend part of the classes or even part of one class. In practice, the use of this solution is not simple and raises further problems: the parent must know the entire curriculum to deliberately give up some of the classes; what should a child do in the resulting free time, should s/he stay in the classroom or leave; whether resignation of the entire subject does not lead to a violation of the right to education, especially if the child sits idly by during the course; would it affect the annual GPA or promotion to the next class?

1.6.Positive state obligations in relation to the right to (religious) education

State positive obligations in relation to the right to education go hand in hand with parental educational rights. Even if we agree that parents are the “first school”, the educational

process will not be complete (usually) without the institutional framework (public or private). Garlicki noted that on the ground of article 2 protocol 1 of the European Convention: "the State has a right (or – rather – an obligation) to provide public schooling for all children whose parents are not ready to use private schools".[63] The European Convention's provisions are narrower and less detailed than other international standards, i.e. art. 28 of the Convention on the Right of the Child or art. 14 of the ICESCR.

The right to establish a school system entails the right to organize it, including curriculum, although "such regulation must never injure the substance of the right nor conflict with other rights enshrined in the Convention or its Protocols".[64] Furthermore, the state shall do it with respect to the general principles related to freedom of religion and other rights; by taking into account the pluralism and non-discrimination clause and spirit of the European Convention in general.[65] But as stated in *Belgium Linguistic Case*, a variety of solutions are permissible. The state discretion in this respect "ends where the operation of a public school becomes incompatible with children's/parents' convictions"[66]; all actions that have an aim of indoctrination (in curriculum or in general) are prohibited.

Here the standard from *Klejdsen* case might be useful:

> …the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an

[63] Garlicki, Lech. 2015. The Strasbourg Court on Issues of Religion in the Public Schools System. In H.-J. Blanke, P. C. Villalón, T. Klein, & J. Ziller, *Common European Legal Thinking* (pp. 321-341). Heidelberg, New York, Dordrecht, London: Springer, 321.
[64] Campbell and Cosans v. United Kingdom, Joined Appl. No. 7511/76, 7743/76 (ECtHR 25 February 1982) para 41.
[65] Garlicki, Lech. 2010. *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz. Tom II.* Warsaw: C.H. Beck, 548.
[66] Garlicki, L. (2015). The Strasbourg Court on Issues of Religion in the Public Schools System. In H.-J. Blanke, P. C. Villalón, T. Klein, & J. Ziller, *Common European Legal Thinking* (pp. 321-341). Heidelberg, New York, Dordrecht, London: Springer, 325.

> objective, critical and pluralistic manner. The State is forbidden to pursue the aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions…[67]

The Court in this judgment recognized the right to access education and positive state obligation to ensure such access to the educational institution. Moreover, it stated that parental educational rights related to their right to freedom of religion shall be applied to all curriculum and not only to religious classes, since such knowledge may be an important part of different subjects. Although, the teacher shall provide that information in an objective matter.

Therefore, although states enjoy wide discretion in relation to how to organize the public school's system and how the curriculum should look like, it is limited by both parental educational rights and freedom of religion in general. The standard from the European Court's case-law applies directly. The state duty is not easy to fulfill especially in religious education. As will be explained in the next chapter, states created different religious education mechanisms inside their public schools' systems. In general, the way in which states have shaped their public religious education systems is directly related to their historical background and established relations between the state and the church. Each system encounters different kinds of challenges while performing its positive obligations under the European Convention, which shall be analyzed in detail.

[67] *Kjeldsen and Others v. Denmark,* Appl. No. 5926/72 (ECtHR 7 December 1976) para 53.

Chapter 2 – Religious education

Historically in Europe, churches had a dominant position in providing educational services. It has changed in some countries in the eighteen century and in others, it lasted hundred years more. Currently, states are responsible for providing education, including, as can be argued, religious education, according to their constitutions and church-state relations and international standards. Religious education (or at least some information about religion or religious facts) should not be excluded from public education as well as religion cannot be fully excluded from the public sphere. In Europe, although, states enjoy a large margin of appreciation in this regard.

Religious education can be understood differently in different curriculums and jurisdictions. As recognized by Glendenning it may include: philosophy or ethics (the German approach), comparative religions and 'good behavior' program (the UK approach), single-religion orthodox teaching (the Greek approach), objective global program about religion that includes humanism (the Norwegian approach), 'the comparative secular' program (the Irish approach).[68] This categorization can be supplemented by denominational education (teaching *of* religion as recognized in the Toledo Guiding Principles). Such religious education is usually conducted in denominational schools in the form of religious instructions. It is more common in countries with long-established state relations with one dominant religion.

Ilie noted that although religious education should be a concern within a pluralistic society, we also should examine the causal link between religious education and 'its spiritual

[68] Dympna Glendenning, *Religion, Education and the Law: A Comparative Approach* (Haywards Heath: Tottel, 2008), 37.

dimension' since the wrong method can transform simple teaching into 'spiritual initiation'.[69] Many authors believe that adequate religious education is an essential part of anti-discrimination education and serves the diversity of society. Thus, the 'simple' solution of exclusion of religious education from public schools would do more harm to the pluralistic society in the future. At the end of the day, it would lead to further fragmentation of society. Denominational schools for each religion would be more popular, assimilation of the minority groups would be more difficult and the majority understanding of the other cultures and religions would be diminished. Lack of knowledge can lead only to the fear of each other. This perspective was developed by the Council of Europe, which categorized religious education as part of intercultural education (religion is thus part of the culture).[70]

But the inclusion of religious education is not an easy task. It cannot be overlooked that in many countries still the religion of the majority is prioritized in schools' curriculum, and non-believers or agnostics have many problems with actual access to ethics lessons or objectively presented information about religion. The question of which model of religious education state should choose to ensure that rights of all are respected and protected is the first step. Perhaps the government can fulfill its obligations regardless of the used model.

2.1.Models for religious education – different approaches

When categorizing different models few factors should be considered: where the teaching is conducted, who is organizing religious education (who is 'responsible' for providing lessons), what is the scope of the study, whether it is optional or compulsory. In this

[69] Ilie, V. 2018. "Religion" As a Discipline of Study in The Public SchoolsReligious. Education or Spiritual Initiation? In M. R. Ednan Aslan, *Religious Education. [electronic resource]: Between Radicalism and Tolerance. Wiesbaden* (pp. 173-185). Wiesbaden : Springer Fachmedien Wiesbaden, p. 173.

[70] See: Recommendation CM/Rec(2008)12 of the Committee of Ministers to member states on the dimension of religions and non-religious convictions within intercultural education Adopted by the Committee of Ministers on 10 December 2008 at the 1044th meeting of the Ministers' Deputies.

paper I focus on education in the public school system, thus the question of the place is irrelevant, but other factors should be included, as, for example, in the categorization presented by Doe. He recognized five different models of religious education in public schools in Europe, although it is not a clear-cut division:[71]

1. Compulsory Christian education (as for example in Denmark or England),
2. Compulsory denominational education (as for example in Malta or Greece),
3. Optional denominational religious education (as for example in Italy or Poland),
4. Non-denominational religious education (as for example in Sweden of Norway),
5. The prohibition of religious education (a unique example of France).

Schreiner simplified above categorization: "(1) no [r]eligious [e]ducation in schools; (2) denominational or confessional [r]eligious [e]ducation; (3) non-confessional [r]eligious [e]ducation".[72] Ferrari specified this tripartite division more precisely: "1) disallowing religious education within the formal curriculum in schools opened by the state (e.g. France); 2) providing non-denominational teaching about religions, and 3) providing denominational teaching of religion for prevailing religion(s) within the country".[73] In each model, even when religious education is mandatory, opt-outs or exemptions are allowed when requested by parents or even pupils above the established age limit. To juxtapose, even if such lessons are prohibited students are allowed to take them outside the school.

Schorder presented another approach to the categorization of religious education models that focuses on the question of responsibility. The first type is again France and lack of religious instructions. In the second type religious education is the sole responsibility of the religious organization: teachers come from the religious community (their salary, at least partially, is paid by the organization), pupils' attendance is voluntary (optional subject) and the

[71] Norman Doe, *Religion, Education, and Public Institutions* (Oxford University Press, 2011), http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199604005.001.0001/acprof-9780199604005-chapter-9.
[72] Martin Rothgangel et al., *Basics of Religious Education [Electronic Resource]*, Ebook Central (Göttingen, [Germany: Göttingen, Germany : V&R Unipress, 2014), 166, https://ezproxy-prd.bodleian.ox.ac.uk/login?url=http://ebookcentral.proquest.com/lib/oxford/detail.action?docID=1693287.
[73] Ferrari, Silvio. "Religion in the European public spaces: A legal overview. ." In *Religion in Public Spaces. A European Perspective*, by Silvio Ferrari and Sabrina Pastorelli, 139-156. Burlington: Ashgate, 2012, pp.100-101.

state merely provides space and schedule (and sometimes funding).[74] In the third model, the state is responsible for providing religious education, for both content and technical organization (teachers membership in any religious organization is irrelevant as long as they have pedagogic experience and knowledge). The form of lessons is interdenominational or is shaped by religious studies. The subject is compulsory and open for all pupils regardless of their beliefs and religions. The fourth type is oriented on the majority religion within the state. Religious education is provided by the largest religious organization ('mono-denominational subject'[75]) according to the public school's policy. It is mandatory for pupils that belong to it and optional for others (they can also attend ethics lessons). In the fifth type, religious education is a shared responsibility of the state and different religious organizations (requirement of plurality). Here, the government ensures technical assistance, general rules, and recognition of the subject, and organizations are responsible for the realization and the content during separate classes of every religion.

In the next subsections, I will examine three different jurisdictions and try to establish which domestic solution mirrors which model for religious education in public school, what are the biggest problems with their implementation and how those models affect freedom of religion and right to education.

2.2.A unique French example

France has a very specific place on the loop of institutional religion-state relationships proposed by Durham and Scharffs. It is a clear-cut example of *laïcité*, placed somewhere between Secular Control Regimes and Separation and closer to secularism (state ideology that

[74] *Religion and Nationhood: Insider and Outsider Perspectives on Religious Education in England*, Praktische Theologie in Geschichte Und Gegenwart, 21 (Tübingen: Mohr Siebeck, 2016).
[75] Gates, Brian. Religion and Nationhood: Insider and Outsider Perspectives on Religious Education in England. Tuebingen, Germany: Praktische Theologie in Geschichte und Gegenwart, 2016, p. 360.

promotes secular order) than secularity (a state that avoids identification with any ideology).[76] Therefore, although it is categorized as a non-identification regime, one could say that the state actually identifies itself with *laïcité* and the idea of a secular state[77]. It must be highlighted that this assumption is no longer in line with the French model established in 1905. But can such ideology equal any religious identification? If so, would it be possible to argue that the Marxist-Leninist ideology of Soviet states was a form of identification as well? The place of the laïcité on the loop entails as well as the separation of the state and religion and that the freedom of religion will be regulated as negative freedom. In order to fully understand this model we need to examine the concept of laïcité in detail

2.2.1.Laïcité and the constitutional framework

The first obstacle that one would counter when trying to understand this concept is a translation. Zoller argued that it cannot be 'truly translated' into non-Romance terminology.[78] A simple separation of church and state or secular state are not enough to express the range of connotations that this term can carry. Laïcité is linked to the history of the state, to the state's identity, its perception of citizenship, state's ideological principles and values. It is not only exceptional, it is just more than the only legal concept of separation, it has also ideological and historical meanings as "the collection of civil, civic, and political values"[79] [that roots in 1789 Declaration]; Laïcité is 'the moral conscience' of the state. But, at the same time, there is no clear definition, it is vague and (probably) overbroad. Gunn noted that similar to the US 'wall of separation' laïcité is a 'founding myth' that shall ensure founding principles, like freedom,

[76]Durham, W. Cole, and Brett G. Scharffs Jr. *Law and religion : national, international, and comparative perspectives*. New York: Aspen Publishers, 2010, 125.
[77] It must me highlight that this assumption is no longer in line with the French model established in 1905.
[78] Zoller, Elizabeth. "Laicite in the United States or The Separation of Church and State in Pluralist Society." Indiana Journal of Global Legal Studies, 2006: 561-594, 562
[79] Ibid. 591.

equality or neutrality.[80] He stated that the French identity includes protection from the religion (the state obligation).

The concept arose arouse first and more intensely in the debates for free obligatory and laic education. During the French Revolution Catholic Church privileges and abuses of powers were highly criticized. Firstly, the tithes gathered by the clergy were abolished and later Constitutional Assembly placed all Church property 'at the disposition of the nation'. Those, and further reforms led to the counter-revolution position of the Church. In 1791 some congregations were accused of teaching pupils 'false principles'. It was clear then that the 'enemies of the people' should have no place in the public sphere, especially in public education. Revolution becomes the new religion. This ended to some extent with 1801 Concordat, and the church-state union was reestablished. The Concordat regime established by Napoleon was replaced with the 1905 Law.

Later laïcité was used in the strict opposition to the Catholic Church during 1905 struggle for separation, 'la laïcité de combat'. The separation was a legal solution for the state to protect itself from the church influence. Although, in the wake to the establishment of the 1905 law, it was also vice-versa: Combes used the previous Concordat regime to punish clergy that was in political opposition. The object of the state 'hostility' was a majority religion in particular, but also for the church to gain more autonomy. The theocratic state (principe de catholicite) shifted even more toward secular (principe de laïcité).[81] This shift happened more than a century earlier for the first time, with the French Revolution. After that France went back and forth from republic to empire and to kingdom again in the Restoration. Chronologically, however, religious liberty was the first founding principle. Freedom of

[80]Gunn, T. Jeremy. "Under God but Not the Scarf: The Founding Myths of Religious Freedom in the United States and Laïcité in France." *Journal of Church and State* 46, no. 1 (2004): 7-24, 9.
[81] Salton, Herman. "France's Other Enlightenment: Laïcité, Politics and the Role of Religion in French Law." *Journal of Politics and Law*, 2012, 31.

religion (art.10), as a negative freedom, together with freedom of expression (art. 11) was established already under 1789 Declaration ("No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by the law"). The church-state union was broken in 1905 by the establishment of the separation clause. Articles 1 and 2 of the French Law (1905) are the first legal recognition of the grounds for a secular republic (Article 1: The Republic ensures the liberty of conscience. It guarantees the free exercise of religion, under restrictions prescribed by the interest in public order; Article 2: The Republic does not recognize, remunerate, or subsidize any religious denomination). Religious liberty and separation were adopted also by the 1946 Constitution. The first article of the 1958 Constitution directly ensures the principle of laïcité: *La France est une République indivisible,* ***laïque****, démocratique et sociale* (so does Article 1 of the 1946 Constitution).

More recently, during the debate about the headscarf ban, it was argued that laïcité is "a comprehensive ideal whose purpose is to symbolize, promote, and preserve the French Republic's founding principles of liberty, equality, and fraternity".[82] It was called 'a cornerstone', 'heart of republican identity', 'guarantee of freedom of conscience'.[83] But as Gunn highlighted, regardless of this rhetoric, the concept can be applied against freedom of religion or against a specific religion. Especially when we take into account historical context: the principle was established mostly *against* one religion. Gunn argued that it was and still can be used as a tool to divide and not to unify society.[84] In my opinion, even if the concept rooted

[82] Durham, W. Cole, and Brett G. Scharffs Jr. *Law and religion : national, international, and comparative perspectives*. New York: Aspen Publishers, 2010, 132.
[83] Gunn, T. Jeremy. "Under God but Not the Scarf: The Founding Myths of Religious Freedom in the United States and Laïcité in France." *Journal of Church and State* 46, no. 1 (2004): 7-24, 10.
[84] Ibid. 16.

in the opposition to the Catholic Church it does not necessarily mean that it is hostile towards religion itself, but it can be used as such.

2.2.2.Separated but tolerant? Laïcité in a democratic society.

The idea of laïcité was historically closely linked to the public education system, which was exclusively Catholic before the XIX century. 'The two Frances' created two different approaches to the schooling: to maintain Catholic education or to create a secular system.[85] The latter won in 1882; since then religious teaching was conducted outside the school and teachers in public schools were 'non-religious [laique] personnel', and 'moral and religious instruction' were replaced by 'moral and civic instruction'. [86] Later, during the reorganization of primary education in 1923 the phrase 'duties before God' was also removed from the program. The Education Law of 1882 was strictly anti-Catholic but its ideological grounds, according to its authors Gambetta and Ferry, were not anti-religious but pro-religious freedom. 1882 Law replaced the Falloux Act that had given control over public schooling to the Catholic Church.[87] But it was not until 1905 Law of Separation that almost a hundred years old concordat with the Catholic Church was officially ended.

Similarly, from examining parliamentarian debates in 1905 we can conclude that the Law of Separation was also not an act of hostility. Authors, including Briand, wanted to ensure 'a spirit of marked liberalism'.[88] The separation was intended to protect and respect the Church's and other religions' freedoms within limits of public order, including the possibility of expression. The *ratio legis* was to establish autonomy and separation of both parts – state

[85] Salton, Herman. "France's Other Enlightenment: Laïcité, Politics and the Role of Religion in French Law." *Journal of Politics and Law*, 2012, 33.
[86] Ibid. 34.
[87] Willaime, Jean-Paul. "Teaching Religious Issues in French Public Schools." *Religion and Education in Europe: Developments, Contexts and Debates*. 2007, Munster: Waxmann Verlag GmbH, 90.
[88] Salton, Herman. "France's Other Enlightenment: Laïcité, Politics and the Role of Religion in French Law." *Journal of Politics and Law*, 2012, 34-35

and religious organizations. The ground legislative norms ensured rules of non-recognition and non-financing of religious organizations. Although freedom of religion was an inseparable part of this system; legal order, laïcité, and separation. Salton highlighted that from a variety of drafted options the one that ensures all separation, religious liberty and equality of churches was chosen by the members of Parliament. He argued that the number of exceptions to the laïcité principle and primacy of freedom of religion is the evidence of the liberal character of the French solution. The hostility was aimed toward the establishment of religion and not religion itself.

The principle of fraternité, incorporated into both the 1946 and the 1958 constitutions, can also strengthen this argumentation. According to the concept of "living together", an open and democratic society requires respect for others' values and beliefs. But here again, it is the question of interpretation of what actions should be taken to ensure the peaceful realization of this idea. It can be both tolerances, understood as broadly, for example as the widespread presence of religion within the public sphere, or as exactly opposite and absence of it. The ECtHR found the 'living together' argument, as presented by the French government, convincing and recognized this principle as a part of the legitimate ground for limitation of freedom of expression: 'protection of freedoms and rights of others'. The Court found "that under certain conditions the 'respect for the minimum requirements of life in society' referred to by the Government – or of 'living together', (…) can be linked to the legitimate aim of the protection of the rights and freedoms of others". [89] It was stated a valid reason to apply a wide margin of appreciation since it is "essential for the expression not only of pluralism but also of tolerance and broadmindedness without which there is no democratic society".[90]

[89] S.A.S. v. France, App. No. 43835/11 (1 July 2014), para. 121.
[90] Ibid. para. 153.

2.2.3.Model of religious public education – history of creation through domestic laws

Before the French Revolution, all schools were Catholic, but education was not mandatory and was the sole responsibility of parents. Two decrees of Louis XIV (1698) and Louis XV (1724) obliged parents to send children to schools (usually Catholic, with paid tuition). Religion was "the top of the agenda of the school curriculum".[91] This model, teaching of religion by priests or cathects, was criticized by parents (ignorance of teachers, class environment). The call for secular teachers was one of the revolutionist's statements. The French Revolution brought a level of separation (the new Republic, under the decree of 1795 about freedom of worship did not finance church and its facilities), also on the public education ground. Although, not for long. Schools remained neutral (including lack of religious teachings) only till the concordat signed by Napoleon and the pope in 1801. Similar concordats were established between France and Calvinists, Lutherans and Jews. Napoleon's policies on education, although ensured the centered education system, required teachings to be based on Catholic principles and doctrine and the teachers also could be the members of the clergy. The concordats era has ended with the Law of Separation 1905.

Until the XIX century, in France, religion and education were directly connected, even on the institutional level. The offices of Minister of Education and Minister of Religious Affair were combined and held by a bishop.[92] Implementation of the principle of laïcité, that was developed through the debates on public schooling, and move towards secularism started from removing religious content from the public schools' curriculum. The Jules Ferry Law in 1881 progressively established free public education (primary schools), one year later provisions

[91] Derek Davis, Elena Miroshnikova. *The Routledge International Handbook of Religious Education.* New York: Routledge , 2013, 115.
[92] Salton, Herman. "France's Other Enlightenment: Laïcité, Politics and the Role of Religion in French Law." *Journal of Politics and Law*, 2012, 33.

were extended, and public education was both mandatory and secular. Article 2 of 1882 laws removed religious education from the public school sphere by stating that: "the public primary schools will hold one day free, apart from Sunday, allowing parents to give, if they wish, their children a religious education outside from school buildings". Moreover, Goblet Law secularized the teaching staff.

Wykes noted that 1882-1886 legislation furthered compromise between the Catholic Church and state and was not hostile. Although the methods, used to ensure secular school, were detailed and wide:

> "No religious teaching was given in the state-supported schools, no religious emblems, or pictures adorned the walls, no access was given to the present in the primary, and later, the technical schools. In the lycées chaplains might use allotted rooms for individual advice and instruction if requested, but they received no state salary and could teach only outside school hours."[93]

The goal of public schools was to achieve tolerant and secular space for education, including teachings about morals. Secular school, from the governmental perspective, became a perfect place to raise future 'good citizens' and patriots. Religion was replaced by the national identity that rooted in "the republican regime" and "belief in the sovereignty of reason and science".[94] In response, Catholics undermined those founding principles and argued that "the school without God was the school against God".[95] Those tensions were present even in the XX century and were furthered through unclear interpretations of the principle of laïcité.

The 1905 separation led also to the reform of curriculum for secondary schools. The new education laws required references to God and life after death were removed and replaced

[93] Wykes, Olive. "The Decline of Secularism in France." 4.3. *Journal of Religious History*, June 1967: 218-232, 219.
[94] Ibid. 220.
[95] Ibid. 221.

by lessons about religious history. The 1905 separation brought more questions and uncertainty within the religious parts of society, related to the exercise of religious freedom and the religious education sphere. The partial solution was, as stated in statutory laws, the introduction of the chaplains into some public institutions, including schools.[96] Moreover, in order to ensure access to religious education, the new legislation, the Ferry Law of 1881, established that "school schedules must be changed in a way as to allow children to receive religious education outside the public schools".[97] Thus, one free day during the school week (usually Thursday) was dedicated to allowing participation in religious classes outside the school.

Troper[98] noted that such a solution can be criticized by parents that want to ensure the education of their children to be fully in line with their religious beliefs. Although those parents could decide to send their children to private (Catholic) school system, their access to free public education is limited, and they can perceive this as discrimination based on their religion. It is difficult to argue those feelings but from a legal perspective, state obligations to ensure the realization of the right to education (including the establishment of the public school system) do not oblige it to provide education that is in line with one religion. In 1959, with the Debré law, this allegation was remedied and the rule "public funding for public school, private for private school" was changed. Private schools are able to enter a contract with the state in order to receive funding for, i.e. salaries of teachers who teach secular courses. This, although, did not change that religion was unquestionably removed from public schools and replaced by morals in the curriculum. Here a new question, about teachers' competencies, arose.

A few problems were raised by parents: whether teachers can remain neutral when conducting lessons that are related to religion (for example history), is teaching logical thinking

[96] Troper, Michel. "French Secularism, or Laïcité." *Cardozo Law Review*, 1999: 1267–1284, 1277.
[97] Ibid. 1277.
[98] Ibid.

going to unduly force atheistic worldview, should morality (secular or not) be a part of the public curriculum in general. Although total abstention could be the easiest solution I agree with Troper that, especially in a diverse society, an absolute lack of education about religion and values could be "dangerous for the maintenance of social cohesion".[99] But teachings about only secular morality, even as principle values as tolerance, democracy or human rights, are still perceived by some parents as a breach of neutrality. In their view, even a secular ideology is still an ideology. Schools, especially within the public sphere, are obliged to respect both laïcité and diversity. That allegation for a long time remained unanswered. Human rights and democracy cannot be, although, seen as an ideology; these are values and laws that state has obliged to follow under several international treaties and Constitution, thus this argumentation can be easily undermined.

Nevertheless, the implementation of the theories of equality of religious organizations and full state-church separation was criticized.[100] Under the 1905 Law of Separation, a religious organization can be recognized by the state as 'association cultulle'. For a long time, not all religions had access to this procedure (for example, the Jehovah's Witnesses were not recognized as a religion but only as a sect until the 2011 judgment of the ECtHR).[101] Furthermore, there are two possible statuses that religious organizations can receive: full and partial. The full recognition entails, *inter alia*, tax exemption and allows chaplains religious concealing in public schools. When minority religions are refused to be fully recognized the principle of equality is violated. Dericquebourg noted that this approach of the French government is slowly changing.[102] However, due to this inequality of treatment of different

[99] Troper, Michel. "French Secularism, or Laïcité." *Cardozo Law Review*, 1999: 1267–1284, p. 1278.
[100] Derek Davis, Elena Miroshnikova. *The Routledge International Handbook of Religious Education.* New York: Routledge , 2013, p. 114.
[101] Association Les Témoins de Jéhovah v. France. 8916/05 (European Court of Human Rights, July 17, 2011).
[102] Davis, Derek, Elena Miroshnikova. *The Routledge International Handbook of Religious Education.* New York: Routledge , 2013.

religious organizations, the system was criticized: the state wants to teach equality but in reality it discriminates.

2.2.4.Laïcité of understanding? Bringing religion to curriculum

The debate about the role of religion in public schools and the education system increased again in 1980. This was related to the decrease of the position of religion in general not only within the state but also within society. Globalization, plurality, multiculturalism, and secularism were recognized as specific challenges by, *inter alia*, the Catholic Church. For some, the assumption was simple – lack of religion entails lack of moral or ethical values; assumption especially controversial in now multicultural and secular France. This debate was further not only by the voices of religious organizations but also by teachers. According to Joutard's report on the teaching of history, geography and social science from 1989 "knowledge of religious cultures is necessary for an understanding of our societies past and present, their artistic and literary heritage, their legal and political systems".[103] Thus, during public debate religion was presented as a tool for understanding French history and for furthering tolerance.

Willaime noted that, although the public schooling system remained devoted to the principle of laïcité, to some extent information about religions was presented during history classes.[104] Some surveys showed that a lack of complementary approach led to a high level of ignorance among both pupils and teachers towards religious cultures. During national seminars about cultural education, the question was not whether to include but how to include religious culture into the curriculum.[105]

[103] Report by Recteur Philippe Joutard on the teaching of history, geography and social sciences, 1989. Willaime, Jean-Paul. "Teaching Religious Issues in French Public Schools." *Religion and Education in Europe: Developments, Contexts and Debates*. 2007, Munster: Waxmann Verlag GmbHp. 92.
[104] Willaime, Jean-Paul. "Teaching Religious Issues in French Public Schools." *Religion and Education in Europe: Developments, Contexts and Debates*. 2007, Munster: Waxmann Verlag GmbHp. 92.
[105] Ibid. 92.

Nevertheless, the real re-examination of the place of religious education in public schools has not started until the 2002 Regis Debray report issued on request of the Minister of Education, Jack Lang. The government decided to take a closer look at the public school and its responsibility to provide children with 'an understanding of the world'. Especially in the context of the 9/11 terrorist attack, Lang recognized an overwhelming need to include in the curriculum information about religious cultures. As an answer, Debray proposed turn from 'a laïcité of ignorance' towards 'a laïcité of understanding'.[106]

Debray distinguished religious instructions from teachings about religion and proposed to introduce the letter in public schools' system through 12 concrete measures, related to curriculum and teacher training. In order to examine and discuss the report, the national interdisciplinary conference was held by the Ministry of National Education. Willaime noted three main avenues of the approach discussed during the seminar: "1) education in the symbolic language of religion; 2) a contribution to the understanding of insight into cultural heritage; 3) a contribution to civic education".[107] Moyon noted that the report and followed discussion focused on teaching 'religious facts' instead of creating a separate subject – as an objective approach, without criticism of religion or texts.[108] Moreover, as Nouailhat argued, in order to create a fully interdisciplinary approach variety of disciplines must be concerned, not only history, art or political science but also science (history of science).

Speaking about 'religious facts' instead of religions was very persuasive. According to the interpretation of the 1789 Declaration religion has a status of private opinion, this recognition, as argued by Willaime led to the conclusion that:

[106] Ibid. 93.
[107] Ibid. 94.
[108] Moyon, Marc. "Religious facts and History of Sciences: Example of a Fruitful interaction in the French School of the 21st Century." *Journal of Educational Sciences*, 2013: 25-33, 27.

> …the public school may not know whether God exists [but] it must know that there are individual[s] (…) who live their religions, there are religious organizations (…) text and rituals, representations and attitudes, works and conducts. (…) Religions are too important a social factor to allow them to be monopolized by clergy and religious communities…[109]

The final effect of the Debray report was the establishment of a European Institute for the Study of Religion (IESR) under the supervision of Claude Langlois. The mission of the Institute was to fill the existing gap in the curriculum by working with both international and regional societies and collaborate with the Ministry of National Education and other governmental institutions. But the report brought also fears: non-believers that religious education will be back in the public school curriculum, and believers that factual and historical approach will undermine the position of 'living religions'. Others criticize it for mixing knowledge and faith in the textbooks.

Willaime noted that religious education in public schools is necessary for a democratic society since it has a 'civic education dimension' as well. Schools should acknowledge that they do not exist in a cultural vacuum.[110] Teaching about education furthers critical thinking about religion and religious leaders, furthers integration, tech to discuss religion in front of a diverse audience. Pupils that had such education are less keen to shift toward fundamentalism. The detailed study confirmed that assumptions. The project REDCo (Religion in Education: A contribution to Dialogue or a Factor of Conflict in Transforming Societies of European Countries) studied several state models of religious education, including the French approach, in order to examine overall effects of different approaches. It showed that French students agree with the laïcité of understanding and inclusion of religious facts into different subjects; they

[109] Willaime, Jean-Paul. "Teaching Religious Issues in French Public Schools." *Religion and Education in Europe: Developments, Contexts and Debates*. 2007, Munster: Waxmann Verlag GmbHp. 95.
[110] See more: Willaime, Jean-Paul. "Teaching Religious Issues in French Public Schools." *Religion and Education in Europe: Developments, Contexts and Debates*. 2007, Munster: Waxmann Verlag GmbHp. 95.

are passively tolerant (no hostility), and in majority declared lack of personal religion (41%); they tend to criticize religion in general and not specific observance.[111]

The general question that had been asked after Debray's report was whether 'objective' religious education is even possible. In 2007, only 5 years after the Debray report, this question was addressed in the Toledo Guiding Principles on Teaching about Religion in Public Schools (TGPs) issued by the OSCE. Durham and Ferrari noted it was the first such broad recognition that "knowledge about religious diversity is a key instrument to respond to the complexity of challenges faced in the 21st century".[112] The objective, non-discriminatory religious education is possible when precise standards are implemented as recognized by OSCE experts (*inter alia* system of opt-outs, inclusive and diverse curriculum, professional training of teachers). Although, TGPs are a very useful and practical tool to ensure the best system of religious education (inclusive, non-discriminatory, objective) its legal power is limited. It is a "standard-setting document that encapsulates practical aspects related to teaching about religions and beliefs".[113]

From the perspective of the implementation of Toledo Principles, the most problematic in the French approach is not the model itself but the training of teachers. This was recognized as an obstacle by the teacher's society during the REDCo project. Ministry of Education supported the increase of teachers' competencies in teaching religious facts through providing access to dedicated (initial and continuing) training. Although those efforts were criticized for being modest and insufficient. In 2013, in order to preserve respect for Republican values and

[111] Pille Valk et al., *Teenagers' Perspectives on the Role of Religion in Their Lives, Schools and Societies. A European Quantitative Study* (Waxmann Verlag, 2009). See also: Knauth, T., Jozsa, D.-P., Bertram-Troost, G. & Ipgrave, J. (Eds.) *Encountering Religious Pluralism in School and Society: A Qualitative Study of Teenage Perspectives in Europe*. 2008: 13.

[112] Durham, W. Cole Jr., Silvio Ferrari, and Simona Santoro, 'The Toledo Guiding Principles on Teaching about Religion and Beliefs in Public Schools', *Security and Human Rights* 19 (2008): 229–39, 231.

[113] Durham, W. Cole Jr., Silvio Ferrari, and Simona Santoro, 'The Toledo Guiding Principles on Teaching about Religion and Beliefs in Public Schools', *Security and Human Rights* 19 (2008): 229–39, 229.

principles in schools, the Ministry promoted the Charter of School Secularity (Charte de la laïcité à l'école).[114] IESR recognized that the two principles that should be implemented in teachers' work are neutrality and impartiality, which entail "capacity to venture beyond the convenience of abstention, which avoids hard questions and sensitive subjects".[115]

2.2.5. 2015 terrorist attacks and recent changes in the curriculum

Terrorist attacks conducted by religious fundamentalists in January and November 2015 during which 241 people have died, triggered firstly acts of great unity within the French nation and abroad. However, the principle of living together was challenged again. The discussion about laïcité, republican values, and religious education has started again.

Gaudin recognized that in result there are now at least three forms of providing information about religions in French state schools:

> ... (1) philosophy, dispensed in *Terminale*, the year of graduation at secondary school; (2) teaching 'religious facts' through existing subjects (mainly history); and (3) a new moral and civic education subject introduced in 2015 for all years…[116]

During Terminale, the final year of secondary education, all pupils take philosophy courses. The classes are not aimed to simply present facts, including religious, but to encourage critical thinking and ability to use philosophical doctrines in individual argumentation. Here,

[114] "Charte De La Laïcité À L'école". *Ministère De L'éducation Nationale Et De La Jeunesse*, 2013. https://www.education.gouv.fr/pid25535/bulletin_officiel.html?cid_bo=73659.
[115] Gaudin, Philippe. "Neutrality and impartiality in public education: the French investment in philosophy, teaching about religions, and moral and civic education." *British Journal of Religious Education*, 2017: 93-106, 98.
[116] Gaudin, Philippe. "Neutrality and impartiality in public education: the French investment in philosophy, teaching about religions, and moral and civic education." *British Journal of Religious Education*, 2017: 93-106, 94.

currently, a place of religion and its relationship with philosophy, and religion as a social phenomenon should be recognized by teachers.[117]

'Education Morale et Civique' is a new subject that was included in the state school's curriculum in order to ensure consistency of the education and to "rebuild the school of the Republic",[118] to secure its values, promote tolerance and unity of citizens. Art. L 111-1 of the Education Code states the school's mission precisely: "Apart from imparting knowledge, the Nation establishes that the school's foremost mission is to bring pupils to share the values of the Republic (…). [Schools] shall ensure that all pupils learn to respect the equal dignity of human beings, freedom of conscience, and secularism".[119]

Moral and civic education is currently studied in primary school (including pre-school, education from the age of 3); the civic course is part of lower secondary education and legal and social civics are taught in higher secondary schools. The approach should be interdisciplinary and focused on moral values and laïcité.

2.3.Non-denominational teaching *about* religion – Norwegian example

Before the 2012 constitutional amendment (effective from 2017) Norway had an established religion: Evangelical Lutheran Church. On the Durham-Scharffs's loop, the Norwegian legal system was placed on the positive identification side, between the Theocratic States and Religious Status Systems. According to theory, from such a location, it follows that the level of religious freedom will be low. However, because Norway is strongly attached to the values of human rights and freedoms, this theory does not work fully in practice. The

[117] Ibid. 99.
118 Law No. 2013-595 of July 8, 2013, on Guidance and Programming for Restructuring Schools (as amended up to January 1, 2015).
119 "Code De L'éducation | Legifrance". Legifrance.Gouv.Fr, 2019. https://www.legifrance.gouv.fr/affichCode.do;jsessionid=1911314AFED0669D2817E2C909CA5349.tplgfr43s_2?idSectionTA=LEGISCTA000006166558&cidTexte=LEGITEXT000006071191&dateTexte=20190429.

general religious rights were respected by the state, but the full equality of religious unions and associations of non-believers was not implemented.

Currently, the Norwegian system took a step toward the separation of church and state and it now mirrors relations recognized as 'Historically Favored and Endorsed Churches' on the Durham-Scharffs loop. The constitution still refers to the Christian values but introduces freedom of religion. There is a national (*folk*) church but not an established religion. However, it is too early to say what legal consequences will result from it and how the system will change. Much depends on statutory solutions, and these, in turn, have transferred a significant part of the responsibilities to the Church.

2.3.1.History of church-state relation. Constitutional framework

The Evangelical Lutheran Church, the Church of Norway, has been having a special position in the state legal order since the Reformation in 1537 when King Christian III became head of the church. Establishment of the absolute monarchy in 1660 furthered the church-state unity (King was the head of both legal and religious regimes, insult of the Majesty could be categorized as a blasphemy).[120] When in 1814, after 400 years of unity, Norway become independent from Denmark, the new Constitution was founded. It is one of the oldest constitutions that is still in force, although after several and deep amendments. Founding fathers were inspired by and derived from both American and French achievements and introduced to the Norwegian legal system model of liberal parliamentarian democracy. However, the established church and national religion were constitutionally recognized, and freedom of religion was not secured (art. 2 "The Evangelical-Lutheran religion shall be maintained and constitute the established Church of the Kingdom. The inhabitants who profess

[120] Morland, Egil. "New relations between state and Church in Norway." *European Journal of Theology*, January 2018: 162-169, 164.

the said religion are bound to educate their children in the same. Jesuits and Monastic orders shall not be tolerated. Jews are furthermore excluded from the Kingdom.").[121]

The King remained the head of the National Church. The new Constitution imposed state control over the Church and King's obligations to profess, uphold and protect the national religion (Art. 4 "The King shall at all times profess the Evangelical-Lutheran religion, and uphold and protect the same").[122] The Constitution introduced a quota system that requires governmental officials, including half of the cabinet, to be Lutheran. However the autonomy of the Church was also limited: the King had the power to appoint all senior ecclesiastic officials (art.16), and to decide about public worships and religious meetings (art. 21).[123] Over time, the executive, through different departments (the Ministry of Church and Cultural Affairs, the Ministry of Church, Education, and Science), gained more control over the Church of Norway, including decisions about appointment of bishops and clergy (which also entailed that the state paid their salaries).[124]

Only in 1964 amendments to the Constitution introduced the freedom of religion to the Norwegian legal system, although scholars note that this right in practice was respected before the amendment.[125] The 1969 Act on the Status of Religious Organizations has additionally enabled financial support for non-national religions. This was extended in 1980 and other non-religious organizations were included, such as humanists. In the next years (1984, 1989, 1996

[121] Constitution of the Kingdom of Norway of 1814, art. 2, available at www.constitution.org/cons/norway/dok-bn.html.
[122] Constitution of the Kingdom of Norway of 1814, art. 4, available at www.constitution.org/cons/norway/dok-bn.html.
[123]Ernst, Julia L. "Making the case for antiestablishmentarianism: the. Church and State in Norway." *Fordham International Law Journal*, 2015: 543-594, 550.
[124] Ernst, Julia L. "Making the case for antiestablishmentarianism: the. Church and State in Norway." *Fordham International Law Journal*, 2015: 543-594, p. 551. See also: Stoichevski, William,. "No More State Church in Norway?" *The Lutheran*, August 2006: 36-37.
[125]Ernst, Julia L. "Making the case for antiestablishmentarianism: the. Church and State in Norway." *Fordham International Law Journal*, 2015: 543-594, p. 551.

church autonomy laws were introduced) Church's autonomy and self-governance were furthered but the state still had control over appointments of bishops.[126]

It was argued by the government that state control over the Church of Norway brought anti-discriminatory changes within its structure (appointments of homosexuals for bishops, female pastors and bishops). This is exceptional since in most other systems anti-discrimination laws do not apply to religious institutions, for example in the US this is called ministerial exception, as discussed in the Hossana Tabor case conundrum. Nonetheless, state-church relation was highly criticized in Norway not only by civil society (humanist organizations) and public officials but also by the Church and religious leaders.[127] The debate about church-state separation entered the official level in 2003 with the establishment of the governmental commission and 2006 the General Synod meeting and own hall hearings. According to polls, the majority of citizens wanted to decide about the issue through the referendum (69%), but the debate continued.[128]

In 2008, after five years of commission's work, the Ministry of Culture presented the report about a church-state relationship that advised further democratization and separation of functions but not dis-establishment of the church. The proposed constitutional amendment that would introduce the principle of separation but also maintain state church was supported by all seven parties.[129]

[126] Plesner, Ingvill Thoren. "State Church and Church Autonomy in Norway." In *Church autonomy: a comparative survey*, by Gerhard Robbers, 476-484. Peter Lang, 2001, p. 479.
[127] Stoichevski, William,. "No More State Church in Norway?" *The Lutheran*, August 2006: 36-37.
[128] "Norway Should Separate Church, State, Says Panel. *Americans United For Separation Of Church And State*, 2006. https://www.au.org/church-state/march-2006-church-state/au-bulletin/norway-should-separate-church-state-says-panel.
[129] U.S. Dep't of State, Bureau of Democracy, Human Rights and Labor, International Religious Freedom Report for 2010 (2nd report) 6 (2011), available at www.state.gov/j/drl/irf/rpt/.

2.3.2.2012 constitutional amendment. Towards separation.

The Constitution was amended on May 21, 2012, as a result of a political compromise. Few key provisions were changed, including articles 2 and 16:

Table 1

The Constitution 1814-2012	The Constitution 2012
Article 2 All inhabitants of the Realm shall have the right to free exercise of their religion. The Evangelical-Lutheran religion shall remain the official religion of the State. The inhabitants professing it are bound to bring up their children in the same.	Article 2 Our values will remain our Christian and humanist heritage. This Constitution shall ensure democracy, a state based on the rule of law and human rights.
Article 16 The King ordains all public church services and public worship, all meetings and assemblies dealing with religious matters, and ensures that public teachers of religion follow the norms prescribed for them.	Article 16 All inhabitants of the realm shall have the right to free exercise of their religion. The Church of Norway, an Evangelical-Lutheran church, will remain the Established Church of Norway and will as such be supported by the State. Detailed provisions as to its system will be laid down by law. All religious and belief communities should be supported on equal terms.
Art. 4 The King shall at all times profess the Evangelical-Lutheran religion, and uphold and protect the same.	Article 4 The King shall at all times profess the Evangelical-Lutheran religion.

Figure 1

Article 2 no longer refers to the Evangelical Lutheran as an official state religion. There is although recognition of Christian values. Some scholars refer to the former Art. 2 provision as a '*de facto* preamble'[130] that expresses national ideology. During the amendment procedure, the issue of protecting and ensuring the continuity of national values (human rights and Christian heritage) was very important. This, to some extent, explains the unusual wording ('remain').

The King, both personally and constitutionally, is no longer the head of the Church (former Art. 16). Under the new Article 4, he is no longer obliged to uphold and protect the

[130] Morland, Egil. "New relations between state and Church in Norway." *European Journal of Theology*, January 2018: 162-169, 166.

religion, but he must profess it (from the human rights perspective it can be questionable why King's freedom of religion is constitutionally limited).[131] There is no longer a constitutionally established national religion. Although the amended Constitution does recognize the Evangelical-Lutheran church as an 'Established/National Church of Norway'. The translation does not fully mirror the original wording (*folk church*) which was a result of political compromise and an attempt to lose ties between state and church and, at the same time, to recognize its national importance.[132] Morland noted that the formulation of Article 16 is more a political statement than a legal establishment. It implies on the one hand "church's responsibility to be geographically present in all of Norway", and, on the other hand, "the political wish to *watch over the church*".[133] The question of interpretation and judicial meaning of both articles 2 and 16 remains unanswered, but further conflicts on this ground are possible.

Although the level of separation was introduced also in other constitutional provisions (for example state can no longer appoint bishops under new Art. 21), the close relationship between church and state still exists. Moreover, the state financial ties with the Church were not changed (the state is still an employer of clergy and bishops) but other religious organizations, under the obligation of the state recognition, have access to the governmental funding (equal state support, as stated in Art. 16).[134] Statutory laws still regulate the internal organization of the Church, as required by new Article 16 ("Detailed provisions as to its system will be laid down by law").

[131] See Ernst, Julia L. "Making the case for antiestablishmentarianism: the. Church and State in Norway." *Fordham International Law Journal*, 2015: 543-594, 541.
[132]The mere importance of the Church is, although, questionable. More than 70% of Norwegians are members of the Evangelical-Lutheran church but only 5% of them are recognized as a churchgoers practitioners.
[133]Morland, Egil. "New relations between state and Church in Norway." *European Journal of Theology*, January 2018: 162-169, 167.
[134] U.S. Dep't of State, Bureau of Democracy, Human Rights and Labor. "International Religious Freedom Report for 2017." 2018.

The amendments came into force in 2017. At that time, a new draft law was prepared for 'the Church of Norway and other belief- and worldview-societies'. The new law, in force from 2018, regulates some internal proceedings of the Church, including church elections but generally transfers obligations to establish detailed regulations on the Synod (this is although highly undermined since the state regulates some internal church matters). Moreover, the new Equality and Anti-Discrimination Act, effective January 1, 2018, prohibits directly discrimination based on religion.

2.3.3.Model of religious education. How to teach religious education in one subject objectively? Are opt-outs necessary?

Before the 2012 amendment, Article 2 of the 1814 Constitution stated parental obligation to ensure the religious education of their children in the spirit of religion they profess. The assumption was to bring up children in the Evangelical-Lutheran faith and to secure continuity of the national religion. As a result, this provision limited rights of both parents and children, thus, it is surprising that it lasted for so long. This obligation is even more worrying when taken in the statistical context: although more than 70% of Norwegians are members of the Evangelical-Lutheran Church, only 5% are practitioners (answered positively to the question whether they attended mass on the last Sunday).[135] This parental obligation was found inconsistent with the ICCPR in the Human Rights Committee's Concluding Observations on the fourth periodic report by Norway.[136] In Article 22 the Constitution also obliged the King to "ensure (…) that public teachers of religion follow the norms prescribed

[135]Marianne Nilsen Kvande, Christian Andreas Klöckner,Michael E. Nielsen. "Church Attendance and Religious Experience: Differential Associations to Well-Being for Norwegian Women and Men?" *SAGE Open*, 2015: 1-13, 2.

[136] *Concluding Observations of the Human Rights Committee. Norway.* CCPR/C/79/Add.112, Geneva: UN Human Rights Committee, 1999, para 13.

for them". Thus, the King, being also the head of the Church, had direct control over teachers in public schools.

In 1739 mandatory education system was created. Between 1739 and 1860, according to the Christian education policy, religious teaching was mandatory for all students. From 1860 gradually, Christianity religious instruction was supplemented by other secular subjects and taken from the central position within the curriculum. The opt-out procedure was introduced even earlier with the Dissenter or Non-Conformist Act of 1845.[137] The confessional teaching of religion ended with the 1969 Education Act. The new law introduced a 'parallel model'[138] also called 'separative religious education'[139] or 'two-subject solution'.[140] Parents could choose between Ethics Education and Knowledge of Christianity lessons in primary and lower secondary schools, but the exemptions were still possible.

In 1990 the model of religious education was discussed broadly. The need for inclusion and protection of diversity in multicultural, more secular and globalized society was recognized. Two years after the 1995 report of the special ministerial commission a new mandatory subject was introduced: KRL – Christianity, Religion, and Ethics.[141] The idea behind the change was to create an extensive version of Knowledge of Christianity that will be more inclusive. However, its major focus was still to be on Christianity, as a 'common heritage' of the nation. Possibilities of exemptions were limited (only from specific lessons). Both religious minorities' and humanists' societies objected to this solution and criticized it for

[137] Ernst, Julia L. "Making the case for antiestablishmentarianism: the. Church and State in Norway." *Fordham International Law Journal*, 2015: 543-594, 565.
[138] Alberts, Wanda. *Integrative Religious Education in Europe. A Study-of-Religions Approach*. Berlin: De Gruyter, 2007.
[139] Andreassen, Bengt-Ove. "Religion Education in Norway: Tension or Harmony between Human Rights and Christian Cultural Heritage?" *Temenos - Nordic Journal of Comparative Religion*, no. 49(2) (2014): 137-164, 138.
[140] Lied, Sidsel. "The Norwegian Christianity, Religion and Philosophy subject KRL in Strasbourg." *British Journal of Religious Education*, September 2009: 263–275, 265.
[141] Other possible translation: Christian Knowledge and Religious and Ethical Education

not meeting the requirement of neutrality. The detailed curriculum from 1997 shows that 3/5 of all subject areas were directly related to Christianity (with the special focus on the Bible).[142] The curriculum was revised and reduced in 2002, although 55% of teachings still focused only on Christianity (25% other religions, 20% philosophy and ethics).[143]

Although the introduction of general exemptions and opt-outs mechanisms were discussed, the law was not changed. The limited exemption could be granted at the request of parents, but the school had full discretion in this regard. Parents could appeal the decision to the local government and then to the courts. The Education Act in para 13 (section 9) stated:

> …KRL is a school subject supposed normally to include all pupils. By written notification from parents/guardians, pupils shall be exempted from those parts of the teaching at the specific school that they [pupils and parents], on the basis of their own religion or view of life (*livssyn*) experience as practice of another religion or as adherence to another view of life (*livssyn*). This may, for example, include religious activities in or outside the classroom. In case of notification of exemption, the school should, as far as possible and especially in the lower stages (1‑4 grade), try to find solutions by facilitating differentiated teaching in accordance with the curriculum…[144]

Norway incorporated to national law both Covenants and European Convention in 1999 as the Menneskerettsloven ("Human Rights Act"). The international criticism of the religious education model, especially in two separate cases before the UN and Council of Europe institutions, was perceived by the public officials and society as an embarrassment (Norway perceived itself as a world leader in human rights). The Norwegian Supreme Court in 2001 ruled that the Education Act that provides only limited opt-outs and that mandatory religious

[142] Andreassen, Bengt-Ove. "Religion Education in Norway: Tension or Harmony between Human Rights and Christian Cultural Heritage?" *Temenos - Nordic Journal of Comparative Religion*, no. 49(2) (2014): 137-164, 140.
[143] Ibid.141.
[144] Innst. O. nr. 95, 1996‑1997, 32‑3; Transleation after: Andreassen, Bengt-Ove. "Religion Education in Norway: Tension or Harmony between Human Rights and Christian Cultural Heritage?" *Temenos - Nordic Journal of Comparative Religion*, no. 49(2) (2014): 137-164,142.

education is in line with Norway's international obligations, Constitution, and human rights standards but, noted that the question about the application of the law is still open.[145] In 2002 the Norwegian Humanist Association together with two groups of concerned parents filed two petitions/applications: one before the UN Human Rights Committee (Leirvåg et al. vs. Norway) and one before European Court of Human Rights (Folgerø et al. vs. Norway).

2.3.4. The UN Human Rights Committee decision

During the communication with the Human Rights Committee, chaired by the UN Special Rapporteur for Freedom of Religion and Belief, parents raised concerns related to violations of the International Covenant on Civil and Political Rights:

- Art. 17 ("1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks|),
- Art. 18 para 4 ("The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions"), and
- Art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status").

Their objections were directly focused on the statute and curriculum:

lack of neutrality and objectivity because of the special place of Christianity and Evangelical Lutheran church within subject areas;[146]

parts of the classes were in reality religious instructions that parents wanted to avoid (teaching of/by, not about religion such as learning by heart Bible texts, hymns; although, as it

[145] Ernst, Julia L. "Making the case for antiestablishmentarianism: the. Church and State in Norway." *Fordham International Law Journal*, 2015: 543-594, 569.
[146] *Leirvåg et al. v. Norway.* CCPR/C/82/D/1155/2003 (UN Human Rights Committee, November 23, 2004), para 7.8.

was noted by the state and the Committee the Education Act, section 2-4, stipulates exactly that: "[t]eaching on the subject shall not involve preaching" but the curriculum and the Education Act allowed 'religious activities');[147]

- compulsory nature of the subject itself (as not necessary in a democratic society);[148]
- the system of partial exemptions required parents to follow the syllabus every day or at least every week to raise objections on time (since it was an undue burden only on parents that are not members of the majority religion, applicants, as non-Christians, felt discriminated);[149]
- the school discretion in deciding about exemptions (even disregarding the will of parents or pupils);
- even when exempted from the class, pupils still had the obligation to know the information provided (for example, they did not have to sing the hymn but they should know it by heart anyway);[150]
- the application of the exemption system led to ostracism (a child who was exempted from participation in a certain part of the lesson was sent to a separate room, where s/he should do homework or read, which is exactly how s/he would be punished for the wrong behavior);[151]
- as a result, the system could lead to the 'conflict of loyalty' that can undermine parents' beliefs.[152]

The Committee noted that the mandatory nature of religious education can meet Covenant's requirements if it is presented in an 'objective and neutral' manner. It referred to the General Comment on the Art. 18: "[A]rticle 18.4 permits public school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way", and "public education that includes instruction in a particular religion or belief is inconsistent with Article 18, paragraph 4 unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents or guardians."[153]

[147] Ibid. para 9.18, 10.10-10.11.
[148] Ibid. para 7.5.
[149] Ibid. para 7.8, 7.11.
[150] Ernst, Julia L. "Making the case for antiestablishmentarianism: the. Church and State in Norway." *Fordham International Law Journal*, 2015: 543-594, p. 570.
[151] *Leirvåg et al. v. Norway.* CCPR/C/82/D/1155/2003 (UN Human Rights Committee, November 23, 2004), para 7.12.
[152] *Leirvåg et al. v. Norway.* CCPR/C/82/D/1155/2003 (UN Human Rights Committee, November 23, 2004), para 2.5.
[153] "CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)." no. CCPR/C/21/Rev.1/Add.4. UN Human Rights Committee, July 30, 1999, para 6.

The Committee concluded that the system can pass this test if "the system of exemption, in fact, leads to a situation where the teaching provided to those children and families opting for such exemption will be neutral and objective".[154]

The system, even when preferring one religion, in theory, could meet the requirements of neutrality and objectivity if the opt-outs would be effectively provided to parents and pupils. However, the Committee agreed with the applicants that the partial exemptions system imposes an undue burden on parents in their position and create serious practical problems. The system, as applied, was discriminatory and could lead to loyalty conflicts and *de facto* coercion. Thus, the Committee found a violation of Article 18 para 4 and obliged the state to change the statute. The full exemptions were granted to parents within 90 days from the publication of the judgment. In 2005 the curriculum was amended. The new subject was still mandatory and in great part focused on Christianity (including, *inter alia*, singing hymns). Opt-outs were possible (both partial and full), although the new legislation was still criticized by parents for not meeting the Committee requirements since the school had discretion in deciding about exemptions.

2.3.5.The European Court of Human Rights' judgment

Parents complained that the partial exemption system prevented the enjoyment of their parental educational rights and in effect enabled rising their children in line with their beliefs. They claimed as well that the burden on non-religious parents (and minority religions) was higher than on the majority and thus entailed discrimination. The 2004 application was declared admissible in 2006. A few years after the Human Rights Committee decision, on June 29, 2007, the European Court of Human Rights held the case. The very divided Grand Chamber (9 votes

[154] *Leirvåg et al. v. Norway.* CCPR/C/82/D/1155/2003 (UN Human Rights Committee, November 23, 2004), para 14.3.

to 8 dissenting) ruled that both the nature of the subject and partial exemptions system violated Art. 2 Protocol 1 (right to education) of the European Convention. Unfortunately, the Court examined the 1997 law and its application, not its amended version from 2002 and 2005.

The question before the Court was whether the state, when fulfilling its positive obligations to ensure the right to education in the specific context of the religious education, had presented information in an 'objective, critical and pluralistic manner'[155] or whether the KRL subject was taught in a coercive manner that violated parental educational rights. The general objective of the law, as stated by the Parliamentary Committee for Church Affairs, Education and Research during legislative process as well as in the section 2-4 of the Education Act in item V, was to "promote understanding, respect and the ability to maintain a dialogue between people with different perceptions of beliefs and convictions".[156] The idea behind the KRL subject was that by teaching about all Christianity, philosophy and other religions, the school will create an open and inclusive forum to discuss fundamental issues and to gain broad knowledge. It supposed to be a normal subject that brings all pupils together to avoid sectarianism. The Court recognized that those intentions were fully in line with the principles of pluralism and objectivity from the Art. 2 Protocol 1 of the Convention.[157]

The Court also noted that Art. 2 Protocol 1 does not create a right to avoid knowledge about religion and that there is no "right for parents that their child be kept ignorant about religion and philosophy in their education".[158] The mere fact that teachings about Christianity occupied the major part of the curriculum (55%) did not violate the Convention and it is not state indoctrination. It is within the state margin of appreciation to create a curriculum according to the national values (here clearly stated in the Constitution, Article 2). However,

[155] *Folgero and Othres v. Norway*. 15472/02 (ECtHR, June 29, 2007), para 78.
[156] Ibid. para 15, 95.
[157] *Folgero and Othres v. Norway*. 15472/02 (ECtHR, June 29, 2007), para 88.
[158] Ibid. para 91.

the Court also noted the differences in the law related to the special position of Christianity in transferring knowledge. Firstly, Christianity was recognized as a starting point to general religious education in order 'to help give pupils a Christian and moral upbringing'.[159] The aim of the law was to "transmit [values] thorough knowledge of the Bible and Christianity".[160] To juxtapose, *thoroughness* was not applied to other religious or philosophical information, which was presented in a 'knowledge-based' approach.

The Court investigated the curriculum and noted major differences in teaching different religions and worldviews. The curriculum required "thorough insight into Christianity" and only "sound knowledge of other world religions and philosophies".[161] It specified that pupils should 'learn the fundamentals' of Christianity (including learning Ten Commandments by heart) but only 'study the main features' of other religions and 'know about' secularism. Although 'religious activities, such as 'prayers, psalms, the learning of religious texts by heart and the participation in plays of a religious nature', were not limited to the Christianity the Court stated that since the major part of lessons was about this religion it would proportionally affect those activities as well. The Court noted that such religious activities could 'affect pupils' minds in a manner giving rise to an issue under Article 2 of Protocol No. 1".[162]

Therefore, the Court recognized "not only quantitative but even qualitative differences applied to the teaching of Christianity as compared to that of other religions and philosophies".[163] After establishing this imbalance the Court examined whether partial exemptions procedure sufficiently protects parental educational rights. The judgment highlights that to use the exemption procedure parents must be well informed about the subject,

[159] Ibid. para 22-23, 90.
[160] Section 2-4(1)(i) of the Education Act 1998.
[161] *Folgero and Othres v. Norway.* 15472/02 (ECtHR, June 29, 2007), para 49, 92.
[162] *Folgero and Othres v. Norway.* 15472/02 (ECtHR, June 29, 2007), para 94.
[163] Ibid. para 95.

which could be challenging not only for them but also for the teachers. Especially since the lessons' plans do not need to follow the textbook directly. Moreover, parents needed to have reasonable grounds for exemptions (only exempt from religious activities was unconditional). The Court recognized that personal beliefs are one 'of the most intimate aspects of private life',[164] and obligation to expose them could violate Art. 8 and (possibly) Art. 9 of the Convention. Although it was not a requirement to enjoy exemption, parents could feel compelled to do so. The curriculum and the Education Act divided religious activities from knowledge. In the case of religious activities, even reasonable parental request for exemption could not be enforced, since the curriculum proposed that a child who does not participate can still observe. The Court found this division not only very complicated to use in practice but also diminishing parental right to exempt. Overall, the Court found that the state failed to present information in an objective, critical and pluralistic manner and that lack of full exemption violated art. 2 Protocol 1 of the Convention.

Dissenters disagreed with almost every aspect of the majority judgment. Firstly, they recognized the historical meaning of both Christianity and pluralism within the state. Both then should be included and recognized in the school curriculum. They noted that 'the Christian upbringing' requires parents 'cooperation and agreement'.[165] The general rule of not teaching by preaching and ensuring the objectivity of the teachers applied to all religions and philosophy, all subjects in general including religious activities. Moreover, the subject was aimed to further both knowledge and mutual understanding, including humanist, Christian and others. Thus, dissenters did not find a qualitative difference between teaching different religions/views and, thus, did not find a violation of the Convention.

[164] Ibid. para 98.
[165] *Folgero and Othres v. Norway.* 15472/02 (ECtHR, June 29, 2007), Joint Dissenting Opinion of Judges Wildhaber, Lorenzen, Bîrsan, Kovler, Steiner, Borrego Borrego, Hajiyev And Jebens, p. 51.

Furthermore, as to the exemption procedure, dissenters stated that it is reasonable to ask parents to 'make an effort' of the following curriculum and to give reasons for the exemption (since it is natural relation between the citizen and authority). They also recognized that the possibility of applying to the National Education Office (and later to the ordinary court) was provided. Although the curriculum stated also a more flexible solution since the teacher was obliged to "seek to find solutions by facilitating differentiated teaching within the school curriculum".[166] They concluded exact opposite to the majority view and stated that the subject is taught in an objective, pluralistic and critical manner (no indoctrination) and the partial exemption is enough to secure the rights of minorities.

2.3.6. The most recent changes in the system

The model of religious education did not change (non-confessional, compulsory and objective teachings about religion and other worldviews), although it was revised, and a new curriculum was introduced in 2005. Christianity still occupied the big part of the lessons, but the full exemption was possible as well. The next new curriculum was presented in 2008. During the preparatory process variety of lawyers were consulted. The government implemented also recommended solutions from the OECD Toledo Guiding Principles, related to the training of the teachers and put more effort to ensure the objectivity of the subject. To ensure the implementation of both judgments the text of the curriculum was written by using legal terminology, with the great focus on 'impartiality' understood as something more than objectivity, pluralism, and criticism.[167] The name of the subject was also changed to "Religions, Philosophies of Life and Ethics".

[166] *Folgero and Othres v. Norway.* 15472/02 (ECtHR, June 29, 2007), para 23. Joint Dissenting Opinion of Judges Wildhaber, Lorenzen, Bîrsan, Kovler, Steiner, Borrego Borrego, Hajiyev And Jebens, p. 52.

[167] The example could be: "Religion, Philosophies of life and Ethics is an ordinary school subject intended to bring all pupils together. The Norwegian Education Act demands that the teaching of this subject be objective,

For 5 years the system was not questioned or broadly discussed, but as noted by Seie, at least two questions related to religious education remained unanswered: "How can [education] at the same time function both as socialization and as individualization? How to achieve integration and inclusion without assimilation or segregation?".[168] During the electoral campaign in September 2013, 4 parties presented new program that included change of the name of the subject (from RLE to KRLE, thus from Religions, Philosophies of Life to Christianity, Religions, Philosophies of Life) and furthering extended focus on Christianity during religious education (direct statement in the curriculum of at least 55%).[169] Both changes were implemented in 2015 after the strong call of the Norwegian Christian Democratic Party.

Currently, still only partial exemptions are allowed, but the requirement of providing reasoning was limited:

> …Following written notification by parents, pupils shall be exempted from attending those parts of the teaching at the individual school that they, on the basis of their own religion or own philosophy of life, perceive as being the practice of another religion or adherence to another philosophy of life, or that they on the same basis find objectionable or offensive. It is not necessary to give grounds for notification of exemption pursuant to the first sentence…[170]

critical and pluralistic. This implies that the subject be taught impartially and based on facts, and that the different world religions and philosophies of life shall be presented with respect. Classroom teaching shall not include preaching, proselytising or religious practice. The principles of equivalent education shall be the basis for teaching in the subject. This involves treating all religions and philosophies of life in an academic and professional manner based on the distinctive characteristics and diversity of all religions." Translation after: Skeie, Geir. "Impartial teachers in religious education – a perspective from a Norwegian context." *British Journal of Religious Education*, 2017, 39:1, 25-39, 27.

[168] Skeie, Geir. "Impartial teachers in religious education – a perspective from a Norwegian context." *British Journal of Religious Education*, 2017, 39:1, 25-39, 31.

[169] Skeie, Geir. "Impartial teachers in religious education – a perspective from a Norwegian context." *British Journal of Religious Education*, 2017, 39:1, 25-39, 30.

[170] Section 2-3a of the Education Act 1998, avialable at https://www.regjeringen.no/contentassets/b3b9e92cce6742c39581b661a019e504/education-act-norway-with-amendments-entered-2014-2.pdf.

Thus, the general rule, (to "do not exempt from knowledge only from activities)" is in force: "exemption cannot be demanded from instruction in the academic content of the various topics of the curriculum".[171]

2.4.Denominational teaching *of* religion – Polish example

According to a survey carried out by the Central Statistical Office, atheists or agnostics are only 3.1 percent of Poles.[172] Nearly 93% of Polish believers declare that they are Catholics (32 910 865 members of Roma Catholic Church, 87% of all Poles are baptized).[173] On the Durham-Scharffs loop, the Polish system can be categorized as a cooperationist regime, similar to one in Germany.[174] The presumption is that this position entails a wide (but not the widest) religious freedom. There is no state identification with any religion but there is a level of cooperation with at least one church.

In Poland, the strong Catholic Church's position and a high level of state cooperation are ensured by the concordat (first signed in 1925, current in 1993). Other churches in theory, under Article 25 para 5 of the Constitution, can also enter agreements with the state. There is also clear-cut state obligation to ensure equality of all religious organizations but only 14 religious groups have similar church-state agreements and the government in the special register recognized overall 166 religious organizations within the Polish territory.[175]

[171] Section 2-3a of the Education Act 1998, avialable at https://www.regjeringen.no/contentassets/b3b9e92cce6742c39581b661a019e504/education-act-norway-with-amendments-entered-2014-2.pdf.
[172] *Terytorialne zróżnicowanie jakości życia w Polsce w 2015 r.*, Central Statistical Office, Warsaw, 2017. 39.
[173] Ibid. 38.
[174] Durham, W. Cole, and Brett G. Scharffs Jr. *Law and religion : national, international, and comparative perspectives*. New York: Aspen Publishers, 2010,127.
[175] Ministry of the Interior Affairs and Administration, Department of Registry of Churches and Other Religious Associations. "Kościoły i związki wyznaniowe wpisane do rejestru kościołów i innych związków wyznaniowych." 2018.

2.4.1.History of church-state relations

Religious freedom has a long history in Poland, beginning with the Warsaw Confederation from 1573, the first act in Europe that guaranteed religious tolerance.[176] The first Polish Constitution from May 3, 1791, was a step back in this regard since in article I it recognized Roman Catholic beliefs as a dominant religion, but it still guaranteed religious freedom to all other faiths. The strong position of the Catholic Church was later repeated in the March Constitution of 1921, however, here also equality of religious associations, non-discrimination on religious grounds and freedom of conscience and beliefs were protected. The church-state relations changed drastically during and after the war. 1952 Constitution in Article 82 ensured clear church-state separation, although provision was vague and overbroad.[177] Antireligious ideology was also an essential part of the communist regime (religion as an 'opium for the people'). Although, regardless state politics, the position of the Catholic Church was very strong within the society. The Church (especially members of the PAX movement within it, such as Tadeusz Mazowiecki) was also a crucial actor in the Solidarity movement. Election of Karol Wojtyła as the first Polish pope (Jan Paul II) and murder of Solidarity priests, such as Jerzy Popiełuszko, were also crucial factors that strengthen position of both the catholic faith and Solidarity.

Therefore, already in 1989, simultaneously to the transformation process and the Round Table, three separate bills about the position of the Catholic Church, priests and religious freedom were introduced. The religious law of 1989 (still in force) in article 10 stated that Poland is 'a secular state, neutral in matters of religion and beliefs', article 11 stated state-

[176] See more: Davies, Norman. *God's Playground: A History of Poland, Vol. 1: The Origins to 1795.* Columbia University Press, 2005, 125-6

[177] As noted by the Constitutional Tribunal in the famous judgement *Wliczenie do średniej ocen z obowiązkowych zajęć lekcyjnych ocen z religii lub etyki [Inclusion of grades from compulsory religion or ethics lessons into the GPA]*. U 10/07 (Constitutional Tribunal, December 2, 2009).

church separation and article 16 principle of state cooperation.[178] Four years later the concordat with the Vatican was signed. Episcopate had great influence also on the process of drafting the current, 1997, Constitution (some scholars noted that their power was almost censorial).[179] Non-inclusion of those regulations, especially a special position of the church or state cooperation could threaten the whole democratic process since the church was able to mobilize the Poles against such a project and ultimately reject it in a referendum. Thus, the current Constitution is usually labeled as a compromise[180] and has a wide range of provisions related do the religious matters that mirror the Italian solution. Unfortunately, this influenced the coherence of constitutional norms.

2.4.2.Constitutional framework

There are at least four constitutional provisions crucial during the consideration of religious education system in Poland: Article 25 (the principle of equality of religious organizations), Article 48 (the principle of protection of parental authority), Article 53 (the principle of freedom of conscience and religion), and Article 70 (right to education). Separation of the institutional (church-state relations) and material (religious freedom) aspects were criticized.[181]

The idea behind Article 25 was on the one hand to establish equality of all religious associations, as directly stated in paragraph 1, and, on the other hand, the special position of the Catholic Church, as recognized by the 1993 concordat. The provision was highly criticized for non-coherence or even internal contradictions and the high involvement of the Episcopate

[178] "Ustawa z dnia 17 maja 1989 r. o gwarancjach wolności sumienia i wyznania." no. 29 item 155. Dz.U. [Journal of Laws], 1989.
[179] Garlicki, Lech, and Marek Zubik. *Konstytucja Rzeczypospolitej Polskiej. Komentarz Tom II Wydanie 2.* Warsaw: Wydawnictwo Sejmowe, 2016, art. 25, para 5.
[180] The so-called 'abortion compromise' legislation was introduced also in 1993.
[181] See more: Garlicki, Lech, and Marek Zubik. *Konstytucja Rzeczypospolitej Polskiej. Komentarz Tom II Wydanie 2.* Warsaw: Wydawnictwo Sejmowe, 2016, art. 25, para 7.

in the drafting process. Equality provision under this article cannot be applied to non-religious organizations, such as secular movement or humanists' associations (those can be protected only by the general non-discrimination provision from Article 32 of the Constitution or provision about freedom of conscience from Article 53).

In relation to the state, a religious organization can potentially have one out of three different positions regulated by different acts. The Constitution recognized only two possibilities: the concordat with the Catholic Church implemented by the state legislation, as ensured in Article 25 para 4; and agreement with other religious organizations signed by the Council of Ministry and implemented in statutory law, as stated in Article 25 para 5 (14 agreements in force). In practice, the gross of religious organizations is recognized only by the registration by the special department in the Ministry of Administration, according to the law on guarantees of freedom of conscience and religion of 17 May 1989.[182] The Constitutional Tribunal stated that provisions of the concordat, under Art. 25 para 4, are not only 'part of legal order' of Poland, but also were 'actually incorporated into constitutional matter'.[183] This reasoning was not clearly elaborated within the judgment and was highly criticized by constitutional lawyers.[184]

Garlicki, following Pietrzak's analyze,[185] noted that the Constitution ensured so-called 'friendly separation in a secular state' model in Poland.[186] Article 25 in paragraph 3 does not state a clear separation directly, although the Constitutional Tribunal recognized that it 'fits in'

[182] The list and Electronic Registry are accessible here: https://www.gov.pl/web/mswia/rejestr-kosciolow-i-innych-zwiazkow-wyznaniowych.
[183] *Wliczenie do średniej ocen z obowiązkowych zajęć lekcyjnych ocen z religii lub etyki [Inclusion of grades from compulsory religion or ethics lessons into the GPA].* U 10/07 (Constitutional Tribunal, December 2, 2009), para 196.
[184] Garlicki, Lech, and Marek Zubik. *Konstytucja Rzeczypospolitej Polskiej. Komentarz Tom II Wydanie 2.* Warsaw: Wydawnictwo Sejmowe, 2016, art. 25, para 30.
[185] Pietrzak, Michał. *Prawo wyznaniowe.* Warsaw: LexisNexis, 1999, 263.
[186] Garlicki, Lech, and Marek Zubik. *Konstytucja Rzeczypospolitej Polskiej. Komentarz Tom II Wydanie 2.* Warsaw: Wydawnictwo Sejmowe, 2016, art. 25, para 11.

the separationist model.[187] Constitutional provision focuses on principles of 'respect for [churches] autonomy and mutual independence'.[188] But the same paragraph *expressis verbis* ensured also a principle of state cooperation with religious organizations.

Parental educational rights are protected on a constitutional level by both Article 48 para 1 ("Parents shall have the right to rear their children in accordance with their own convictions. Such upbringing shall respect the degree of maturity of a child as well as his freedom of conscience and belief and also his convictions") and Article 53 para 3 ("Parents shall have the right to ensure their children a moral and religious upbringing and teaching in accordance with their convictions"). Constitution requires, thus, balancing between parental rights and children's freedom. Article 53 in paragraph 4 permits explicitly teaching religion in public and private schools by religious organizations and churches ('natural continuation' of parental rights). Automatic introduction of religious lessons is not mandatory since the Constitution stated only a possibility ('may be taught in schools'). Garlicki noted that this provision *per analogia* established this right for non-religious worldviews.[189] Religion can be *taught* in school, and it is the only obligation of public school management. Thus, Constitution does not allow to organize student participation in other situations of 'manifestation' (paragraph 5) of religion, and "forcing [them] to participate in religious practices" (paragraph 6). In practice, the principle of cooperation may result in a situation when public schools are taking measures to enable students to practice religion (for example, school holidays during the retreat period).

[187] *Wliczenie do średniej ocen z obowiązkowych zajęć lekcyjnych ocen z religii lub etyki [Inclusion of grades from compulsory religion or ethics lessons into the GPA]*. U 10/07 (Constitutional Tribunal, December 2, 2009), para 188.

[188] Article 25 para 3 of the Constitution of Poland: The relationship between the State and churches and other religious organizations shall be based on the principle of respect for their autonomy and the mutual independence of each in its own sphere, as well as on the principle of cooperation for the individual and the common good.

[189] Garlicki, Lech, and Marek Zubik. *Konstytucja Rzeczypospolitej Polskiej. Komentarz Tom II Wydanie 2.* Warsaw: Wydawnictwo Sejmowe, 2016, art. 53, para 11.

2.4.3.Polish denominational model

The denominational teaching of religion by religious organizations within the public school system has a long legislative history in Poland. Ethics lessons, as an alternative for non-believers, are relatively new additional aspects of religious education system. Both ethic and religion classes are voluntary. Pupils can attend religion or ethic, both subjects or any. In theory, organization of them is not automatic but requires providing information about such needs from parents at the beginning of school year.

Historically, under Article 120 of March Constitution from 1921, religious education conducted by religious organizations was compulsory to all pupils in both private and public schools:

> …Instruction in religion is compulsory for all pupils in every educational institution, the curriculum of which includes instruction of youth under eighteen years of age, if the institution is maintained wholly or in part by the state, or by self-government bodies. The direction and supervision of religious instruction in schools belongs to the respective religious communities, reserving to the state educational authorities the right of supreme supervision…[190]

The concordat from 1925 required 2 lessons per week. PRL (communist) Constitution form 1952 withdraw this provision and, according to the 1961 Law on Education, religion was removed from schools to secure their secular character. Religious education was conducted by and within religious institutions or churches, usually as a 'Sunday lessons', but even then, lesson plans were still under state supervision.

Under the law of 17 May 1989 on guarantees of freedom of conscience and religion (still in force), according to Art. 20 para. 1, churches and other religious organizations may

[190] "Constitution of the Republic of Poland." no. 44 item 267. Dz.U. [Journal of Laws], March 17, 1921.

teach religion and educate children and youth religiously, in accordance with the choice made by their parents or legal guardians.[191] Just a few months after the Round Table, when the 1952 Constitution and 1961 law were still in force, Tadeusz Mazowiecki's government took a decision to re-introduce religious education in public schools. The Ministry of Education issued two instructions in order to prepare schools to start teaching it in 1990/1991 school year, firstly regarding only Catholic religion[192] and 20 days later regarding minorities.[193] The decision was perceived as very symbolic since, at the same time, mandatory Russian language classes were removed. The decision was arbitrary and was taken without involvement of legislative or society, thus in pure violation of the rule of law. Not all parents and pupils, also religious, and not all priests, wanted this change and the media debate was vivid. Thus, the first Ombudsman, Ewa Łętowska, decided to challenge this decision and instruction before the Constitutional Tribunal. In 1991 the CT found all acts and procedures constitutional.[194]

Before the CT judgment, a new law on the education system of September 7, 1991, was introduced. Since then it has been amended 110 times and the CT reviewed it in 8 separate judgments. It states that the school organizes religious education at the request of parents or students themselves (Article 12). Moreover, the school should allow students to maintain a sense of 'national, ethnic, linguistic and religious identity' (Article 13).[195] The Law was implemented through the Regulation (ordinance) of the Minister of National Education of 14 April 1992 on the conditions and manner of organizing religious education in public

[191] "Ustawa z dnia 17 maja 1989 r. o gwarancjach wolności sumienia i wyznania." no. 29 item 155. Dz.U. [Journal of Laws], 1989
[192] The act was not published.
[193] "Instruction of the Minister of National Education on the return of teaching religion to school in the school year 1990/91, defining the principles of cooperation with Churches and Religious Associations outside the Roman Catholic Church." August 24, 1990.
[194] *W sprawie powrotu nauczania religii do szkoły [On the matter of the return of teaching religion to school]*. K 11/90 (Constitutional Tribunal, January 30, 1991).
[195] "Ustawa o systemie oświaty [Law on education system]." no. 95 item 425. Dz.U. [Journal of Laws], 7 September 1991.

kindergartens and schools (still in force). This ordinance overturned both ministerial instructions. The ordinance repeated regulation from Article 12 of the 1993 concordat.

The ordinance regulated: general rule of voluntary participation and obligation to organize religion/ethic classes on parents or adult pupils request (para 1 and 3); the required minimum number of pupils (7 to organize class in one school, 3 to organize interschool class; para 2); religious organizations freedom to decide about curriculum, textbooks and selection of religion teachers that school hires (para 4); prohibition for religious teachers to be a class teacher (para 7); number of classes (two hours per week for religion, discretion of school principal to decide about number of ethic class; para 8); requirement to put religion/ethics grade on the school certificate without recognizing which class was taken by pupil, with reservation that the grade cannot be a reason to refuse promotion (para 9); permission to place cross in the classroom and to pray before and after classes (para 12).[196]

Overall, the legal grounds of religious education in Poland are: 1997 Constitution and ratified international treaties, the 1993 Concordat, the 1991 law on the education system; separate agreements and laws regulating legal status of religious organizations; regulation of the Ministry of National Education of April 14, 1992 on the conditions and manner organizing religious education in public kindergartens and schools.

2.4.4.Ethics lessons v. religious lessons

The possibility to organize ethics lessons as an alternative for religious education was introduced already in the 1990 instruction of the Ministry of Education:

[196] "Ordinance of the Minister of National Education of 14 April 1992 on the conditions and manner of organizing religious education in public kindergartens and schools." April 14, 1992.

> "2. For students who do not use religious lessons at all, the school should, if possible, organize lessons to learn about universal ethical principles, as well as the norms of life of people and groups of people with different religions and world views, and different nationalities".[197]

The crucial is the reservation clause 'if possible'. Even after the ministerial ordinance of 1992, that more precisely set ethics lessons as an alternative to religion classes, only in a marginal number of school ethics classes were organized (in 2007, as recognized by the Constitutional Tribunal, in less than 1% of schools).[198] Zieliński noted that this situation was a direct result of state policy, this was confirmed by the European Court of Human Rights in case Grzelak v. Poland.[199]

Article 12 of the Law on Education system that regulates religious education, as well as Article 12 of the concordat, has never covered ethics lessons. This matter was regulated in the lower act, the ministerial ordinance 1992, without required statutory delegation. Thus, the duality of the system and lack of symmetry are disturbing. When religious classes enjoy both constitutional and statutory protection, ethics are regulated simply and only by the executive act. Some scholars, such as Garlicki and Zieliński,[200] noted that some level of protection of rights of non-believers can be ensured by the proper interpretation of Article 53 of Constitution. Paragraph 4 *in fine* requires that introduction of religious education must be in line with general freedom of conscience and religion of other people. Thus, the principle of non-discrimination requires proper state actions, one of them could be establishment of alternative classes, such as for example, ethics. This although depends, in practice, on political will of state or, in case of

[197] Cited after: Zieliński, Tadeusz J. "Nauka etyki w szkołach publicznych w ujęciu prawnym." *Studia z Teorii Wychowania*, 2013: 23-48, 23.
[198] *Wliczenie do średniej ocen z obowiązkowych zajęć lekcyjnych ocen z religii lub etyki [Inclusion of grades from compulsory religion or ethics lessons into the GPA]*. U 10/07 (Constitutional Tribunal, December 2, 2009), para 40.
[199] *Grzelak v. Poland.* Application no 7710/02 (European Court of Human Rights, 15 June 2010).
[200] See: Garlicki, Lech, and Marek Zubik. *Konstytucja Rzeczypospolitej Polskiej. Komentarz Tom II Wydanie 2.* Warsaw: Wydawnictwo Sejmowe, 2016, art. 53, para 20; Zieliński, Tadeusz J. "Nauka etyki w szkołach publicznych w ujęciu prawnym." *Studia z Teorii Wychowania*, 2013: 23-48, 28.

violation, on involvement of judiciary (the CT or the ECtHR). Moreover, parental educational rights, as recognized in Art. 53 para 3 can be protected also by different school subject that is recognized as useful in moral education. There is no clear positive obligation of the state to organize ethics lessons, and state enjoys wide discretion in deciding about the manner to ensure freedom of religion of all in non-discriminatory way. Nonetheless, ethics lessons can be an adequate way to fulfill this state obligation.

In 1993, the ordinance on the conditions and manner of organizing religious education in public kindergartens and schools was challenged by the Ombudsman before Constitutional Tribunal. In its judgment, the CT recognized ethics lessons as an 'accepted alternative' to religious classes and that attendance in them is voluntary.[201] To avoid discrimination based on worldview, a school can require only positive declarations and the school certificate should have only one position 'religion/ethics' without recognizing which class pupils have taken. In case of attendance in both religion and ethics the assessment is joint. Since both religion and ethics lessons *de facto* serve the same goal and protect the same constitutional right, lack of proper statutory regulation is striking.

Article 12 of the Law on Education system and 1992 ordinance ensure also religious education in kindergartens. There is no analogical regulation, on any level, regarding ethics. Children of non-religious parents can, therefore, face discrimination at the very early stage of education. In practice, religion classes are very common in kindergartens and ethics lessons (or any other alternatives) are absent. Such a difference in the state approach is contrary to the official recognition of ethics as 'alternative' to religion class.

[201] Orzeczenie w sprawie gwarancji wolności sumienia i wyznania [Judgement on the guarantee of freedom of conscience and religion]. U 12/92 (Constitutional Tribunal, April 20, 1993).

The requirement set in 1992 ordinance to find a minimum of 3 pupils in order to organize ethics/religion lessons is also controversial. In practice such obligation limits both parental educational rights and freedom of religion of pupils, thus, according to articles 53 para 5 and 31 para 3 of the Constitution, it should be recognized on the statutory level. This was highly criticized by scholars[202] and has been changed in the result of the ECHR judgment in Grzelak case in 2014 by the separate ordinance of the Ministry of Education. Another difference in the treatment of religion and ethics is lack of clear regulation of the number of ethics lessons (discretion of school principle). To juxtapose, 1992 ordinance in 8.2 requires 2 hours of religion class per week. On this ground Zieliński recognized discrimination of non-believing pupils/parents.

Requirements for and position of ethics teachers were not regulated in the law. 1992 ordinance, however, set the specific position of religious teachers. Firstly, under para 5, the decision about who is going to be hired by the school is based on church's personal, written referral of the teacher to specific school (regulation roots in Art. 12 paras 3 of the concordat). Required that teacher qualification should be set according to agreement between religious organization and Ministry of Education (para 6). Mezglewski noted that in practice this entails lower qualifications for religious teachers than any other teachers of public schools, although currently, in practice, it is required to complete theological studies and obtain pedagogical training.[203]

Since ethics lessons are organized fully by the state (curriculum, teachers) the principle of state neutrality and impartiality (Art. 25 para 2 of the Constitution) applies. Thus, the beliefs

[202]Zieliński, Tadeusz J. "Nauka etyki w szkołach publicznych w ujęciu prawnym." *Studia z Teorii Wychowania*, 2013: 23-48, p. 34.; Borecki, Paweł. "Dylematy konstytucyjności prawnych zasad nauczania religii i etyki w szkole." *Państwo i Prawo*, 2008: 63-72, 65.

[203] Mezglewski, Artur. "Zasada równouprawnienia religii jako przedmiotu nauczania w szkołach publicznych oraz jej prawne i faktyczne konsekwencje." In *Prawo i Religia vol. 2*, by Tadeusz J. Zieliński, 67-74. 2011.

of the ethics teacher cannot be a criterion to hire a person in this position. Teacher although cannot 'upbring' pupils in specific worldview and must stay neutral. Ethics lessons cannot be also antireligious and are not addressed only to non-religious pupils. The law does not prohibit combining positions of ethics and religion teacher, but in practice, such solution could be controversial (question whether religious teacher that during one class has an obligation to upbring pupils can stay neutral/be seen as neutral by pupils during another class).

Curriculum and lessons' plans for ethics lessons are regulated, analogically to other public school subjects, by the state according to Article 22 para 2 of Law on education system. Under Article 12 para 2 of the Concordat, lesson plans for religious classes should be established by the church officials and the state shall be merely notified about their decisions. Other religious organizations enjoy the same privilege under para 3 of the 1992 ordinance.

Overall, the Polish legal system treats very differently denominational classes on religion provided by religious organizations and ethics lessons. This controversy, especially when the real accessibility was not ensured, was highly debated in media. The Constitutional Tribunal judgments tend to favor religious classes (did not recognize discrimination of non-believers) and give great discretion to both state and religious organizations regarding the establishment of the religious education system. This was challenged by the European Court of Human Rights in 2010. *Grzelak* case significantly influenced and strengthened the position of ethics within the system, but it did not resolve all problems.

2.4.5.The judgment of the European Court of Human Rights and the following changes

Grzelak case comes after the controversial judgment of the Constitutional Tribunal from 2009 that upheld the 2007 ministry ordinance to include grade from religion/ethics class

into the pupils' GPA.[204] The applicant claimed that in case of absence of the grade on the school certificate pupils could be discriminated and *de facto* negative aspects of his/her religious right would be violated (it would revile his/her beliefs). The CT disagreed and was criticized for very formalistic analyze that did not consider reality, i. e. lack of accessibility to ethics lessons.

Applicants in Grzelak case, being atheists, for many years of their son's education had no access to any alternative to religious education. Their son was not only discriminated but also physically attacked because of their conscience. His situation did not change after notifying the school and state authorities. The schools required providing official statements of non-attendance in religious classes, refused organizing classes only for one pupil, did not organize alternative activities during the time of religious classes. Applicants stated that their rights under article 9, 14 and Article 2 Protocol 1 of the Convention were violated. The government highlighted that the Polish system differs from the Norwegian and Folgerø case since religious education is on voluntary not compulsory base. Thus, providing access to ethics lessons when number of required pupils has not been met was not a state obligation.

The Court found that the absence of the grade on the school certificate under the position 'religion/ethics' could, especially in Polish reality, entail reviling of pupil non-religious beliefs and thus violate negative religious freedom. In para 87 the Court held:

> …It necessarily follows that there will be an interference with the negative aspect of this provision when the State brings about a situation in which individuals are obliged – directly or indirectly – to reveal that they are non-believers. This is all the more important when such obligation occurs in the context of the provision of an important public service such as education…[205]

[204] *Wliczenie do średniej ocen z obowiązkowych zajęć lekcyjnych ocen z religii lub etyki [Inclusion of grades from compulsory religion or ethics lessons into the GPA].* U 10/07 (Constitutional Tribunal, December 2, 2009).
[205] *Grzelak v. Poland.* Application no 7710/02 (European Court of Human Rights, 15 June 2010), para 80.

The Court state that provision of ordinance about including ethic/religion grade on the school certificate is neutral and does not violate Articles 14 and 9 "as long as the mark constitutes neutral information on the fact that a pupil followed one of the optional courses offered at a school".[206] Here, because of the lack of ethics lessons in the majority of schools the absence of the grade is not, in fact, neutral, since a reasonable person can assume that pupil is non-believer.

The Court distinguished the Polish approach from Norwegian and stated that religious classes are parallel and that 'teaching of ethics is offered to interested pupils'; both ethics and religion classes are optional.[207] Nonetheless the Court, after recognizing the wide margin of appreciation of the state, held that the system, if applied correctly did not violate the Art. 2 Protocol 1 of the Convention.

The judgment of the Court was not implemented for years, although the number of schools that provide ethics lessons increased to 4,49% in 2013.[208] In 2012 the government proposed that ethics lessons can be provided in e-learning system, but this solution was never implemented. According to interpretation provided by the Polish Helsinki Foundation of Human Rights, the judgment could be implemented simply by changing the 1992 ordinance.

Under new ordinance from 2012 schools are required to provide ethics lessons even if only one pupil is interested. The government changed challenged regulations, but it did not affect reality for non-believing pupils and their parents. Firstly, many parents are not aware of

[206] Ibid. para 92.
[207] *Grzelak v. Poland.* Application no 7710/02 (European Court of Human Rights, 15 June 2010), para 104.
[208] "Helsińska Fundacja Praw Człowieka » W Trzy Lata Od Wyroku Grzelak Przeciwko Polsce Wciąż Trudno O Lekcje Etyki W Szkołach". *Hfhr.Pl*, 2013. https://www.hfhr.pl/w-trzy-lata-od-wyroku-grzelak-przeciwko-polsce-wciaz-trudno-o-lekcje-etyki-w-szkolach/.

this possibility. Secondly, classes are very often organized in the first or last hour (at 7 am/7 pm) or in different schools (i.e. on the other part of the city).

Chapter 3 – Comparative analysis

On the Durham-Scharffs loop of church-state relations, the level of religious freedom (from absence to optimal) is a crucial factor. In this theory, the absence of the state, identification entails an increase of equality and greater freedom. Applying this model in states, such as Poland, Norway, and France, at least to some extent considered equalities, religious freedom, and parental rights during the creation or re-organizations of religious education systems. But their priorities varied accordingly to their church-state relations. Nonetheless all states must have followed their international and constitutional obligations. In order to asses which model protects individual's rights better than others (if any), four factors will be considered: realization of state positive obligations towards all actors (conventional rights), respect of parental educational rights, respect of children (pupils) religious rights and level of religious autonomy.

3.1.State positive obligations

Since international treaties and domestic constitutions provide a direct right to education, firstly there is a state obligation to create a public education system, open for all. The level of education that is provided for free can vary but cannot be less than primary. Other, higher levels shall be introduced progressively.

The general state obligations in relation to the right to education under the International Covenant on Economic, Social and Cultural Rights are to protect, respect and fulfill (rights). More precisely educational institutions should be accessible (non-discrimination, economically and physically) and available. The form of education should be acceptable and adaptable to the

needs.[209] State obligations are different for different levels of education: obligation to create free and compulsory primary education, obligation to provide accessible and available secondary education (progressive introduction of free education); obligation of equal access to higher education.

Paragraph 3 of article 13 of ICESCR, alike article 18 of ICCPR, states that a state should respect parental freedom of deciding about the religious/moral education of their children (in line with their convictions). In the general comment, Committee recognized that Covenant "permits public school instruction in subjects such as the general history of religions and ethics if it is given in an unbiased and objective way, respectful of the freedoms of opinion, conscience, and expression".[210] A system of public religious education in the form of instruction without the possibility of non-discriminatory exemptions or alternatives for other parents would be inconsistent with article 13.

In the European context state obligations under article 2 of Protocol 1 of ECHR (right to education) are limited. There was no political will and agreement to clearly state positive obligations, thus the right is formulated in a negative way (negative wording). Therefore, the first state obligation is to not interfere with the enjoyment of this right. Secondly, the state cannot deny access to public institutions that it has created. The mere existence od this right calls on the state to create the system of public education and some proportionate limitations are possible.

Religious teaching must be also recognized as part of religious freedom in general. Garlicki noted that a primary issue is the possibility to create private (religious) schools, the

[209] Committee of Social Economic and Cultural Rights. General Comment No. 13, E/C.12/1999/10. Economic and Social Council, 1999, para 6.
[210]Committee of Social Economic and Cultural Rights. General Comment No. 13, E/C.12/1999/10. Economic and Social Council, 1999.

level of state funding and the presence of religious instructions within the public school curriculum.[211] The second issue that should be analyzed is the scope of religious education within school. The principle of non-discrimination is especially important in realization of both right to education and freedom of religion. Thus right to education is linked with art. 8, 9, 10 and 14.[212]

All analyzed states created a free public education system that is accessible. The religious education to some extent exists in all of them, but it can be argued that the French system – providing general information about religion during other classes – in fact, does not provide religious education at all. The European Court recognized that state enjoys a certain margin of appreciation in deciding about the specific model of religious education as long as it ensures protection of conventional rights.

I would like to consider how the state decision on the model of religious education affects the right to education and its realization. All systems have flaws. In France, the model is built on the principle of *laïcité*. According to some parents' argumentation *laïcité* is actually an ideology, since it – in their view – enforces secular ideology. The conclusion of such perspective would be that the French public school system is no longer neutral. This would mean that the very construction of the model is flawed because it can significantly affect the right of parents to raise a child according to their beliefs. Moreover, possibility of opt-outs would be limited since it would require parents to have enough funding to cover private school tuition and fees. The state perspective is although stronger: *laïcité* is a constitutional, legal principle. There is no state positive obligation to provide religious education *per se*; state can

[211] Garlicki, Lech. "Perspectives on Freedom of Conscience and Religion in the Jurisprudence of Constitutional Courts." Brigham Young Law University Review, 2001: 467-510, 494-495.
[212] Council of Europe/European Court of Human Rights. Guide to Article 2 of Protocol No. 1 - Right to Education. Strasbourg: Council of Europe, 2015, para 11.

ensure realization of parental rights and educational rights in different ways since the margin of appreciation doctrine applies here. The only state obligation is to provide sufficient alternatives in such model. In France the only alternative provided is a system of private religious schools – it should be analyzed in practice whether it is sufficient and satisfactory.

With the introduction of the new subject 'Education Morale et Civique', a new question arose: whether the state has competence and legitimacy to teach about morals. In my opinion, the state should be particularly careful in teaching about morals in non-objective way, although it should not be controversial to teach about universally recognized ethical values or constitutional principles (such as *laïcité*). Nonetheless, it should be possible to opt-out from at least some part of these classes in case when curriculum is controversial for parents, but only in the aspect of imposing other worldwide or religion. The state should also ensure that constitutional principle of *laïcité* is not enforced on children as a religious ideology. But it can be essential for the state to teach about constitutional principles, such as *laïcité*, in order to create citizens; here we have a clear state interest, The instructions provided by the Ministry of Education are sufficiently clear and precise in this regard. Another question related to this model is whether information about religion provided during other classes is in fact objective. The teachers of other subjects usually have no proper training about how to teach about religion in non-bias way. Thus, on the one hand there is parent's fear that state will impose secularism on children in a formative age and on the other hand that teachers will impose their views (for example specific religion perspective on the topic) during class. Both problems are not only hypothetical and should be analyzed and answered by the state. But here the state position is limited by the constitution – state and religion in secular system are, and should be, fully separated; the French model is just a clear implementation of this rule.

In theory, the Norwegian model is the best one from perspective to access information about religion. The curriculum is objective (knowledge-based approach, no teaching by preaching rule) and the subject is mandatory for all, thus it should create a great environment for discussion and integration for minorities. In reality although, as it presented in the previous chapter, the subject puts greater focus on teaching about Christianity and the opt-out system is only partial. In such a situation children could feel that some religions are more important and can feel discriminated, or it can lead to 'conflict of loyalty' with parents. European Court noted that the state is allowed to incorporate knowledge and information about religions and worldviews in the curriculum.[213] Nonetheless, in my opinion, in situation when the objectivity of the teaching is compromised, the compulsory nature of the subject can be questionable and there should be a possibility for a full exemption from this class.

The Polish model, if implemented correctly, would be the best for ensuring parental educational rights. Firstly, in theory, every religious organization is on the same starting position – parents must ask for specific religious classes. The school will cover the salary of the teacher, organize schedule and classroom, refrain from interfering with the curriculum and provide an alternative for non-believers. It is also the cheapest option for parents. In reality although it is very difficult to ensure equal treatment since the Catholic Church's position is specifically ensured by the Constitution and concordat. Although from parental perspective it is very convenient to have religious instructions organized within public school (normal teaching hours), in my opinion it is problematic that pupils will not be taught about other religions and worldviews. There is no place in Polish public schools where discussions about religions can take place. I believe that it can lead to the lower level of integration, to greater fear of other cultures (especially minorities and atheists in Poland). The system can potentially

[213] Campbell and Cosans v. United Kingdom . Joined Appl. No. 7511/76, 7743/76 (ECtHR, February 25, 1982), para 37.

lead also to a greater separation within school – because children participate in different classes their religion or worldwide is known for everyone (that is especially true in small towns). That situation can, in the worst-case scenario, lead to discrimination or ostracism.

3.2.Parental educational rights

The Convention requires the state to 'respect' parents religious and philosophical convictions. The Court recognized that the word 'respect' means more than 'acknowledge' or 'took into account' and entails some state positive obligations.[214] The state has the competence to create a curriculum and to decide that it will include knowledge about religion and other philosophical views. Since the state positive obligations towards the right to education were explained in the previous subchapter, here I would like to focus on the perspective of holders of rights.

Firstly, it should be noted that parents do not have a right to require separate religious classes within the public school system or to force the state to apply a specific model. Parental educational rights have two aspects: one to have access to some religious education (accessibility) and second to have a possibility of opt-outs or exemptions from religious classes when they exist in the system. The accessibility to religious upbringing can be ensured outside the public school.

Here the French model is interesting: since no religious teachings are provided within the curriculum, the system of opt-outs is not necessary. The only way for parents to ensure religious upbringing is outside the public school system, either by deciding to choose a private (religious) school for their children or by religious instructions provided by church after

[214] Campbell and Cosans v. United Kingdom . Joined Appl. No. 7511/76, 7743/76 (ECtHR, February 25, 1982), para 37.

school.[215] Some schools still close on Wednesday afternoons in order to secure time for religious education. Although the system looks very neutral (no opt-outs, teaching only about religious facts, religion as part of the curriculum of other subjects, new objective subject), in fact, it favorites atheists and agnostics. The secular worldwide is presented in curriculum through teaching about *laïcité*. Religious parents must ensure religious upbringing of their child by additional classes, meeting within church or by paying for private school.

Some parents indicate that in practice this means that they have to choose between extra-curricular activities for their children (e.g. learning a foreign language, sport) and religious education and thus the system favors non-believers. Although it must be acknowledged that this is a legitimate concern and a real practical problem, it should also be pointed out that non-believers must also find time to convey their values to children. In my opinion, the decision about the need for religious education must be made solely by parents and by taking into account the best interests of the child. To juxtapose, in a Polish voluntary system, religious parents can also decide that their child should attend different extra-curriculum activities instead of the religion course.

In the context of French multicultural society, this system can lead to greater separation of society. Religious parents that can afford private religious education for their children will probably avoid the public school system. But this option will be less accessible for migrants and minorities, because of their economic situation. The general principle of *laïcité* in public schools that are perceived by minorities as hostile towards religions must be carefully applied. Proper training for teachers and opt-outs system should be ensured, the curriculum of new subjects should be drafted carefully and the school environment should encourage discussion and tolerance. The current system creates only two possibilities for religious families: either

[215] As mentioned before, historically in France there was additional day of from school to ensure time for religious education outside public school.

they decide to stay in a secular public school or they pay for private religious (if such a school exists for their religion). The second option is obviously not accessible to poorer families.

The Norwegian model was revised after *Folgerø* judgment in order to ensure greater protection of parental educational rights. Here especially important is the compulsory nature of the subject. In theory, only teachings of religious information are mandatory, and pupils can opt-out of all religious activities. It is still controversial why some (although limited) religious activities still take place during neutral and objective subject. For example, in relation to part of the curriculum about Christianity, there still is requirement for pupils to be familiar with Christian hymnal traditions and some chosen songs, to know Ten Commandments and read the Bible. The curriculum does not specify whether that information needs to be known by heart.

The possibility of only partial exemptions can be, in some specific cases, problematic. Opt-outs are possible only in relation to religious activities (the practice of another religion), not the knowledge about it. This division is not as clear as the French solution of 'religious facts'. The high burden has been put on parents that need to follow the content of each lesson in order to ensure exemptions. It will be especially problematic for minorities because the greater part of the classes will be about Christianity. Especially after the last changes, Christianity has, again, a special position within the system, therefore the objective nature of the subject can be compromised.

In my opinion, the possibility of a full opt-out from religious class (even if its nature should be neutral) should be provided. Some steps still should be taken in order to implement the standard from the European Court case-law. Since curriculum still contains religious activities the way in which this subject is taught might entail for children a conflict of allegiance between the school and their own values. In order to secure their right parents need to revile every time their religion to the school authority, although situation is better since they do not

need to provide grounds form their decision. Still although, the negative aspect of religious freedom is violated.

In theory, the Polish model provides great protection for parental educational rights. Religion and ethics are not compulsory for the student, participation in them is voluntary, thus the opt-out system is not needed. On the request of parents or adult students, the school administration has a legal obligation to ensure religious classes for their children. This should be made in a non-discriminatory way, meaning that the school obligation is the same regardless of the religious denomination they profess and whether it is a majority or minority religion. From 1 September 2014, the principle of expressing a wish in the form of a written declaration applies. The same rules apply to the non-believers who can request the school to organize ethics lessons. In practice the system favors bigger, well organized religious organizations that have organizational structures that cover the entire territory of the country. Nonetheless the obligation to organize requested lessons lies entirely in school, thus potential problems with finding teachers should not violate parental rights.

The school organizes classes in religion (specific religion, denominational teaching) and ethics in class (department) or inter-class groups (inter-department) when it receives at least 7 applications for a given subject. The school is obliged to organize religion or ethics lessons for a group of not less than 7 students of a given class or department. If less than 7 students present such requests in one school, the principal sends the statements to the leading authority (gmina or powiat), which organizes ethics classes in inter-school groups. In such a case, religion classes are organized in consultation with the church or religious association and can take place in non-school catechetical centers.

In order to facilitate the organization of teaching ethics at school, it is recommended that in the case of a small number of students choosing ethics, organizational solutions enabling

conducting classes in different age groups connecting students from the entire educational stage should be used. In this case, the content of ethics teaching should be divided into modules that can be implemented in any order. In practice, after *Grzelak* judgment, ethics or religion classes are organized even if only one student requests it. In this case, it is advisable that ethics classes take place at the school in which the student fulfills the school obligation or study obligation.

The accessibility of ethics lessons still is problematic. It is still common that classes of the Catholic religion are organized in the middle of the day and pupils who do not attend them have an hour gap in their schedule. It is also quite frequent that the school organizes ethics/minorities religion classes very early or very late (7 am, 7 pm). The possibility of organizing those classes is also not always express at the beginning of the school year. The inter-school classes that can be organized if less than three requests were made can be problematic in smaller cities or in rural areas and can require that parents or guardians will transport a child to other schools, in extreme situations in other cities. The school is obliged to provide ethics lessons for one student not in the inter-school system, only in municipalities (gmina) in which it is impossible to create an inter-school group.

The denominational model of teaching religion entails that during religious classes the real upbringing in the specific religion takes place. Decisions about the lesson plans and teachers' requirements are the sole competence of religious organizations. Therefore, it is extremally important for parents that only members of this religion participate in such a class. Ethics lessons are open for everyone and should not be anti-religious since the principle of state neutrality applies.

Overall, if the Polish system would treat equally ethics, minority religions, and majority religion classes it could be the best option to secure parental educational rights. But in reality being a member of a minority group or being an atheist still can entail discrimination.

Especially in smaller cities it is still unusual to use the right to request ethic classes and by doing so parents reveal their worldviews (negative aspect of religious freedom). Nonetheless, this model could be a great option for open and divided society. It must be noted although that it is expensive (all teachers' salaries are financed from public funds) and complicated from organizational perspective.

3.3.Religious autonomy and right of religious organizations to have a separate educational system

As stated before, in Durham's broad definition of church autonomy ("the right of religious communities to decide upon and administer their own religious affairs without government interference; a right of self-determination for religious communities"[216]) religious teachings are an important part of core ministry. But the decision on how much autonomy should religious organizations have in a neutral public education system is the sole competence of the state.

If we agree that state in principle shall be neutral the democratic state strategic goal in the education sphere is to shape the citizens that respect the rule of law and are open and capable of living together. Education can, therefore, serve as a safeguard for the preservation of the system in the future. Democratic state goal overlaps with neutrality. As mentioned before, the church's goal will be different – to shape the faithful believers through religious education. Since the goals are not compatible the religious organizations can be afraid that the public system of education, even religious ones, will not be in line with their idea of upbringing. Therefore they could demand the right to providing education through their own institutions or ask to be included in the decision-making process (shaping curriculum) or teaching themselves.

[216] Durham, W. C., & Jr., B. G. *Law and religion : national, international, and comparative perspectives.* New York: Aspen Publishers, 2010, 370.

The possibility to create independent educational institutions, perceived as a horizontal aspect of religious autonomy, seems less controversial. The issue of securing state interest although remains. Therefore there are two common (and usually parallel) models: religion lessons in public schools run by representatives of religious associations paid or not by the state in different European models (teaching of religion) or the whole separate system run by the religious organization. Here the conflict of interests that shall be solved is related to the questions of funding, shaping the curriculum and controlling teachers. The further question that should be considered in this regard is: whether the teaching by religious organizations' representatives in public school and providing funds to run religious educational institutions violate state neutrality and how much autonomy should religious organizations have when teaching within the public school.

A very high level of religious autonomy is ensured within the Polish system. Denominational religious education entails great discretion for religious organizations. In Poland, since the teaching of religion is present in the state education system, it is fully financed from public funds. In practice, most of the teachers of Catholic religion classes are priests or catechists. Similarly, for minority religions, teachers are members of religious organizations as well. In theory, the fact that religious teachers are employees of the public school could be problematic (the question of real independence, potential conflict of interests). Therefore the great level of latitude has been given to religious organizations in deciding about hiring selected person for a teacher – public servants.

The school employs a religion teacher solely on the basis of a written referral to the given school, issued by in the case of the Catholic Church - the competent diocesan bishop; in the case of other churches and other religious associations - the competent superior authorities

of these churches and religious associations.[217] Teachers of religion are protected in the same way as other teachers through the so-called "Teacher's Card". However, the period of employment of a religion teacher is determined by bishops, and it is stated within the written referral to teach at the school. At any time, the proper church authority may withdraw this referral and the teacher loses the right to teach in the given institution. In the case of religion teachers employed on the basis of an appointment and an indefinite employment contract, withdrawal of the referral is equivalent to the termination of the employment relationship at the end of the month in which the referral to religion was withdrawn (Article 23 (1) (6) and (2), (2) 6 Teacher Cards). In the case of a fixed-term employment contract – if the referral is withdrawn, the contract must be terminated by notice or agreement of the parties. The school principals cannot decide by themselves about the termination of the contract with the religious teacher.

Neither the religion curriculum nor the teachers are subject to secular authorities' control. It is the Commission of Catholic Education at the Polish Episcopate (or other similar authority) that prepares the program and oversees its implementation. The Ministry of National Education is only informed about it. Reducing the number of lessons is possible only with the written consent of the diocesan bishop and in practice results only from staff shortages among religious teachers, and they are getting smaller every year. The lack of public control over matters that are presented within the public school system must be worrying. Here the religious autonomy and interest of religious organizations can be very different from the child's interests. More and more frequent media reports show that the information presented during the religion lessons is controversial, not true or illegal, including anti-Semitic or homophobic content,

[217] "Ordinance of the Minister of National Education of 14 April 1992 on the conditions and manner of organizing religious education in public kindergartens and schools." April 14, 1992.

drastic and false videos about abortion, false sex education, or films presenting drastic exorcisms performed on mentally ill persons.

The level of religious autonomy in shaping religious education within Norwegian public schools is low since this model is based on the teaching about religion. The curriculum of religious education in Norway is shaped only by the state authorities: "the Norwegian Directorate for Education and Training is responsible for the development of kindergarten and primary and secondary education. The Directorate is the executive agency for the Ministry of Education and Research".[218] Religious organizations were able to present their opinions on drafted proposition but their influence was limited. The organization of lessons is the competence of school authorities.

Teachers are also state employees and therefore they should be fully neutral, the religious organizations cannot affect their work. Although, according to studies from 2016,[219] teachers still have concerns about how they can teach religion (what methods can be used in the classroom). It is true that the division between religious knowledge and religious activities is not clear, and some parents and pupils can perceive, for example, acts of reading the Bible as a religious activity. The issue is especially important in primary schools. It is not clarified also whether teachers can use psalms, prayers, and other religious expressions, although according to studies, several teachers stated that they avoid these and teach based mostly on textbooks. Textbooks, however, were also questioned in recent studies that "found that

[218] The Norwegian Directorate for Education and Training (2017, August 16). URL: www.udir.no/in-english/ accessed 5 October 2019.
[219] Toft Audun. 'Religious Education In Norway: Distance And Unease' (Religion: Going Public, 2016) <http://religiongoingpublic.com/archive/2016/religious-education-in-norway-distance-and-unease> accessed 5 October 2019.

Buddhism and Christianity receive significantly more attention for their ideas than Hinduism, Islam, and Judaism".[220]

This asymmetry can have an impact on the pupils' perception of some religions. Critics emphasize that teaching based solely on books affects the detachment of the subject from reality, making it less attractive to students. In their view, religion cannot be taught without relying on the example of believers and practitioners. In my opinion, however, this solution is much safer from the perspective of the rights of religious minorities and atheists. It is crucial although to ensure similar recognition of religions within accepted textbooks, and religious organizations should be able to take part in the process of evaluation.

The private schools in Norway can be established as a 'religious alternative' for public school. Religious autonomy is greater in private, religious schools, but it is still limited. There is state obligation to ensure that pupils in religious schools are protected from teaching that contains discriminatory content. The teaching at private schools is regulated by Norway's Private Education Act. The religious school must provide education in accordance with a curriculum that is approved by the Ministry's Department of Education and Training. Those schools are under the supervision of the Ministry. In case of breach of those regulations, the school can lose its license. In effect, it will be denied the right to continue providing education, or be ordered to repay the states' financial support.

Similarly, in France, religious organizations have limited autonomy in affecting the religious education system. They cannot influence teaching about religious facts or morals (in the newly introduced subject) – either curriculum or selection of teachers. Since religious organizations cannot influence the curriculum, which is the sole power of the state, they cannot

[220] Thomas, Andrew and Alf Rolin, 'Reading Religion In Norwegian Textbooks: Are Individual Religions Ideas Or People?', *British Journal of Religious Education*, 2018, 2.

affect how the school presents information about them (e.g. in the form of 'religious facts'). The traditional religious education (denominational, organized by religious organizations) is entirely outside the public school system. Although it seems that all religious organizations can secure religious education by themselves either in form of the private schools or lessons after school/on weekend, in practice it will be easier for bigger and well-structured religious organizations.

A religious organization that manages the private school can decide about the selection of the teachers but must follow the same curriculum as state schools if they wish to remain under contract to the state education system. Only non-contracted, fully independently funded private schools can decide about their curriculum. Therefore, in practice, private non-contracted schools in France are essentially (about 90%) catholic schools. Only then school plans include religious instruction in the curriculum. It should be noted that in France most of private religious schools are Catholic. Thus, this model does not support sufficiently religious minorities, such as Muslims, that cannot afford to establish educational institution. This influence also the level of respect for parental educational rights.

3.4.Children rights

Children, according to article 14 of the Convention on the Rights of Children, shall enjoy the freedom of religion and they are rights holders in their own capacity. Parents can help their children in deciding on this issue but they cannot force them to adopt any religion or to stop following one. The role of parents (right and duty) in this regard is, therefore, to provide directions. Bielefeldt noted that "the interests of parents and children are not necessarily identical, including in the area of freedom of religion or belief".[221] The parental rights to

[221] 'OHCHR | Children Also Have The Right To Freedom Of Religion Or Belief, And That Must Be Protected' (Ohchr.org, 2015)

educate their children according to their own conviction and to introduce their children to religious initiation are, in some cases, in the clash with the children right. Parents are not obliged to provide "a religiously neutral upbringing in the name of the child's right to an open future".[222]

Potentially, children's freedom of religion can be endangered at the highest level in the Polish system. It is common for many families to decide about child's attendance in religious class without discussing it with pupil him-/herself. These decisions in many families, especially in smaller cities, are perceived natural, even though classes are voluntary. School authorities do not have the obligation to take into account individual child believes and convictions. The pupil can decide about his/her attendance only after turning eighteen, therefore, usually, at the very end of education in public school.

In practice, thus, in the event of a conflict of beliefs between parents and children, there is a serious violation of his/her freedom of religion. Denominational religious classes *de facto* lead to professions of faith - prayer, memorizing biblical texts, singing psalms and going to retreats. Ethics lessons are not that controversial since they should be taught in a neutral way. It is also common for children from religious families to attend them. In addition, this situation is problematic due to the obligation to include religion grade in the average of pupil's grades (GPA). In a situation where a child attends religion only in connection with the parents' decision (and he/she has different beliefs), he/she may be forced to actively participate in it (including elements of professing faith) due to concerns about the future of his/her education.

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16647&LangID=E> accessed 5 October 2019.

[222] Bielefeldt, Heiner. Interim Report of the Special Rapporteur on freedom of religion or belief, UN Doc A/70/286 (5 August 2015), para 27.

The average grade may affect the child's ability to enter a university and therefore affect his or her right to education.

In Norway, the system is less controversial since teaching about religion should be neutral and objective. Nonetheless, the system of opt-outs provides only the possibility for parents and their decision. In practice, it would be more convenient to include children's opinions, since it is very difficult for parents to follow all the lesson plans. Norwegian system secures children's freedom of religion wider than Polish since a pupil needs to be only sixteen in order to withdraw from parts of religious classes by him-/herself. Again, however, the full exemption is not possible.

In France the system of opt-outs was not established, it would be also very problematic (inclusion of religious information in different subjects). Securing that pupils have a knowledge of religious facts, especially presented in general teachings, cannot be although perceived as a violation of freedom of religion by the state. As long as school does not impose the *laïcité* as a religious ideology and does not discriminate any religion or worldview, children's rights are protected. Nevertheless, it would be problematic for children from poor families to secure their religious upbringing in private religious schools. Similarly, in case of the conflict between parents and children's worldview.

It seems that children's freedom of religion was not included in the design of any analyzed model of religious education. It would be very socially and politically problematic and controversial to limit parental educational rights in this context. Legally, although, is can be seen as a state duty. Nonetheless, in my opinion, pupils, at least during secondary level of education, should be involved in deciding about voluntary attendance in religious class or deciding about opt-out. Unfortunately, this discussion has not even started yet.

Conclusion

The research question of this paper was what is the best model of religious education – the teaching of religion, about religion or lack of religious education within the public school system? In order to answer that question I analyzed what the states' practices should be to ensure respect for the rights of all parents and their children, and religious autonomy in public religious education systems; what is the scope of the permissible religious education in public school; and which model is ensuring realization of state obligations and protection of people religious and educational rights in the best way. All models of religious education that were analyzed (Poland, Norway, and France) can, if properly implemented, secure conventional rights and can be applied in non-discriminatory way. There cannot be one simple solution since the European doctrine of margin of appreciation applies and states have wide discretion in establishing religious education system.

All the presented models have although their flaws, more of them in practical implementation than on the theoretical level. The research showed that states when deciding about the model of religious education either protects more religious autonomy and parental educational right in positive sense (Poland) or focuses on securing state interests in upbringing citizens according to state traditions (*laïcité* in France, Christianity heritage in Norway). The only existing limits root in the state obligation to respect international human rights, especially non-discrimination and parental educational rights (in negative sense – exemption from religious class). Thus, the standards stated by international/regional courts are crucial. The perspective of children's rights was not included in any model.

In deciding which model implement, the state will decide which right/interest wants to protect wider. If state wants to create a system that leaves decision about religious education to parents, the Polish model (in theory) is the most adequate – voluntary system and possibility

of opt-outs at any time provides wide range of possibilities. Unfortunately, in practice the system can lead to discrimination of non-believers and great disrespect of children's freedom of religion. Moreover, lack of state supervision over teaching and curriculum can lead to other human rights violations (especially discrimination against sexual minorities, right of women).

If a state decides that knowledge about different religions is crucial to further tolerance and to create an open and inclusive society, it can construct a great environment for discussion within compulsory, but neutral and objective subjects – alike in Norwegian system. Here, however, the opt-out system (full, not only partial) is essential and should be accessible also for pupils. The religious upbringing can take place outside the public school, especially in religious schools that meet public school requirements and are co-founded by the state. Religious autonomy can be secured only by allowing religious organizations to constitute such schools and to enable them to participate in consultations about specific parts of the curriculum (but it still needs to meet human rights standards, especially non-discrimination). In practice, however, Norwegian system does not secure rights of parents of different religions and worldviews adequately, since Christianity is still the greater part of the curriculum, which includes some religious activities.

If the state priority is to maintain the wall of separation between state and (any) church or religion, the French system is the most suitable. Teaching about religious facts does not violate parental educational rights or children's freedom of religion. Neutral school can be the safest environment for all religious minorities and non-believers. In that case, although, the school does not create a space for discussion about religion (also critical) or a place to meet different cultures (religions). Thus, it will not – in the long run – facilitate open and tolerant society. Possibility to create separate religious schools is an alternative to secure religious autonomy. The French example, however, can be questioned, since private schools that are co-

funded by the state cannot introduce any religious teachings within their curriculum. However, the system of private religious schools means that society closes even more within its religious minorities and separates from others.

All struggles between states and religious organizations over the influence on the education system led to a very difficult situation in the religious education system. Historically, in all system once strong churches needed to fight for their religious autonomy when the state wanted to influence their internal matter, as for example in Poland in communist-era or in Norway during established church era. On the other hand states were similarly fighting for independence from the religious organizations, here the example of French Revolution is very vivid (religion as a political enemy of the Revolution). This influenced models of religious education.

The French model is an example where state sovereignty prevails over church influence. Although the side effect of this is that religious education in a separate course was excluded from public schools. The only alternative for parents is the system of private religious schools. Since there is no state obligation to provide information about religions in separate subjects, in theory, teaching about religious facts is enough to ensure the protection of rights. In practice the system is discriminatory – minorities, especially Muslims (migrants, refugees) are not able to participate in the private schooling system, even if one would be created (most private schools are Catholic). State to ensure the protection of rights could create a separate possibility of supporting minority religions in creating such private schools and create scholarship opportunities for pupils from poor families. Although such solution would protect parental rights it could violate children's rights. A pupil could not withdraw from private religious schools when his/her faith would be different from parents. Laicite is an important legal

principle and it must be clearly stated that it is not taught as a state indoctrination of a religious ideology (worldview) but as a constitutional value.

The Norwegian model mirrors the relation between church and state. Since there was an established national church teaching about religion was natural and it was a part of the curriculum. The wall of separation did not exist also in education. The decision to teach about religion in objective way was a big step toward religious freedom and equality of religious education. Unfortunately it was implemented in a biased way –Christianity took a great part of curriculum and religious activities were included in it. Here, therefore, the system of opt-outs was crucial. After the judgments of ECHR and the UN Committee situation slightly changed but still exemptions are only partial and the process is not perfect as explained in chapter two. In order to secure parental rights the system must be simplified (lesson plans must be clear so parents can easily decide about opt-outs), curriculum should be more balanced and religious activities should be minimized or even excluded. Children in secondary schools should be able to decide about opt-outing. The new changes in the system must be criticized – lack of full exemptions and stronger position of Christianity within curriculum can lead again to discrimination of religious minorities and non-believers.

The Polish system secures the strong position of the Catholic Church mostly because of its position during Solidarity and transformation. Securing religion was crucial after the communist period that was hostile towards it. The huge discretion that church was given within public school system is an effect of the concordat. The major flaw of this model is that pupils do not learn about other religions. This undermines the idea of open society and leads to greater fear of others, right now especially Muslims, In order to secure parental rights, it is important to ensure that the system of religious education is clearly voluntary – which is not that obvious in rural areas of Poland. It must be also clearly stated that parents can ask for ethics classes as

a valid alternative. It is necessary to create proper statutory law in order to secure organization of ethics lessons. Other religious organizations can provide religious instructions as well but since fewer students will attend them, less funding will be provided by the state, thus, such solution could lead to discrimination. Nonetheless, the separation of church and state in this model is also not secured: religious upbringing is taking place within public school. Here again children rights were ignored; underaged pupils cannot opt-out or decide to attend some religious classes by themselves, as they should at least in secondary education institutions.

Overall, state when creating a religious education system should focus especially on creating equal system for all religions and believes that does not entail systematic discrimination. Parental educational rights can be protected in all models, in the wider way in Poland. Although in order to balance it with other state values and interests (secularity, equality) From the perspective of open society the solutions that secure teaching *about* religion within public schools are the best (here the Norway example). In the model of teaching *of* religion pupils do not learn enough about other religions and do not further critical thinking about religion and worldview in general since religious instructions focus on religious activities of one religion. In the model of lack of religion situation is similar. Although religious facts included in all school courses are important, to further critical thinking and ensure non-discrimination among citizens in the future classes on religion, philosophy and ethics can be vital. Thus, the new changes in French system must be welcomed (new subject on ethics).

France, Norway, and Poland need to introduce changes in both legislation and implementation (practice). Governments should especially consider not only state interest and religious autonomy, as they did for centuries. Religious education should not be a battleground to win hearts and minds of people but an opportunity to create more open and understanding society. It is crucial to focus on non-discrimination, inclusion of others (not only minority

religions but also non-believers) and children's rights in all systems. Religious facts and objective teaching about religion can be a tool to further tolerance. The creation of the curriculum in this spirit would be beneficial for the society, parents, state and religious organizations implementation. However implementation of such model required state and religious organizations to take a step back, therefore it is – unfortunately – very unlikely to happen.

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