

Treading a Tightrope: The Fragility of Family and Religious Minority Rights in the Jurisprudence of the European Court of Human Rights

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This article examines the uncertainties in the jurisprudence of the European Court of Human Rights (ECtHR) relating to religious minorities, particularly case law involving families, and particularly children. In view of the increasingly religiously diverse and pluralist societies of the European Union, the ECtHR is required to ensure that, in terms of the European Convention on Human Rights (ECHR), both individuals and collective religious or non-religious minorities are afforded religious freedom against so-called secular values which pursue majority interests, although there may be genuine cases where minority rights to freedom of religion need to be limited. This article argues that, in several cases, the ECtHR, with respect, appears to have allowed some secular laws of various States which restrict the freedom of religious minorities, to prevail without the need to adequately justify such limitations. Furthermore, the margin of appreciation doctrine has been widely used by the ECtHR, and has permitted States Parties to interpret religious rights and freedoms within the broader context of their national cultures, values and traditions. However, the argument that a lack of consensus between the laws of Contracting States allows a wide margin of appreciation may risk jeopardising the protection of minority religious rights, including those of children. Although the margin of appreciation doctrine is integral and essential to the Convention's system of constitutional-interpretive principles, it should be confined within acceptable limits, mainly by appreciating its subordination to the Convention's primary constitutional principles and also its relationship with other secondary principles, particularly proportionality. The ECtHR is urged to follow a careful and considered process of balancing of interests in the application of Article 9.2 to ensure that the legitimate interests of families of religious (and non-religious) minorities are protected, and to avoid a mechanistic or over-deferential application of the margin of appreciation doctrine.

INTRODUCTION

This article focuses on the uncertainties and lack of clarity in the jurisprudence of the European Court of Human Rights (ECtHR) over the

position of families and particularly children, as religious minorities in European Union countries. This uncertainty is particularly prevalent where conflicts arise in cases when parents assert their right to manifest their religious freedom or freedom from religion¹ over the religious upbringing or education of their children.² European societies have become increasingly diverse, as many religions, creeds, beliefs and non-beliefs offer their various visions of the 'good life' to their adherents.³ In this diverse society,⁴ conflicting religious rules may also regulate some families⁵ and constitute a way of life for them.⁶ Marital and partner relationships are also increasingly inter-ethnic,⁷ which may lead to parental clashes between notions of what constitutes the right way of life, religion or education for the children concerned.⁸

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¹ For example, in England and Wales, the proportion of the people who do not identify with any religion has now reached a quarter of the population (Office for National Statistics February 2014.) Since 2001 in England and Wales, there has been an increase in those reporting no religion from 14.8% of the population in 2001 to 25.1% in 2011

² According to the British Social Attitudes Survey, affiliation to the Church of England fell from 40% in 1983 to 20% in 2010 and 16% in 2013 (*British Social Attitudes Survey No 31, 2014.*)

³ Marie Claire Foblets 'Family, Religion and Law in Europe: Embracing Diversity from the perspective 'Cultural Encounters' in *Family, Religions and Law: Cultural Encounters in Europe* edited by Prakash Shah with Marie Claire Foblets and Mathias Rohe (2014) (Ashgate Publishing (England) xi at xv.

⁴ The 2011 Census has shown that the population in England and Wales has become more ethnically diverse. In 2011, 1.2 million people identified themselves as mixed ethnicity, up from 660,000 in 2001. The Office for National Statistics analysis provides further insight into diversity by looking at patterns and trends of people living as a couple in an inter-ethnic relationship (Office of National Statistics 2011 Census.)

⁵ *British Social Attitudes Survey No 31, 2014.*

⁶ Despite falling numbers, Christianity remains the main religion in England and Wales in 2011. In the 2011 Census, Christians were the largest religious group, with 33.2 million people (59.3% of the population (Office for National Statistics February 2014). Muslims comprise the next biggest religious group and have grown in the last decade. Between 2001 and 2011 there were increases in the other main religious group categories. Muslims grew the most (*British Social Attitudes No 28, 2011, and No 31, 2014.*)

⁷ Inter-ethnic relationships are defined as relationships between couples that are either married, in a civil partnership or cohabiting where each partner identifies with an ethnic group different from the other. 2.3 million people in the United Kingdom live in an inter-ethnic relationship (*Office of National Statistics 'Religious Ethnicity Analysis' September 2014.*) One in eight households now contain more than one ethnic group ('Mapping the Dynamics of Diversity' *Office for National Statistics* September 2014). Nearly 1 in 10 people living as a couple was in an inter-ethnic relationship in 2011 (Part of 2011 Census Analysis, What does the 2011 Census tell us about inter-ethnic relationships Release?) It has been predicted that by 2051, the ethnic minority population will more than double due to a baby boom among epode of /Pakistani, Bangladeshis and African origin. Also more than one in four Britons will be from Black and minority ethnic groups. (Richard Ford 'Quarter of Britons will be from an Ethnic Minority within Decades' *The Times* 20 April 2015, page 4.)

⁸ Jürgen Habermas 'Religion in the Public Sphere' (2006) 14 (1) *European Journal of Philosophy* 1-25.

In these increasingly pluralist societies,⁹ the ECtHR has the task of assessing the relationship between aspects of family law and religion, particularly religious upbringing and education.¹⁰ In terms of the ECHR, both individuals and collective religious or non-religious minorities should be afforded protection in the exercise of religious freedom against obligations stemming from legal provisions that pursue majority interests, unless such rights to freedom of religion need to be limited, justifiably and legitimately. This article argues that, in several cases, the ECtHR, with respect, seems to hold that the States' secular laws may prevail without the need to adequately justify such limitations.¹¹

For the first thirty years of its operation, the ECtHR did not determine any cases against any state on the basis of Article 9 of the ECHR. However, since 1993,¹² the ECtHR has now considered more than fifty Article 9 decisions, indicating the rapidly increasing significance of the ECtHR in matters relating to religious freedom.¹³ A growing body of scholarship offers critical analyses of the ECtHR's religious freedom judgments.¹⁴ Of eighteen such cases heard in the ECtHR between 2001 to 2014, in only two cases was a violation of the right to religious freedom (Article 9 of the ECHR) established.

Although, in some cases, the ECtHR has been prepared to attach value to the concept of pluralism in connection with the protection of freedom of thought, conscience and religion,¹⁵ generally the right of religious and non-religious minorities to manifest freedom of religion or belief appears to have been cautiously approached. In some cases, the ECtHR has avoided the strict application of the proportionality test by refusing to find that, in cases of conflict between the religious obligations of minority groups and ostensibly 'secular' laws, there is any state interference with the exercise of freedom of thought, conscience and religion. This article considers these cases in the context of Article 9, Article 2 Protocol 1, Article 8 and the United Nations Convention on the Rights of the Child (CRC) and the decisions of its Committee.

⁹ Rowan Williams 'Civil and Religious Law in England: A Religious Perspective' (2008) volume 10 (3) *Ecclesiastical Law Journal* pp 262-282; Rupert Shortt *Rowan's Rule: The Biography of the Archbishop* (Hodder) 2014.

¹⁰ Jurgen Habermas 'Notes on a Post-Secular Society' (2008) *Sign and sigh.com. Let's talk Europe*.

¹¹ Javier Martinez Torron 'Religious Pluralism: the case of the ECHR' chapter 7 in *Democracy, Law and Religious Pluralism in Europe* (Edited by Ferran Requejo and Camil Ungureanu) (Routledge) (2014) 123 at 126.

¹² *Kokkinakis v Greece* (1994) 17 EHRR 397 (ECHR).

¹³ Effie Fokas 'Directions in Religious Pluralism in Europe: Mobilisation in the Shadow of European Court of Human Rights Religious Freedom Jurisprudence' (2015) 4 *Oxford Journal of Law and Religion* 54 at 60.

¹⁴ Carolyn Evans and Christopher Thomas 'Church-State Relations in European Court of Human Rights' (2006) 3 *Brigham Young University Law Review* 699; Effie Fokas 'Directions in Religious Pluralism in Europe: Mobilisation in the Shadow of European Court of Human Rights Religious Freedom Jurisprudence' (2015) 4 *Oxford Journal of Law and Religion* 54 at 60.

¹⁵ *Kokkinakis v Greece* 25 May 1993, para 31.

THE RIGHT TO FREEDOM OF BELIEF, THOUGHT, CONSCIENCE AND RELIGION

Article 9 (1) of the ECHR states that everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion¹⁶ or belief, in worship, teaching, practice and observance. When considering which religions or beliefs qualify for protection in terms of article 9, the Convention (ECHR) clearly distinguishes between the absolute right of freedom of thought, conscience, belief and religion, and the potentially limited right to 'manifest' such religion or beliefs in Article 9(2). In the assessment of what qualifies as 'belief',¹⁷ the ECtHR in *Kokkinakis*¹⁸ stressed the importance of the protection of pluralism in a democratic country, taking into account non-religious convictions as a reason for granting exemptions from general rules.¹⁹ In the case of non-religious belief systems, such systems may have to indicate that they have reached such a level of seriousness and coherence as to warrant the law's protection.²⁰ Article 9 protects not only religious beliefs. It protects all kinds of philosophical beliefs, sincerely held and internally coherent. This case underlined that Article 9 is a precious asset, not only for the believer but also for atheists, agnostics, and sceptics because it also protects the right not to believe.

A restriction on such rights is permitted, but only if it is justifiable and legitimate in terms of article 9(2). The ECtHR is faced with considerable challenges where the rights of religious minorities to freedom of religion or belief conflict with those of the majority faith.²¹ The principle of

¹⁶ In this context, religion is not easy to define. In *R (Hodkin & Anor) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77 at para [57]. Lord Toulson described it as:

".. a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind's place in the universe and relationship with the infinite..."

This description emphasises the non-secular aspect and its group character, but excludes the requirement of belief in a supreme deity, indicating how much broader the understanding of religion in contemporary society has become. Although in this case Lord Toulson emphasised that this definition only applies to the Place of Worship Registration Act 1855, it is likely to have far-reaching effects (see Russell Sandberg 'Defining the Divine' (2014) 16 *Ecclesiastical Law Journal* 198 at 201-2.) This description appears to exclude secular beliefs which qualify for protection as 'beliefs' rather than 'religion.'

¹⁷ In *R (on the application of Hodkin and another) v Registrar General of Births, Deaths and Marriages* [2014] 1 FCR 577 the English Supreme Court held that expression 'place of meeting for religious worship' in s 2 of the 1855 Act was to be interpreted in accordance with a contemporary understanding of religion. Scientology was within that approach to the meaning of religion (para [31].)

¹⁸ (1994) 17 EHRR 397 (ECHR).

¹⁹ *Kokassinis v Greece* (1994) 17 EHRR 397 (ECHR). Cristina Lafont 'Religious Pluralism in a Deliberative Democracy' in *Democracy, Law and the Religious Pluralism in Europe: Secularism and Post-secularism* (edited by Ferran Requejo and Camil Ungureanu) (Routledge) (New York and Oxford) (2014) chapter 3 page 46.

²⁰ Baroness Hale 'Secular Judges and Christian Law' (2015) 17 *Ecclesiastical Law Journal* 170 at 173. in *Campbell and Cosans v The United Kingdom*, the parents objected to corporal punishment at their children's schools on the grounds that it was contrary to their philosophical convictions. The ECtHR took the view that those convictions had to 'attain a certain level of cogency, seriousness, cohesion and importance' in order to engage the ECHR and be worthy of respect.

²¹ Lady Hale 'Are we a Christian country? Religious freedom and the law' Oxfordshire High Sheriff's Lecture 2014 14 October 2014 (Oxford).

proportionality provides a valuable framework for the line of enquiry into whether the restriction on the right concerned is justifiable in terms of a set structure of enquiry. Firstly, the Court should enquire as to whether there has been interference and, secondly, whether the interference is justified. In most cases, the question of whether there has been interference is a formality. However, various filters have been developed such as the definition of a belief (a world view held with a degree of cogency, serious reflection and importance); the 'specific situation' rule (which examines whether a person has voluntarily submitted themselves to the situation such as employment) and the motivation for the practice (is it religious?). It would seem that in recent case law the use of filtering devices has become increasingly limited.²²

On the first question, the law cannot legitimately inquire into the validity²³ or importance of those beliefs, or any particular manifestation of them, as long as they are genuinely held. The challenge for the ECtHR is to reach a decision without an overt evaluation of different religions,²⁴ and without unduly jeopardising the protection of religious minorities, for whom the protection offered by human rights is a significant part of the democratic process and the balancing and proportionality test.²⁵

On the second issue, there are various questions that are asked although there are some differences in the way they are framed. These differences in formulation and practice need not detract from the claim that proportionality is the *jus cogens* of human rights law, any more than the existence of different theories of rights poses an obstacle to the ascendance of rights discourse. Questions to be asked at this stage are: is the legislation (or other government action) establishing the limitation of the right pursuing a legitimate objective of sufficient importance to warrant limiting such a right? Are the means rationally connected to the objective? Are the means necessary, taking into account alternative means of achieving the same objective? Is there a fair balance between the public interest and the private right?

In some cases, the ECtHR has held that legal restrictions on freedom of religion and belief may be reasonable when they seek to guarantee the secularity of the public sphere.²⁶ This approach, interpreting secularity as being synonymous with neutrality, implies that religion cannot be a part of public sphere and the public sphere should be presided over by a secularism that permits the presence of non-religious ideas or signs, but not their religious equivalent.²⁷ - With respect, this approach seems to avoid a rigorous application of the proportionality exercise and creates an unduly secular approach, which prevails unjustifiably over the market place, and appears to be sanctioned by a loose concept of the margin of appreciation. This is a problem that has been posed in 'multicultural societies,' in which

²² *Eweida and others v United Kingdom*, 15 January 2013, para 81.

²³ Lady Hale has pointed out that, if the law is going to protect freedom of religion and belief, it has to accept all religions and beliefs (Lady Hale 'Are we a Christian country? Religious freedom and the law' Oxfordshire *High Sheriff's Lecture* 2014 14 October 2014 (Oxford)).

²⁴ Baroness Hale 'Secular Judges and Christian Law' (2015) 17 *Ecclesiastical Law Journal* 170 at 173.

²⁵ Para 2.

²⁶ *SAS v France* (Application Number 43835/11).

²⁷ *Efstathiou v Greece*, 18 December 1996 and *Valsamis v Greece*, 18 December 1996 but c.f. decision of the Grand Chamber in *Lautsi v Italy* (GC) 18 March 2011, Para 74, 66; *Eweida and others v United Kingdom*, 15 January 2013, para 81.

a minority's attachment to religious or cultural community may be opposed to the majority's apparently secularized citizenship. In such circumstances, the principle of autonomy in liberal democracy may be forced to give way to the exigencies of the secular state.²⁸ With 'secularism' may come the need to conceive and practise the observance and celebration of the values, symbols, and signs of recognition which indicate the adherence to the community of majoritarian views.²⁹

THE APPLICATION OF THE MARGIN OF APPRECIATION DOCTRINE

The doctrine of the margin of appreciation arose to balance the diverse interpretations of the ECHR by member states.³⁰ The ECtHR is generally more deferential to States Parties challenged with the infringement of ECHR rights where there is little evidence of a European consensus on the correct interpretation of a human right. By the same token, where agreement on an issue is more widespread, the margin of appreciation is less wide.³¹ Where there is little or no agreement, States Parties are able to interpret the ECHR according to their unique perspective and implement laws that may be, in some cases, not fully appropriate for religious minorities with different value systems.

The structure and context of the ECHR is couched in language that requires the balancing of competing interests in accordance with the principles of proportionality, universality and diversity.³² Universality implies a guarantee of an equal degree of protection of the freedom of religion and belief to all individuals and groups whether as members of a majority or minority group. The necessary balance between diversity and universality is contained in the doctrine of the margin of appreciation, which allows a national variation in the limitation that States can legitimately impose on the freedoms guaranteed by different articles of the ECHR. Thus, diversity may, in practice, imply some limitation on the consequences of universality since States must be allowed a reasonable margin of appreciation when a limitation on freedom becomes necessary.

Limitations on the exercise of the freedom of religion may be justifiably imposed when prescribed by law or in the legitimate interest of the protection of public order, health or morals or protection of the rights and freedoms of others and such limitations should be necessary in a democratic society. Where there is a lack of consensus among the States of the European Union, the margin of appreciation gives national authorities some discretionary power

²⁸ Stewart Motha 'Veiled Women and the Affect Of Religion In Democracy' (2007) 34 *Journal of Law And Society* p. 139-62.

²⁹ Jean- Luc Nancy 'Church, State, Resistance' (2007) 34 *Journal of Law and Society* p. 3-13.

³⁰ James A. Sweeney 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era' (2005) 54 *International and Comparative Law Quarterly* 459 (2005).

³¹ Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1998) 31 *New York University Journal International Law and Policy* 843

³² Javier Martinez-Torron 'Freedom of Religion in the ECHR under the Influence of Different European Traditions' (2012) accessed at <http://www.pass.va/content/dam/scienze-sociali/pdf/acta17/acta17-martineztorron.pdf> 5 September 2016.

to determine when limitations on the exercise of religious freedoms are necessary and therefore legitimate. However, the ECtHR has its own discretionary power to intervene if it considers that national states have used their discretion unreasonably or if any restrictive measures adopted have not respected the principle of proportionality.

Thus, although the margin of appreciation doctrine is integral and essential to the Convention's system of constitutional-interpretive principles, it should be confined within acceptable limits, mainly by appreciating its subordination to the Convention's primary constitutional principles and also its relationship with other secondary principles, particularly proportionality. Although the ECtHR has signalled its deference to the national margin of appreciation doctrine, a strict proportionality approach might bring about a welcome reduction of such deference.

THE PROHIBITION OF RELIGIOUS DRESS IN EDUCATIONAL SETTINGS

For children growing up in religious minorities, the right to education includes promotion and respect for their distinctiveness as well as the development of individual right to an open future. Thus, the individual right to education must be viewed against the context of the collective right to allow religious minorities their identity. Where conflict arises between equality of opportunity and religious minority rights, these cases should be decided in favour of equality of opportunity for children.³³ However, different considerations may arise where the minority right does not conflict with any right to education but only with majority interests. In such cases, it is argued that proportionality and the margin of appreciation should give way to the right of minorities to practise their religion or non-belief in a pluralist Europe.

In the educational context, the ECtHR has tended to justify restrictions of individual expression of religious beliefs in terms of Article 9.2. The ECtHR has sanctioned restrictions on religious dress, allegedly in the interests of peace and tolerance.³⁴ In *Dahlab v Switzerland*,³⁵ the applicant was a primary school teacher who converted to Islam and wished to wear the Islamic headscarf when teaching and was dismissed for doing so. She argued that this prohibition infringed her freedom to manifest her religion. The Geneva authorities weighed the right of the teacher to manifest her religion against the need to protect pupils between the ages of 4 and 8 by preserving religious harmony. The Swiss authorities concluded that, having regard to the young age of her pupils, the measure did not exceed their margin of appreciation and was not unreasonable. On appeal, the ECtHR failed to question whether the Swiss authorities' attitude should be more inclusive and pluralist to permit students to perceive in their own school a reflection of the different religions existing in Swiss society. Nor did the ECtHR fully address the issues of whether the banning of the Islamic headscarf could be assessed as a legitimate response to the need to preserve peace and tolerance. It was said to be impossible to assess the potential proselytizing effect on children of a powerful external symbol such as the teacher wearing a hijab.

³³ Holly Cullen – 'Education Rights or Minority Rights?' (1993) 7 *International Journal of Law and Policy* 143.

³⁴ *Dahlab v Switzerland* 2001-V ECHR 447.

³⁵ *Dahlab v Switzerland* 2001-V ECHR 447.

In similar vein, in *Sahin v Turkey*³⁶ the ECtHR allowed the limitation on the grounds that the neutrality of the public sphere is best served when religion is absent. In this case, Leyla Sahin was a fifth year medical student at the University of Istanbul who came from a traditional family of practising Muslims and considered it her religious duty to wear the Islamic headscarf. She defied a letter from the Vice-Chancellor of the University forbidding her to wear the headscarf and eventually was excluded from the University and argued that the ban on wearing the scarf constituted an unjustified interference with her right to freedom of religion and in particular her right to manifest her religion. The ECtHR concluded that, though her freedom had been interfered with, this was necessary in a democratic society and gave a very wide meaning to indoctrination (based in the margin of appreciation permitted to countries.) In this case, the ECtHR appears to have failed to fully analyse the necessity and the proportionality of the ban. The Court accepted that the banning of the headscarf contravened secularism, but failed to establish that the applicant wore the headscarf in order to provoke a reaction or proselytise or alter the convictions of others. The ECtHR could not discern any factor, which could have suggested that Miss Sahin had fundamental views and also did not prove that the ban promoted sexual equality. The ECtHR failed, with respect, to establish that the ban was proportionate.

Sequels to *Sahin*³⁷ were the justification of the French ban on religious garments in public schools and public places,³⁸ in schools justified because of the hypothetical argument of the threat to the principle of laicite (or secularism in public places)³⁹ which may conflict with the rights of religious minorities. Differential treatment is acceptable to some extent, as long as it is justified and pursues legitimate objectives. In *Dogru and Kervanci*⁴⁰ the ECtHR held that it was legitimate to expel two twelve-year old female students from their state school on the grounds that they had refused to remove their headscarves in physical education classes. The school authorities justified the decision by alleging health and safety reasons. It appeared that the school authorities had rejected, without providing any reason, the applicants' offers to wear a hat or balaclava instead of a headscarf in order to ensure that their religious obligations were compatible with the school's health and safety rules, the ECtHR held unanimously that the expulsion was justifiable. These decisions were followed by six decisions in 2009 in which the applicants were students who had been expelled from schools in different French towns in the 2004 French laws against personal religious symbols in state schools.⁴¹ On the grounds that they persistently wore religious clothing, the Court held that the disciplinary measures imposed were justified, despite the fact that the prohibition was not limited to sports classes, but extended to all school hours

³⁶ *Sahin v Turkey* (2005) 41 EHRR 8.

³⁷ (2005) 41 EHRR 8.

³⁸ *SAS v France* (Application Number 43835/11).

³⁹ [2008] ECRR 1579.

⁴⁰ [2008] ECRR 1579. Both decisions made on 4 December 2008.

⁴¹ Decisions made on 30 June 2009: *Aktas v France* 43563/08; *Bayrak v France* 14308/08; *Gamadeddyn v France* 18527/08; *Ghazal v France* 29134/08; *Jasvir Singh v France* 25463/08; *Ranjit Singh v France* 275611/08.

and premises. The Court refused to offer a full judgement on the merits of these cases but declared them inadmissible as ‘manifestly unfounded’.

The headscarf ban for both pupils and children appears to be motivated by the desire to protect the religious freedom of children who do not wear headscarves in the belief that children will get a better education in a school context that is free from religion. However, neither the individual child’s best interests (as contained in article 3(1) of the United Nations Convention on the Rights of the Child (CRC)) nor the concept of the child’s autonomy have been overtly considered. Nor does the age of the pupil appear to have been a relevant factor.⁴² Thus the interpretation of Article 9 by the ECtHR in *Dahlab*,⁴³ confirmed in *Sahin*⁴⁴ has validated the imposition of restrictions on minority religions in cases involving cultural and religious diversity.⁴⁵ Restrictions on religious dress thus appear to be sanctioned by the ECtHR in the interests of living together where the veil conceals the whole face,⁴⁶ or in the context of education, for example, for teachers (*Dahlab v Switzerland*),⁴⁷ and students (*Sahin and Karaduman v Turkey*).⁴⁸ However, restrictions on dress have been disallowed when they are considered to have been applied disproportionately (*Eweida et al v UK*).⁴⁹ Where the restriction was in line with a so-called secular approach, the court seems ready to allow it - as within the margin of appreciation.⁵⁰

In regard to the right to wear religious dress, Strasbourg jurisprudence generally seems to take the approach that this right falls within the margin of appreciation of individual states to determine how best the compromise should be struck between respect for religious freedom and the protection of the rights of others. The ECtHR appears to be hesitant to rule in favour of granting too much protection to freedom of religion or belief, especially where it may be detrimental to the authority and power of a secular state and against majority interests.⁵¹

FEMALE CHILDREN AND WOMEN FROM RELIGIOUS MINORITIES: OBSERVING THEIR RIGHTS TO RELIGIOUS FREEDOM

In terms of the ECHR, States are required to ‘fully protect... women against all violations of their rights based on or attributed to religion.’⁵² At times,

⁴² Eva Brems ‘Above Children’s Heads: The Headscarf Controversy in European Schools from the Perspective of Children’s Rights’ (2006) 14 *International Journal of Children’s Rights* 119 at 132.

⁴³ *Dahlab v Switzerland* 2001-V ECHR 447.

⁴⁴ *Sahin v Turkey* (2005) 41 EHRR 8.

⁴⁵ Article 18(4). Under the ICCPR, States undertook to have respect for the liberty of parents to ensure the religious and moral education of their children in conformity with their convictions. The same wording is used in Article 13(3) of the ICESCR.

⁴⁶ *SAS v France* (Application Number 43835/11).

⁴⁷ *Dahlab v Switzerland* 2001-V ECHR 447.

⁴⁸ *Sahin v Turkey* (2005) 41EHRR 8. rights.

⁴⁹ *Eweida and Others v UK* (2013) 57 EHRR 8.

⁵⁰ E.g. *Dahlab v Switzerland* 2001-V ECHR 447.

⁵¹ J Martinez-Torron ‘The Case of the European Court of Human Rights’ *Democracy, Law and Religious Pluralism in Europe* edited by Ferran Requejo and Camil Ungureanu (2014) (Routledge, Taylor and Francis) (London and New York) p 136.

⁵² Council of Europe, Parliamentary Assembly Res. 1464 (2005) on Women and Religion in Europe, 15 September 2005, Doc 10670, at Para. 7.1; Human Rights Committee, General

'religion is one of the chief perpetrators of women's subjugation, inequality, lower social status, lack of equal treatment and protection, and internalised notions of inferiority'.⁵³ However, in the case of female children, the veil, burqa (and burkini) debates frequently demonstrate that such arguments about the compatibility of religion and women's rights cannot be made and in this respect, at times, secular law may be guilty of side-lining women's human rights.

Some women may wish to exercise their right of choice in religious dress, even though this mode of dress may appear to others to indicate subjugation. For example, in *S.A.S. v. France*,⁵⁴ the ECtHR held, by a majority, that the French law that made it illegal for anyone to conceal their face in public places did not violate the ECHR. The French Government listed three values in favour of the ban: respect for gender equality, respect for human dignity and respect for the minimum requirements of life in society (or of "living together"). While dismissing the arguments relating to the first two of those values, the Court accepted that a veil concealing the face in public raised a barrier against others which could undermine the notion of "living together" and therefore could be regarded as necessary for protecting the rights and freedoms of others in a democratic society and to create social harmony.

The French Government did not utilise public order as a possible justification, preferring instead to invoke the protection of the rights and freedoms of others. After determining that the ban constitutes a limitation of those rights that has been prescribed by law, the ECtHR considered whether France had a legitimate aim in enacting the ban. The Court emphasised that the law aims to ensure the respect for the minimum set of values of an open and democratic society. These values are respect for equality between men and women, for human dignity; and for the minimum requirements of life in society. The ECtHR was not convinced by the French Government's argument that concerns for respect for equality between men and women justified the ban on the wearing of the full-face veil,⁵⁵ nor did the ECtHR accept that respect for human dignity justified a blanket ban on the wearing of the full-face view in public places.

However, the majority of the ECtHR held that the ban did correspond with the legitimate aim of protecting the rights and freedoms of others.⁵⁶ After finding that the ban is premised on a legitimate state objective, the Court embarked on a necessity test by weighing up whether the ban was proportionate to the legitimate aim. The majority of the ECtHR stated that the ban did not constitute a proportionate response to an argument based on public safety. However, it found that the ban was proportionate to the goal of promoting "living together." The ECtHR emphasised that the ban is not directly targeted at Muslim women but rather towards the practice of concealing the face, which, if hidden,

Comment No 28: Equality of Rights between Men and Women (Article 3), 29 March 2004 CCPR/C/Rev.1/Add/10.

⁵³ *S.A.S. v France* Application Number 43835/11.

⁵⁴ Application Number 43835/11.

⁵⁵ At Paragraph 118. At paragraph 120.

⁵⁶ *SAS v France* at para 22.

prevents socialisation. The majority of the ECtHR concluded that it was correct to defer to the French Government's values in terms of the margin of appreciation. For the majority of the ECtHR, facial communication was assumed to be essential in contemporary society and vital for the functioning of society. The argument of respect for the minimum requirements of life in society or of "living together" was considered by the ECtHR to have justified and legitimated the imposition of the ban.⁵⁷ The majority of the ECtHR found that this means was necessary in a democratic society,⁵⁸ but failed to explain why the law should back this social expectation, relying over- heavily on the margin of appreciation, and justifying its stance by arguing that the trifling nature of the sanctions imposed on violation of the ban made the restriction proportionate.⁵⁹

By contrast, the two dissenting judges (the ECtHR was divided 15:2) argued that it is wrong to allow abstract rights to trump concrete rights. For them, the general concept of 'living together' (*vivre ensemble*) did not fall directly under any of the rights and freedoms guaranteed within the European Convention and the social duty to engage with French fellow citizens was not seen to be at stake.

Although the careful analysis of the position of women is a positive feature, *SAS*⁶⁰ does not give similar domestic cases much scope to support minority rights. The reasoning of the ECtHR may have serious consequences for such groups if the insensitivity to the fragility of religious minority rights continues to prevail. In one case, the ECtHR appears to regard certain aspects of the Islamic religion as incompatible with democratic values.⁶¹ At other times, the ECtHR appears to value an alleged State assertion of protection of gender equality above the protection of the right of the children or women themselves to religious manifestation.⁶² This may disempower some girls, as members of a religious minority, limiting their right of choice and free will. It may, in fact, operate contrary to essential gender equality by imposing coercive measures on those from religious minorities who do not observe the majority religion. This right to equality involves the right to participate on an equal footing within the deliberative process of shaping the context and transforming the collective understanding of what is compatible with gender equality, non-discrimination, and freedom of religion, in the light of the special circumstances in that particular religious minority or community.⁶³

⁵⁷ At paragraph 120.

⁵⁸ Paragraph 155.

⁵⁹ Application Number 43835/11 at paragraph 152.

⁶⁰ *SAS v France* (Application Number 43835/11).

⁶¹ *Rerefah Partisi (The Welfare Party) and Others v Turkey* 37 EHRR 1.

⁶² *Sahin v Turkey* (2005) 41 EHRR 8.; *Dahlab v Switzerland* 2001-V ECHR 447; *SAS v France* (Application Number 43835/11).

⁶³ Cristina Lafont 'Religious Pluralism in a Deliberative Democracy' in *Democracy, Law and Religious Pluralism in Europe* edited by Ferran Requejo and Camil Ungureanu (Routledge) (New York and Oxford) (2014) chapter 3 p 46 at p 57. If these women appeal to equality arguments - the unequal treatment involved in denying a certain group of citizens the right to freely exercise their religion or to freely chose how to dress, they may also individually argue that anti-discrimination law (such as the UK Equality Act section 2) justifies their opposition to the ban and, furthermore, that those in favour of such a ban are under a duty to examine these objections and to offer convincing reasons to legitimise the imposition of the ban. The

PARENTAL ENTITLEMENT TO RESPECT FOR THEIR PHILOSOPHICAL AND RELIGIOUS CONVICTIONS

In the exercise of any of the functions that it assumes in regard to teaching and education, the State shall respect the right of parents to ensure such education and teaching is in conformity with their own religious and philosophical convictions,⁶⁴ provided that such convictions are cogent and coherent.⁶⁵ In *Campbell and Cosans v The United Kingdom*,⁶⁶ the parents objected to corporal punishment at their children's schools on the grounds that it was contrary to their philosophical convictions. The ECtHR took the view that those convictions had to 'attain a certain level of cogency, seriousness, cohesion and importance' in order to engage the ECHR and be worthy of respect.⁶⁷ The ECtHR has, in many cases involving education and religious organisations, stated, as a general principle, that a State is forbidden to pursue the aim of indoctrination and must ensure that religious knowledge is conveyed in an objective, critical and pluralist manner.⁶⁸

In *Zengin v Turkey*,⁶⁹ where a Turkish citizen residing in Istanbul, requested that his daughter be exempted from a mandatory course on religious culture and ethics, since he and his family were followers of Alevism, a branch of Islam, which rejects some of the religious code of Sharia law.⁷⁰ Zengin

rights of mature girls to make religious choices, such as the right to wear the nijab, are inherent within the concept of gender equality.

⁶⁴ Article 2, Protocol 1 provides that no person shall be denied the right to education. (This right was ratified by the UK, subject to the reservation that the right to education would be adhered to only insofar as is compatible with the provision of efficient instruction and training and the avoidance of unreasonable expenditure (Education Act 1996, section 375.))

⁶⁵ *Campbell and Cosans v The United Kingdom* (1982) 4 EHRR 293.

⁶⁶ *Campbell and Cosans v The United Kingdom* (1982) 4 EHRR 293.

⁶⁷ In similar vein but interpreting Article 9 of the ECHR, the House of Lords in *R (Williamson) v Secretary of State for Education* [2005] UKHL 15, [2005] 2 WLR 590 at paras [23] – [24] adopted a pluralist approach where an application was made by parents in favour of the use of corporal punishment in the Christian education of their children at Christian schools. The House of Lords held that the 'belief' in the use of corporal punishment was protected by Article 9, emphasising that it was not its role to embark on an inquiry into the asserted belief and judge its validity by some objective standard, since freedom of religion protects the subjective belief of these parents, however misguided.⁶⁷⁻ By contrast, when the question of what constituted 'manifestation' arose, the belief was required to satisfy some objective minimum requirements. The ban on the use of corporal punishment was held to be a justified and proportionate interference with the expression of a belief in the interests of protection of the children involved. The case was decided within the analysis of whether the interference with the expression of the belief was justifiable and proportionate.

⁶⁸ *Folgero & Others v Norway* (2008) 46 EHRR 47 by a 9:8 Majority.

⁶⁹ (2008) 46 EHRR 44.

⁷⁰ Zengin was arguing that the mandatory religious culture and ethics course was in conflict with Turkey's fundamental principle of secularism. The Directorate turned down Zengin's

appealed to the ECtHR, which held that there was a violation of article 2 of the First Protocol on the grounds that, not only did the mandatory course on religious culture and ethics not meet the ECHR's standard of objectivity and pluralism, but also the content of the course failed to respect Zengin's religious and philosophical convictions. The ECtHR unanimously held that, although the course instruction did not rise to the level of indoctrination, the content of the lesson did not meet the criteria of objectivity and pluralism. Furthermore, the compulsory course lacked adequate instruction on the Alevi faith so did not respect Zengin's religious and philosophical convictions. Even though the state had instituted an exemption policy for that pupil whose religion conflicted with the required course, the ECtHR rejected the exemption as an inappropriate method of ensuring respect for parents' religious philosophical convictions.

In similar vein, in *Folgero and Others v Norway*,⁷¹ the ECtHR indicated its awareness of the risk of indoctrination in education and recognised that the State has a positive obligation to fulfill in terms of education to ensure that information or knowledge in the curriculum is conveyed in an objective, critical and pluralist manner, to respect the limits implied by Article 2 protocol 1. This case, along with *Zengin v Turkey*,⁷² suggested that the States' accommodation of religion would be stringently controlled, with an emphasis on an objective and critical approach to the parental right.⁷³ The principle of non-indoctrination appears to be a suitable tool to ensure religious minorities retained the right to freedom of and from religion, although it may be difficult to assess when indoctrination is occurring.⁷⁴ In some cases, the difference between indoctrination and strongly instilling the goal of objective, critical and pluralistic religious instruction would respect the rights of religious minorities and those who desire freedom from religion as non-believers.

In the Italian case of *Lautsi*,⁷⁵ Ms Lautsi, living in a predominantly Catholic area, argued, in her own name and on behalf of her two children (aged 11 and 13) that the display of the crucifix in the Italian State school attended by her children was contrary to her human right to ensure her children's education and teaching was in conformity with her religious and philosophical convictions, within the meaning of Article 2, protocol 1 and the display of the cross had also breached her freedom of religion as protected by Article 9. In response, the Italian Government argued that the display of a religious symbol in a public place did not exceed the margin of appreciation left to States and did not breach the State's duty of impartiality and neutrality since there was no European consensus on the concept of secularism in practice, with the result that States were given a wide margin of appreciation in this area.

request. Zengin applied to the Istanbul Administrative Court and again unsuccessfully to the Supreme Administrative Court.

⁷¹ (2008) 46 EHRR 47 by a 9:8 Majority.

⁷² *Zengin v Turkey* (2008) 46 EHRR 44.

⁷³ *Campbell and Cosans v The United Kingdom* [1982] ECtHR (Nos. 7511/76 & 7743/76) (25 February 1982).

⁷⁴ Rachel E Taylor 'Responsibility for the Soul of the Child: The Role of the State and Parents in Determining Religious Upbringing and Education' (2015) 29 *International Journal of Law, Policy and the Family* 15

⁷⁵ *Lautsi v Italy* Grand Chamber, 18 March 2011, Application no 30814/06.

The Chamber of the Second Section of the European Court of Human Rights held that in countries where the vast majority of the population adhered to one religion, the manifestation of the observances of a symbol of that religion could constitute pressure on the student who did not practise that religion.⁷⁶ The Chamber held that the display in classrooms in state schools of a symbol that could reasonably be associated with Catholicism, the majority religion in Italy, could not reasonably serve the educational pluralism that was essential to the preservation of a democratic society and thus restricted the right of parents to educate their children in conformity with their convictions and the right of children to believe or not to believe.⁷⁷ The political uproar, which followed the Chamber decision in *Lautsi*, indicated the type of opposition that might flow in a Catholic country over the decision that the presence of crucifixes in schools violated the ECHR.

On a rehearing, the Grand Chamber reversed the decision of the Second Section and concluded that the presence of the crucifix was compatible with the right of parents to have their children educated in line with their own philosophical convictions.⁷⁸ Although the positive duty on States to act neutrally and impartially in ensuring the influence of various religions was once again emphasised, the Grand Chamber was not satisfied that the mere presence of a crucifix in classrooms could be enough to have a proselytizing or indoctrinating effect. The crucifix on the wall was essentially perceived as a passive symbol that, in regard to the principle of neutrality, could not be deemed to have an influence on pupils as compared to that of didactic speech or participation in religious activities.⁷⁹ Where the state imposes indirect restrictions on religious freedom caused by apparently neutral laws of general applicability that pursue legitimate secular goals, the Grand Chamber of the ECtHR was of the view that the ECHR provides no protection. This approach indicates that, in these cases, there is no state interference with religious freedom, even if the philosophical convictions of some parents are disregarded, as long as there is no aim to indoctrinate pupils.

The Grand Chamber judgment in *Lautsi*⁸⁰ found against the parental right and denied that a blank school wall (instead of a crucifix) was acceptable.⁸¹ It is not easy to discern whether this decision of the Grand Chamber suggests an understanding of the need for religious and ideological pluralism and a more inclusive notion of the neutrality of the public sphere, or if such a judgment merely echoes the uncertainties in this court as it navigates its way without visible points of reference through the complexities of the relationship between religion, law and society. Furthermore, so-called neutral laws will not be neutral if they correspond to the ethical values or religion of the political majority and impinge on those

⁷⁶ *Lautsi v Italy* Grand Chamber, 18 March 2011, Application no 30814/06 para 50. The Chamber had found that crucifixes were perceived as an integral part of the school environment and could therefore be regarded as strong symbols within the meaning of the decision in *Dahlab*, in which it had been the state arguing for a secular approach.

⁷⁷ *Lautsi v Italy* Grand Chamber, 18 March 2011, Application no 30814/06, para 57.

⁷⁸ Grand Chamber, 18 March 2011, Application no 30814/06, paras 76-7.

⁷⁹ *Lautsi v Italy* Grand Chamber, 18 March 2011, Application no 30814/06, para 72.

⁸⁰ *Lautsi v Italy* Grand Chamber, 18 March 2011, Application no 30814/06.

⁸¹ *Lautsi v Italy* Grand Chamber, 18 March 2011, Application no 30814/06.

with minority beliefs. A delicate balancing act is required without any suggestion of overt evaluation⁸² to ensure that each of these rights continues to be respected.⁸³ Neutrality will always be a difficult concept to implement and it is argued that there is no such thing as neutrality in matters of faith or non-belief.⁸⁴ To pretend that there is neutrality is to deny the existence of fundamental difference and ultimately to devalue the faiths themselves. However, there can be consensus and compromise and neutrality could be understood in this sense.

The GC in *Lautsi* appeared to give little separate consideration to the rights of the children as a religious minority group. The majority opinion of the Grand Chamber downplays the significance of the pupils' experience of religion.⁸⁵ In the past, the Italian judges have been reluctant to listen to children, although the Constitutional Court considers Article 12 of the CRC as being immediately enforceable in Italian law without need for an implemented legislation.⁸⁶ However, the majority judgment of the Grand Chamber does not indicate whether children's actual experience reflects the tradition of tolerance and pluralism. None of the judges of the ECtHR were able to reflect whether the children themselves considered that all religions were respected with the crucifix on the wall. It would have been illuminating to know the response of Italian children when asked what they consider when they see the crucifix (Muslim, Hindu, Buddhist, Christian and atheist children).⁸⁷ Although bestowing religious autonomy on children is subject to the restrictions⁸⁸ necessary to protect children from significant harm, the views of children require respect in terms of the child's right to autonomy,⁸⁹ to be heard⁹⁰ and to form a religious belief.⁹¹

THE INFLUENCE OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (CRC) AND ITS COMMITTEE

⁸² B Hale 'Freedom of Religion and Belief' *The Annual Human Rights Lecture (Law Society of Ireland)* on 13 June 2014. <http://supremecourts.uk/docs/speech-140613.pdf>

⁸³ Frankie McCarthy 'Prayers in the Playground: Religion and Education in the United Kingdom and Beyond' in *The Place of Religion in Family Law: A Comparative Search* (edited by Jane Mair and Esin Orucu (Intersentia))(Cambridge, Antwerp, Poland) (2011) 235 at 263.

⁸⁴ Julian Rivers 'Religious Liberty and Education: coping with Diversity' *International Conference on Human Rights and our responsibility towards Future Generations: an Inter-religious Perspective*, organized by the Further Generation Programme in Collaboration with UNESCO and the Mediterranean Academy of Diplomatic Students at the Foundation for International Students) Valletta, Malta, 6-8 May 1999).

⁸⁵ To some extent, Piaget's theories have been largely discredited by later research (Justin L Barrett 'Do Children Experience God as Adults Do?' in *Religion in Mind" Cognitive Perspectives on Religious Belief, Ritual and Experience* ed. Jensine Andresen (New York) (Cambridge) University Press) (2001) 174 – 6.)

⁸⁶ Constitutional Court judgment.1, 2002.

⁸⁷ Barbara Bennett Woodhouse 'Religion and Children's Rights' in *Religion and Human Rights : An Introduction* (edited by John Witte, Jr. and M. Christian Green (Oxford University Press) (Oxford) (2012) p.310.

⁸⁸ John Eekelaar *Family Law and Personal Life* (Oxford University Press) 2006 at page 94.

⁸⁹ *Gillick v West Norfolk and Wisbech Area Health Authority and the DHSS* [1986] AC 112.

⁹⁰ In terms of their age and maturity and ability to understand the nature and consequences of their actions (*Gillick v West Norfolk and Wisbech area Health Authority and the DHSS* [1986] AC 112.)

⁹¹ *Re T (Minors) (Custody: Religious Upbringing)* [1981] 2 FLR 239.

The CRC has the capacity to accommodate the largely diverse contexts in which its provisions are to be realised, but contains potentially diverse and confusing interpretations on these issues.⁹² In the preamble, the CRC recognises the importance of the family as the fundamental group of society. As far as the family relationship is concerned, it is necessary to focus on the right to religious freedom in the context of the child's relationship with their parents and, on the child's right to a religious or secular education in the context of the parental right to educate their children in accordance with their convictions in line with Article 2 Protocol 1 of the ECHR. In terms of the ECHR and the CRC, the child's right to religious freedom would appear to be an independent right, although it is improbable that a court would uphold very young children's right to choose their religious upbringing in the face of opposition from both parents, and where there was no evidence of harm as a result of the parental choice of religion.⁹³ In terms of the CRC,⁹⁴ both children's right to freedom of thought, conscience and religion and the rights and duties of their parents to provide direction to their children (in a manner consistent with the evolving capacities of the child) should be respected.⁹⁵ The child's interest in religious freedom, in accordance with their evolving capacities, would suggest that a mature child should be able to engage with religious claims and practices and be able, in accordance with this developing maturity, to make her own religious judgements.⁹⁶ In accordance with this, the Committee of the CRC has stated that the child must be entitled to express views on religious matters before the age of 18, with the family or outside it⁹⁷ and placed a strong emphasis on the evolving capacities of the child.⁹⁸

Although it is stated that children's rights, like human rights, are interrelated, certain principles are given precedence such as non-discrimination (Article 2), the best interests of the child (Article 3), the right to life and development (Article 6) and respect for the child's views (Article 12). These principles have become both the basis for children's rights and also the major points of tension in the religious rights of children.⁹⁹ The child's rights to choose a religion are only one part of the human rights scheme, which includes respect for parents' rights and the fact that the exercise of such rights is linked to the child's evolving capacities.¹⁰⁰

⁹² Fiona Orr (2014) 5 *The King's Student Law Review* pp. 58-77

⁹³ Carolyn Hamilton *Family, Law and Religion* (1995) (Sweet and Maxwell) page 198-199.

⁹⁴ Article 14.

⁹⁵ Article 14 of the CRC.

⁹⁶ Harry Brighthouse 'How Should Children be Hard?' (2003) 45 *Arizona Law Review* 691 at 705.

⁹⁷ *Summer Record of the 1068th meeting: Finland*, UN Doc. CRC/C/SR.1068, para 17 (2005).

⁹⁸ *Summary Record of the 1101st meeting: Lithuania*, UN Doc. CRC/C/R paragraph 36 (2006).

⁹⁹ J Fortin (2006) 'Children's Rights – Substance or Spin?' *Family Law* 759, pp760-762.

¹⁰⁰ In *Re J (Specific Issue Order: Children's Religious Upbringing and Circumcision)*¹⁰⁰ [2000] 1 FLR 571 (CA) at 575. A dispute had arisen between a non-practising Christian mother and a non-practising Muslim father over the circumcision of the child. The court issued a prohibited steps order, preventing the father from arranging or permitting the boy to be circumcised without the agreement of the court. The court stated that the child was too young to belong to a particular religion, focusing on the child's upbringing rather than religion and the child's rights to make decisions for himself, once competent.

It is significant that Article 14 of the CRC, which contains the child's right to religion is unlike other rights of the child, such as rights to freedom of expression, assembly and privacy, in that it is subject to the qualification of the obligation of State Parties to respect the rights and duties of parents to provide direction for the child. Parents' rights are mentioned in regard to the child's freedom of religion, although they are not mentioned in other Articles regarding various rights of the child. It would appear that, in respect to religion, the CRC regards parents as having rights to shape their child's identity and children cannot be considered in this context as autonomous religious beings, without sufficient focus on their links to family and community.¹⁰¹ The child's interests, whilst being prioritised and privileged, are not viewed in isolation: they are the primary consideration, but not the only one.¹⁰² In each case, rights must be balanced against others to determine their legitimacy of aim and proportionality in relation to other rights.¹⁰³

Article 12 (2) of the CRC provides that children shall in accordance with their age and maturity be provided with the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly, or through a representative or an appropriate body. The Committee on the Rights of the Child, whilst stressing that the principles set out in Article 12 should be given greater priority and that this should be seen as a right and not merely a matter of discretion for individual governments,¹⁰⁴ provides no hierarchy of Articles when conflicts arise. Article 3 emphasises the best interests of the child, Article 5 the evolving capacities of the child, Article 12 the participatory right of the child and Article 14 the child's right to freedom of belief. Uncertainty over the hierarchy prevails in the Reports of the Committee of the CRC and needs clarity to inform its decision-making and provide a steer for the ECtHR.¹⁰⁵

In the educational context, the CRC has set up an almost irreconcilable contradiction in values where respect for religious and cultural identity may affect the child's ability to achieve his or her potential within contemporary society. Article 5 of the CRC attempts to deal with these conflicts between parental and children's rights by recognising the parental role and emphasising that both parents, the extended family and the community have responsibilities and duties to raise the child in accordance with

However, Wall J went further and stated obiter that where two parents with parental responsibility for their infant male child have him ritually circumcised in accordance with the tenets of their religions, that exercise of parental responsibility is lawful.

¹⁰¹ Sylvie Langlaude 'Children and Religion under Article 14 of the UNCRC: A Critical Analysis' (2008) 16 *International Journal of Children's Rights* 475 at 479

¹⁰² Andrew McFarlane "'Am I bothered?": The Relevance of Religious Courts to A Civil Judge' (2011) 41 *Family Law* 946 at 955; John Eekelaar *Family Law and Personal Life* (2006) (Oxford) 161.

¹⁰³ J Fortin, J Hunt and L Scanlan (2012) *Taking a longer view of contact: The perspectives of young adults who experienced parental separation in their youth*.

¹⁰⁴ Jane Fortin *Children's Rights and the Developing Law* (2009) (3rd Edition) (Cambridge University Press) 42; John Eekelaar 'The Interest of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' in Philip Alston (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (Oxford University Press) (1994) page 161.

¹⁰⁵ Sylvie Langlaude 'Children and Religion under Article 14 of the UNCRC: A Critical Analysis' (2008) 16 *International Journal of Children's Rights* 475 at 501. Langlaude criticised the Committee for interpreting Article 14 in such a way that requires both the parents and State to respect the decision of the child and limit their guidance and instruction to that which is necessary to support the child in his or religious and moral development.

their customs and children themselves enjoy a further right to freedom of thought, conscience and religion in terms of article 14 of the CRC.¹⁰⁶ The parental right to respect for their children's educational and religious upbringing can both conflict with and complement the children's rights. Article 29 (1) (a) of the CRC emphasises the requirement that education should develop the child's personality, talents and abilities to their fullest potential¹⁰⁷ but, by contrast, Article 29 (1) (c) asserts that the child's education should develop respect for the child's parents and rights to their own cultural identity, language and values.¹⁰⁸ Children may be brought up and nurtured within a particular religion – which does not imply that they are necessarily indoctrinated.¹⁰⁹

The ECtHR has not, as yet, been required to rule on the legality of the circumcision of infant males. The Parliamentary Assembly of the Council of Europe has endorsed a report of its Social Affairs and Health Committee, which addressed the issue of children's right to physical integrity, and expressed concern about the violation of the physical integrity of children, which includes the circumcision of young boys for religious reasons.¹¹⁰ The Committee on the Rights of the Child has recommended to Israel in its July 213 Concluding Observation that the State party undertake a study on the short and long-term effects of male circumcision.¹¹¹ A German court has held that a ritual male circumcision performed by Muslim parents on an underage child, represents a bodily injury. ¹¹² The case was followed by intense reaction from the religious representatives who condemned that

¹⁰⁶ A report by the Parliamentary Joint Committee on Human Rights on the United Kingdom's compliance with the CRC suggests that that CRC should be incorporated into domestic law and calls for the UK to ratify the Optional Protocol which give individual child the ability to petition the Committee of the CRC on the grounds of alleged violation of their rights. *The Fifth Periodic Report to the UN Committee on the Rights of the Child*, May 2014, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGBR%2f5&Lang=en (Back). See too *R (SG) v Secretary of State for Work and Pension* [2015] UKSC 16. Scotland has legislated to provide protection in terms of articles 28 and 29 of CRC (Standards in Scotland Schools Act 2000 s 1.)

¹⁰⁸ Article 30 also requires states to respect the right of any child of an ethnic or religious minority to enjoy his or her own culture to profess and practise his or own religion. Article 5 of the United Nations Declaration on All forms of Intolerance and Discrimination based on Religion or Belief article 5 states the every child shall enjoy the right of access to education in the matter of religion or belief in accordance with the wishes of the parents and shall not be compelled to receive teaching on religion or belief against their wishes... the best interest of the child being the guiding principle.

¹⁰⁹ Sylvie Langlaude "Children and Religion under Article 14 of the UNCRC: A Critical Analysis' (2008) 16 *International Journal of Children's Rights* 475 at 479 c.f. Joel Feinberg 'The Children' sight to an Open Future in W Aitken and H LaFollette (Eds) *Whose Child? Children's Rights, Parental Authority and State power* (Totowa NJ: Littlefield, Adams, 1980).

¹¹⁰ Parliamentary Assembly to the Council of Europe (PACE, Resolution 1952 and Recommendation 2023 (Provision version on Children's Right to Physical Integrity available a <http://www.assembly.coe.int/nw/xml/XRef/XRef-DocDetails-EN.asp?FileID=20176&lang=EN>

¹¹¹ UN Committee on the Right of the Child, Concluding Observations on Israel (CRC/C?ISR/CO/2-4), para 42.

¹¹² 17/10331. The Court held that the constitutional right of the child to bodily integrity outweighed the parents' religious rights in terms of the education of their children.

alleged assault on freedom of religion and calling for legislative intervention. The Bundestag approved a resolution¹¹³ that Jewish and Muslim religious life must continue to be possible in Germany. The German Parliament enacted a law¹¹⁴ which permits non-therapeutic circumcision performed by a medical doctor where the operation does not affect the child's health. The legislation specified that circumcision is a religious choice and not simply a ritual act. Parliament had been invited to present an Act directed at ensuring that ritual male circumcision, performed with medical expertise and without unnecessary pain, was permitted, provided there was due regard to the constitutional protection of child's welfare, bodily integrity, freedom of religion and the parent's right to educate their children.

THE USE OF ARTICLE 8 TO DEFEND RIGHTS OF THOSE FROM RELIGIOUS MINORITIES OR ECCENTRIC RELIGIOUS GROUPS

In some cases, the ECtHR has used Article 8 of the ECHR to ensure that the rights of individual parents from religious minority or eccentric religious groups are not unduly restricted. In the context of proportionality reasoning and balancing of legitimate interests, this line of ECtHR jurisprudence has shown a sensitivity and respect for the religious rights of the parties whilst not neglecting the best interests of the child.¹¹⁵ For example, in *Hoffmann v Austria*,¹¹⁶ whilst the divorce proceedings were pending, both parents applied for custody of the children. The father opposed a grant of custody to the applicant, mainly on the ground that she was a Jehovah's Witness.¹¹⁷ On appeal by the mother to the ECtHR, the ECtHR noted that the children had lived with their mother for two years after she had left with them, before the judgment of the Supreme Court of Austria compelled her to give them up to their father. The Supreme Court's decision therefore constituted an interference with her right to respect for her family life, and the case thus fell within the ambit of Article 8 of the ECHR.¹¹⁸

The ECtHR accepted that articles 14 and 8 had been violated in that there had been a difference in treatment based on the ground of religion. The burden was on the state to show a 'reasonable and objective justification' for the difference in treatment: differentiation based on religion

¹¹³ 17/10331, 2012.

¹¹⁴ Article 1631d of the BGB.

¹¹⁵ *Hoffmann v Austria* [1993] ECtHR (No. 12875/87) (23 June 1993).

¹¹⁶ [1993] ECtHR (No. 12875/87) (23 June 1993).

¹¹⁷ The District Court granted custody to the applicant. An appeal by her husband was dismissed. However, the Supreme Court allowed the father's appeal, holding that the education of the children in accordance with the principles of the Jehovah's Witnesses violated the provisions of the Religious Education Act and that the lower court had disregarded the children's best interests: their contact with that religious group was likely to create a risk of their social marginalisation and their inability to consent to receiving blood transfusions. In this case, the applicant was, when she married, a Roman Catholic, as was her husband. During the marriage the couple had two children who were baptised as Roman Catholics. Subsequently, although the applicant became a Jehovah's Witness, her husband and children did not. Following a breakdown of the marriage, the applicant left the matrimonial home together with the children.

¹¹⁸ In view of the nature of the allegations made, the Court considered it appropriate to examine the case, as the Commission had, under Article 8 in conjunction with Article 14 of the ECHR.

alone was held to be in breach of Article 14.¹¹⁹ Although the aim pursued by the judgment of the Austrian Supreme Court was a legitimate one, namely the protection of the health and rights of the children, a distinction based essentially on a difference in religion alone was not acceptable. The ECtHR accepted that the practical consequences of the mother's membership of the Jehovah's Witnesses (the possible effects on the children's social life and her total rejection of blood transfusions for her children) might be capable of tipping the scales in favour of one parent rather than the other. However, the ECtHR could not find that a reasonable relationship of proportionality had existed between the means employed and the aim pursued. There had accordingly been a violation of Article 8 in conjunction with Article 14.¹²⁰

More recently, in *Vojnity v Hungary*¹²¹ the ECtHR held that, though the domestic courts of Hungary had pursued the legitimate aim of protecting the child's best interests, the decision to remove the divorced applicant's access rights to his son, essentially on grounds of his eccentric religious convictions, had discriminated against his exercise of his right to respect for family life on the basis of his religion, in violation of Article 14 (discrimination) taken together with Article 8 (private and family life).¹²² The removal of the son from any contact with his father on the grounds of the child's welfare was not a proportionate response to his eccentric religious convictions. In *Vojnity* the ECtHR was clear that on the facts, there was no evidence that the father's religious convictions involved dangerous practices or exposed his son to physical or psychological harm; there was no evidence that the father's insistence on proselytising substantiated a risk of actual harm and there was no evidence of any harm which the father's irrational world views and proselytism could have caused to the child. There were no exceptional circumstances to justify the radical step of severing all contact and family life between the applicant and his son. The child's best interests form part of the reasoning of the ECtHR and parental rights are clearly not unlimited.¹²³

Thus, in these cases of disputed custody, the use of Article 8 and the principle of proportionality enabled the ECtHR to find that the means employed were unjustifiable since they were out of proportion to the need to protect the best interests of the child and based on an evaluation of the religion which meant that the means used were disproportionate to the aim. The ECtHR considered that, in the light of the importance of the rights enshrined in Article 8 in guaranteeing the individual's self-fulfilment, such

¹¹⁹ *Hoffmann v Austria* [1993] ECtHR (No. 12875/87) (23 June 1993).

¹²⁰ Similarly, in *Palau-Martinez v France* [2003] ECtHR (No. 64927/01) (16 December 2003) the French Court of Appeal had held that the children of divorced parents should live with their father, noting that their mother was a Jehovah's Witness, that the Witnesses' rules for the upbringing of children were 'open to criticism mainly on account of their strictness and intolerance and the obligation on children to proselytise' and concluding that it was 'in the children's interests to avoid the constraints and prohibitions imposed by a religion whose structure resembles that of a sect'. Following the approach of *Hoffmann v Austria*, the ECtHR held that this decision violated Article 8 of the ECHR since the means employed were disproportionate to the legitimate aim pursued.

¹²¹ Application no. 29617/07 [2013] ECHR 131.

¹²² *Vojnity v Hungary* 12 February 2013, ECtHR No 29617/07 At para [42].

¹²³ Para [42-44].

treatment would only be compatible with the ECHR if very weighty reasons existed, such as the protection of the child.¹²⁴ In *Vojnity v Hungary*¹²⁵ the ECtHR held that the approach adopted by the authorities amounted to a complete disregard of the principle of proportionality, requisite in this field and inherent in the spirit of the Convention. It is this principle which needs to be more stringently applied in the context of Article 9 and minority rights.

BALANCING ON THE TIGHTROPE

The ECtHR is faced with the complex task of balancing the competing principles of the welfare of the child, the rights of all the parties (including the child) to freedom of religion and the parental right to respect for their religious or non-religious convictions.¹²⁶ How should such decisions shape the law in a manner that is as consistent as possible with the exercise of the rights of religious or non-religious minorities and respect for the parents' philosophical convictions and the child's right to an open future?¹²⁷ How should the potentially competing principles of the child's rights and the parties' freedom of religion be proportionately juxtaposed so that there is a space in which religious persons are able to confirm their commitment to a religion in accordance with their human dignity? How should the secular state cope with the recognition of diverse religious practices of child-rearing? Should parents, who are part of a religious minority be able to bring up their children according to their own values and beliefs, which may wholly conflict with the norms of the majority? Should parents be able to demand that their children receive an education of a religious nature and thus be able to condition their children into specific ways of thinking and feeling and to a particular level of intellect solely based on their own moral and religious persuasions? There is always the danger that children's educational opportunities and their rights to an open future¹²⁸ may well end up 'sacrificed on the altar of the religious freedom' of their parents.¹²⁹ Generally, unless the parents are disputing the religious upbringing of the child, the state does not have a primary responsibility to ensure equality of opportunity,¹³⁰ since this might constitute an uncalled for invasion of a protected private sphere¹³¹ or a unjustifiable limitation of parental right to respect for their religious convictions.¹³²

¹²⁴ Application no. 29617/07 [2013] ECHR 131.

¹²⁵ At para [42].

¹²⁶ *Buckley v Buckley* [1973] Fam Law 106, and *Re B and G (Minors) (Custody)* [1985] FLR 134.

¹²⁷ S.E. Mumford 'The Judicial Resolution of Disputes Involving Children And Religion' (1998) 47(1) *International & Comparative Law Quarterly* 117. In 1998 Mumford examined the factors which influence some English courts in their evaluation of the influence of religion on children.

¹²⁸ Joel Feinberg 'The Child's Rights to an Open future' in Aiken and LaFollette (eds) *Whose Child?* (1980) 124-153.

¹²⁹ Carolyn Hamilton *Family, Law and Religion* (1995) (Sweet and Maxwell) page 198-199.

¹³⁰ Carolyn Hamilton 'Religious School and Religious Schooling' in N Lowe and G Douglas (eds) *Families across Frontiers* (1996) 397; John Rawls' First Principle in *A Theory of Justice* (1971.)

¹³¹ *Hoffmann v Austria* [1993] ECtHR (No. 12875/87) (23 June 1993).

¹³² Catherine Henney 'Education in a Multicultural Society: A Matter of "Fair Equality of Opportunity" or Parental Choice?' (2003) *UCL Jurisprudence Review* 68 at 69.

Since each case will depend to some extent on the nature, circumstances and context of the individual child, the ECtHR would need to bear in mind that the child does not exist in a vacuum and a balance is needed to ensure that other rights are not undermined.¹³³ Discrimination between religions is justifiable where the banned religious practice clashes with the right and freedoms of others. However, recognition is needed of the plurality of religious communities that exist within many European societies and, accordingly, an acceptance that parents of different cultural and religious communities will also hold different values regarding the education of their children. The CRC clearly recognises this plurality in stating that a child's education must prepare him or her for 'responsible life in a free society in the spirit of understanding, peace, tolerance, equality of sexes and friendship among all people, international and religious groups and persons of indigenous origin.'¹³⁴ If freedom of religion is to be observed, it must apply to all religions and not only to the religion of the majority.¹³⁵

Undoubtedly, especially in the early years of a child's life, parental autonomy will mean that parental religious choices will be respected, but this clearly cannot be without question in cases such as circumcision.¹³⁶ In considering these complex issues, the ECtHR needs to adhere to a 'balancing of rights' process in the context of a holistic view of the child's welfare. The need for a focus on the human rights of the parties is heightened by the fact that, in some cases, there is no allegation of harm to the child so the issue of the child's welfare will never arise unless the parents dispute religious aspects of the child's upbringing or education. A consideration of the proportionality and legitimacy of any limitation on human rights is likely to produce a more fact-sensitive, contextualised judicial approach, taking into account the need for protection of the rights and freedom of others.

Parental responsibility includes the right to bring up children in a particular religious faith, or in none. The ECtHR may need to examine the child's right to an open future in the case of educational opportunities, but in the context of the right of religious minorities (as a group) to freedom of religion. Any imposition of state values should be based on a genuinely cohesive vision, which, whilst respecting the diverse religious convictions of parents, formulates and enforces those values in a legitimate and consultative fashion.¹³⁷ The framework of values in terms of which it is lawful for the state to intervene should be clearly established.¹³⁸ In

¹³³ Andrew McFarlane "'Am I bothered?'" The Relevance of Religious Courts to A Civil Judge' (2011) 41 Family Law 946.

¹³⁴ Article 29(1) of the CRC.

¹³⁵ Lorenzo Zucca *A Secular Europe: Law and Religions in the European constitutional Landscape* (2012) (Oxford University Press (Oxford) page xvii.

¹³⁶ Howard Gilbert 'Time to Reconsider the Lawfulness of Ritual Male Circumcision' (2001) 7 *European Human Rights Law Review* pp. 279 at 282-294.

¹³⁷ Rachel E Taylor 'Responsibility for the Soul of the Child: The Role of the State and Parents in Determining Religious Upbringing and Education' (2015) 29 *International Journal of Law, Policy and the Family* 15, 31.

¹³⁸ Rachel E Taylor 'Responsibility for the Soul of the Child: The Role of the State and Parents in Determining Religious Upbringing and Education' (2015) 29 *International Journal of Law, Policy and the Family* 15, 31.

implementing a holistic exercise, courts need to be sensitive to the fact that a tension exists between focussing on the ‘accepted standards of the community’¹³⁹ to determine a child’s welfare and the risk of the imposition of majority standards that risk jeopardising that attempt to be neutral.¹⁴⁰

CONCLUSION

This article has discussed some of the challenges for the ECtHR in these complex situations. The margin of appreciation doctrine has been widely used by the ECtHR, and has permitted States Parties to interpret religious rights and freedoms within the broader context of their national cultures and traditions. However, the argument that a lack of consensus between the law of Contracting States allows a wide margin of appreciation may risk jeopardising the protection of minority religious rights, including those of children. To prevent such rights being disproportionately undermined, the proportionality test should be strictly applied to balance the goal pursued by the religiously restrictive measures as against the impact of a ban on a particular group of persons.¹⁴¹

An analysis of some of the relevant ECtHR jurisprudence indicates that the ECtHR has sometimes denied religious minorities the protection of article 9 of the ECHR, justifying national policies that impose, in the public sphere, a concept that excludes the visibility of religion, allegedly in the interests of secularity. It would seem that, on these occasions,¹⁴² the ECtHR, with respect, confuses the concept of secularity with that of neutrality. The notion of secularity as interpreted by the Turkish and French concepts of *laïcité* and ratified by the ECtHR excludes the visibility of religion in some areas of public life, especially in educational settings. It would seem that this policy is synonymous with an exclusive concept of secularism rather than a concept of inclusive neutrality. Neutrality should, wherever possible, in cases of religion be implicitly inclusive. Careful balancing of interests in the application of Article 9.2 in accordance with the principles of proportionality would help to ensure that a pluralist policy is adopted and may prevent a mechanistic or deferential application of the margin of appreciation doctrine.

¹³⁹ *Re G (Children) (Religious Upbringing: Education)* [2012] EWCA Civ 1233; [2013] 1 FLR 677 (CA) at paras [18]–[19] and [64]. In this case, one of the witnesses in the first court, Miss Brereton had pointed out that for the children a change in their education would involve an entire change in the children’s way of life.

¹⁴⁰ Rachel Taylor ‘Case Commentary: Secular values and sacred rights: *Re G (Education: Religious Upbringing)*’ (2013) 25 *Child and Family Law Quarterly* 336 at 339.

¹⁴¹ For example, in *Palau-Martinez v France* [2003] ECtHR (No. 64927/01) (16 December 2003) where the ECtHR applied proportionality reasoning in the context of Article 8.

¹⁴² For example, *SAS v France* (Application Number 43835/11).