

**STATE RELIGIOUS NEUTRALITY AS A COMMON EUROPEAN  
STANDARD? RE-APPRAISING THE EUROPEAN COURT OF HUMAN  
RIGHTS APPROACH**

**Julie Ringelheim**

**February 2017**

 **UCLouvain**



**Institute for Interdisciplinary Research in Legal sciences (JUR-I)**  
Centre for Philosophy of Law (CPDR)

La Cellule de recherche interdisciplinaire en droits de l'homme (CRIDHO) a été constituée au sein du Centre de philosophie du droit, centre de recherches localisé au sein de l'Institut pour la recherche interdisciplinaire en sciences juridiques (JUR-I) de l'Université de Louvain, par des chercheurs soucieux de réfléchir le développement contemporain des droits fondamentaux à l'aide d'outils d'autres disciplines, notamment l'économie et la philosophie politique. La CRIDHO travaille sur les rapports entre les mécanismes de marché et les droits fondamentaux, aussi bien au niveau des rapports interindividuels qu'au niveau des rapports noués entre Etats dans le cadre européen ou international.

CRIDHO Working Papers

Tous droits réservés.

Aucune partie de ce document ne peut être publiée, sous quelque forme que ce soit, sans le consentement de l'auteur.

The Interdisciplinary Research Cell in Human Rights (CRIDHO) has been created within the Centre for Legal Philosophy (CPDR), a research centre located in the Institute for Interdisciplinary research in legal science (JUR-I) of the University of Louvain, by scholars seeking to understand the development of fundamental rights by relying on other disciplines, especially economics and political philosophy. The CRIDHO works on the relationship between market mechanisms and fundamental rights, both at the level of interindividual relationships as at the level of the relationships between States in the European or international context.

CRIDHO Working Papers

All rights reserved

No part of this paper may be reproduced in any form without consent of the author

# STATE RELIGIOUS NEUTRALITY AS A COMMON EUROPEAN STANDARD? RE-APPRAISING THE EUROPEAN COURT OF HUMAN RIGHTS APPROACH

Julie Ringelheim\*

*Note: A revised version of this paper has been published in Oxford Journal of Law and Religion, Vol. 6, No. 1, February 2017, 24-47, <https://doi.org/10.1093/ojlr/rww060>.*

## ABSTRACT

This article explores the development, by the European Court of Human Rights, of the notion that states have a duty to be neutral in religious matters. It is submitted that such a principle of neutrality, which echoes a classic tenet of liberal philosophy, can legitimately be derived from the rights and ideals enshrined in the European Convention on Human Rights (ECHR). It can be considered as a corollary of religious freedom, non-discrimination, and pluralism. However, the way the Court has interpreted the concept of state religious neutrality throughout its case law gives rise to criticism. In dealing with cases raising the question of the place of religion in public institutions, the Court has failed to remain consistent in its approach to neutrality. In effect, it balances between three different understandings of the concept. They are characterized here as 'neutrality as absence of coercion', 'neutrality as absence of preference', and 'neutrality as exclusion of religion from the public sphere'. The present article argues that 'neutrality as absence of preference' provides the most adequate model for an ECHR-based concept of state religious neutrality.

## INTRODUCTION

In a 2000 judgment, the European Court of Human Rights (ECtHR) explicitly established that religious freedom, as guaranteed by Article 9 of the European Convention on Human Rights (ECHR), entails that states have an obligation to be neutral in religious matters.<sup>1</sup> By positing that states have a duty to be neutral, the Court echoes a classic tenet of liberalism. Yet determining what state denominational neutrality means exactly and what it entails in specific contexts raises special challenges for the Court. First of all, neutrality is not a straightforward concept. It can be subject to different interpretations. Secondly, when elaborating this principle, the Court must take into consideration the diversity of existing state-religion arrangements across Europe. The Convention, unlike a national constitution, does not institute a specific state-religion regime. Amongst Council of Europe member countries, current institutional frameworks regarding religions range from established or official church systems, which are still in force in some countries such as the United Kingdom, Norway, and Greece, to diverse forms of mild separation allowing collaborations between state and religious communities which we find for instance in Germany, Belgium, Spain, or Italy, and strict separation (or

---

\* Senior Researcher at F.R.S-FNRS (Belgium) and Senior Lecturer at Louvain University (UCL). The author wishes to thank Lorenzo Zucca, Effie Fokas, Monica Claes, Pasquale Annichino, Pierre-Olivier de Broux and all the participants of the workshop organized at ELIAMEP in Athens in July 2016 by Effie Fokas, in the framework of the 'Grassrootsmobilise' research programme, for their insightful comments on an earlier version of this paper.

<sup>1</sup> *Hasan and Chaush v Bulgaria* (Grand Chamber) (2000), ECHR 2000-XI.

*laïcité*) in France and Turkey.<sup>2</sup> Furthermore, all over Europe state-religion issues are very politically sensitive. In many countries, religious heritage itself, or legal traditions relating to state-religion relations, play a significant role in discourses on national identity. At the same time, in most European countries today we observe a high degree of secularization, in the sense of a decline of religious practice amongst the population, combined with a heightened confessional diversity, the re-assertion of certain – majority or minority – religious identities, and mounting fears about religious radicalization.<sup>3</sup> This complex set of trends contributes to render controversies around religion and its place in the public sphere particularly acute.

Some have claimed that the Court has erred in asserting that states have an obligation to be neutral in matters of religion based on the ECHR. They argue that, through its emphasis on such a duty to be neutral, the ECtHR imposes a specific state-religion regime, namely strict separation, that is alien to many member states. By doing so, it exceeds its powers and disregards the margin of appreciation states should enjoy in a domain so closely linked to national traditions and political culture.<sup>4</sup>

This article defends the opposite view. It submits that an obligation of neutrality can legitimately be derived from the rights and principles guaranteed by the European Convention,<sup>5</sup> and that identifying such a requirement does not necessarily amount to imposing a uniform state-religion institutional model. Granted, asserting a duty of religious neutrality implies going beyond a strictly individualistic approach to religious freedom and admitting that rules pertaining to the state's relationship with religious communities as such falls within the ambit of Article 9. But this approach is well-founded. The way in which the state interacts with religious groups and regulates their legal status can indeed affect the freedom individuals enjoy to practice or not practice a certain faith and may create inequalities among believers. The recognition of a state duty to be neutral is part of a more general evolution which has seen the Court inferring collective and institutional implications from the individual right to freedom of religion.<sup>6</sup>

---

<sup>2</sup> See G Robbers (ed), *State and Church in the European Union* (Nomos 2005) and JTS Madeley and Z Enyedi (eds), *Church and State in Contemporary Europe. The Chimera of Neutrality* (Routledge 2003).

<sup>3</sup> See O Roy, *Holy Ignorance. When Religion and Culture Part Ways* (Columbia University Press 2010); MC Foblets, K Alidadi, JS Nielsen and Z Yanasmayan (eds), *Belief, Law and Politics. What Future for a Secular Europe?* (Ashgate 2014); G Davie, 'Pluralism, Tolerance, and Democracy: Theory and Practice in Europe' in Th Banchoff (ed), *Democracy and the New Religious Pluralism* (OUP 2007).

<sup>4</sup> One of the most outspoken critics of the Court in this regard has been Judge Bonello in his concurring opinion in the *Lautsi* case (*Lautsi and Others v Italy* (2011) ECHR 2011-III). In the academic literature, see M Evans and P Petkoff, 'A Separation of Convenience? The Concept of Neutrality in the Jurisprudence of the European Court of Human Rights' (2008) 36(3) *Religion, State & Society* 205; M Evans, 'Freedom of Religion and the European Convention on Human Rights: Approaches, Trends and Tension' in P Cane, C Evan and Z Robinson (eds), *Law and Religion in Theoretical and Historical Context* (CUP, 2008); I Leigh and R Ahdar, 'Post-Secularism and the European Court of Human Rights: Or How God Never Really Went Away' (2012) 75(6) *MLR* 1064; I Leigh, 'The European Court of Human Rights and Religious Neutrality' in G D'Costa, M Evans, T Modood and J Rivers (eds), *Religion in a Liberal State* (CUP 2013).

<sup>5</sup> In this sense, see H Bielefeld, 'Misperceptions of Freedom of Religion and Belief' (2013) 35(1) *HRQ* 33; J Temperman, 'The Neutral State: Optional or Necessary? A Triangular Analysis of State-Religion Relationships, Democratisation and Human Rights Compliance' (2006) 1 *Religion & Hum. Rts.* 269; D Kyritsis and S Tsakyrakis, 'Neutrality in the Classroom' (2013) 11(1) *I.CON* 200; L Zucca, *A Secular Europe. Law and Religion in the European Constitutional Landscape* 97 (OUP 2012). See also the dissenting opinion of Judge Malinverni in *Lautsi* (n 4).

<sup>6</sup> See J Ringelheim, 'Rights, Religion, and the Public Sphere: the European Court of Human Rights in Search of a Theory?' in L Zucca and C Ungureanu (eds), *Law, State and Religion in the New Europe* (CUP, 2012); C

Thus the principle of neutrality helps to clarify constraints imposed on state action as a result of the obligation to respect religious freedom under the Convention. However, such constraints can be met in the context of various legal frameworks.

That said, the way the Court has developed the concept of state denominational neutrality throughout its case law gives rise to criticism. As references to neutrality have multiplied, the meaning afforded to this notion has become blurred. It has come to mean different things in different rulings. And there are clear tensions between some of these interpretations. This ambiguity is problematic. It confuses the message sent by the Court and weakens the persuasive force of its judgments. Hence it hampers its capacity to contribute meaningfully to the public debate in Europe on important issues such as religious instruction in public schools, the status of minority faiths, or the presence of religious symbols in public institutions.

The aim of this article is twofold. On the one hand, it seeks to cast light on how the ECtHR has developed and construed the concept of states' denominational neutrality. It will be demonstrated that diverging conceptions of this notion coexist in its case law and that this creates problems. On the other hand, based on a critical discussion of this case law combined with insights drawn from political theory, this article endeavours to identify which conception better reflects the ideals underlying the European Convention.

Part I delves further into the theory of state religious neutrality. Looking at political theory helps to clarify how such a concept relates to the rights, freedoms, and principles enshrined in the European Convention. These background considerations will guide the analysis of the case law which is the object of parts II and III. As will be shown, the duty of neutrality, in its most basic interpretation, entails an obligation of non-interference and impartiality. It is in this sense that the Court understands the concept when dealing with disputes concerning internal conflicts within religious communities or the legal status of religious groups (Part II). However, as we see in Part III, this construction of neutrality is insufficient to deal with another type of case, namely that raising the question of the proper place of religion in public institutions. Here the Court's approach to neutrality becomes difficult to grasp. In effect, the Court balances between three different understandings of the concept that need to be disentangled. They are characterized here as 'neutrality as absence of coercion', 'neutrality as absence of preference', and 'neutrality as exclusion of religion from the public sphere'. *Lautsi and others v Italy* (2011), *Folgerø and others v Norway* (2007), and *Ebrahimian v France* (2015) exemplify each of these models of neutrality. It will be argued that 'neutrality as absence of preference' provides the most adequate model for an ECHR-based concept of state religious neutrality.

---

Evans and Ch A Thomas, 'Church-State Relations in the European Court of Human Rights' (2006) *BYU L. Rev.* 69; Fr Tulken, 'The European Convention on Human Rights and Church-State Relations: Pluralism v. Pluralism' (2008-2009) 30 *Cardozo L. Rev.* 2575.

## I. THE PHILOSOPHICAL FOUNDATIONS OF STATE NEUTRALITY

The elaboration of the principle of state religious neutrality by the ECtHR should, in order to remain within the limits of its mandate, meet two criteria: it should find a basis in the norms and principles enshrined in the European Convention, and it should be compatible with the legitimate diversity of models of state-religion relations among Member States.

Political theory provides valuable insights to better capture the fundamental meaning of state neutrality. It is widely agreed that the idea that the state should be neutral towards different conceptions of the good life is a central tenet of liberalism.<sup>7</sup> To be sure, this notion is the object of vivid controversy.<sup>8</sup> Yet there is a relative consensus on a series of points that are especially relevant to our inquiry. At its most basic, the principle of neutrality entails that the state should refrain from imposing or promoting one controversial view of the good life. It should leave its citizens to define their own goals and pursue their own lives as they see fit, confining itself to providing a 'neutral framework within which different and potentially conflicting conceptions of the good can be pursued.'<sup>9</sup> In other words, the state should not take sides on the question of the good life.<sup>10</sup> Of course, in practice, many government policies have the effect of advantaging or disadvantaging certain conceptions of the good insofar as they make certain lifestyles easier to pursue than others. But it is commonly admitted that neutrality does not require governments to ensure that their action has *neutral consequences* (i.e. *consequential neutrality*), for this would make almost any public policy impossible. Rather, the requirements of neutrality bear upon the *aims* or *justification* of government policies, that is, in order to be neutral, state practices cannot be aimed at favouring one particular world-view at the expense of others (i.e. *justificatory neutrality*).<sup>11</sup> According to this view, a political decision 'can count as neutral only if it can be justified without appealing to the presumed intrinsic superiority of any particular conception of the good life'<sup>12</sup> State rules and policies should be based upon justifications that all citizens can reasonably accept, what Rawls call *public* reasons.<sup>13</sup>

Neutrality is usually considered not as an end in itself but as a condition necessary to guaranteeing some higher liberal principles. Various authors consider it as primarily a corollary of individual freedom, that is, in order to respect the freedom of individuals to choose their own conception of the good life, states need to remain neutral towards these comprehensive doctrines<sup>14</sup>. Others insist on its connection with equality. For Dworkin:

---

<sup>7</sup> See i.a. R Dworkin, 'Liberalism' in S Hampshire (ed.), *Public and Private Morality* (CUP 1978); W Kymlicka, 'Liberal Individualism and Liberal Neutrality', (1989) 99 *Ethics* 883; Ch Larmore, 'Political Liberalism' (1990) 18(3) *Political Theory* 339; J Rawls, *Political Liberalism* (Columbia University Press 1993). See also P Jones, 'The Ideal of the Neutral State' in R Goodin and A Reeve (eds), *Liberal Neutrality* (Routledge 1989).

<sup>8</sup> J Kis, 'State Neutrality' in M Rosenfeld and A Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2013).

<sup>9</sup> Kymlicka (n 7) 883. See also Jones (n 7) 9.

<sup>10</sup> Jones (n 7) 20.

<sup>11</sup> See Kymlicka (n 7); Jones (n 7); Kis (n 8) 320.

<sup>12</sup> Ch Larmore, *Patterns of Moral Complexity* (CUP 1987) 44.

<sup>13</sup> Rawls (n 7).

<sup>14</sup> See in particular Kymlicka (n 7) 892.



Since the citizens of a society differ in their conceptions, the government does not treat them as equals if it prefers one conception to another, either because the officials believe that one is intrinsically superior, or because one is held by the more numerous or more powerful group.<sup>15</sup>

Furthermore, as Rawls emphasizes, the requirement that state action be based on neutral reasons is also a response to ‘the fact of pluralism’, which is a natural result of free institutions. Given that in modern societies, citizens are deeply divided as to their religious or philosophical doctrines, a just polity where citizens are treated as free and equal participants is only possible if the state’s foundations and action are based on reasons that are independent of these conflicting doctrines.<sup>16</sup>

Hence the state’s obligation to be religiously neutral derives from three concerns: freedom, equality, and pluralism. They all find a basis in the European Convention on Human Rights.<sup>17</sup> Freedom and equality are the inspiring ideals behind the provisions on religious freedom and non-discrimination. As for pluralism, it has been recognized by the European Court as one of the foundations of a ‘democratic society’ within the meaning of the Convention, a notion that should guide the interpretation of protected rights.<sup>18</sup> In *Kokkinakis v Greece*, its first ruling on freedom of religion, it famously emphasized the crucial importance of *religious pluralism* for a democratic society.<sup>19</sup> As envisaged by the Court, pluralism conveys the idea that in a democracy, the diversity of opinions and world-views individuals may hold as a result of the exercise of their freedoms should be respected and allowed to flourish.<sup>20</sup> It is both an outcome and a condition of the exercise of various individual rights. In the words of the Court, pluralism is ‘built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts.’<sup>21</sup>

On a general level, the duty of states to be neutral entails that they refrain from forbidding, imposing, or deliberately promoting one particular religious or philosophical doctrine. But in concrete situations, this broad obligation has to be fine-tuned to identify the specific requirements it entails. In this endeavour, the ECtHR cannot lose sight of the fact that it is an international court and the Convention does not impose a single state-religion legal framework. Its conception of neutrality should reflect common minimum standards that any state party to the ECHR ought to respect, while allowing them, beyond such a threshold, to maintain different legal systems of state-religion relations. The challenge for the Court then is to arrive at a concept of neutrality that is substantial enough to be meaningful while being sufficiently flexible to accommodate the legitimate diversity of state-religion models.

---

<sup>15</sup> Dworkin (n 7) 127.

<sup>16</sup> Rawls (n 7).

<sup>17</sup> D Kyritsis and S Tsakyrakis, ‘Neutrality in the Classroom’ (2013) 11(1) *I.CON* 200, 205 and 211.

<sup>18</sup> *Handyside v United Kingdom* (1976) Series A no 24, para 49.

<sup>19</sup> *Kokkinakis v Greece* (1993) Series A no 260-1, para 31.

<sup>20</sup> On the concept of pluralism in the ECtHR’s case law, see A Nieuwenhuis, ‘The Concept of Pluralism in the Case-Law of the European Court of Human Rights’ (2007) 3 *European Constitutional Law Review* 367 and J Ringelheim, *Diversité culturelle et droits de l’homme. La protection des minorités par la Convention européenne des droits de l’homme* 349-426 (Bruylant 2006).

<sup>21</sup> *Gorzelik and others v Poland* (2004) ECHR 2004-I, para 92.

The existence of established or official churches in some Member States poses particular difficulties in this regard. A distinction should be made here between two situations. Where the entire political-legal system rests on religious norms, conflicts with Convention requirements, notably with states' duty to be neutral, are unavoidable. Such a hypothesis was envisaged in *Refah Partisi (Welfare Party) v Turkey*, where the Court stated that such a system would be incompatible with the Convention for:

[It] would do away with the State's role as the guarantor of individual rights and freedoms and the impartial organiser of the practice of the various beliefs and religions in a democratic society, since it would oblige individuals to obey, not rules laid down by the State [...] but static rules of law imposed by the religion concerned.<sup>22</sup>

In other words, in a democratic society the legal system's foundations must be autonomous with regard to religious norms. A theocratic regime cannot be reconciled with the Convention. Yet some states, while having a legal system separate from religious norms, still formally confer upon one church the status of the official or established church. In *Darby v. Sweden* (1989), the former European Commission of Human Rights took the view that such a system is not *per se* incompatible with Article 9. However, in order to satisfy the requirements of this provision, it must include specific safeguards for freedom of religion. First and foremost: 'no one may be forced to enter, or be prohibited from leaving a State Church'.<sup>23</sup> The Court sticks to this stance:<sup>24</sup> it does not condemn a regime of establishment as such but it is ready to review any rule or practice deriving from it to ascertain its compatibility with Convention's rights. This position is sensible. It entails that special links between a state and a church may persist only to the extent that they are merely symbolic and do not influence the substance of state laws and policies. On the contrary, norms that constitute unjustified privileges for this church or inadmissible constraints on those who do not adhere to it, should be deemed incompatible with the Convention.

Evidently, states can go beyond the minimum common standards identified by the Court and opt for a more demanding vision of neutrality. The Court, however, should also be careful that the neutrality concept does not become instrumentalized to justify disproportionate restrictions upon certain individual rights.

It is with these considerations in mind that we now turn to the examination of the ECtHR's case law on state religious neutrality.

## II. STATE NEUTRALITY AS NON-INTERFERENCE AND IMPARTIALITY

The first time the Court explicitly referred to an obligation of states to be neutral in religious matters was in 2000 in *Hasan and Chaush v Bulgaria*.<sup>25</sup> At stake was the attitude of the Bulgarian government which had intervened in an internal conflict within

---

<sup>22</sup> *Refah Partisi (the Welfare Party) and others v Turkey* (2003) 37 ECHR 2003-II, para 119.

<sup>23</sup> *Darby v Sweden*, App 11581/85 (EurCommHR, 9 May 1989 (Report)), Series A no 187, para 45.

<sup>24</sup> See *Asatruarfélagid v Iceland* App 22897/08 (ECtHR, 18 September 2012 (dec.)) and *Magyar Keresztény Mennonita Egyház and Others v Hungary* (2014) ECHR 2014-I, para 100.

<sup>25</sup> *Hasan and Chaush* (n 1).



the Bulgarian Muslim community over the designation of its leaders. Whereas the majority of the community had elected Mr. Hasan as 'Grand Mufti', the government decided to register its contestant, Mr. Gendjev, as the official leader of Bulgarian Muslims. The Court stated that the 'failure by the authorities to remain neutral in the exercise of their powers in this domain must lead to the conclusion that the State interfered with the believers' freedom to manifest their religion within the meaning of Article 9 of the Convention.'<sup>26</sup>

State neutrality, in this initial context, is understood in a very basic sense. It means that, where a religious community becomes divided, the state should not take sides with one faction at the expense of the other. The Court adds a second element, that is, but for exceptional cases, the state should not make judgments on the legitimacy of religious beliefs or the means used to express them.<sup>27</sup> In other words, public authorities cannot interfere to define appropriate forms of theology or doctrines. Only secular reasons, corresponding to the justifications laid down in Article 9 (2), such as the protection of the rights of others or of public order, may justify restricting the right to religious freedom.<sup>28</sup> This first dimension of neutrality amounts to an obligation of *non-interference*. It entails that the state should refrain from intervening in disputes that are purely religious or that pertain exclusively to the internal organization of a community.<sup>29</sup>

There are, however, situations in which the state cannot simply adopt a hands-off approach, that is, it must take a decision that will affect the situation of a religious group. This is particularly the case where a religious organization requests the benefit of a certain legal status. Here, neutrality cannot imply 'non-interference'. Rather, it translates into an obligation of *impartiality*, that is, the state cannot arbitrarily advantage or disadvantage a faith community when determining the legal status it is entitled to.<sup>30</sup> Thus, in a series of cases originating in contestations around the registration of religious organizations, which in some countries is a prerequisite for access to legal person status, the Court insisted on the obligation of the state to remain *neutral and impartial* in the decision-making process on requests of registration.<sup>31</sup> Refusal of registration cannot denote bias or prejudice against a religious group, it must be based on sound and objective reasons, i.e. *public* reasons, to use Rawls' term. Without legal personality, the community is deprived of rights essential to carry out its religious activities, such as the right to own or rent property, the right to maintain bank accounts, or to employ people. Denying such status to a religious movement because it deems that its doctrine is

---

<sup>26</sup> *id.*, para 78.

<sup>27</sup> *id.*, para 78.

<sup>28</sup> See also *Jehovah's Witnesses of Moscow and Others v Russia* App 302/02 (ECtHR 10 June 2010), para 119.

<sup>29</sup> Subsequently, the Court has specified that the state may engage in 'neutral mediation' between groups of believers in order to help settle a conflict. But 'the State authorities must be cautious in this particularly delicate area' (*Supreme Holy Council of the Muslim Community v Bulgaria*, App 39023/07 (ECtHR 16 December 2004), para 80). Here the duty of neutrality would seem to entail an obligation of impartiality, as in the situation discussed in the next paragraph.

<sup>30</sup> *Ahdar and Leigh* (n 4) 1079.

<sup>31</sup> See *Metropolitan Church of Bessarabia and Others* (2001) ECHR 2001-XII, paras 105 and 118; *Svyato-Mykhaylivska Parafiya v Ukraine* App 77703/01 (ECtHR, 14 June 2007); *Religionsgemeinschaft der Zeugen Jehovas and Others*, App 40825/98 (ECtHR, 31 July 2008), paras 66 and 79-80; *Kimlya and others v Russia* (2009) ECHR 2009-IV, paras 84-85.

'wrong' or for any other arbitrary reason amounts to the state interfering with the freedom of individuals to choose to adhere or not to a religion.<sup>32</sup>

More generally, the Court asserts that, when exercising its overall regulatory power in the sphere of religious freedom, and in its relations with different religions, denominations, and beliefs, the state must remain neutral and impartial.<sup>33</sup> Its role in a democratic society is to act as 'the neutral and impartial organiser of the exercise of various religions, faiths and beliefs'.<sup>34</sup>

The Court, however, does not consider that neutrality requires granting all religious communities *identical* status. The state can, within its margin of appreciation, opt for a constitutional model allowing for special collaborations with some denominations.<sup>35</sup> This may include providing funding and other benefits to certain religious organizations. However, the state should ensure that all religious groups have a fair opportunity to apply for such special status and that distinctions made in this connection are based on objective and legitimate criteria.<sup>36</sup> The duty of impartiality must be understood here in the light of the prohibition of discrimination. This norm does not entail that all differences of treatment are ruled out but only those that do not rest on an objective and reasonable justification or do not involve a reasonable relationship of proportionality between the means employed and the aim pursued.<sup>37</sup>

In this set of cases, the Court managed to remain fairly consistent in its analysis of the requirements of neutrality. Two fundamental dimensions of state neutrality emerge from these rulings - a duty of non-interference in merely religious disputes and an obligation to be impartial and non-discriminatory where a decision affecting a religious group must be taken.

### III. THE PLACE OF RELIGION IN THE PUBLIC SPHERE: THREE CONCEPTS OF NEUTRALITY

A whole series of other cases in which the concept of neutrality is at issue raise a different question, that of state regulation of the place of religion in the public sphere or, more precisely, public institutions. What does the state's duty of neutrality imply in this regard? Can a state be considered neutral if it grants the majority religion a special place in official institutions? Conversely, can the principle of neutrality justify prohibiting individuals from manifesting their religious beliefs in the public realm? These queries have arisen in the case law relating to three main issues: religious teaching in state schools; religious references in official oaths, and the presence of religious symbols in state institutions.

---

<sup>32</sup> See *Jehovah Witnesses of Moscow* (n 28), para 119. See also *Metropolitan Church of Bessarabia* (n 31); *Moscow branch of the Salvation Army v Russia* (2006) ECHR 2006-XI, para 97; *Church of scientology of Moscow v Russia* Appl No 18147/02 (ECtHR, 5 April 2007), para 97.

<sup>33</sup> *Metropolitan Church of Bessarabia* (n 31) para 116.

<sup>34</sup> *Refah Partisi* (n 22) para 91.

<sup>35</sup> *Savez Crkava "Riječ života" and Others v Croatia* App 7798/08 (ECtHR, 9 December 2010), para 85; *Magyar Keresztény Mennonita Egység* (n 24) para 108.

<sup>36</sup> *Relionsgemeinschaft der Zeugen Jehovas* (n 31) para 92; *Savez Crkava "Riječ života"* (n 35), para 85-92; *Magyar Keresztény Mennonita Egység* (n 24) paras 106-108.

<sup>37</sup> See for instance *Koua Poirrez v France* (2003) ECHR 2003-IX, para 46.

It is argued that the Court, in addressing these concerns, has so far failed to remain consistent in its approach to the neutrality principle. As will be shown in this section, three different understandings of the neutrality concept in fact coexist in the case law. These conceptions can be characterized as follows:

- *Neutrality as absence of coercion*

This is the minimal conception of neutrality. It posits that neutrality entails that states cannot *impose* a religion or belief on people. It cannot *coerce* individuals into embracing or practicing a certain religion or belief. However, the state is not prevented from granting one religion a privileged position in the public sphere since, by doing so, it does not force individuals into endorsing this religion; they are allowed to exercise another faith or no faith at all.

- *Neutrality as absence of preference*

According to this second approach, the state is neutral if it abstains from expressing a *preference* for a religion in its institutions. This conception is more demanding than the previous one. Not only direct pressure but also indirect or subtle forms of pressure exerted on individuals are deemed to conflict with religious freedom. The state should not only abstain from imposing a religion on people but also refrain from *promoting* a faith and trying to influence an individual's conscience.

- *Neutrality as exclusion of religion from the public sphere*

The third conception is the most far-reaching. It assumes that state neutrality excludes any visibility of religion in public institutions. Not only should official premises be free from religious symbols, but state agents, and potentially private individuals, should also abstain from externalizing their religious beliefs when they find themselves within the sphere of the state. Any outward manifestation of religion in the physical space of official institutions compromises state neutrality and threatens freedom of conscience and equality. Thus, in order to appear strictly neutral, the state would have to ban religious expression from its institutions and confine the manifestation of religion to the private sphere.

To be sure, these three conceptions are not spelt out as such by the Court. They are proposed here as ideal types to help make sense of the case law and its fluctuations.

The Court's position regarding these three models of neutrality has evolved over time. In a first phase, its approach mirrored the first conception, namely: 'neutrality as absence of coercion' (1). From 2000 onwards, the Court progressively evolved towards the second conception: 'neutrality as absence of preference' (2). At the same time, it accepted that states, within their margin of appreciation, could opt for the third approach: 'neutrality as exclusion of religion' (3). The 2011 ruling in *Lautsi and Others v Italy* inaugurates a third period characterized by a reactivation of the first model of state neutrality in certain contexts. As a result, the Court's current approach to the state's duty of neutrality is marked by uncertainty and fragmentation. Depending on the issue at stake, it relies upon a different conception of neutrality (4).

## 1. The Early Case-Law: 'Neutrality as Absence of Coercion'<sup>38</sup>

Generally speaking, in their first decade of activity, the Convention organs displayed strong judicial restraint when dealing with religious freedom, in particular where church-state relations were at stake.<sup>39</sup> Until 1989, almost all cases brought under Article 9 were deemed inadmissible by the former European Commission on Human Rights.<sup>40</sup> It is in this context that the aforementioned *Darby v Sweden* (1989) case was decided. As noted, the Commission held on this occasion that a state church system does not in itself violate Article 9 but that, in order to be consonant with this provision, it must include specific safeguards for freedom of religion.<sup>41</sup> Two of these safeguards are explicitly mentioned in the decision, that is, no one may be forced to join, or prohibited from leaving, a state church<sup>42</sup> and no one may be compelled to be involved directly in the religious activities of a community one is not a member of.<sup>43</sup> The decision allows various interpretations. But if it has to be understood as meaning that these are the *only* safeguards required by the Convention – an issue that remains undetermined – the Commission's approach could be said to echo the first model of state neutrality identified above, that is, the institution of an established church would be seen as not conflicting with the principle of neutrality provided individuals are not *coerced* into belonging to this church or participating in its activities.<sup>44</sup>

Decided by the Commission a few years earlier, *Angeleni v. Sweden* (1986)<sup>45</sup> shows the limits of a conception of state neutrality based on the notion of absence of coercion. A mother and her daughter, who described themselves as atheists, disputed the refusal of Swedish authorities to exempt the latter from participation in the teaching of religious knowledge, which was part of the public school curriculum. Only children belonging to another faith than the Swedish Church were entitled to an exemption. Sweden argued that the course was neutral and dealt with different faiths. But the applicants submitted that, in effect, the instruction was not neutral; it was only concerned with Christianity and involved participation in religious activities such as studying the Bible. The Commission, however, found no violation. In response to the applicants' claims, it contented itself with observing that: 'the fact that the instruction in religious knowledge focuses on Christianity at junior level at school does not mean that the second applicant

---

<sup>38</sup> In order to understand the Court's evolution, we will start our inquiry with cases that predate *Hasan and Chaush*, where the neutrality principle was explicitly acknowledged. This choice is justified by the fact that these rulings continue to be referred to by the Court and to inform its case law on religious freedom, therefore on state neutrality. It should also be noted that, when the Court determined in 2000 that religious freedom entails a duty of neutrality, it did not present it as something new, but as an obligation that had always been implied by Article 9.

<sup>39</sup> M Koenig, 'Governance of religious diversity at the European Court of Human Rights', in J Bolden and W Kymlicka (eds), *International Approaches to the Governance of Ethnic Diversity* (OUP 2015).

<sup>40</sup> For an overview of the Commission's case-law on religious freedom, see C Evans, *Freedom of Religion under the European Convention on Human Rights* (OUP 2001). The Court itself delivered its first judgment relating to the right to religious freedom only in 1993 in *Kokkinakis v. Greece* (n 19).

<sup>41</sup> *Darby* (n 23), para 45.

<sup>42</sup> *ibid.*

<sup>43</sup> *id.*, para 51.

<sup>44</sup> In the case at stake, the Commission did find a breach of Article 9. The applicant, a Finnish citizen working in Sweden, complained that he had been required to pay a church tax to a church he was not a member of. The Commission held that this amounted to compelling him to be involved directly in religious activities against his will (*Darby* (n 23), paras 51 and 60).

<sup>45</sup> App 10491/83 (1986), 51 DR 42.

has been under religious indoctrination in breach of article 9 of the Convention.<sup>46</sup> This suggests that making it compulsory for children in public schools to attend a teaching that is biased in favour of a certain religion is not enough to infringe upon their rights. For such a breach to occur, children should be the subject of *indoctrination*, that is, a form of learning that aims to forcibly inculcate adherence to a certain faith, involving, therefore, an element of coercion.

The criterion of ‘indoctrination’ is drawn from *Kjeldsen, Busk Madsen and Pedersen v Denmark*, decided by the Court in 1976.<sup>47</sup> Here the Court established the bases of its interpretation of the obligation incumbent on states, when assuming functions in relation to education and teaching, to respect the right of parents to educate their children in accordance with their religious and philosophical convictions, laid down in Article 2 of Protocol No 1 of the Convention. Two considerations were referred to in this judgment. First, the Court held that public authorities have a duty to ‘take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner’. It then added that the ‘State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents’ religious and philosophical convictions.’<sup>48</sup> This formulation is ambiguous. Ensuring that information is transmitted in an ‘objective, critical and pluralistic manner’ is more demanding than merely abstaining from pursuing ‘an aim of indoctrination’. Are these two concerns cumulative or is the lower threshold, the prohibition against indoctrination, given determining importance? In *Angeleni*, the Commission opted for the second option. It only referred to the criterion of indoctrination and set aside the first requirement identified by the Court, that is, the obligation to present information and knowledge in an objective, critical, and pluralistic manner.

## 2. The Evolution Towards ‘Neutrality as Absence of Preference’

The 1990s was a decade of profound change for the Court, given the accession of Central and Eastern European countries to the Convention and the major reform introduced by Protocol No. 11. From then onwards, applications relating to religious rights have dramatically increased and the Court has shown increasing willingness to exercise strict scrutiny in such cases.

As part of this trend, the Court, as noted, explicitly recognised a duty of denominational neutrality in *Hasan and Chaush* (2000). In *Folgerø and Others v. Norway* (2007),<sup>49</sup> it further elaborated the neutrality principle in the specific context of education. The facts at stake were very similar to those at issue in *Angeleni*. Parents of children attending public schools in Norway, a country with a state church, the Evangelical Lutheran Church, complained that they had been denied full exemption from the compulsory course of ‘Christianity, religion and philosophy’. They maintained that, far from being neutral, this course was biased in favour of Christianity. The Court reacted very differently from the Commission in *Angeleni*. It scrutinized the programme and teaching methods in order to determine whether information and knowledge included in the curriculum were conveyed in an objective, critical, and pluralistic manner. It concluded

---

<sup>46</sup> id, 49.

<sup>47</sup> *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) Series A no 23.

<sup>48</sup> id, para 53.

<sup>49</sup> *Folgerø and Others v Norway* (2007) ECHR 2007-III (Grand Chamber).



that this was not the case. Not only was Christianity preponderant in the composition of the subject – which in itself was not reprehensible and felt within the state’s margin of appreciation<sup>50</sup> – but there were also ‘qualitative differences applied to the teaching of Christianity as compared to that of other religions and philosophies’.<sup>51</sup> As described in the legislation, the teaching was aimed at contributing to give pupils a ‘Christian and moral upbringing’.<sup>52</sup> It could involve religious activities such as prayers, psalms, and learning religious texts by heart.<sup>53</sup> In view of these facts, the Court held with a tight majority of nine to eight that Norway’s refusal to exempt the applicants’ children from this course entailed a violation of its duty to respect parents’ religious and philosophical convictions in public education.

Importantly, the Court here does not content itself with verifying that children were not subject to indoctrination. It also insists on the obligation to ensure that the teaching is objective, critical, and pluralistic. This reflects an evolution towards the second conception of neutrality identified above. Not only does the exercise of direct coercion on pupils in religious matters conflict with rights laid down by the Convention, but teaching a certain religion in a manner that is partial, non-critical, and non-pluralistic, thus in a way that denotes a *preference* for this religion, also affects pupils’ freedom of conscience and the rights of their parents to have their convictions respected. In the sphere of teaching and education, the state should not only abstain from coercing children into embracing a religion, but also from promoting a certain faith. This, however, does not mean that states are forbidden from including a (non-neutral) religious instruction course in the curriculum, but that such a course cannot be compulsory. The right to opt out cannot be limited to pupils belonging to minority faiths; it should be available to everyone.<sup>54</sup>

Subsequent rulings have confirmed this evolution.<sup>55</sup> The Court has been increasingly anxious to ensure that the possibility to opt out from religious education is not merely theoretical but constitutes a real, and not unduly burdensome, option. As hinted at in *Folgerø*, a procedure obliging parents to disclose their religious or philosophical beliefs in order to have their request for exemption considered is inadequate,<sup>56</sup> for it compels them to reveal information about some of the most intimate aspects of their private life.<sup>57</sup> In a case brought against Poland, the fact that, as a result of exercising an opt out from religious instruction, pupils had no mark for religion/ethics courses on their school certificate, was found to entail a breach of Article 9, in conjunction with Article 14, for this was a clear indication that these children had asked not to attend the Catholic religion course. In the context of a predominantly Catholic society, this could generate

---

<sup>50</sup> Id, para 89.

<sup>51</sup> Id, para 95.

<sup>52</sup> Id, para 90.

<sup>53</sup> Id, para 94.

<sup>54</sup> See also *Hasan and Eylem Zengin v Turkey* App 1448/04 (ECtHR 9 October 2007), para 74.

<sup>55</sup> See see J Temperman, ‘State Neutrality in Public School Education’ (2010) 32 HRQ 866 and C Mathieu, S Gutwirth and P De Hert, ‘Liberté religieuse: vers un devoir de neutralité de l’Etat dans l’enseignement public?’ (2010) *Journal de droit européen* 133.

<sup>56</sup> *Hasan and Eylem Zengin* (n 54), paras 75-76. In 2014 the Court found that, despite changes to the curriculum of the religious instruction course, the Turkish education system still did not conform to the obligation to respect parents’ religious and philosophical convictions given that the possibility of being exempted from this course remained too limited (*Mansur Yalçın and others v Turkey* App 21163/11 (ECtHR 16 September 2014), paras 76-77).

<sup>57</sup> *Folgerø* (n 49) para 98.



'unwarranted stigmatisation'.<sup>58</sup> Hence, the Court pays increasing attention to the social pressure and stigmatization pupils and parents willing to avail themselves of conscience provision may face as a result of circumstances created by the state. The Court's central concern is that public authorities cannot try to deter people from opting out of religious education by subjecting those making this choice to a particular burden.

A similar logic can be discerned in judgments relating to religious references in official oaths. In *Alexandridis v Greece* (2008),<sup>59</sup> the applicant criticized the fact that the lawyer's professional oath, required in order for them to be entitled to practice law, normally had to be taken on the Gospels. The possibility existed, however, to opt for a solemn declaration instead of the religious oath. But those willing to do so had to justify this choice therefore to disclose their religious affiliation. The Court found a breach of Article 9 on the ground that freedom of religion includes the right *not* to manifest one's beliefs and not to adopt a behaviour from which it can be inferred that one has or has not a certain belief.<sup>60</sup> Interestingly, it could not be said that individuals were *forced* to take a religious oath since there was the possibility of exemption.<sup>61</sup> But the system relied upon the assumption that every lawyer in Greece is normally Christian Orthodox and wishes to take the religious oath.<sup>62</sup> The obligation to justify taking the solemn declaration created pressure to conform to the dominant norm. It also meant that those not identifying with the Orthodox faith were not treated on an equal footing. Thus the whole procedure revealed the state's preference in favour of the Greek Orthodox faith.

It is submitted that this evolution towards the 'neutrality as absence of preference' model resonates with the Convention. Compared to 'neutrality as absence of coercion', it represents a strengthening of the protection of individuals' rights, and especially of those – non-believers and minority believers alike – who are in the minority. This approach implies being mindful of the subtle or indirect forms of pressure that may be exerted by the state in matters of conscience and religion with a view to preserving the dominant position of a certain religion in society. It reflects a concern for the effectiveness of the rights protected, which entails having regard to the social context in which these rights are exercised. It echoes the Court's well-known observation that the Convention 'is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.<sup>63</sup> Likewise, it is also more respectful of equality and pluralism.

### **3. 'Neutrality as Exclusion of Religion': Compatible with but Not Required by the Convention**

From 2000 onwards, the Court was also increasingly confronted with the third model of neutrality, that is neutrality as exclusion of religion from the public sphere. This conception underlay arguments developed by the defending government in the various

---

<sup>58</sup> *Grzelak v Poland*, App No 7710/02 (ECtHR 15 June 2010), para 99. See Leigh and Adhar (n 4) 1086.

<sup>59</sup> *Alexandridis v Greece*, App No 19516/06 (ECtHR 21 February 2008).

<sup>60</sup> *Id.*, para 38. See also *Dimitras and Others v Greece* App No 42837/06 et al. (3 June 2010), relating to the oath taken by witnesses in a criminal trial.

<sup>61</sup> In *Buscarini v San Marino* (App 24645/94 (ECtHR 18 February 1999) ECHR 1999-I), the Court had already held that compelling elected members of the parliament to take oath on the Gospel was in breach of Article 9 ECHR. In this latter case, however, there was no possibility of exemption.

<sup>62</sup> *Alexandridis* (n 59) para 36.

<sup>63</sup> *Airey v Ireland* (1979), Series A no 32, para 24.

cases dealing with the prohibition of religious symbols, in particular the Islamic headscarf, in state education institutions. Contrary to the cases examined so far, neutrality here is not invoked by the applicant. Rather, it is referred to by the state in support of its claim that interference with the right to manifest one's religious beliefs is justified by a legitimate aim. The contention is that forbidding individuals from manifesting 'ostentatiously' their religious beliefs in the public education context is necessary to preserve the neutrality of state institutions thereby protect others from unwanted pressures. In all these cases, the Court accepted this argument.

The first Court decision dealing with this question, *Dahlab v Switzerland*, concerned a primary school teacher.<sup>64</sup> It concluded that prohibiting her from wearing a headscarf while teaching could be held necessary to protect 'the right of State school pupils to be taught in a context of denominational neutrality'. The measure was justified by the aim to preserve the rights and freedoms of others, public order and public safety. To arrive at this conclusion, the Court insisted that, as a teacher, the applicant was a representative of the State, that the headscarf was a 'powerful external symbol', and that the children she was in charge of were especially young and thus easily influenced. But going beyond the issue of neutrality, it also relied, in a very controversial comment, upon its own interpretation of the headscarf's meaning:

[It] cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which [...] is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.<sup>65</sup>

While this first decision involved a teacher, *Leyla Şahin v Turkey* concerned a university student. Although as a student the applicant was not a representative of the state, here too the Court accepted that forbidding her from wearing a headscarf in a public university based on the principle of *laïcité*, which implies a strict obligation of state neutrality, was compatible with the Convention.<sup>66</sup> The judgment refers to the specific context of Turkey, claiming that in a country where Islam is the religion of the vast majority of the population and where Islamist political movements are on the rise, the wearing of the headscarf in universities could constitute pressure on women who do not wish to wear it. Against this background, national authorities could legitimately consider it necessary to prohibit outward manifestations of their religious beliefs by students in public universities in order to preserve the *laïc* nature of this institution, thereby protect pluralism, the rights of others, and gender equality.<sup>67</sup> Having admitted that such a measure may be deemed necessary to protect students, who are adults, against the risk of pressure allegedly created by the wearing of a religious sign by others, the Court easily accepted that high school pupils in Turkey<sup>68</sup> but also in France<sup>69</sup> could be

---

<sup>64</sup> *Dahlab v Switzerland* App No 42393/98 (ECtHR, 15 February 2001 (dec.)).

<sup>65</sup> *Ibid.* This comment was heavily criticized in the literature. See in particular the critique of Judge Tulkens in her dissenting opinion in *Leyla Şahin v Turkey* (2007) ECHR 2005-XI.

<sup>66</sup> *Leyla Şahin* (n 65).

<sup>67</sup> *id.*, para 116.

<sup>68</sup> *Sefika Köse and 93 others v Turkey* App No 26625/02 (ECtHR, 24 June 2006 (dec.)).

subjected to a similar ban. This restriction upon religious freedom is said to be justified, having regard to the principle of *laïcité*, a constitutionally protected concept in both countries, by ‘the legitimate aim of preserving the neutral character of secondary education, which is intended to protect adolescents when they are at an impressionable age’.<sup>70</sup>

The conception of neutrality at stake here significantly differs from that underlying *Folgerø* or *Alexandridis*. In these latter cases, the expression of a preference for a certain religion *by the state* was seen to be problematic. Neutrality referred to a constraint on the use of state power.<sup>71</sup> By contrast, the third model of neutrality, that associated with the concept of *laïcité* as understood in Turkey and France, posits that any visible expression of religion in the public sphere, even by private individuals, jeopardizes state neutrality. Neutrality, according to this view, not only requires states to refrain from endorsing religious beliefs, but it may also entail restricting the right of individuals to manifest their faith on the sole ground that they find themselves in a public institution. As Kyritsis and Tsakyrakis highlight, the critical question becomes ‘which areas of social life belong to the public sphere’, whereas in the previous conception, it is ‘which acts count as illicit state endorsement of religion.’<sup>72</sup>

To be sure, the Court does not hold that this third model of neutrality is *required* by the Convention. Rather, it considers that states are *permitted* to adopt it. If they do so, they go beyond the common standard of neutrality stemming from Convention rights. The Court insists that such a strong vision of neutrality is closely linked to a specific model of state-church relations, namely strict separation or *laïcité*. Accordingly, it is inclined to leave states a wide margin of appreciation in this regard.

Yet the ample discretion left to states to limit religious freedom in the name of neutrality is open to criticism.<sup>73</sup> The Court accepts at face value the claim that the wearing of religious symbols by some individuals in public schools or universities affects the neutrality of these institutions and is a source of pressure or exclusion for others.<sup>74</sup> In the case of students and pupils, who are private individuals attending education

---

<sup>69</sup> *Dogru v France* App 27058/05 (ECtHR, 4 December 2008 (dec.)) and *Kervanci v France* App 31645/04 (ECtHR, 4 December 2008); *Gamaleddyn v France* App 18527/08, *Aktas v France* App 43563/08, *Jasvir Singh v France* App 25463/08 and *Ranjit Singh v France* App 27561/08 (ECtHR, 30 June 2009 (dec.)). The Court also decided in favour of the State in the case of bans imposed on a university professor (*Kurtulmuş v Turkey* App 65500/01 (ECtHR, 24 January 2006 (dec.)) and on religion teachers working in public schools providing vocational teaching for religious functionaries (*Fatma Karaduman v Turkey* App 41296/04 (ECtHR, 3 April 2007 (dec.)).

<sup>70</sup> *Sefika Köse and 93 others* (n 68). In this case, the applicants were attending ‘Imam-Hatip’ schools, i.e. public schools providing vocational teaching for religious functionaries, such as imams and Koran teachers, where 40 % of the subjects taught concern Islamic theology. The Court nevertheless accepts the argument that the education provided in these schools is neutral and that banning the headscarf can be deemed necessary to preserve this neutrality.

<sup>71</sup> Kyritsis and Tsakyrakis (n 17) 206.

<sup>72</sup> *ibid.*

<sup>73</sup> See i.a. Leigh and Ahdar (n 4) 1077; I Th Plesner, ‘The European Court of Human Rights: between fundamentalist and liberal secularism’ in W C Durham Jr., R Torfs, D M Kirkham, and Ch Scott, *Islam, Europe and Emerging Legal Issues* (Routledge 2012); T Lewis, ‘What not to Wear: Religious Rights, the European Court, and the Margin of Appreciation’ (2007) ICLQ 56 395; S Langlaude, ‘Indoctrination, Secularism, Religious Liberty, and the ECHR’ (2006) ICLQ 55 929.

<sup>74</sup> In her dissent in *Leyla Şahin* (n 65), Judge Tulkens observes that the ‘European supervision seems quite simply to be absent from the judgment’ (para 3).

establishments as public service users, it remains unclear why they endanger the neutrality of the institution and interferes with the rights of others simply by externalizing their religious beliefs. In none of these cases was it argued that the applicants had personally pressured their peers. The Court's assessment of the proportionality of the measure appears very loose. On other occasions, it stated that, in case of tension within a religious community or between groups, the role of the state is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.<sup>75</sup> But here it does not envisage the possibility that peaceful coexistence between pupils wearing religious signs and those who do not could be achieved through less restrictive means.

The neutrality argument has more weight in the case of public school teachers. In their capacity as state agents, they indeed represent the state to a certain extent. It is nevertheless a matter of dispute that the attitude of a teacher who wears a piece of clothing revealing her religious convictions should necessarily be understood by pupils as a sign that the state endorses this religion rather than as an indication that she, as an individual, holds certain beliefs.<sup>76</sup> The Court, however, does not enter into this discussion.

The deference displayed by the Court towards the respective governments' stance in these cases is motivated by the importance attached to the concept of *laïcité* in the constitutional order of the states concerned. The problem is that it disregards the possibility that the argument of neutrality is instrumentalized to justify all sorts of restrictions upon the right to manifest one's religion in public.<sup>77</sup> Only once did the Court rule that a religious attire ban could not reasonably be deemed necessary to protect the secular nature of the state. In *Ahmet Arslan and Others v Turkey* (2010), it held that convicting a group of persons on the sole ground that they had wore the distinctive dress of their religious movement in the street constituted a breach of religious freedom.<sup>78</sup> The Court emphasized that the applicants were not state agents exercising a public function, they found themselves in public areas open to everyone not in public institutions, and there was no evidence that they constituted a threat to public order or had exerted inappropriate pressure on passers-by. Hence the Court established a limit to what states are entitled to do in the name of 'neutrality qua *laïcité*'. That is, they cannot justify sanctioning private individuals for the mere fact of making their religious beliefs visible in public streets and squares. The 'public sphere', where neutrality can be imposed on individuals, is limited to public institutions. This, however, leaves large scope for potential rights restrictions.

#### **4. *Lautsi* and Beyond: in Search of Coherence**

The famous *Lautsi* 'affair' was decided in this jurisprudential context. The case concerned the mandatory display of crucifixes in Italian state schools. A mother and her

---

<sup>75</sup> *Serif v Greece*, para 53.

<sup>76</sup> See J Temperman, 'Religious Symbols in the Public School Classroom' in J Temperman (ed), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (2012). See also the German Constitutional Court Order of 27 January 2015, holding that a general prohibition incumbent on teachers in state schools of expressing religious beliefs by outer appearance is not compatible with their constitutional freedom of faith (1 BvR 471/10, 1 BvR 1181/10).

<sup>77</sup> See Temperman, 'Religious Symbols in the Public School Classroom' (n 76).

<sup>78</sup> *Ahmet Arslan and Others v Turkey* App 41135/98 (ECtHR, 23 February 2010).

two school-age children argued that this situation violated their freedom of conscience as well as the right of parents to educate their children in accordance with their convictions. Initially a Chamber of seven judges unanimously found a breach of the Convention.<sup>79</sup> But this judgment was reversed in 2011 by the Grand Chamber which ruled by a majority of 15 to two that there was no violation.<sup>80</sup>

One crucial difference between the Chamber and the Grand Chamber judgments relates to their vision of state neutrality. The Chamber's decision insists on the state's duty 'to refrain from imposing beliefs, even indirectly, in places where persons are dependent on it' or 'where they are particularly vulnerable.'<sup>81</sup> It points out that public education is an especially sensitive area as it concerns children who still lack 'the critical capacity which would enable them to keep their distance from the message derived from a *preference* manifested by the State in religious matters'.<sup>82</sup> Given that school attendance is compulsory, they are placed in a situation from which they cannot extract themselves without making disproportionate efforts.<sup>83</sup> It characterizes the crucifix as a 'powerful external symbol' which affects how the school environment is perceived by pupils.<sup>84</sup> This situation may be felt as a pressure by pupils who do not adhere to this religion.<sup>85</sup> The Court recalls the state obligation to ensure that knowledge is passed on in an objective, critical, and pluralist way.<sup>86</sup> It concludes that the compulsory display of a symbol of a particular faith in state school classrooms 'restricts the right of parents to educate their children in conformity with their convictions and the right of schoolchildren to believe or not to believe'. And these restrictions 'are incompatible with the State's duty to respect *neutrality* in the exercise of public authority, particularly in the field of education.'<sup>87</sup>

Consonant with *Folgerø*, this judgment reflects the second neutrality model: 'neutrality as absence of preference'. States must abstain from manifesting a preference for a religion in a context like public education in which individuals are directly exposed to state power.

To reverse this conclusion, the Grand Chamber's judgment relies mainly upon two arguments. First, it claims that there was no evidence that the display of a religious symbol on classroom walls had an influence on pupils.<sup>88</sup> A 'crucifix on a wall is an essentially passive symbol', states the Court, and this aspect is of importance: 'particularly having regard to the principle of neutrality'.<sup>89</sup> Second, its presence in Italian state schools constitutes an historical tradition and the decision to perpetuate a tradition or not falls within the margin of appreciation of states.<sup>90</sup> The Court admits that

---

<sup>79</sup> *Lautsi v Italy* App 30814/06 (ECtHR, 3 November 2009) (hereinafter *Lautsi I*).

<sup>80</sup> *Lautsi and Others v Italy* (2011) ECHR 2011-III (hereinafter *Lautsi II*).

<sup>81</sup> *Lautsi I* (n 79), para 48.

<sup>82</sup> *ibid* (emphasis added).

<sup>83</sup> *id*, para 55.

<sup>84</sup> *id*, para 54-55.

<sup>85</sup> *id*, para 50.

<sup>86</sup> *id*, para 49.

<sup>87</sup> *id*, para 57 (emphasis added).

<sup>88</sup> *Lautsi II* (n 4), para 66.

<sup>89</sup> *id*, para 72.

<sup>90</sup> *id*, paras 67-68.



the crucifix is primarily a religious symbol<sup>91</sup> and that ‘by prescribing the presence of crucifixes in State-school classrooms – a sign which [...] undoubtedly refers to Christianity – the regulations confer on the country’s majority religion preponderant visibility in the school environment’.<sup>92</sup> But that is not in itself sufficient ‘to denote a process of *indoctrination* on the respondent State’s part’.<sup>93</sup> Moreover, the greater visibility given to Christianity is counter-balanced by two elements, that is, it is not associated with compulsory teaching about Christianity, and pupils are allowed to wear symbols of other religions at school.<sup>94</sup>

One determining aspect of the judgment is that, when interpreting Article 2 of Protocol 1, the Grand Chamber emphasizes the criterion of *indoctrination* while ignoring the requirement that instruction be delivered in a manner that is *objective, critical, and pluralist*.<sup>95</sup> Thereby, the Court is actually re-activating the first conception of neutrality that characterized the pre-*Folgerø* jurisprudence: ‘neutrality as absence of coercion’. For sure, by requiring the presence of a crucifix in the classroom, the state is not inculcating the Christian religion by force. Yet it is clearly manifesting a preference for a specific religion. It is hard to see how this attitude can be reconciled with the obligation to respect objectivity and pluralism in education.

The Grand Chamber, however, suggests that a mere symbol on the wall is insignificant and its effect negligible. This argument is difficult to follow. If the state insists that a crucifix should be present in each public school classroom, it means that, for the public authorities, it has a pedagogical role. As a symbol, it is there to send a message. And this message unavoidably includes the expression by the state of a special connection with Christianity. A preference for the majority religion is thereby inscribed in the public school environment. It is part of the experience children have of the institution. Only a retreat to the ‘neutrality as absence of coercion’ model permits us to argue that this situation does not conflict with the state’s duty to be neutral. But this entails diminishing the protection afforded to pupils’ freedom of conscience and the right of parents to educate their children according to their convictions. It is also difficult to square with the requirement to guarantee pluralism in education as a fundamental feature of a democratic society.<sup>96</sup>

Besides, one important factor is totally neglected by the Grand Chamber. Parents in Italy who wish their children to be schooled in a Christian environment have access to private denominational schools. By contrast, those who want an education free from any religious influence are left without any option since public schools themselves – which are supposed to be open to everyone whatever their beliefs – are marked by a specific religion.

---

<sup>91</sup> *id.*, para 66.

<sup>92</sup> *id.*, para 71.

<sup>93</sup> *ibid.* (emphasis added).

<sup>94</sup> *id.*, para. 74.

<sup>95</sup> See K Henrard, ‘Shifting Visions of Indoctrination and the Margin of Appreciation’ (2011) *Journal of Religion and Human Rights* 245.

<sup>96</sup> See Judge Malinverni’s dissenting opinion in *Lautsi II* (n 4). See also Pierik, ‘State Neutrality and the Limits of Religious Symbolism’ in J Temperman, *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Brill 2012).



One argument proposed by the Grand Chamber deserves special attention. The presence of a crucifix in state schools is said to be mitigated by the fact that Italy ‘opens up the school environment in parallel to other religions’, since *inter alia* pupils are allowed to wear headscarves or other religious symbols.<sup>97</sup> Whilst the judgment is unclear on this point, it could be understood to mean that the mandatory display of majority religious symbols in state schools is acceptable *only if* pupils are permitted to wear minority religious attires. This, however, would not solve all problems mainly because the position of the state as regards the display of religious symbols cannot be equated with that of individuals. Where pupils wear religious attire, such items simply indicate that, as individuals, they adhere to a certain faith. A democratic state, by contrast, represents the whole community of citizens. Where it imposes the exhibition of the symbol of a religion in public institutions, it endorses it in the name of the polity. It signals that this religion has a special value for the national community and participates in the definition of national identity. But this entails that those who do not identify with this faith are not treated as ‘free and equal members of the polity’.<sup>98</sup>

The logic of the Grand Chamber ruling not only conflicts with the position taken by the Court in *Folgerø* – which it re-confirmed three years after *Lautsi* in *Mansur Yalçın and Others v Turkey*.<sup>99</sup> The return to the first model of neutrality is also in tension with the position of the Court towards the third concept of neutrality, namely ‘neutrality as exclusion of religion’. On the one hand, it considers it legitimate for the state to prohibit individuals from wearing religious symbols at school on the ground that such an attitude may threaten the freedom of others. On the other hand, when states impose the presence of religious symbols in public schools, it deems that no right is affected. Certainly, in both cases, the Court insists on the states’ margin of appreciation. Hence it can be concluded that the decision as to whether to authorize, prohibit, or on the contrary impose religious symbols in public schools is left to the states’ discretion. Nevertheless, it is unsettling that, whereas the Convention protects the rights of individuals – and not states – to manifest their religious beliefs, in practice the Court is more lenient towards religious expression emanating from the state than it is protective of individuals’ freedom to express their faith. It is also troubling to see the Christian crucifix being described as ‘an essentially passive symbol’ by the Grand Chamber in *Lautsi*, while the Islamic headscarf was characterized in *Dahlab* as a ‘powerful external symbol’, the proselytising effect of which ‘cannot be denied outright’.<sup>100</sup> It is difficult to escape the impression that European judges do not perceive symbols of a religion that has been historically dominant on the continent and those of minority faiths in the same way.<sup>101</sup>

---

<sup>97</sup> *Lautsi II* (n 4), para 74.

<sup>98</sup> See Kyritsis and Tsakyrakis (n 17) 212-215. For other comments on this case, see J Temperman (ed.), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Brill 2012); L Zucca, *A Secular Europe, Law and Religion in the European Constitutional Landscape* 137-158 (OUP 2012); S Mancini, ‘The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty’, 6 *European Constitutional Law Review* (2010), 6-27 and I Leigh and R Ahdar (n 4). For a sociological perspective, see E Fokas, ‘Sociology at the intersection between law and religion’ in S Ferrari (ed), *Routledge Handbook of Law and Religion* (Routledge 2015).

<sup>99</sup> App 21163/11 (ECtHR, 16 September 2014), para 77.

<sup>100</sup> See *i.a.* *Dahlab v Switzerland* (n 64) and *Leyla Şahin* (n 65).

<sup>101</sup> S Mancini, ‘The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence’ (2009) 30(6) *Cardozo Law Review* 2629, 2631. See also the critique of J Temperman, ‘Religious Symbols in the Public School Classroom’ (n 76).

Since *Lautsi* was decided, the Court, in *Ebrahimian v France* (2015), had a new opportunity to review a headscarf ban based on the principle of neutrality, this time in a sphere other than public education.<sup>102</sup> The applicant was a social worker employed in the psychiatric wing of a public hospital whose contract had not been renewed given her refusal to remove her headscarf. The Court again found no breach of the Convention. It accepts that such interference with the applicant's right to manifest her religious beliefs, which the French government justified on the ground of preserving the principles of *laïcité* and neutrality of public service, could be deemed necessary to protect the rights and freedoms of patients. As observed by Judge O'Leary, the Court's reasoning is ambiguous as it mixes a concrete and an abstract approach to the assessment of the proportionality of the interference.<sup>103</sup> On the one hand, the Court emphasizes the concrete circumstances specific to the case, that is, the applicant had contact with patients, the persons she was dealing with were especially vulnerable,<sup>104</sup> and her attitude had allegedly caused some difficulties in the service.<sup>105</sup> It notes that she was not accused of any act of pressure, provocation, or proselytism vis-à-vis patients or colleagues.<sup>106</sup> Nevertheless, it accepts that a state may consider it necessary to prohibit people who are working in a public hospital and are in contact with the public from externalizing their religious beliefs in order to ensure equal treatment of patients. Such interpretation of 'equal treatment' is wide. The measure is not said to be necessary to prevent *actual* discrimination, but rather the risk that patients might doubt the agent's impartiality therefore fear being discriminated against.<sup>107</sup> Yet this part of the judgment suggests that such a far-reaching duty of neutrality – which implies that agents must not only be neutral in their *action* but also in their *appearance*<sup>108</sup> – can only be justified in the case of *some* public service agents who, because of their position and the domain they work in, are likely to generate fears of partiality among users if they wear a religious sign. In other parts of the judgment, however, the Court seems to rely upon a much more abstract and open-ended justification. It stresses that the measure was primarily based on the notion of '*laïcité-neutralité*', a foundational principle of the French state,<sup>109</sup> and that on this basis *all* public service agents are prohibited from wearing a sign revealing their religious belonging. This, it says, is part of the 'French model' which it is not entitled to question as such.<sup>110</sup> Does this imply that this blanket ban is in itself considered compatible with the Convention? This would mean doing away with the requirement to substantiate allegations justifying a human rights

---

<sup>102</sup>(2015) ECHR 2015.

<sup>103</sup> Judge O'Leary partly concurring and partly dissenting opinion, p 36.

<sup>104</sup> *id*, para 61.

<sup>105</sup> *Ebrahimian* (n 102), para 69.

<sup>106</sup> *id*, para 62.

<sup>107</sup> *id*, para 64. See the critiques of S Garahan, 'A Right to Discriminate? Widening the Scope for Interference with Religious Rights in *Ebrahimian v France*' (2016) 5(2) *Ox. J Law Religion* 352 and E Brems, 'Ebrahimian v France: headscarf ban upheld for entire public sector' (*Strasbourg Observers* 27 November 2015) <<https://strasbourgobservers.com/2015/11/27/ebrahimian-v-france-headscarf-ban-upheld-for-entire-public-sector/>> accessed 1 September 2016.

<sup>108</sup> On this distinction, see S Van Drooghenbroeck, 'Les transformations du concept de neutralité de l'Etat : quelques réflexions provocatrices' in J Ringelheim (dir.), *Le droit et la diversité culturelle* (Bruylant 2011).

<sup>109</sup> *Ebrahimian* (n 102), para 67.

<sup>110</sup> *id*, para 68.

restriction by providing concrete evidence of the violation of the rights of others.<sup>111</sup> It would be in direct conflict with *Eweida and others* where the Court especially insisted on this point.<sup>112</sup> The exact implications of *Ebrahimian* are ultimately unclear. But it confirms that, where the state invokes the third model of neutrality to justify a restriction to religious freedom in the context of public institutions, the Court is ready to show high deference towards the state's justification.

From the discussion in this last section, it can be concluded that the Court's approach to the principle of state neutrality has become increasingly blurred and fragmented. Where religious instruction at school is at stake, it sticks to the second model of neutrality, that is, respect for conscientious and religious freedom implies that the state should not manifest a preference for a religion. But where the display of religious symbols by the state at school is concerned, the Court retreats to a lower standard of protection. Neutrality here merely means 'absence of coercion'. At the same time, where states officially opt for the 'neutrality as exclusion of religion' model, the Court allows them a wide margin of appreciation to impose restrictions on an individual's right to manifest their religion when they are in a public institution. Hence the current phase is marked by a heightened uncertainty about the Court's understanding of the state's duty of neutrality. More problematic, although they are very different, the latter two visions of neutrality both entail a weakening of the protection of the individual's rights if compared with the 'neutrality as absence of preference' approach.

## CONCLUSION

The notion that states have an obligation to be neutral in religious matters is now firmly established in the case law of the ECtHR. This principle finds a solid basis in the rights and ideals enshrined in the European Convention. It is a corollary of religious freedom, non-discrimination, and pluralism. In order to respect the right of individuals to determine freely their convictions or beliefs, to treat them without discrimination, and to guarantee pluralism, the state must refrain from forbidding, imposing, or deliberately promoting one particular conception of the good life. Neutrality is fundamentally aimed at guaranteeing that all citizens, whatever their beliefs, are treated as free and equal members of the polity. This is the thrust of state neutrality.

Yet when it comes to implementing this principle in specific circumstances, further specification may be needed. Two requirements stemming from this general obligation of neutrality have been clearly identified by the Court. First, with regard to disputes that are exclusively religious, neutrality entails a duty of non-interference. Second, where the state has to take a decision affecting a religious community, in particular when determining its legal status, it must act impartially and without discrimination.

However, with regard to cases relating to the regulation of the place of religion in public institutions, the Court's approach is more confused. In post-2000 judgments relating to

---

<sup>111</sup> See Judge O'Leary's individual opinion and Judge De Gaetano's dissenting opinion. See also Brems (n 106) and Garahan (n 106). For a less critical view of the judgment, see R McCrea, 'Secularism before the Strasbourg Court: Abstract Constitutional Principles as a Basis for Limiting Rights' (2016) 79(4) MLR 691.

<sup>112</sup> *Eweida and Others v the United Kingdom* (2013) ECHR 2013, para 95. Two of the cases dealt with in this judgment – *Eweida* and *Chaplin* – concerned employees who had been forbidden to wear a cross necklace at work. These measures, however, were not based on the principle of state neutrality.

religious instruction in public school and religious references in official oaths, the Court endorsed a conception of neutrality which we have termed 'neutrality as absence of preference'. To be neutral, public authorities should abstain from expressing a preference for a certain religion, especially in contexts such as education in which individuals are directly exposed to state power. Accordingly, the state cannot make it compulsory for public school pupils to attend non-neutral religious instruction classes. Any child should be entitled to opt out without having to justify this choice. More generally, when assuming functions in the sphere of instruction, the state must guarantee the objective, critical, and pluralistic character of the teaching. This model of neutrality, it is argued, is based on a sound interpretation of the requirements of the Convention. It acknowledges that the right to decide freely in religious matters and to be treated equally whatever one's beliefs can be impinged upon not only where the state compels people to endorse a certain religion, but also where it uses its power to promote a faith and attempt to influence an individual's convictions. This approach resonates with the principle of pluralism which requires respect for and recognition of the diversity of beliefs, religious or non-religious.

But in *Lautsi and Others v Italy* the Court failed to remain true to this conception. By ruling that the mandatory exhibition of crucifixes in public schools does not conflict with the state duty of neutrality insofar as it does not involve indoctrination, it retreats to a weaker version of neutrality which assumes that the state merely has to refrain from coercing individuals in matters of religion and conscience. Such an approach, however, lowers the standard of protection. It disregards the various ways in which the state, while not using direct coercion, may nevertheless restrict an individual's freedom to determine autonomously their religious convictions. It also neglects the demands of pluralism.

Furthermore, the Court has been confronted with a third conception of state neutrality, one that assumes that the manifestation of a religious preference by an individual in public institutions can also compromise state neutrality. While it is legitimate to allow states, within their margin of appreciation, to go beyond the minimum standards imposed by the Convention and opt for a stricter understanding of state neutrality, this does not exempt them from the rule that Article 9 rights can only be restricted where this is necessary and proportionate to achieve a legitimate aim listed in this provision. However, when examining cases relating to the banning of religious signs in public institutions, which the government justifies based on the need to preserve state neutrality thereby the rights of others, the Court often seems to dispense with scrutiny of the reality of the alleged threat to other peoples' rights and assessment of the proportionality of the measure.

At a time where all over Europe the question of how to handle religious plurality is becoming ever more controversial, it is essential that the ECtHR brings its own contribution to the debate, one that is informed by human rights norms and democratic principles common to all European countries. To this end, it must be able to propose a credible and coherent understanding of the state duty to denominational neutrality. This, in our view, presupposes that the Court remains consistent with the 'neutrality as absence of preference' model as this approach best protects the rights and principles of the Convention. To be faithful to its mission, it should also be prepared to review

adequately the justification and proportionality of restrictions to an individual's religious rights, even when the government invokes the argument of state neutrality.