May I be excused? Conscience-based exemptions from compulsory classes: lessons from Strasbourg

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Abstract

Conscience-based requests for exemptions from mandatory classes have been dealt with by the European Court for Human Rights on several occasions.[1] Although some general principles can be distilled from its caselaw, which mostly concern Article 2 of Protocol No. 1, it seems nonetheless difficult to ascertain a clear and coherent line of thinking therefrom. In light of the wide margin of appreciation left to the States in these matters, a casuistic analysis taking into account the concrete circumstances and historical, political and societal context of the State involved is justifiably called for. Nevertheless, the disparities in the Court's jurisprudence are such that they significantly oscillate between an inclusive or religious normative conception of pluralism on the one hand and a more exclusive or militant version thereof on the other hand, resulting in striking incongruities in the readiness to grant pupils reasonable accommodation on the ground of their (parents') religious convictions.

I. *Folgerø* and *Mansur Yalçin*: Opt-outs from Religious Education

A. Walking the fine line between religious instruction and religious education

As Ian Leigh rightly puts it: '*few subjects are as fraught with difficulty for legislators and officials as education concerning religion in state schools.*'[2] First and foremost, there is a difference between religious instruction on the one hand and religious education, or information about religions or beliefs, on the other hand. Although both types of education deal with the issue of religion or belief, they do so in a different spirit and with different intentions: whereas *"'religious instruction" aims at familiarizing students with their own religious tradition (i.e. with theological doctrines and norms of their particular faith), "information about religions", on the other hand, serves the purpose of broadening the students' general knowledge about different religions and beliefs, in particular those religions and beliefs they may encounter in the society in which they live.*'[3]

Generally speaking, there is a consensus that religious education (teaching about religions or beliefs) constitutes an appropriate topic for inclusion in the school curriculum.[4] The rationale for such religious education, the implications for the content of the syllabus and way in which it is delivered, the treatment of minority religions and the question of exemption for certain pupils are however contested, as the case law of the ECtHR shows. The latter's jurisprudence lays bare that, in practice, the distinction between

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1 Hereafter: the ECtHR.

2 I. Leigh, 'Objective, critical and pluralistic? Religious education and human rights in the European public sphere', in *Law, State and Religion in the New Europe – Debates and Dilemmas*', L. Zucca and C. Ungureanu (eds.), Cambridge: Cambridge University Press, 2012, p. 192.

3 H. Bielefeldt, N. Ghanea and M. Wiener, *Freedom of Religion or Belief – An International Law Commentary*, Oxford: Oxford university Press, 2016, p. 211-212.

4 See, however, professor Patrick Loobuyck's call, *inter alia* strengthened by the increasing number of exemptions, to remove religious education classes from the Belgian constitution and replace it by an ethics and philosophy class (*LEF: Levensbeschouwing, Ethiek en Filosofie*): 'Haal levensbeschouwelijke vakken uit de grondwet', De Standaard 30 August 2017, http://www.standaard.be/cnt/dmf20170829_03041711.

religious instruction and religious education can become blurred, which is especially the case when, in a compulsory school setting education on religious knowledge is combined with practicing a particular religious belief.[5] The *Folgerø* judgment, which concerned the compatibility of religious education in Norway with the parental rights ensured in Article 2 of Protocol No. 1 and sharply divided the Grand Chamber, is the leading case on the matter. It was closely followed by *Zengin v. Turkey*, which was subsequently revisited in the case of *Mansur Yalçın*, where a similar complaint was presented before the Court about religious education in Turkish schools.

B. An in-depth analysis of the cases

1. The facts

In the case of *Folgerø*, the application was lodged by members of the Norwegian Humanist Association and their children, primary-school pupils at the time of the litigious events. A process of reform of compulsory primary and secondary school had resulted in Christianity, religion and philosophy being taught together.[6] Although in 1997 the integrated approach was adopted with the aim of ensuring an open and inclusive school environment, Christianity formed the central part of the subject and emphasis was put on its teachings.[7]

Upon the submission of a written parental note elucidating reasonable grounds for their request, pupils were granted partial exemption from those parts of the integrated subject they considered to amount to the practice of another religion or adherence to another philosophy of life, including religious activities within or outside the classroom.[8] A school receiving such a request had to strive for solutions through differentiated teaching.[9] The applicants had sought unsuccessfully to have their children fully exempted from the entire KRL subject and complained before the Court that the latter was neither objective, critical nor pluralistic for the purposes of the criteria established in the interpretation of Article 2 of Protocol No. 1.[10]

In the case of *Mansur Yalçın* a similar situation of religious education, albeit in an intrareligious context, was presented before the Court.[11] fourteen Turkish nationals living in Istanbul and adherents of the Alevi faith complained that the way in which the religion and ethics class – a compulsory subject in primary and secondary public education under article 24 of the Turkish Constitution – was taught,

5 The distinction between religious instruction and religious education also largely depends on the pedagogical approaches. In that connection: *'teaching methods can encourage pupils to 'learn about religions' (including enquiry into, and investigation of, the nature of religions, their beliefs, teachings and ways of life, sources, practices and forms of expression) or to 'learn from religion' (by developing students' reflection on and response to their own and others' experiences in the light of their learning about religion).'* H. Bielefeldt, N. Ghanea and M. Wiener, *Freedom of Religion or Belief – An International Law Commentary*, Oxford: Oxford university Press, 2016, p. 211-212 and Advisory Council of Experts on Freedom of Religion or Belief, *Toledo Guiding Principles about Religion and Beliefs* (OSCE/ODIHR 2007) p. 45-46.

6 *Kristendomskunnskap med religions- og livssynsorientering*, hereafter the KRL subject.

7 Norway has a State religion and a State Church, of which, at the time of the proceedings, 86% of the population were members. Article 2 of the Constitution provides: *'Everyone residing in the Kingdom shall enjoy freedom of religion. The Evangelical Lutheran Religion remains the State's official religion. Residents who subscribe to it are obliged to educate their children likewise.'*

8 The right to a general exemption, which was the arrangement of the previous Christian Knowledge subject in state schools, was revoked, one of the intentions of the government being, as stated, to have all pupils together in the classroom when important issues like the combating of prejudice and discrimination, or better understanding of different backgrounds, were taught.

9 *Cfr. infra.*

10 In addition they brought a similar complaint before the UN Human Rights Committee (*Leirvåg and others* **v.** *Norway*, 3 November 2004) who ruled that there was a violation of the right of parents to secure the religious and moral education of their children in conformity with their convictions under art. 18 (4) of the ICCPR, which similarly to Article 2 of Protocol No. 1 guarantees: '*The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*'

11 ECtHR 19 September 2014, *Mansur Yalçin vs Turkey.*

violated Article 2 of Protocol No. 1.[12] At the relevant time, when the domestic proceedings were started, the children of Mr Mansur Yalçın, Yüksel Polat and Hasan Kılıç, were attending secondary school whereas Mr Sofuoğlu's son and daughter were already in higher education. Ms Serap Topçu and Eylem Onat Karataş indicated that their young children, of whom they did not specify the age, would be obliged to attend the aforesaid classes – which they had previously attended themselves. As for the internal procedure, the applicants had asked the Ministry of Education on June 22, 2005 to consult the leading members of the Alevi community in pursuance of a revision of the curriculum of the religion and ethics class and the integration therein of the Alevi culture and philosophy, together with a compulsory teachers' training and a control- and monitoring mechanism.

The decision to reject this proposition by the Directorate of Religious Education of the Ministry of Education was contested before the Ankara Administrative Court, who appointed a tripartite expert commission. The latter's report emphasized the supra-denominational approach of the class and the important alterations to which the curriculum had been subject following a number of round tables and gatherings. The applicants however held that the content of the class centered on a Sunni interpretation of Islam, with the Alevi faith being presented only summary and as a tradition or culture instead of a belief in its own right. Subsequent to their claim being dismissed on 1 October 2009 by the Administrative Court – who, relying on the supra-denominational approach indicated by the expert report and the curriculum changes, decided that the principle of neutrality was respected – the applicants' appeal on points of law was also rejected on 13 July 2010.

2. General principles pertaining to Article 2 of Protocol No. 1: inclusive pluralism

In both cases the Court starts by reminding the general principles enounced in its case-law pertaining to the general interpretation of Article 2 of Protocol No. 1, which reads as follows: *'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.'* [13]

Firstly, the two sentences of the article must be interpreted in the light of each other and, in particular, of Articles 8, 9 and 10 of the Convention.[14] The Court then goes on to underline that the right of parents to have their religious and philosophical convictions respected, is grafted on the fundamental right to education as laid down in the first sentence.[15] Indeed, according to established case law, whereas the first sentence of the article provides that everyone has the right to education, the right set out in the second sentence is regarded as an adjunct of the right set out in the first sentence. The Court's view is based on parents being '*primarily responsible for the education and teaching of their children; it is in*

12 In this connection, they moreover put forward a violation of Articles 9 and 14 of the Convention.

13 See ECtHR 7 December 1976, *Kjeldsen, Busk Madsen and Pedersen*, § 50-54; ECtHR 25 February 1982, *Campbell and Cosans v. the United Kingdom*, § 36-37 and ECtHR 18 December 1996, *Valsamis v. Greece*, § 25-28. The term 'conviction' is, in the Court's view, not synonymous with mere 'opinions' and 'ideas'. Rather, '*it denotes views that attain a certain level of cogency, seriousness, cohesion and importance*'. The Court has had more difficulty with the notion of 'philosophical', which has varying meaning and connotations from the serious to the trivial but it has held that it denoted in this context such convictions as are *'worthy of respect in a democratic society'*. In *Campbell and Cosans*, it found that the applicants' views of the use of the tawse in the school attended by their sons related to a weighty and substantial aspect of human life and behaviour, i.e., the integrity of the person subject to corporal punishment and found that the latter failed to respect the applicants' philosophical conviction. Supporters of secularism may also claim their views attain the level of 'conviction'. See for similar provisions: art. 14 (3) of the Charter of Fundamental Rights of the European Union and art 18(4) ICCPR, *cfr. supra* footnote 10.

14 As Tulkens notes *'There are three key provisions of the European Convention on Human Rights (ECHR) that deal with religion. Article 9 provides the basic framework for freedom of religion. Article 14 ensures that ECHR-acknowledged rights should be free from religious discrimination. Article 2 of the first Protocol gives parents the right to regulate the religious education of their children. The first and most central is Article 9.*' F. Tulkens, The European Convention on Human Rights and Church-State Relations: Pluralism vs. Pluralism', *Cardozo Law Review* 2009, 2575.

15 Which, importantly so, does not distinguish (nor does the second) between State and private teaching.

the discharge of this duty that parents may require the State to respect their religious and philosophical convictions'.[16]

What is of crucial importance is that the Court *expressis verbis* links the second sentence to the notion of pluralism in education: '*The second sentence of Article 2 of Protocol No. 1 aims in short at safeguarding the possibility of pluralism in education, which possibility is essential for the preservation of the democratic society as conceived by the Convention. In view of the power of the modern State, it is above all through State teaching that this aim must be realized.*' [17] What is more, the Court clearly advocates an inclusive notion of pluralism with regard to the vulnerability and need for protection of outsider groups: '*Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position*.'[18] In this regard, it is noteworthy that the Court emphasizes that *'the verb 'respect' means more than 'acknowledge' or 'take into account'. In addition to a primarily negative undertaking, it implies some positive obligation on the part of the State.*'

The foregoing does not take away from the setting and planning of the curriculum falling in principle within the competence of the States, as the Court does not consider itself fit to rule on the practical questions that such curricular organization brings forth and which may legitimately vary from country to country.[19] In particular, the second sentence of Article 2 Protocol No. 1 does not *'prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable.*' [20] In light of the wide margin of appreciation the states enjoy in this regard, *Article 2 of Protocol No. 1 cannot be interpreted to mean that parents can require the State to provide a particular form of teaching.*[21] Simultaneously, however, the Court clearly delineates the aforementioned freedom, and in doing so yet again relies on the principle of pluralism: '*(…) in fulfilling the functions assumed by it in regard to education and teaching, (the State) must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner.*' More concretely, *'the State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded.*'[22] In sum, whereas there is in effect no absolute right for parents to have their children educated in accordance with their philosophical convictions, the latter must be respected.[23]

16 See ECtHR 7 December 1976, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, § 52 and footnote 47.
17 *Ibid*, § 50.
18 *Cfr. infra*. See ECtHR 18 December 1996, *Valsamis v. Greece*, § 27; ECtHR 25 May 1993, *Kokkinakis v. Greece*, § 31 and ECtHR 15 February 2001, *Dahlab v. Switzerland*.
19 ECtHR 18 December 1996, *Valsamis v. Greece*, § 28.
20 Thus, the mere inclusion of ideas contrary to a particular faith is not problematic, there being no right not to be exposed to contrary opinions in religious and ethical matters. Indeed, the Court clarifies, many subjects cannot avoid having some philosophical complexion or even religious elements, bearing in mind that some religions have a very broad dogmatic base and offer answers to every kind of philosophical, cosmological or moral question. ECtHR 7 December 1976, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, § 53. See also: ECtHR 6 October 2009, *Appel-Irrgang vs Germany*.
21 ECtHR 3 November 2009, *Lautsi and others vs Italy*, § 61, see also: ECtHR 30 November 2004, *Bulski vs Poland*.
22 ECtHR 29 June 2007, *Folgerø and others vs Sweden*, § 84 and ECtHR 3 November 2009, *Lautsi and others vs Italy*, § 62.
23 K. Reid, 'A Practitioner's Guide to the European Convention on Human Rights', London: Sweet & Maxwell, 2011, p. 387.

3. Application of the aforementioned principles to both cases

a. The courses from which exemption is sought: content imbalances

In the case of *Folgerø*, the Court starts by turning its attention to the drafting history behind the introduction of the KRL subject, of which the prevailing intention as expressed during the preparatory work was to '*ensure an open and inclusive school environment, irrespective of the pupil's social background, religious creed, nationality or ethnic group and so on.*'[24] In the view of the Court, these intentions are clearly consonant with the principles of pluralism and objectivity embodied in Article 2 of Protocol No. 1, which, again, and in line with what has been said before, unmistakably attests to its inclusive understanding of the term pluralism. The Court agrees that these intentions were reflected in the Education Act too, which prescribed transmission of knowledge about not only Christianity but also other world religions and philosophies, whilst stressing the promotion of understanding and respect for people with different beliefs and convictions as well as the dialogue between them.[25] In this regard, the Court reiterates that '*the second sentence of Article 2 of Protocol No. 1 does not embody any right for parents that their child be kept ignorant about religion and philosophy in their education. That being so, the fact that knowledge about Christianity represented a greater part of the Curriculum for primary and lower secondary schools than knowledge about other religions and philosophies cannot (…) of its own be viewed as a departure from the principles of pluralism and objectivity amounting to indoctrination.*'[26] In light of the place Christianity occupies in Norwegian history, this falls within the State's margin of appreciation in planning and setting the curriculum.

Yet, subsequently, the Court focuses on problematic features of the Education Act. E.g., it was stipulated that the teaching should take as a starting-point the Christian object clause, according to which the object of primary and lower secondary education was to help give pupils a Christian and moral upbringing. In addition, there was a clear preponderance of Christianity in the composition of the course: a requirement of thoroughness applied to the knowledge of the Bible and Christianity in the form of cultural heritage and the Evangelical Lutheran Faith, but not for the knowledge about other religions and philosophies. This was also reflected in the curriculum, where nearly half of the items listed referred to Christianity and the remainder was shared between other religions and philosophies.[27] Furthermore, the aim set out in the Act to *'promote understanding and respect for Christian and humanist values'* indicates for the Court something more and other than the mere transmission of knowledge. In addition to these disparities in the teaching objectives of the different religions, the emphasis on Christianity would logically be reflected in the choice of educational activities in the context of the course. Participation therein - in particular prayers, psalms, the learning of religious texts by heart and plays of a religious nature – could affect especially young pupils' minds in a manner giving rise to an issue under Article 2 of Protocol No. 1.[28] In light of the foregoing, the Court holds that *'not only quantitative but even qualitative differences applied to the teaching of Christianity as compared to that of other religions and philosophies'*.

24 *'The intention was that the school should not be an arena for preaching or missionary activities but a meeting place for different religious and philosophical convictions where pupils could gain knowledge about their respective thoughts and traditions'*.

25 The different religions and philosophies were to be taught from the standpoint of their particular characteristics and following the same pedagogical principles. The idea was that bringing pupils together in a joint subject rather than splitting them up could foster intercultural dialogue.

26 Devoting greater attention to the majority religion is, however, not an obligation. In *Appel-Irrgang* (*cfr. supra*) the Court upheld a German compulsory ethics course and disagreed with the applicants that the course constituted a non-neutral form of secular indoctrination. After analyzing both content and structure of the course, the Court concluded that both its aims and message comply with the requirements of pluralism and objectivity, as the course *'does not attach particular weight to any particular religion or denomination and its goal is to convey certain basis values common for all students'*. It rejected the argument that the course did not reserve sufficient space for information about Christian religion, contrary to its historical position in Germany, clarifying that from *Folgerø* no such obligation can be derived.

27 *'The study of the subject is intended to give pupils a <u>thorough</u> insight into Christianity and what the Christian view of life implies, as well as sound knowledge of other world religions and philosophies* [emphasis added]'.

28 The emphasis the Court lays on the pupils' young age seems absent in the case of *Osmanoğlu*, *cfr. infra*.

Similarly, in the case of *Mansur Yalçın*, the Court reiterates that, while education providing information on religion is not contrary to the Convention, there must be careful scrutiny whether pupils are obliged to take part in a form of religious worship or are exposed to any form of religious indoctrination. The Turkish education system only provides such an exemption for two categories of pupils of Turkish nationality, i.e. those whose parents belong to the Christian or Jewish faiths.

The parties do not contest the important changes made to the curriculum of the religion and ethics course following the case of *Hasan and Eylem Zengin v. Turkey* and the introduction of the application at hand. The Court therefore proceeds with the examination of the case in light of these syllabus changes, of which it however notes that, though primarily introduced to provide information about the different beliefs in Turkey, including the Alevi faith, they do not amount to an actual revision of the main axes of the class: '*(…) these changes were primarily intended to facilitate the provision of information on the various faiths existing in Turkey, including the Alevi faith. However, the changes did not entail a real overhaul of the key components of the syllabus, which focuses primarily on knowledge of Islam as practised and interpreted by the majority of the population in Turkey*'. Whereas the government maintained that, despite the predominance of the Koran and the *Sunnah*, the textbooks followed a supra-denominational approach, the applicants claimed that there were significant disparities between their faith and the Sunni approach of Islam, which predominated in the course and caught their children in a stranglehold between the information provided at school and that handed down by their families.[29]

Subsequently identifying the content of the education provided on Islam in the compulsory class as the main point of contention, the Court finds itself ill-positioned to take a stance on matters of Islamic theology while recalling that the State – in light of its role as the ultimate guarantor of pluralism in a democratic society – must be neutral and impartial in the exercise of its regulatory powers in the domain of religion, worship and belief.[30] Similarly to Folgerø, the fact that the curriculum pays more attention to Islam as practiced and interpreted by the majority of the Turkish population than to other minority interpretations of Islam (and other religions and beliefs) does not, as such, constitute a lack of the principles of pluralism and objectivity which could be regarded as indoctrination.

However, taking into account the particularities of the Alevi faith in comparison to the Sunni conception of Islam, the Court believes that the applicants could legitimately consider that the teaching methods concerned could, for their children, trigger a conflict of allegiance. The Court points to the positive State duty under Article 2 Protocol No.1 to, when including religious instruction in the curriculum, to the extent possible, avoid situations where pupils face such a conflict between the religious education at school and the religious or philosophical convictions of their parents. The Court fails to see how such conflicts can be avoided without an appropriate exemption mechanism.

b. The exemption procedures: insufficient to remedy the content imbalances

After establishing the imbalance in *Folgerø*, the Court moves on to see whether it is brought to a level acceptable under Article 2 of Protocol No. 1 by the partial exemption arrangement. The latter presupposes a challenging task for parents, who need to be constantly informed of the lesson plan

29 In addition to their faith being presented only as a cultural and traditional concept rather than a branch of Islam in its own right, the applicants held that the principal Alevi rites were presented as cultural activities or folk rituals rather than as religious rites, and that the teachings on the main faiths happened exclusively from the standpoint of the Sunni interpretation of Islam.

30 It reaffirms that the role of the authorities is not to adopt measures favouring one interpretation of religion over another or aimed at forcing a divided community, or part of it, to come together under a single leadership against its own wishes, see ECtHR 2 February 2010, *Sinan Işık v. Turkey* and ECtHR 14 December 1999, *Serif v. Greece*. The State's duty of neutrality and impartiality excludes any discretion on its part to determine whether religious beliefs or the means used to express such beliefs are legitimate, and requires the State to ensure that conflicting groups tolerate each other, even where they originated in the same group: ECtHR 26 September 1996, *Manoussakis and Others v. Greece*, § 47. Religious and philosophical beliefs concern individuals' attitudes towards religion, an area in which even subjective perceptions may be important in view of the fact that religions form a very broad dogmatic and moral entity which has or may have answers to every question of a philosophical, cosmological or moral nature: ECtHR 7 December 1976, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, § 53.

details to be able to single out those parts considered incompatible with their convictions and beliefs. Secondly, the Court finds that despite the lack of an obligation thereto, the condition to give reasonable grounds for the request carries the risk for parents to feel compelled to disclose to the school authorities '*intimate aspects of their own religious and philosophical convictions*'.[31] The potential for conflict that a request for exemption could accordingly form, might deter parents from making it altogether. Lastly, the Court denounces the differentiated teaching approach entertained in case of such a request. The latter was premised on the idea that exemptions relate to the activity as such, and not to the knowledge transmitted thereby. As a result, for a number of activities such as prayers, hymns, church services and school plays, it was proposed that observation by attendance could suitably replace involvement through participation. The Court finds this distinction not only inoperable, but also to substantially reduce the effectiveness of the right to an exemption.[32] In light of the foregoing, the refusal to grant the applicants full exemption for their children from the KRL constitutes a violation of Article 2 Protocol No. 1.[33]

Similarly, in the case of *Mansur Yalçın*, and notwithstanding that parents can always educate their children in line with their own religious or philosophical convictions, the Court finds the deviations between the approach of the curriculum and the particular features of the Alevi faith to be such that they can hardly be sufficiently attenuated by the mere information about the Alevi beliefs and practice. Moreover, the exemption procedure being restricted to only two categories for the Court necessarily suggests that the instruction is likely to lead pupils to face the aforementioned allegiance conflicts. Against the background of almost all member States offering at least one opt-out route for religious education, the Court concludes that the one offered by the Turkish education system is very limited, and moreover susceptible of subjecting parents to a heavy burden in terms of disclosure of their religious or philosophical convictions. Having regard to its finding of Article 2 of Protocol No. 1, the Court does not find it necessary to examine the applicants' complaints under Articles 9 and 14 ECHR.[34]

C. Conflicts of allegiance as a criterion highlighting the interest of the child

Both cases have in common that the principles applied therein by the Court correspond with the Toledo Guiding principles on Teaching about Religions and Beliefs in Public Schools, which, among others, recommend that: '*Where a compulsory programme involving teaching about religions and beliefs is not sufficiently objective, efforts should be made to revise it to make it more balanced and impartial, but where this is not possible, or cannot be accomplished immediately, recognizing opt-out rights may be a satisfactory solution for parents and pupils, provided that the opt-out arrangements are structured in a sensitive and non-discriminatory way.*'[35] The principles therefore require the possibility of opting out to be available for persons adhering to the same religion on which instruction is given, whenever the children or parents feel that their personal and possibly dissenting convictions are not respected. Furthermore, exemptions must neither be linked to onerous bureaucratic procedures nor involve any *de jure* or *de facto* penalties and other negative consequences.[36] Still, there are some disparities. Firstly, despite the factual similarities between the cases, the Court was distinctly more divided in the case

31 This risk was all the more present for the Court in view of the difficulties for parents in identifying the problematic parts of the course content.

32 Parents might also be discouraged to ask teachers to take on the extra burden of differentiated teaching.

33 For some scholars, this indicates a move to the North American approach, see I. Leigh in '*Law, State and Religion in the New Europe – Debates and Dilemmas*', L. Zucca and C. Ungureanu (eds.), Cambridge: Cambridge University Press, 2012, p. 206: '*The Canadian courts especially have tended to discount such exemptions if there is a risk that the child will be made to feel different or stigmatized*'. Given the approach adopted in the case of *Osmanoğlu*, that conclusion now seems premature.

34 This to the discontent of judges Sajó, Vučinić and Kūris who highlight the importance of the underlying question of religious discrimination of the Alevi faith – which is not granted the status of a separate religion with the rights associated thereto – and regret the Court's reluctance to dig deeper into the issue.

35 Advisory Council of Experts on Freedom of Religion or Belief, *Toledo Guiding Principles about Religion and Beliefs*, OSCE/ODIHR 2007.

36 While stressing the importance of low-threshold exemptions in his thematic report on the rights of the child, Special Rapporteur Heiner Bielefeldt flags that those requirements are often ignored in practice: Interim report of the Special Rapporteur on Freedom of Religion or Belief, 5 August 2015, A/70/286, § 48.

of Folgerø than in that of *Mansur Yalçın*, with the former dividing the Grand Chamber by nine votes to eight. In the view of the dissenting minority, Christianity taking up half of the subject is a logical reflection of Norway's history and background. Neither did they find the differences between the teaching of Christianity and that of other religions and philosophies to be qualitative nor the exemption scheme excessively burdensome or intrusive.[37] The contrast with the unanimous position of the Court in *Mansur Yalçın* seems curious, *a fortiori* given the factual resemblance of the curriculum in both cases conferring preponderant visibility to the majority religion.[38] Equally, the analysis the Court undertakes of the course content is markedly more detailed in the case of *Folgerø*, although it has been criticized for that reason.[39]

The most noteworthy dissimilarity however concerns the fact that in *Mansur Yalçın*, the Court seems to use the existence of a conflict of allegiance on the part of the pupil as the decisive criterion for curricular assessment in light of Article 2 Protocol No. 1, a criterion that, although equivalently brought to the fore by the applicants, remained absent in the case of *Folgerø: 'Where a Contracting State includes religious instruction in the curriculum for study, it is then necessary, in so far as possible, to avoid a situation where pupils face a conflict between the religious instruction given by the school and the religious or philosophical convictions of their parents.'*[40] More than a strategic solution to its incompetence to delve into Muslim theology, this could be embraced as a welcome emphasis as it brings the attention to a crucial yet oftentimes overlooked interest in these kind of cases, i.e. the (best) interests of the child. Certainly, education is a grid of potentially conflicting rights and interests.[41] There are several actors – as rights-holders and/or duty-bearers – whose rights, freedoms, duties and interests require consideration and possibility reconciliation in the case of clashes: children, parents (or legal guardians) and the school.[42] Although children enjoy the right to freedom of religion or belief from birth, especially during early childhood they are largely dependent on the direction provided by their parents or legal guardians, which should be consistent with the child's evolving capacities. Some parents may have well-founded fears of the school alienating their children from family tradition or coercing them to assimilate into mainstream society by abandoning their religion or belief, whilst other parents will object to religious instruction, and yet others might contrarily prefer their children to be familiarized with religious

37 They also argued that due to an earlier admissibility decision, the scope of the case before the Court was more limited than the parallel case reviewed by the Human Rights Committee. In the same vein, judges Zupančič and Borrego Borrego flag the danger of *forum shopping* consisting of separate applications before multiple regional and international human rights mechanisms and which may lead to contradictory decisions in Strasbourg and Geneva, see: M. Forowicz, *The Reception of International Law in the European Court of Human Rights*, Oxford: Oxford University Press, 2010, p. 163.

38 The question arises whether this might have to do with the general unease the Court seems to experience when dealing with issues relating to Islam, *cfr. infra*.

39 For some, the careful weighing of the different parts of the course and the scrutiny over the depth of the teaching dedicated to each religion and philosophy is problematic in pedagogical terms: '*the desire to be fair and accurate can lead to curricula which are dense in facts but that do not leave students space to engage with and be challenged by the material presented*'. See: C. Evans, 'Religious Education in Public Schools. An International Human Rights Perspective', *Human Rights Law Review* 2008, 8(3), (449), p. 471 and M. Hunter-Henin, 'Law, religion and the school' in S. Ferrari (ed.), *Routledge Handbook of Law and Religion*, New York: Routledge, 2015, p. 263. See also: '*As a consequence of the Court's willingness to examine these issues in details and its failure to articulate clear principles, there now arises the prospect of a series of cases challenging syllabuses in different European countries entailing fact-sensitive analysis of the content, the legal provisions and the specific syllabus by the Court*'. I. Leigh in '*Law, State and Religion in the New Europe – Debates and Dilemmas*', L. Zucca and C. Ungureanu (eds.), Cambridge: Cambridge University Press, 2012, p. 206.

40 ECtHR 19 September 2014, *Mansur Yalçin vs Turkey*, § 72.

41 Three sets of interests exist between which a balance is to be found: '*For parents, transmitting to their children the values and beliefs they are themselves deeply committed to will be one of the most fundamental responsibilities they undertake; ensuring that the school their children attend assists them in this process will therefore often be one of their most pressing concerns. For children, the school 'is the place where they learn about the world, about the place they will occupy in it, about powers and inequality'. Educational systems committed to children's rights will need to respect pupils' convictions (which may coincide or diverge from their parents' belief) while maintain a right to 'an open future'.* M. Hunter-Henin, 'Law, religion and the school' in S. Ferrari (ed.), *Routledge Handbook of Law and Religion*, New York: Routledge, 2015, p. 259-260.

42 Some categorizations add thereto: the State (to the extent it is not yet represented in the State school) and religious communities.

doctrines and expect the school to take an active role in this regard.[43] Schools, in their turn, have the interest of forming generations of citizens and will thus naturally attracts legitimate state interests.[44]

The test or criterion of the conflict of allegiance potentially bridges the latter interest with the parental one by looking at the interest in between, i.e. of the child.[45] Indeed, '*the liberty of the parents to ensure the religious and moral education of their children and the right of the child to freedom of religion or belief appears as two sides of the same coin.*'[46] This is echoed in the Court's case law: '*It is in the discharge of a natural duty towards their children – parents being primarily responsible for the 'education and teaching' of their children – that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education.*'[47] Hence, by shifting the focus on the parental belief (or, for that matter, the school's interest) to the experience of the child, or at least having the capacity to do so, the criterion of conflict of allegiance laudably ties in with the fact that the parental right as guaranteed by the second sentence of Article 2 Protocol No. 1 is founded upon the child's right as laid down in the first sentence thereof and in light of which the former should be read: *'Article 2 of Protocol No. 1 constitutes a whole that is dominated by its first sentence.*'[48] Nonetheless, Hunter-Henin points out that, in practice, children's rights to freedom of religion as laid down in Article 9 of the Convention tend to be merged into those of their parents as guaranteed Article 2 of Protocol No. 1. This seems '*slightly at odds with other areas where the entitlement of children as right bearers has been more willingly recognized.*'[49] Completely separating the child's and parents' perspectives, however, entails practical difficulties concerning the determination whether a child's claim that his or her religious freedom has been infringed is truly motivated by their individual or rather parental beliefs: *'Could a judge realistically embark on a systematic questioning of the reasons underlying a given religious commitment? Would the coincidence between family tradition and religious adherence strengthen the religious commitment or weaken it on the grounds that – allegedly – it had been embraced not by the child as an individual but as part of the family?'*[50] These questions are far from straightforward, but at least the conflict of allegiance criterion can help prevent the child from being muted or reduced to the mere 'go-between' between the school and the parents and suffer from unduly pressure as a consequence thereof.

43 *'This may also comply with the interests of religious communities themselves, which are in fact involved in providing religious instruction in private and/or public schools in most countries in the world', ibid.*

44 H. Bielefeldt, N. Ghanea and M. Wiener, *Freedom of Religion or Belief – An International Law Commentary*, Oxford: Oxford university Press, 2016, p. 205-207. See on the discussion as to parental rights (*sui generis*) being allegedly eroded since the Convention on the Rights of the Child, see p. 211-212. Indeed, *'the relationship between the rights of the child and parental rights in the area of freedom of religion or belief has given rise to controversies. On the one hand, fears have been expressed that the status of the child as a rights holder might undermine parental rights, thus opening the floodgates for far-reaching interference by State agencies in the religious socialization of children. On the other hand, there exist views that parents should be obliged to provide a religiously 'neutral' upbringing of their children*' See for the response of the Special Rapporteur in this regard, contributing to *'a holistic understanding of the rights of the child and parental rights in their normative interrelatedness, without ignoring possible conflicts*': Interim report of the Special Rapporteur on Freedom of Religion or Belief, 5 August 2015, A/70/286, § 27 and further.

45 See also: '*The criterion (of allegiance conflict) is imbedded in a manifest triangular relationship (the conflict of allegiance faced by the pupil, between the parental and the State's educational values), to assess whether an educational system including religious instruction in the curriculum for study is adequately equipped to comply with the positive state obligation to ensure respect for the religious and philosophical parental convictions, the latter being an obvious binary relationship in which the parent, and not the child, is viewed as the rights-holder. It is a construction that stems from the paternalistic approach of the second sentence of Article 2 of Protocol No. 1 as to the position of the child in the context of religious education.*': Y. Benfquih, 'Mansur Yalçın v. Turkey: religious education and the (easy) way out', 10 October 2014, available at: https://strasbourgobservers.com/2014/10/10/mansur-yalcin-v-turkey-religious-education-and-the-easy-way-out/#_ftn5.

46 *'Depending on the child's age, maturity, and evolving capacities, the visibility of the child's side of the coin may be fully apparent or less prominent.'* Problems may then arise when the child and his or her parents have different or evolving convictions or if the parents do not agree on the appropriate religious and moral education to be given. H. Bielefeldt, N. Ghanea and M. Wiener, *Freedom of Religion or Belief – An International Law Commentary*, Oxford: Oxford university Press, 2016, p. 205.

47 ECtHR 29 June 2007, *Folgerø and others vs Sweden*, § 84.

48 *Ibid* and ECtHR 7 December 1976, *Kjeldsen, Busk Madsen and Pedersen vs Denmark*, § 52.

49 M. Hunter-Henin, 'Introduction: Religious Freedom in European Schools: Contrasts and Convergence', in M. Hunter-Henin (ed.), *Law, Religious Freedoms and Education in Europe*, Surrey: Ashgate, 2011, p. 5-6.

50 *Ibid*.

Despite the aforementioned differences, *Folgerø* and *Mansur Yalçın* do have a lot in common. Most importantly, the primordial principle guiding the Court's analysis in both cases is that of pluralism. As previously elaborated, the Court unambiguously ascribes the second sentence of Article 2 Protocol No. 1 to the notion of pluralism and, with regard to minorities, promotes an inclusive understanding thereof.[51] Still, the interpretation thereof merits a closer analysis, particularly as other cases, including that of *Osmanoğlu*, gravitate in the opposite direction.

II. Religious Diversity of Strasbourg: Back and forth between Inclusive and Exclusive Pluralism?

A. The concept of pluralism in the Court's case law: general considerations

The concept of pluralism lies at the heart of the jurisprudence of the Court.[52] The latter considers pluralism as one of the main characteristics of a democratic society. The concept is often used in cases that touch upon interferences with the fundamental rights to freedom of speech, freedom of education, freedom of association and freedom of religion, where it functions as a critical factor determining the scope and impact of aforesaid rights.[53]

Yet, and in several respects, the concept is riddled with ambivalence. Firstly, its meaning varies according to the discipline in which it is used.[54] Second, the concept can be associated both with individual fundamental rights as well as groups, associations and institutions.[55] Finally, pluralism *'both aims at an existing feature of certain societies and at an idea that is to be fostered'*.[56] One of the two cases in which the Court first used the concept, was the well-known case of *Kjeldsen, Busk, Madsen en Pedersen,* where the Court laid down some key principles as to the interpretation of Article 2 Protocol No. 1. Read in conjunction with *Handyside* – the other case where the term was first used – it becomes clear not only that the Court sees pluralism both as a characteristic of and condition for a democratic society, but also that it links the concept to values of' 'tolerance' and 'broadmindedness'.[57] This is further confirmed in later case law; where the Court clarifies that 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 (own emphasis).'*[58] Similarly in *Leyla Sahin*, the Court speaks of '*true religious pluralism*' *(own emphasis)*.[59]

Indeed, the Court considers the right to freedom of religion and belief on the one hand and pluralism on the other hand to be inextricably related.[60] In fact, it can be said that the religious freedom jurisprudence of the Court '*most basically concerns the questions of religious pluralism*'.[61] In a key passage of the famous

51 *Cfr. supra.*
52 A. Nieuwenhuis, 'The Concept of Pluralism in the Case-Law of the European Court of Human Rights', *European Constitutional Law Review*, 2007, (367) 367.
53 *Ibid*, (367) 368 and 383.
54 *Ibid*: '*In philosophical ethics, value pluralism, or moral pluralism implies that there is a diversity of conflicting values. Therefore, individuals normally have more than one rational moral choice. Social pluralism is used to characterise a society in which different religious, cultural, ethnic or other groups live together. Individuals may to a certain extent be considered as members of these groups. In political science, more specifically, the concept of pluralism points to the existence of all kinds of associations and groupings that aim for political influence, without one particular group being predominant.*'
55 E.g., the media.
56 A. Nieuwenhuis, 'The Concept of Pluralism in the Case-Law of the European Court of Human Rights', *European Constitutional Law Review*, 2007, (367) 368.
57 ECtHR 7 December 1976, *Handyside v. UK*.
58 ECtHR 17 February 2004, *Gorzelik v. Poland*, par. 92; ECtHR 20 October 2005, *Ouranio Toxo v. Greece*, § 35; ECtHR 19 January 2006, *United Macedonian Organization Ilinden and others v. Bulgaria*, § 58 and ECtHR 5 October 2006, *Moscow Branch of the Salvation Army v. Russia*, § 61.
59 ECtHR 10 November 2005, *Leyla Sahin v. Turkey*, § 110.
60 A. Nieuwenhuis, 'The Concept of Pluralism in the Case-Law of the European Court of Human Rights', *European Constitutional Law Review* 2007, (367) 372.
61 Z. R. Calo, 'Pluralism, Secularism and the European Court of Human Rights', *Journal of Law and Religion* 2011, (101) 101.

case of *Kokkinakis*, the majority of the Court expressed it as follows: *'Freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.'*[62] What is so important about the decision is that it identifies freedom of religion as an instrument to protect and advance the virtues of pluralism: '*Pluralism, in other words, does not stand in the service of religious freedom; religious freedom stands in the service of pluralism*.'[63]

In various decisions following *Kokkinakis,* the Court, in its interpretation of the right to freedom of religion, attributes a dominant role to the advancement of religious pluralism, which is seen as *'both the means and the end of fostering genuine religious freedom.'*[64] Indeed, the Court states: *'respect for religious diversity undoubtedly represents one of the most important challenges to be faced today; for that reason, the authorities must perceive religious diversity not as a threat but as a source of enrichment.'*[65] What is more, the Court recognizes tensions between competing religious groups as an unavoidable consequence of pluralism and clarifies that the role of the authorities in such a situation *'is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.'*[66] Contrarily, the Court expects the authorities to act as mediator between religious groups and endeavor to ensure pacific relations, and foster religious harmony and tolerance in a democratic society.[67] In a more recent case the Court emphasizes that *'the authorities must not neglect the specific features of different religions'*.[68] *Ergo*, the Court's approach, identifying in particular religious pluralism as an essential characteristic and *conditio sine qua non* of a democratic society fostering other values such as diversity and tolerance, clearly espouses an inclusive notion of religious pluralism, or, 'normative religious pluralism'.[69] In normative religious pluralism, religious diversity is '*is held to be a positive force in social life, giving moral and spiritual depth to civic discourse, enriching personal and family life, and even making the diverse religious communities themselves better representative of their faiths and traditions*.' Whereas the cases of *Folgerø* and *Mansur Yalçın* are infused with such an inclusive understanding of religious pluralism, *Osmanoğlu* seems to swing in the other direction, of a more exclusive, militant secular understanding thereof.

62 The case concerned a Jehovah's Witness being repeatedly arrested and jailed for violating Greece's ban on proselytism. ECtHR 15 May 1993, *Kokkinakis v. Greece*, § 31. See also: ECtHR 13 February 2003, *Refah Partisi and others v. Turkey*, § 90 and ECtHR 10 November 2005, *Leyla Sahin v. Turkey*, § 104.

63 Z. R. Calo, 'Pluralism, Secularism and the European Court of Human Rights', *Journal of Law and Religion* 2011, (101) 102.

64 *Ibid*.

65 ECtHR, *Izzetin Dogan and others v. Turkey*, 24 April 2016.

66 *See* ECtHR 20 October 2005, *Ouranio Toxo v. Greece* and ECtHR 14 December 1999, *Serif v. Greece*.

67 See, *inter alia*, ECtHR *S.A.S. v. France*, 1 July 2014, § 127 and ECtHR *Leyla Şahin v. Turkey, § 107*. See also: F. Tulkens, The European Convention on Human Rights and Church-State Relations: Pluralism vs. Pluralism', *Cardozo Law Review* 2009, (2575) 2583.

68 ECtHR 5 December 2017, *Hamidovic v. Bosnia and Herzegovina*, § 41.

69 Z. R. Calo, 'Pluralism, Secularism and the European Court of Human Rights', *Journal of Law and Religion* 2011, (101) 103.

B. Osmanoğlu and Kocabaş v. Switzerland: a fish out of water?

1. Facts

The applicants in the case of *Osmanoğlu and Kocabaş* v. Switzerland are Swiss nationals of Turkish origin who immigrated to Switzerland at the respective age of ten and twenty-one.[70] Based on their religious convictions and the ensuing modesty requirements, the applicants asked for their daughters, initially enrolled in the Vogelsang primary school in Basle, to be exempted from mandatory mixed swimming classes. Under the applicable legislation in the Canton of Basel Urban, swimming classes are part of the compulsory school curriculum and exemptions can only be granted to pupils after reaching puberty.[71] While their daughters had not yet reached puberty and, according to the applicants, the Koran only requires women to cover their body from that stage onwards, they nonetheless considered their beliefs to require them to prepare their daughters for the religious precept concerned. Following several meetings and the persistent refusal of the parents to send their daughters to the swimming lessons, fixed-penalty proceedings were opened and the parents were imposed a fine of 1,400 CHF for breaching their parental duties.[72] The applicants lodged proceedings, claiming that the obligation to send their daughters to said classes violated their right to freedom of religion.

2. Appeal proceedings

Drawing on its leading decision of 24 October, 2008, the Federal Supreme Court dismissed the applicants' appeal, holding that the authorities' refusal to exempt their daughters from mixed swimming lessons in primary school had not breached their right to freedom of conscience and belief. The Court upheld the lower court's judgment by considering the obligation concerned to have a sufficiently solid legal basis and the interference with the applicant's right to freedom of religion to be both necessary and proportionate in light of the paramount importance of the school's function of social integration of children. In addition, the interference was attenuated by the fact that the classes were mixed only until puberty and accompanying measures such as separate showers and cloakrooms as well as the option to wear a burkini. The argument that the daughters were taking private swimming lessons was rejected since '*what was at stake for the children was not simply learning to swim, but also submitting to the conditions surrounding the teaching itself*'.

Whereas the Federal Swiss Court had previously regarded the refusal to grant Muslim students exemption from swimming lessons a violation of the right to freedom of religion, it altered its caselaw by holding the opposite in a leading judgment of 24 October, 2008. Its change of heart was motivated by the sharp increase in Switzerland's Muslim population, from which the Court derives the conclusion that the interest in ensuring integration and compliance with the values of the local culture should be given greater weight. Its refusal to grant exemption in the present case hence echoed its new case law, according to which educational obligations were, in principle, to be recognized as prevailing over compliance with the religious precepts of one part of the population.

70 The fluent Swiss speaking father moved to Basel at the age of ten and temporarily returned to Turkey after completing a business course. There, he met his wife – who at the time of the proceedings was on a training course to become a playgroup leader – and the two of them subsequently moved to Switzerland under family reunion provisions in 1999.

71 A recommendation (*Handreichung*) from the Education Department of the Canton of Basle Urban of September 2007, entitled *Merkblatt zum Umgang mit religiösen Fragen an der Schule* (Guidelines on dealing with religious matters in schools), specifies the arrangements for taking account of religious matters in schools. Under point 5.1 thereof, exemptions from swimming lessons can only be granted to pupils who have reached the age of puberty.

72 Section 91 (8) and (9) of the Education Act of the Canton of Basle Urban.

3. Judgment

The Strasbourg Court finds the contested measure to have both a sufficient legal basis and legitimate aim, by accepting the integration of foreign children from different cultures and religions, the smooth functioning of the education system and gender equality as elements attached to the protection of the rights and freedoms of others or the protection of public order within the meaning of Article 9(2) ECHR.[73] Hence, the focus of the judgment lies on examining whether the refusal by the authorities to grant the applicants' daughters an exemption from mixed swimming lessons was necessary in a democratic society and, more particularly, whether it was proportionate to the aims pursued.

The Court starts by bringing to mind that the freedom of thought, conscience and religion as enshrined in Article 9 is one of the foundations of a democratic society and a vital element making up the identity of believers and their conception of life. It goes on by reiterating that pluralism, tolerance and broadmindedness are the hallmarks of a democratic society, accentuating that the latter does not simply entail the prevalence of the majority view; instead: '*a balance must be achieved which ensures the fair treatment of people from minorities and avoids any abuse of a dominant position*'.[74] It also refers to the positive obligation inherent in the right to freedom of religion which exists alongside the primarily negative undertaking by the State to abstain from interference therewith.[75]

Notwithstanding the foregoing, the Court next emphasizes its subsidiary role and the special weight that ought to be given to the role of domestic policy-makers when it comes to matters of general policy on which opinions may reasonably differ widely in a democratic society, adding that '*this is true, in particular, where questions concerning the relationship between State and religion are at stake*'.[76] Although Switzerland has not ratified Protocol No. 1 to the Convention (and the applicants hence rely on Article 9 of the latter), the Court nevertheless summarizes the relevant principles applicable under Article 2 of said Protocol *'(…) given that the Convention must be read as a whole and that this latter provision, at least with regard to its second sentence, is in principle the lex specialis in relation to Article 9 in the area of education and teaching*'.[77] That means that the State must respect both the general freedom of religion as laid down in Article 9 and the specific guarantee of that freedom in respect of the operation of the school system.

In assessing whether the refusal to grant the applicants' daughters an exemption was necessary in a democratic society and proportionate to the aims pursued, the Court starts by noting that '*States enjoy a considerable margin of appreciation concerning matters relating to the relationship between the State and religions and the significance to be attached to religion in society, particularly where these matters arise in the sphere of teaching and State education*'.[78] While States are under the obligation to ensure

73 Take note of the fact that despite the applicants' daughters being born and raised in Switzerland, they are still qualified as 'foreign' (*sic*).

74 ECtHR 10 January 2017, *Osmanoğlu and Kocabaş v. Switzerland*, § 84.

75 *Ibid*, 86.

76 *Ibid*, 87.

77 *Ibid*, § 90.

78 The margin of appreciation is a compromise between the ECHR's universal ambition to set general standards to be uniformly respected and the subsidiary nature of the machinery of protection established by the Convention. In general, the doctrine implies that the State authorities ought to be allowed a certain measure of discretion in implementing the standards enshrined in the Convention and in choosing the appropriate regulatory response to matters affecting human rights protection. By its very nature, the tension that flows from the margin of appreciation as an interpretative tool between subsidiarity and universality can only be addressed in a casuistic fashion. Among the factors that determine the scope of the margin left for the State, the existence of a common cultural context (i.e. of a particular traditional combination of moral, religious, ideological, political and constitutional values and attitudes) in which particular rights operate within the society, is of particular importance. The delimitation of the national margin of appreciation therefore appears particularly difficult when there is a conflict involving important religious values. The Member States differ in their tradition and history, as well as in their religious structures, in the dominant moral values, and in the existing degree of tolerance, differences which have augmented in light of the geographical expansion of the Convention system as well as due to the evolution of the role of Islam in some Member States, making it difficult to identify common ground on the matter. See L. Garlicki, 'The Strasbourg Court on Issues of Religion in the Public Schools System', in H-J. Blanke, P.C. Villalón, T. Klein and J. Ziller (eds.), *Common European Legal Thinking: Essays in Honour of Albrecht Weber*, London: Springer, 2015, p. 323-324.

that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner and must refrain from pursuing any aim of indoctrination, they are nonetheless free to devise their school curricula according to their needs and traditions. Although the primary responsibility for the education of children lies with the parents, the latter cannot '*relying on the Convention, require the State to provide a particular form of teaching or to organise lessons in a particular manner*'. That holds *a fortiori* true in light of the fact that Switzerland has not ratified Protocol No. 1 and its federal structure attributes extensive curricular planning and organization powers to the cantons and municipalities. While balancing the competing interests at stake, the Court agrees with the government's argument that '*schools plays a special role in the process of social integration, one that is all the more decisive where children of foreign origin are concerned*' and accepts that *'given the importance of compulsory education for children's development, an exemption from certain lessons is justified only in very exceptional circumstances, in well-defined conditions and having regard to equality of treatment for all religious groups*'. In the Court's view, the fact that exemptions from swimming lessons are allowed on medical grounds attests to the approach not being excessively rigid.

Even if it would be true that only a small number of parents ask their children to be exempted, the Court believes that '*the children's interest in an all-round education, facilitating their successful social integration according to local customs and mores, takes precedence over the parents' wish to have their daughters exempted from mixed swimming lessons*'.[79] The argument that not all schools in Switzerland or in the Canton of Basle Urban include swimming lessons is rejected for the same reason, as the Court considers that '*sports education, of which swimming is an integral part in the school attended by the applicants' daughters, is of special importance for children's development and health. That being said, a child's interest in attending those lessons lies not merely in learning to swim and taking physical exercise, but above all in participating in that activity with all the other pupils, without exception on the basis of the child's origin or the parents' religious or philosophical convictions*'.[80] Similarly, the Court overpasses the applicants' argument that their daughters attended private swimming lessons, since: '*what was important for the children was not only taking physical exercise or learning to swim – legitimate aims in themselves –, but above all the fact of learning together and taking part in that activity collectively*'.[81]

Lastly, the Court takes notice of the flexible arrangements which were offered to the applicants and were such as to reduce the impact of the compulsory attendance on the parents' religious convictions (including the separate cloakrooms and showers as well as the option for the daughters to wear a burkini).

As a result, the Court finds that *'by giving precedence to the children's obligation to follow the full school curriculum and their successful integration over the applicants' private interest in obtaining an exemption from mixed swimming lessons for their daughters on religious grounds, the domestic authorities did not exceed the considerable margin of appreciation afforded to them in the present case, which concerned compulsory education'*. It follows that there has been no violation of Article 9 of the Convention.

C. 'Thou shalt swim': swimming as a means for integration

As mentioned, the decision of 24 October, 2008 of the Federal Supreme Court of Switzerland marks a striking turn from its earlier jurisprudence. The primary reason for the shift in the Swiss Federal Court's case law comprised the alleged rapidly increasing Muslim population in Switzerland. Indeed, before, the Court considered swimming classes as an ancillary part of physical education in school, depriving exemption thereof of the risk of endangering class cohesion.[82] As a result, students who

79 ECtHR 10 January 2017, *Osmanoğlu and Kocabaş v. Switzerland*, § 97.

80 In addition, the Court points to the specific features of federalism lessening aforesaid argument's validity.

81 '*Moreover, the Court considers that exempting children whose parents have sufficient financial resources to offer them private classes would create, in respect of those children whose parents do not have such resources, inequality that is unacceptable in compulsory education.' Ibid*, § 100.

82 *'Auch die Kohärenz der Klasse kann nicht allein davon abhängen, dass ausnahmslos alle Schüler auch am Schwimmunterricht, der einen sehr kleinen Teil des Unterrichtsprogramms ausmacht, teilnehmen.'*

did not learn how to swim did not see their chances to conclude scholarly education and succeed in professional life seriously threatened.[83] Interestingly, the Court emphasized that, although surely they must abide by the local legal system, there is no legal obligation for religious minorities to assimilate to local customs and ways of life.[84]

The latter is in sharp contrast with the stance the Court takes in its later decision. Here, the Court starts by stressing that the integration-related issues that were previously at stake should be given more weight, particularly in light of the alleged rapid increase in Switzerland's Muslim population. Basing itself on an article of which the title alone denotes its unmistakably islamophobic nature, the Court points out that their number has increased from 152.200 in 1990 to 310.800 in 2000 to approximately 400.000 at the time of the proceedings.[85] The Court adds that the (male) students concerned should get used to being confronted with images of scarcely dressed women in the street and the media. In addition, the recognition of a right to free collective swimming lessons for Muslim students would run counter to the goal of integration and would in particular make it considerably more difficult for the pupils concerned to familiarize to the local social customs in Switzerland, including the natural gathering with the opposite sex. Consequently, the Court holds that the competent authorities' refusal to grant exemption from mixed swimming classes, combined with accompanying measures such as body-covering swimwear and separate changing- and shower rooms, does not constitute an inadmissible interference with religious freedom. As shown, Strasbourg largely follows suit, equivalently emphasizing the respective importance of public schools in the process of social integration and that of physical education for the development and health of children.

One cannot help but notice that the Strasbourg Court turns a blind eye to several relevant arguments brought forward by the applicants. Firstly, the argument that swimming classes represent only an ancillary part of the school curriculum, remains unconsidered, as well as the fact that the applicants' requests to change to a school establishment in the same city which did not provide for compulsory swimming classes was denied. In this regard, the applicants maintained that there were alternative, less restrictive means: they sent their children to private swimming classes and repetitively asked to be transferred to a school without compulsory swimming classes. The latter was refused, and that is striking, all the more so in light of the case law of the Court where in similar cases of exemption requests, the possibility of parents putting their children in another school has been taken into account. For instance, in *Kjeldsen, Busk Madsen and Pedersen*, where the applicants claimed the compulsory sex education in the third grade of primary education in Danish state schools constituted a breach of Article 2 of Protocol No. 1, the Court explicitly stated that the parents had the possibility of either sending their children to subsidized private schools where the programme contained no sex education or of teaching them in their home themselves.[86] In *Folgerø*, that possibility was also put forward, but the conclusion – given the fact that teaching erred on the side of indoctrination– differed: the majority rejected the alternative of the parents educating their children in the private sector, since '*the existence of such a possibility could not dispense the State from its obligation to safeguard pluralism in State schools which*

83 F. Bretscher, 'Osmanoğlu and Kocabaş v. Switzerland: A Swiss perspective', 30 March 2017, available at: https://strasbourgobservers.com/2017/03/30/Osmanoğlu-and-Kocabaş-v-switzerland-a-swiss-perspective/.

84 Federal Supreme Court judgment of 18 June 1993:*'Angehörige anderer Länder und anderer Kulturen, die sich in der Schweiz aufhalten, haben sich zwar zweifellos genauso an die hiesige Rechtsordnung zu halten wie Schweizer. Es besteht aber keine Rechtspflicht, dass sie darüber hinaus allenfalls ihre Gebräuche und Lebensweisen anzupassen haben. Es lässt sich daher aus dem Integrationsprinzip nicht eine Rechtsregel ableiten, wonach sie sich in ihren religiösen oder weltanschaulichen Überzeugungen Einschränkungen auferlegen müssten, die als unverhältnismässig zu gelten haben.'* (emphasis added).

85 '*Switzerland on its way to becoming an Islamic State*' (UWE STOLZ, *Schweiz auf dem Weg zum Islam-Staat*, http://www.israswiss.ch).

86 ECtHR 7 December 1976, *Kjeldsen, Busk Madsen and Pedersen vs Denmark*. The Court held there was no violation of Article 2, as the intention of the Danish sex education programme existed mainly to supply adolescents with better information (on the increasing numbers of births from adultery, abortions and venereal diseases). That teachers give certain appreciations of or add colouring to those facts, and that religious or philosophical paths are followed, is, in the Court's view, inevitable. The observations were of a moral nature but at the same time very general so they could not be viewed as indoctrination and as promoting sexual behaviour.

are open to everyone'.[87] It is therefore interesting that the Court keeps silent about the same argument put forward by the applicants in Osmanoğlu.

One can furthermore not help but notice the contradiction that exists between the fact that on the one hand, swimming lessons are regarded as being of paramount importance for the social integration of ('foreign', *sic*) pupils in Swiss society and values, and those same lessons simultaneously not being offered in all Swiss schools, or even in the Canton of Basle Urban for that matter, on the other hand. In response to the applicants pointing out the foregoing, the Court says: '*Admittedly, the Court considers that sports education (…) is of special importance for children's development and health. That being said, a child's interest in attending those lessons lies not merely in learning to swim and taking physical exercise, but above all in participating in that activity with all the other pupils, without exception on the basis of the child's origin or the parents' religious or philosophical convictions*.' If, as a result, the emphasis lies on the conjoint nature of the swimming classes – which at first glance might seem a rather solitary activity – the question arises whether a similar communal spirit between pupils cannot be achieved through less restrictive means, and thus, if the refusal to grant exemption can be seen as truly necessary to achieve the aims sought.[88] From a general education perspective, the relationship of necessity between compulsory swimming classes and the objective of successful socialization can be challenged too. Sure, one of the core functions of education is, besides contributing to qualification – i.e. obtaining a minimum package of knowledge and skills for each pupil – to socialize students and pupils into active citizenship.[89] Indeed, schools are organized networks of socializing experiences which prepare individuals to act in society and therefore have an active role in the formation of active and participating citizens and help promote equality in civic competences.[90] However, this socialization function does not depend on one sole course, rather it is reinforced by teachers and the larger school environment as a whole. As a consequence, not only the necessity, but also, and prior thereto, the legitimacy of the alleged objective of integration can be called into question, even more so in light of the applicants' argument that their situation demonstrated that integration did not singularly depend on participation in swimming classes taught in school. Contrarily, they submitted that: *'they had been living as fully integrated residents of Basle for many years, and accepted without difficulty the Swiss legal system, with its democratic and constitutional principles and the local social and societal realities*.' Mr Osmanoğlu arrived in Switzerland at a young age, was subsequently educated in Basle where he studied business and was perfectly fluent in Swiss German. Ms Kocabaş studied German intensively and had begun a training course as a playgroup leader. Their daughters were all born and educated in Switzerland and all the family members submitted feeling *'greater ties with Switzerland than with*

87 ECtHR 29 June 2007, *Folgerø and others vs Sweden*, § 101.

88 The least restrictive means approach represents a more demanding application of the proportionality test, leaning towards a relation of strict necessity between the contested measure and the aim sought to be achieved: *'(…) for a measure to be regarded as both proportionate and necessary in a democratic society, there must be no possibility of recourse to an alternative measure that would cause less damage to the fundamental right at issue whilst fulfilling the same aim*.' (ECtHR 29 May 2018, *Gülbahar Özer and Yusuf Özer v. Turkey*, § 29). Whereas here, the Court interprets the less restrictive means test in a substantive manner – implying that where less restrictive means are at their disposal to achieve the same objective pursued, state authorities are obliged to adopt these – other times the test is understood procedurally, i.e. only requiring such alternative measures to be (duly) considered (e.g., ECtHR 29 May 2018, *United Civil Aviation Trade Union and Csorba v. Hungary*). Whilst the development and application of the test so far leaves the Court divided, the minimal condition seems to be a procedural one, which in the present case does not seem fulfilled (the school does not demonstrate to have considered alternative ways to achieve social integration aside from through the swimming lessons. L. Lavrysen, 'On sledgehammers and nutcrackers: recent developments in the Court's less restrictive means doctrine', 20 June 2018, available at: https://strasbourgobservers.com/2018/06/20/on-sledgehammers-and-nutcrackers-recent-developments-in-the-courts-less-restrictive-means-doctrine/. On the similarity between the least restrictive means test and reasonsable accommodation, see P. Bosset, 'Mainstreaming religious diversity in a secular and egalitarian state: the road(s) not taken in *Leyla Şahin v. Turkey*', in E. Brems (ed.), *Diversity and European Human Rights – Rewriting Judgments of the ECtHR*, Cambridge: Cambridge University Press, p. 201.

89 Whereas socialization was traditionally viewed as the transmission and internalization of societal values and norms, contemporary socialization theorists are moving away from said approach, no longer focusing exclusively on aspects of transmission, internalization and adaptation, i.a. due to increasing pluralism and individualization. See for more: P. Vermeer, 'Religious Education and Socialization', *Religious Education* 2010, vol. 105, issue 1, 103-116.

90 J. W. Meyer, 'The Effects of Education as an Institution', *The American Journal of Sociology* 1977, vol. 83, issue 1, (55) 55.

their country of origin, and it was only their religion which differentiated them from the majority of the Swiss population'. What is more fundamentally going on here is that the Court adopts a very superficial understanding of social integration, which, in its view, would only be possible with regard to secular values and stands in opposition to religious beliefs or distinctiveness.[91]

The other aims which are said to be pursued by the compulsory course, such as argument of gender equality and the smooth function of the education system, can be called into question too. With regard to the latter, the Court says the following: *'(…) even assuming that the applicants' argument to the effect that only a small number of parents request an exemption from compulsory swimming lessons on account of their Muslim faith does indeed reflect reality, the Court considers that the children's interest in an all-round education, facilitating their successful social integration according to local customs and mores, takes precedence over the parents' wish to have their daughters exempted from mixed swimming lessons.*' Much more than in the cases of *Folgerø* and *Mansur Yalçın*, the Court takes on a very active role in determining what is in the child's interest, whilst in the other cases it respectively carried out a detailed syllabus analysis and used the criterion of the existence of a conflict of allegiance for the pupils concerned. Instead of weighing the various interests at stake, the Court seems to frame the proceedings in an 'obligation-interest' juxtaposition, without having much, if any, consideration for the children's interest and dampened voice in the matter: *'(…) precedence to the children's obligation to follow the full school curriculum and their successful integration over the applicants' private interest in obtaining an exemption from mixed swimming lessons for their daughters on religious grounds (…)'.*[92] Against that backdrop, the swiftness with which the Court concludes the swimming classes are key for the pupils' integration, without at any given moment having a closer look at the potential loyalty conflicts that arise for the applicants' daughters, becomes all the more salient.[93]

That is *a fortiori* the case in light of the fact that the courses from which both in *Folgerø* and *Mansur Yalçın* exemption was sought, in several respects can be said to further the aim of socialization and integration too. Admittedly, swimming classes and religious education courses cannot all too easily be compared. Still, the Court has always stressed in its case law that Article 2 of Protocol No. 1 *'does not permit a distinction to be drawn between religious instruction and other subjects. It enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire State education programme.*'[94] More importantly, and although at first glance the need for integration might seem more pressing in case of swimming lessons, it is indeed a widely accepted idea that religious education plays a role in integrative processes too, which nonetheless did not bar the exemption requests in the case-law of the Court. In this connection, religious education in state schools is, at least by some, said to offer opportunities for instilling lessons in mutual toleration and citizenship: *'Arguably, some minimum of religious education is necessary to fulfill one commonly stated liberal goal for education - training for citizenship – since religion has played an important historical part in shaping present-day culture and is an important aspect of contemporary society. On the same basis, learning about the religious beliefs of others may be a foundation for promoting the liberal virtue of toleration. It can, for example, combat ignorance among pupils of the beliefs of those from other religious backgrounds. Increasing awareness and knowledge of a range of religious beliefs may, on the one hand, help to reduce mutual intolerance, and on the other, help to validate and integrate as citizens pupils from minority religious groups.*'[95]

Equally, the Council of Europe considers education to be essential in combating ignorance, stereotypes and errors concerning religions. This ignorance and ensuing errors and lack of knowledge undermine tolerance and everyone's right to full enjoyment of religious freedom. To avoid such breeding grounds for discrimination and religious conflict, the Council believes religious education can be a means of

91 G. du Plessis, 'The European Struggle with Religious Diversity: *Osmanoğlu and Kocabaş v. Switzerland*', *Journal of Church and State* 2018, p. 7-8.

92 ECtHR 10 January 2017, *Osmanoğlu and Kocabaş v. Switzerland*, § 105.

93 The same goes for the applicants' claim that the burkini was stigmatising for their daughters. Here, the Court merely *'shares the Government's view that the applicants have adduced no evidence in support of their assertion*', without feeling the need to resort its criterion of the existence of a conflict of allegiance.

94 See ECtHR 7 December 1976, *Kjeldsen, Busk Madsen and Pedersen vs Denmark*, § 51.

95 I. Leigh in '*Law, State and Religion in the New Europe – Debates and Dilemmas*', L. Zucca and C. Ungureanu (eds.), Cambridge: Cambridge University Press 2012, p. 197.

mitigating these problems.[96] Indeed, it affirms: '*School is a major component of education, of forming a critical spirit in future citizens and therefore of intercultural dialogue. It lays the foundations for tolerant behaviour, founded on respect for the dignity of each human being. By teaching children the history and philosophy of the main religions with restraint and objectivity and with respect for the values of the European Convention on Human Rights, it will effectively combat fanaticism. Understanding the history of political conflicts in the name of religion is essential*.'[97] Much in the same vein, the Toledo Guiding Principles state: '*There is a growing consensus among educators that knowledge of religions and beliefs is an important part of a quality education and that it can foster democratic citizenship, mutual respect, enhance support for religious freedom, and promote an understanding of societal diversity. (…) no educational system can afford to ignore the role of religions and beliefs in history and culture. Ignorance about this issue may fuel intolerance and discrimination and can lead to the creation of negative stereotypes*.'[98]

In light of all the above, one cannot help but wonder what then might have triggered the Court to judge so differently on the requested opt-out in the case of *Osmanoğlu*. What is it that has made the Court feel uncomfortable? Before inquiring the potential roots of the Court's unease, it is noteworthy that the latter found that '*given the importance of compulsory education for children's development, an exemption from certain lessons is justified only in very exceptional circumstances, in well-defined conditions and having regard to equality of treatment for all religious groups (own emphasis).*' In the previous exemption cases of Folgerø and Mansur Yalçın, the Court nowhere even merely hints in this direction. A closer look at the reasoning of the Swiss Court might help unpack the crucial reason for the former's change of heart.

D. Moral panic and Islamophobia: from Switzerland to Strasbourg

Indeed, one would think it disquieting for the Federal Swiss Court to base the main argument for its radical change of jurisprudence not only quantitatively on the increased Muslim population but also qualitatively.[99] It is *a fortiori* alarming for a Court to, in substantiating its findings, draw support from a news article which is of indisputable islamophobic character and clearly seeks to create a moral panic. Moral panic is an ephemeral but recurring condition of people stereotypically portrayed as a threat to societal values and interests by, amongst others, mass media.[100] As Stuart Hall has argued, moral panics as ideological processes represent a way of dealing with diffuse and often disorganized social fears and anxieties not by addressing the real problems and conditions underlying them, but through projections which are then displaced onto an identified social group.[101] Crucial with regard to the specific case of *Osmanoğlu* is that moral panic is used by governments and political parties to legitimize nationalist, anti-immigration policies as much as it is by the media who exploit peoples' fear and anxiety surrounding issues such as the refugee crisis, migration debate and Islam. In that regard, and in light of Hall's work, *'Islamophobia bears resemblance to the historical moral panic which exploits*

96 R. Palomino Lozano, 'Religion and Education in the Council of Europe: Toward a 'Soft' Constitutionalization of a Model of Religious Teaching?' in C. Cianitto, W. Cole Durham, S. Ferrari and D. Thayer (eds.), *Law, religion, constitution – Freedom of Religion, Equal Treatment, and the Law*, Surrey: Ashgate, 2013, p. 373.

97 Recommendation 1720 on 'Education and Religion', § 8-7 Council of Europe PA 2005, par. 7; see also par. 8: '*Knowledge of religions is an integral part of knowledge of the history of mankind and civilisations. It is altogether distinct from belief in a specific religion and its observance. Even countries where one religion predominates should teach about the origins of all religions rather than favour a single one or encourage proselytising*'

98 Advisory Council of Experts on Freedom of Religion or Belief, *Toledo Guiding Principles about Religion and Beliefs*, OSCE/ODIHR 2007.

99 The former is a typical case of the fallacy of the 'slippery slope' argument.

100 Moral panics have been defined in terms of threats to societal values and interests and presented in a stylized and stereotypical fashion by the mass media. They are not just one-off events but it is their reappearance that confirms their status as moral disturbances of any significant order. See the leading work of S. Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rocker*s, New York: Routledge, 1972.

101 S. Hall, 'Racism and Reaction' in S. Davison, D. Featherstone, M. Rustin and B. Swarz (eds.) *Selected Political Writings – The Great Moving Right Show and Other Essays,* Duke University Press, 2017.

on people's fear in maintaining their social status as it capitalises on their fear of losing their national identity and creates and frames folk devils.' [102]

Indeed, Islamophobia is often perpetuated by an instilled fear and sense that Muslims are taking over jobs, homes and lives, hence leading to a polarizing society and the so-called (and self-fulfilling) clash of civilizations.[103] In this connection, several studies have shown that, particularly since 9/11, the media play a substantial role in societal polarization by portraying a negative, one-sided, monolithic and demonizing representation of Islam, *inter alia* via framing, othering discourses and creating moral panics to an extent that Islamophobia is now infused into the everyday life.[104] Indeed, media misrepresentation of Muslims has been shown to influence people's perceptions of Muslims who are put in overwhelmingly negative light, especially, albeit not solely, when combined with lazy journalism and fake news.[105] For instance, a Cardiff University study found that the majority of post-9/11 media coverage about (British) Muslims was negative, with at least two-thirds of newspaper articles focusing on stories on terrorism.[106] And that is only one example of a widely documented and since 9/11 sharply intensified rise of continuous processes of racialized framing and vilification in the media of Muslims, further provoking a moral panic about the presence of the Muslim Other.[107]

Examples include recurrent allegations of western countries witnessing the beginning a new Shariah state – notice how the Swiss article was headlined with '*Switzerland on its way to becoming an Islamic State*' – or becoming the breeding ground for extremists, anti-halal and mosque-building hysterias or stories about local schools being infiltrated by hard-line fanatics. A more recent and topical example concerns a fake-news video circulated on social media allegedly showing Muslim gangs rioting in Birmingham, whilst the footage was really of Swiss football hooligans. The video of these alleged 'Ramadan riots' shows a group of people attacking cars as they attempt to drive along a residential road and a dozen others converging on the street to join the violence. It was widely circulated online by right-wing, far-right, and alt-right activists on social media and filled with false descriptions and comments of the event. Despite the fact that Channel 4 News soon refuted the authenticity thereof, confirming that it was in fact that for a football riot in Switzerland after a match between Basel and Lucerne, the fake news version of the video had in the meantime been immensely posted and shared. Recently in Flanders, a huge anti-Islam outcry erupted when a school decided to cancel Mother's Day, although the school's principal emphasized that the reasons for the decision were not related to religion but to broader issues of (*inter alia* sexual orientation) diversity. An example more closely linked to the topic of swimming is the infamous Daily Mail story, when windows were being blacked out at a central

102 UK Essays, 'Moral Panic in Contemporary Society: Islamophobia', November 2013, available at https://www.ukessays.com/essays/media/examples-moral-panic-contemporary-2376.php?vref=1.

103 S. Huntington's clash of civilizations theory assumes that a cultural, social and political strife between the West and Islam is inevitable in light of their inherently antagonistic worldviews. Although the theory has been heavily criticized and deconstructed, the rhetoric associated therewith still dominates everyday politics and media. See, *inter alia*, the work of T. Modood, 'Anti-Essentialism, Multiculturalism, and the 'Recognition' of Religious Groups' In W. Kymlicka and W. Norman (eds.), *Citizenship in Diverse Societies,* Oxford: Oxford University Press, 2000 and E. Said, *Covering Islam: How the media and the experts determine how we see the rest of the world*, Vintage, 1997.

104 The role of media – as a social process organized around distinctions between a manufactured 'media world' and the 'ordinary world' - in supporting, enhancing or legitimizing particular frames and narratives has been amply discussed in media and cultural studies.

105 '*The media – printed and audiovisual – can have a highly positive informative role. Some, however, especially among those aimed at the wider public, very often display a regrettable ignorance of religions, as shown for instance by the frequent unwarranted parallels drawn between Islam and certain fundamentalist and radical movements.*' Parliamentary Assembly of the Council of Europe, 'Education and Religion', Doc. 10673 19 September 2005 (rapporteur: Mr. Schneider), § 4.

106 These stories often used the words such as 'militancy' and 'radicalism' to depict Muslims in an overtly negative fashion and were a product of a wider anti-Muslim prejudice which they found across British newspapers. Interestingly, they also found that common adjectives used to describe Muslims included the words "radical,' 'fanatical' and 'fundamentalist.' See the full report on www.unhcr.org/56bb369c9.html.

107 Similarly, research of the European Commission found over-all public perception towards migration to be negative, particularly because the public debate thereon in many European countries has been heavily influenced by populist anti-immigration politicians and negative media framing of the refugees. It also showed the repetition of particular divisive terms and the construction of differences along racial, ethnic or religious lines to have had a negative impact on public opinion.

English leisure center, being headlined: *'Swimmers plunged into dark after council covers swimming pool windows 'to protect Muslim women's modesty'*, although the requests to cover the windows had not come solely from the Muslim community.

In times like these, where research repetitively exhibits media coverage on Muslims to further engender moral panic among the public, it is up to the courts to keep a moral calm, by not been carried away by public hysteria and instead breaking the cycle of moral panic. The Court could, for instance, at least have uttered criticism concerning the main argument for the shift in Swiss jurisprudence being fundamentally based on an article clearly subscribing to the aforesaid othering dynamics of moral panic. That is even truer in light of the Court's own case law, according to which the media should act as the watch-dog of society. Upon the media's failure to fulfil that role and faced with widespread unethical journalism further fueling climates of intolerance, and apart from the evident need to improve media practices and media responsibility on portraying of and reporting on Islam and Muslims, both national and regional judges are, as guardians of fundamental rights and institutional force shaping and reproducing the social structure of power relations, arguably best placed to take over the aforesaid role of watch-dog and guarantor of social harmony.

By at no point dealing with the questionable nature of the source on which the Federal Swiss Court bases its decision, and contrarily rather hurriedly accepting the governments arguments flowing from that source, the Strasbourg Court does the contrary. That is not entirely incomprehensible against the backdrop of the Swiss surge of criticism on the Court in recent years.[108] Still, it is both highly regrettable and dangerous, as such decisions keep intact cycles of moral panic and risk further alienating and marginalizing Muslim communities, *a fortiori* in light of growing Islamophobic tendencies.[109] From a more legal-technical perspective, one can reasonably argue the latter should prompt the Court to apply heightened scrutiny in freedom of religion cases.

40

E. Islamophobia: reason for heightened scrutiny?

Inspired by a substantive conception of equality, the Court has adopted a standard of strict judicial scrutiny in cases concerning both Roma and persons with disabilities, characterizing them as vulnerable and disadvantaged groups. In light of the structural and historical disadvantage experienced by aforesaid groups, a similar strict scrutiny test can, naturally, not all too easily *mutatis mutandis* be applied to religious minorities. Notwithstanding that *caveat*, countless reports and studies show a significant rise in anti-Islam sentiments and hate crimes both on an international and national level.[110] In Switzerland too, a report of the Swiss Federal Council signalled a worrisome 'islamisation' of the public debate displaying an offensive attitude towards Islam.[111] In light of the growing hostility and intolerance against Muslims and the rising level of physical and verbal aggression towards them, it would not seem misguided for the Court to apply a more strict standard of scrutiny in cases where

108 Criticism that used to be more abstract (in particular, that against 'foreign judges') has taken on a more concrete, public visibility directed against the ECtHR in the course of three developments. First, much criticism arose in the context of a number of popular initiatives that were deemed incompatible with the ECHR by Swiss authorities. The ECHR is increasingly perceived as an obstacle to the implementation of popular initiatives, such as those concerning the construction of minarets and deportation of foreign criminals. Second, some recent cases against Switzerland where the ECtHR found a Convention violation, were ill-received by parts of the public. Third, the Federal Supreme Court is criticised for too heavily relying on the Convention. See for more: T. Altwicker, 'Switzerland: The Substitute Constitution in Times of Popular Dissent', in P. Popelier, S. Lambrecht and K. Lemmens (eds.), *Criticism of the European Court of human Rights – Shifting the Convention System: Counter-Dynamics at the National and EU level*, Cambridge: Intersentia, 2016, p. 410-411.

109 As a consequence, the sixth stage of Cohen's model –legislative developments further subduing the deviants – indeed appears to have been realized. This is, unfortunately, not a complete surprise, as both classic and contemporary moral panic theories have shown that the law oftentimes is complicit therein, by disproportionate targeting people or groups that are popularly designated, during times of moral panic, as the current 'folk devils'.

110 See, e.g., Council of Europe (2011), 'Living together – Combining diversity and freedom in 21st-century Europe', Report of the Group of Eminent Persons of the Council of Europe, Strasbourg.

111 F. Bretscher, 'Osmanoğlu and Kocabaş v. Switzerland: A Swiss perspective', 30 March 2017, available at: https://strasbourgobservers.com/2017/03/30/Osmanoğlu-and-Kocabaş-v-switzerland-a-swiss-perspective/.

their rights are at stake, especially in the case of children. Indeed, as mentioned before, the importance of the guiding principle of religious pluralism in the case law of the Court grows stronger when the rights of minorities are involved.[112] More specifically, it demands that religious groups be protected against vehement attacks and enjoins States the positive obligation to protect them against treatment that would make it impossible for them to profess their conviction without being threatened.[113] As a consequence, in times where religion in general and Islam in particular is met with emotions ranging from friction to sheer hatred, can one argue that the differentiation ground of religion can be regarded as suspect, hence triggering heightened scrutiny and the requisite of 'very weighty reasons' to justify an interference? Grounds are considered suspect when '*they concern characteristics that are in se irrelevant for someone's functioning in society, and/or innate characteristics or ones that are so intimately connected to one's identity that one should not be expected to change that in order to be treated equally and fairly, and/or there has been a history of discrimination on the basis of that ground.*'[114] Although race, sexual orientation and gender are grounds that are generally considered as suspect, a similar case can be made for religion, especially since the case of *Vojnity v. Hungary*.[115] In addition, from an intersectionality perspective, the identity-markers of religion and race or ethnicity cannot be seen as separate but rather overlapping categories, making it both tricky and arbitrary to apply different standards of scrutiny. Still, in the case of *Osmanoğlu* the Court hints at the opposite: by explicitly stating that exemptions from mandatory classes can only be justified in *'very exceptional circumstances*', the requirement to give *'very weighty reasons'* seems to shift from the authorities to the applicant.[116] Such is at odds with the reasoning adopted in the cases of *Folgerø* and *Mansur Yalçın*. More importantly, and in light of the above-mentioned factors unveiling a hostile climate towards Islam, a less deferential judicial attitude towards claims such as the one in *Osmanoğlu*, would, however, seem more justified.

III. Conclusion: Religion confusing the Court, or the Court confusing Religion?

In light of the previously discussed similarities and disparities between the Court's reasoning in the cases of *Folgerø* and *Mansur Yalçın* with that of *Osmanoğlu*, it is clear that in the former a more inclusive or religious normative conception of pluralism is adopted, whereas the latter reveals a more strict and exclusive conception thereof. This does not come as a complete surprise. Contrarily, in the field of content and orientation of public education, and religious freedom more generally, the Court's perspective is known to oscillate: *'in some cases, driven by a libertarian approach of the public school, more willing to accede to claims or private individuals against majority-friendly educational policies, while giving due weight to the state interest in shaping public education in other, more paternalistic, cases.*'[117] Notably in cases concerning the wearing of religious garment and symbols in public places and schools, the Court has frequently sustained a form of strict secularism or even a sort of 'militant secularism' or 'enlightenment fundamentalism', even *'where individual religious manifestations do not display any signs of political intentions but are performed bona fide, making the prohibitions of certain religious*

112 *Cfr. supra.*

113 ECtHR 20 September 1994, *Otto Preminger Institut* v. *Austria* and ECtHR 25 November 1996, *Wingrove* v. *UK*. K. Reid, 'A Practitioner's Guide to the European Convention on Human Rights', London: Sweet & Maxwell, 2011, p. 710.

114 K. Henrard, 'A Critical Appraisal of the Margin of Appreciation Left to States Pertaining to Church-State Relations under the Jurisprudence of the ECtHR' in K. Alidadi, M.-C. Foblets and J. Vrielink (eds.), *A Test of Faith? Religious Diversity and Accommodation in the European Workplace*, London: Routledge, 2012, p. 73.

115 L. Peroni, '"Very Weight Reasons" for Religion: Vojnity v. Hungary', 27 February 2013, available at: https://strasbourgobservers.com/2013/02/27/very-weighty-reasons-for-religion-vojnity-v-hungary/. Peroni rightly underlines the difference between religion as a suspect ground on the one hand, and (religious) group vulnerability on the other hand: whereas the former would imply heightened scrutiny to all distinctions made on the basis of religion, resting on a symmetrical approach to equality, the latter (preferred) approach rests on an asymmetrical approach to equality, requiring strict scrutiny solely where the litigious differentiation affects those religious groups who have suffered from past or present prejudice or disadvantage.

116 *Cfr. supra.*

117 D. Kyritsis and S. Tsakyrakis, 'Neutrality in the classroom', *International Journal of Constitutional Law* 2013, vol. 11, issue 1, (200) 201-202.

manifestations difficult to reconcile with the necessity to protect a democratic society.'[118] *Osmanoğlu* clearly belongs to the latter side of the spectrum. By entertaining a narrow understanding of the process of social integration and by viewing the principles of secularism as the only outcome thereof, the case can be said to lay bare that the Court adopts an *'antagonistic assumption about the effect of religion on social integration, and that such integration is only possible on the principles of secularism*'.[119]

Still – and although this approach has been previously and not seldom entertained in cases such as *Dogru v. France, Dahlab v. Switzerland* and *Leyla Şahin v. Turkey* – these assumptions do not seem consistent, not only in light of the fact that they deviate from the *Kokkinakis* norm and the principles the Court has systematically enounced with regard to Article 2 Protocol No. 1 in, *inter alia*, the cases of *Folgerø* and *Mansur Yalçın* , but equally in light of some other cases, most strikingly in that of *Lautsi*, a case described as having caused the most widespread opposition in the history of the Court.[120] In short, the Grand Chamber decided that the presence of crucifixes in the classroom did not violate the parental rights under Article 2 of Protocol No. 1.[121] As a consequence, positing that the Court's approach is that of a non-neutral form of doctrinal secularism, does not hold, and indeed the more accurate evaluation is that of Brubaker, who speaks of a growing new 'Christianist' secularism as a new form of strict secularism emerging in Europe: *'In Northern and Western Europe today, this reactive Christianity (…) presents itself as closely linked with secularity and liberalism. Once understood as antithetical to liberalism, secularism, and modernity, Christianity is increasingly seen as their civilizational matrix, and as the matrix of a whole series of more specific ideas, attitudes, and practices, including human rights, tolerance, gender equality, and support for gay rights.*'[122]

Such indeed can far better explain not only the Court's reasoning in the case of *Osmanoğlu*, the difference the Court makes between the passive nature of the crucifix on the one hand and the alleged powerful character of the Islamic veil on the other hand, and ultimately why so far, its more militant or exclusive conception of secularism seems to be solely triggered in cases where the Islamic belief enters into a (largely assumed) conflict with the dominant religious or secular tradition.[123] Indeed, *'these decisions, while diverse in important respects, nevertheless reflect a discernable pattern: most commonly, they are cases where religion challenges Europe's secular identity in a manner that the Court deems threatening. The most prominent of these cases are those involving Muslim headscarves.'*[124] Similarly, former ECtHR president Tulkens notes: *'In the case law of the Court today, I also observe that the main limitations to the right of religious freedom (and also the freedom of thought or conscience) are motivated by the*

118 R. Medda-Windischer, 'Militant or pluralist secularism? The European Court of Human Rights facing religious diversity', *Religion, State & Society* 2017, (216) 217.

119 G. du Plessis, 'The European Struggle with Religious Diversity: *Osmanoğlu and Kocabaş v. Switzerland*', *Journal of Church and State* 2018, p. 7-8.

120 The Chamber's judgment invoked strong criticism from Member States and religious organisations, including unsurprisingly the Vatican. Ten Member States supporting Italy joined the Grand Chamber hearing and then others declared that they were unhappy with the Chamber judgment. Several ngo's and a member group of the European Parliament also intervened and only two of these did so on behalf of the applicant.

121 As mentioned before, the duty under Article 2 Protocol No. 1 is broad in its extent as it applies not only to the content of education and the manner of its provision but also to the performance of all the 'functions' assumed by the State, hence also covering the presence of crucifixes in the classroom. For the Grand Chamber, the presence of crucifixes in the classroom in State schools in Italy did not denote a process of indoctrination, as it was qualified as a traditional and historical symbol of importance to the country that is '*essentially passive*' and unaccompanied by any practices of intolerance to other convictions or proselytising tendencies.

122 See R. Brubaker, 'A new 'Christianist' secularism in Europe', 11 October 2016, available at: https://tif.ssrc.org/2016/10/11/a-new-christianist-secularism-in-europe/: *'But just as 'their' religiosity emerges from the matrix of Islam, so 'our' secularity—in the civilizational perspective of the Right—emerges from the matrix of Christianity (or the 'Judeo-Christian tradition'). The definition of the constitutive other in religio-civilizational terms invites a characterization of the self in the same register. The preoccupation with Islam calls forth, implicitly and sometimes explicitly, a concern with Christianity. If 'they' are Muslim, then in some sense 'we' must be Christian (or Judeo-Christian).'*

123 See also: L. Zucca, 'Lautsi: A Commentary on a decision by the ECtHR Grand Chamber', *International Journal of Constitutional Law* 2013, vol. 11, issue 1 (200) 220-221.

124 Z. R. Calo, 'Pluralism, Secularism and the European Court of Human Rights', *Journal of Law and Religion* 2011, (101) 104.

need to protect democratic societies from the danger of Islam and sects (own emphasis).'[125] In sum, the Court's fluctuating between a more open, inclusive conception of religious pluralism and the more strict, militant version thereof, is perhaps more symptomatic of its struggle and unease with public Islam in particular rather than with religion in general.[126]

IV. *A contrario*: Is the Court leaning towards (*de facto*) Accommodation?

Who doesn't like a story with a happy ending? Despite the many tricky issues previously elucidated and discussed, it is indeed possible to end this article on a positive note. Much less than with pleasing the reader, this has to do with the fact that the Court, in the case of *Osmanoğlu*, repeatedly stresses the fact that the applicants' daughters were offered flexible arrangements, such as the permission to wear a burkini to the swimming lessons as well as the fact that they could undress and take showers with no boys present.

Although the Court's judgment is highly fact- and context-sensitive, one could *a contrario* conclude therefrom that the absence of what the Court calls 'accompanying measures' could have prompted it to judge differently on the matter. Similarly, in the case of *Lautsi*, the Court paid attention to the accommodating measures presented by the Italian authorities and the fact that it had opened up the school environment to religions other than Christianity without any further indications of intolerance in the school.[127]

What follows is that the Court at least *de facto* seems to take into account the attempts made by the authorities to provide for reasonable accommodation. That sparks interesting questions about the Court's readiness (or, reluctance) to embrace reasonable accommodation in cases concerning religious freedom *de jure* too. What would be the legal basis for such a right? And what would be its added value? Could the concept of reasonable accommodation and the principles associated therewith provide more coherence in the Court's attitude vis-à-vis religious freedom and avoid its stance on pluralism from changing depending on what religion is involved.

125 F. Tulkens, The European Convention on Human Rights and Church-State Relations: Pluralism vs. Pluralism', *Cardozo Law Review* 2009, (2575) 2587.

126 See, in the same vein: Z. R. Calo, 'Pluralism, Secularism and the European Court of Human Rights', *Journal of Law and Religion* 2011, (101) 108: *'This secular logic is not expressly hostile towards religion. Yet, it does serve as a background assumption that informs the Court's reasoning about the public life of religion. In particular, this logic promotes the principle that European political life ought be fundamentally secular in its constitution and that religion is therefore 'more a problem . . . than a solution.' Even as the Court defines religious pluralism as the hallmark of the liberal democratic order, this pluralism is locked within the bounds of a secular political narrative. Pluralism thus remains in a tenuous position, easily sacrificed when the Court encounters cases that challenge the predominance of this secular narrative.*'

127 In *Osmanoğlu* too, the Court notes that '*the applicants do not allege that their daughters were restricted in the exercise or manifesting of their religious beliefs other than during the mixed swimming lessons.*' In *Lautsi*, the Court gave highlighted the series of accommodating measures put in place by Italy, in particular that the presence of crucifixes in the classroom not be associated with compulsory teaching about Christianity. It also noted that it is not forbidden for pupils to wear symbols or apparel with religious connotations, that alternative arrangements are possible to support schooling fitting in with non-majority religious practices and that optional religious education can be organised in schools.