Svensk Teologisk Kvartalskrift. Årg. 80 (2004)

Democracy and Multireligious Experience: Constitutional Dilemmas

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Gerard F. Whyte är Associate Professor vid Trinity Law School, Dublin, och Fellow vid Trinity College, Dublin. I sin artikel diskuterar han relationen mellan liberalism och pluralism utifrån ett juridiskt perspektiv: Hur kommer relationen mellan religionsfrihet och religiös neutralitet att utmana ett mångreligiöst samhälles konstitution?

The recent decision of the French National Assembly to ban the wearing of conspicuous religious symbols by students in public schools has focused attention yet again on the relationship between the State and religion[1] in liberal democracies. The backdrop to this discussion contains a number of elements. The growth in secularism in the West during the latter half of the twentieth century has generated tensions in a number of countries between the state and religious conservatives over public policy in such areas as abortion, euthanasia, the family and homosexuality. The growth of Islamic communities in many European countries adds to these tensions and also offers a radically different view of the appropriate relationship between the State and religion to that contained in the separationist model largely adopted in the West after the Enlightenment. The emergence of new cults also raises questions from time to time about the extent of the State's power to regulate religious belief.

At the heart of this debate is the issue of the relationship between liberalism and pluralism. As Timothy Shah puts it,

> Are liberalism's principles and procedures appropriate to societies characterised by radical pluralism? If not, must liberalism be adjusted to match the reality of pluralism? Or must pluralism somehow be adjusted to match the aspirations and structures of liberalism?[2]

From the perspective of the constitutional lawyer, this debate is often played out through two important constitutional principles, namely, the guarantee of freedom of religion and the principle of State neutrality. However these two principles are mediated through the culture of individual societies and so may not always produce the same results in different countries. This paper attempts to provide an overview of how these two principles are understood in five different legal orders — namely, U.S.A., Germany, Ireland, the European Convention on Human Rights and the European Union — in order to illustrate various different ways in which the central question of the relationship between liberalism and pluralism might be addressed.

Freedom of religion

Turning to the two central constitutional principles in this debate, the first of these is the guarantee of freedom of religion.[3] What I wish to consider here is to what extent this guarantee requires the State to defer to religious interests and to what extent the State may override such interests.

[1] Fortunately it is not necessary, for the purposes of this article, to have to address the difficult question of how to define ‹religion› for legal purposes. Readers interested in this topic may wish to consult Sadurski (ed.), *Law and Religion* (New York University Press, 1992), pt.IV.

[2] Shah, «Making the Christian World Safe for Liberalism: From Grotius to Rawls» in Marquand and Nettler (eds.), *Religion and Democracy*, (Blackwell Publishers, 2000), p.121.

Religious beliefs and religious conduct

In examining this guarantee, it is helpful, at the outset, to distinguish between the holding of religious beliefs and engaging in religious conduct. As a general proposition, the State rarely seeks to prohibit the holding of religious views. However in the *Osho* case,[4] the German Constitutional Court appeared to countenance some role for the State in this area. Here the Court held that the State's duty to be neutral in questions of religion or philosophical creeds prohibits it from depicting a religious or philosophical community in a defamatory, discriminatory or distorted manner. But once these standards are observed, it is possible for the State to publish information, including critical statements, about religious groups. In the *Osho* case, the Constitutional Court held that the use of labels such as ‹destructive› and ‹pseudo-religious› and an accusation of manipulation infringed the State's duty to be neutral. Such terms could theoretically be justified (even in the absence of statutory regulation) by the Federal Government's task to direct the State but, in the instant case, no reasons had been advanced that could justify these descriptions of the religious group in question, nor were any such reasons apparent. In the earlier case of *Van Duyn v Home Office*,[5] the European Court of Justice also upheld the right of the United Kingdom government, acting in the interests of public policy, to refuse a Dutch national permission to enter the UK because of her membership of the Church of Scientology.[6] Subsequently, however, the Court indicated that in order to refuse permission to enter a country in the interests of public policy, a state will have to prove a‹genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.›[7] Thus this more rigorous test will have to be satisfied before an EU national can be denied entry to another EU country because of his or her religious beliefs. Under the Irish Constitution, the free profession of religion has to be read subject to public order and morality, though there do not appear to be any examples of where such regulation has occurred.

Turning to religious conduct, it is accepted in all five legal orders that the State has, in certain circumstances, the power to regulate religious conduct in the interests of the common good. The critical question, of course, is what is the extent of this duty.

Regulating religion in the interests of public order

It would appear to be generally acceptable that religious conduct must be read subject to public order.[8] Thus, in one Irish case, a criminal con-

[3] It is worth noting that, in appropriate circumstances, the exercise of this freedom may also entail the exercise of the right to free speech and of the right of parents to rear their children. In the Irish context, the latter right has been held by the courts to justify State funding of denominational education. The need to protect parental interests also forms the backdrop to relatively recent US Supreme Court decisions permitting State aid to parochial schools.

[4] 1 BvR 670/91, decision of 26 June 2002. Noted by Albers in (2002) 3 German Law Journal No.11, http://www.germanlawjournal.com. See also the note by Ruge in (2002) 3 German Law Journal No.12, http://www.germanlawjournal.com.

[5] Case 41/74 [1974] ECR 1337, [1975] 1 CMLR 1.

[6] For an argument that the United States is more protective of religious minorities, including the Church of Scientology, than Europe, see Richardson, «Public Policy toward Minority Religions in the United States: A Model for Europe and Other Countries?» in Nesbitt (ed.), *Religion and Social Policy* (Alta Mira Press, 2001), p.15.

[7] See *R. v. Bouchereau*, Case 30/77 [1977] ECR 1999, [1977] 2 CMLR 800, para.35.

[8] In this context, it is worth noting that, to the extent to which religion may contribute to social conflict, this may occur in two different ways. First, religious beliefs may directly give rise to conflict as in, for example, the case of Salman Rushdie against whom a fatwa was issued because of his perceived blasphemy. However (second), religion may mask the real roots of a conflict. Thus it is possible to argue that opposition to certain Islamic practices, such as the wearing of veils by Muslim women, may, in some cases, be motivated by racism and that in Northern Ireland, religious differences serve to distinguish between the protagonists in what is at root an ethnic conflict. Where religious differences give rise indirectly to social conflict in this manner, the regulation of religion will not, in and of itself, resolve the situation.

viction for malicious damage to property was upheld even though the defendant sincerely believed that he had been sent by God to destroy the religious statues in question.[9] Some states also regulate proselytisation in the interests of maintaining public order. Thus both Irish law and the European Convention on Human Rights accept that the State may, to some extent, regulate attempts to proselytise. In *Kokkinakis v. Greece*,[10] the European Court of Human Rights held that the conviction of a Jehovah's Witness under a Greek anti-proselytisation statute was a violation of his freedom of religion under Article 9. However the Court did accept that religious freedom might require that ‹religiously naïve› people be protected from improper proselytism — in the instant case, the person approached was not so religiously naïve as to require such protection. In contrast, in *Larissis v. Greece*,[11] the conviction of air force officers for attempting to convert airmen under their command was upheld, the Court taking the view that the restriction on proselytisation was justified where there was evidence of harassment or the application of undue pressure in abuse of power. A concern to protect very young children from potential proselytisation also underpinned a decision of the Court upholding a ban on the wearing of scarves by Muslim teachers working in state schools — *Dahlab v. Switzerland*.[12] In *Murphy v. Ireland*,[13] the Court upheld Irish legislation prohibiting religious advertising on the airwaves on the ground that member States had a wide margin of appreciation when regulating expression in relation to matters liable to offend personal convictions in the sphere of morals and religion. The Irish Supreme Court had previously upheld the constitutionality of the legislation on the ground that it was designed to prevent the resentment and unrest that might result from the broadcasting of advertisements relating to matters that had proved extremely divisive in the past.[14]

Regulating religion in the interests of human rights

Perhaps the most profound issue in this area, philosophically speaking, is to what extent religious beliefs and conduct have to be read subject to the rights and freedoms of others. This is particularly relevant in the context of legislation prohibiting discrimination on grounds of gender and sexual orientation for such legislation may offer radically different views to those espoused by traditional religion as to what constitutes human good. Thus part of the justification offered for the ban on Islamic veils is the need to protect Muslim women from oppression[15] while in New Zealand, equality legislation was implicated in the debate within the Methodist and Presbyterian Churches about the ordination of gay clergy.[16]

Two of the legal orders reviewed here have addressed the relationship between equality legislation and religious interests. In Ireland, the Equal Status Act 2000, which deals with the provision of services, accommodation and education and the operation of certain types of club, permits religious discrimination in respect of access to religiously controlled schools and provision of religious goods or services and religious and gender discrimination in respect of access to seminaries. The earlier Employment Equality Act 1998 exempts religiously controlled institutions from employment equality

9 *The People (DPP) v. Draper*, reported in The Irish Times, 24 March 1988.

10 (1994) 17 EHRR 397.

11 (1999) 27 EHRR 329.

12 Application No.42393/98, 15 February 2001.

13 Application No.44179/98, 10 July 2003.

14 *Murphy v. Independent Radio and Television Commission* [1999] 1 IR 12, [1998] 2 ILRM 360.

15 On the tension between Islam and international law on women's rights, see Cooke and Lawrence, ‹Muslim Women between Human Rights and Islamic Norms› in Bloom, Martin and Proudfoot, eds., *Religious Diversity and Human Rights*, (Columbia University Press, 1996) and Mayer, ‹Islamic Law and Human Rights: Conundrums and Equivocations› in Gustafson and Juviler, eds., *Religion and Human Rights: Competing Claims?* (M.E. Sharpe, 1999).

16 See Ahdar, «Religious Group Autonomy, Gay Ordination and Human Rights Law» and Leigh, «Clashing Rights, Exemptions, and Opt-Outs: Religious Liberty and ‹Homophobia›», both in O'Dair and Lewis, *Law and Religion* (Oxford, 2001). See also Ahdar, *Worlds Colliding: Conservative Christians and the Law* (Ashgate, 2001), ch.9.

legislation (other than in respect of the prohibition on gender discrimination) where this is reasonable in order to protect the religious ethos of the institution.

A much narrower approach is evident in Article 4 of EC Framework Directive 2000/78/EC which only permits religious discrimination in employment where the religious characteristic is a genuine and determining occupational requirement of the particular employment concerned and provided the objective is legitimate and the requirement proportional. Thus Irish law might permit the preferential employment of a Roman Catholic maths teacher in a Catholic school but EC law will not. Moreover, under EC law, permitted differentiation on grounds of religion cannot amount to discrimination on another ground — so the dismissal of a gay teacher might be in accordance with the religious ethos of the school (and so permitted by Irish law) but would be contrary to the Directive as constituting sexual orientation discrimination.[17] To the extent to which there is a conflict between EC and Irish law in this area, EC law has to prevail. It was somewhat surprising, therefore, to see that this point was not addressed in the Equality Act 2004, recently passed by the Irish Parliament.[18]

Turning specifically to gender discrimination,[19] one controversial intersection between the promotion of equality and the practice of religion concerns the wearing of scarves by Muslim women. Some argue that this practice is a manifestation of the oppression of women and, therefore, that it should be prohibited (or at least prohibited in certain public fora such as public schools or hospitals, as has recently occurred in France). Whether states may restrict the wearing of scarves by Muslim women has been addressed by two of the legal orders under consideration here, though with somewhat different outcomes. In *Dahlab v. Switzerland*,[20] the European Court of Human Rights upheld the dismissal of a teacher of young children in a public school for wearing a Muslim scarf, taking the view that this was within the margin of appreciation permitted to states by Article 9 of the Convention. According to the Court, the wearing of the headscarf could have some kind of proselytising effect, given the tender ages of the children involved. The Court also expressed the view that the requirement to wear a scarf might conflict with the principle of gender equality. It concluded,

[17] Cp. *Boy Scouts Association of America v. Dale* 530 US 640 (2000), in which the US Supreme Court held, by a narrow 5-4 majority, that the Boys Scouts Association was allowed to discriminate on grounds of sexual orientation in dismissing a homosexual scoutmaster as to hold otherwise would violate its First Amendment right of expressive association.

[18] In a very recent UK case, *R (on the application of Amicus) v Secretary of State for Trade and Industry* [2004] All ER (D) 238, a challenge was mounted to the validity of various derogations contained in the Employment Equality (Sexual Orientation) Regulations 2003 from the principle of non-discrimination on grounds of sexual orientation in relation to employment, having regard to both the Framework Directive and the European Convention on Human Rights. In particular, para.7(3) authorised certain derogations where (a) the employment was for purposes of an organised religion, (b) the employer applied a requirement related to sexual orientation so as to comply with the doctrines of the religion or, because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers and (c) the person to whom the requirement was applied did not meet it or the employer, behaving reasonably, was not satisfied that he met it. Richards J. upheld the validity of this derogation (and others), taking the view that it involved a legislative striking of the balance between competing rights. In the process, he held that the phrase ‹for purposes of an organised religion› was narrower than the phrase ‹for purposes of a religious organisation› and so did not cover, for example, employment as a teacher in a faith school.

[19] For a carefully constructed argument in favour of the priority of rights necessary to protect the human dignity of women over religious interests that is nonetheless sensitive to religious values, see Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press, 2000), ch.3 and, by the same author, ‹Religion and Women's Human Rights› in Weithman (ed.), *Religion and Contemporary Liberalism* (University of Notre Dame Press, 1997), p.93.

[20] Application No. 42393/98, 15 February 2001.

> Weighing the right of a teacher to manifest her religion against the need to protect pupils by preserving religious harmony, the Court considers that, in the circumstances of the case and having regard, above all, to the tender age of the children for whom the applicant was responsible as a representative of the State, the Geneva authorities did not exceed their margin of appreciation and that the measure they took was therefore not unreasonable.

A somewhat different and slightly more tolerant approach is evident in German jurisprudence. In the *Private sector employee's headscarf* case[21] the Federal Labour Court held that the dismissal of a female Muslim employee for wearing a headscarf was not justified as there was no evidence to support the employer's contention that the wearing of the scarf was damaging to his business, a decision subsequently endorsed by the Constitutional Court.[22] According to the Labour Court, having regard to the employee's constitutional right to religious freedom, the employer was obliged to ascertain whether, in practice, the wearing of the scarf created difficulties with co-workers and customers and, if difficulties did arise, to see whether they could be resolved other than by way of dismissal. By implication, of course, dismissal for wearing a religious symbol might be justified in appropriate circumstances.

In the subsequent *Public sector employee's headscarf* case,[23] the State of Baden-Wurttemberg refused to employ a teacher because she wore a headscarf in accordance with Muslim tradition. A majority of the Constitutional Court held that there was no legal basis for forbidding the wearing of headscarves in schools and that due to the impact on the constitutional rights of the applicant, legislation was necessary to resolve the question of whether or not it was permissible to wear a scarf in school. The Lander were free as to how they wished to legislate on this issue, though the Court noted that a ban on the wearing of scarves by teachers would be in accordance with the European Convention on Human Rights.[24] As against that, the majority of the Court considered that the wearing of a scarf per se did not infringe the values of the Constitution and that, in the light of the meagre empirical evidence available to them on the point, the wearing of a scarf could not be regarded as a sign of the suppression of women. The majority distinguished between a religious symbol displayed due to a decision of a public authority and the display of such a symbol due to a decision of an individual — tolerance of the latter does not make it a symbol of the State. The majority also noted that there was insufficient empirical data to indicate any harmful influence of the wearing of a head scarf by teachers on schoolchildren.[25]

As already noted, the tension between freedom of religion and some aspects of equality policy is part of the larger debate about the relationship between the concept of universal human rights and religion and, indeed, about the relationship between liberalism and religion. I am not in a position, in this article, to pursue this debate much further, beyond noting that while some commentators contend that religious values are indispensable to the concept of universal human rights,[26] religious conservatives may feel threatened by the secular inspiration

[21] 10 October 2002, BAG, AZR 472/01, DB 2003, 830. Noted by Seifert in (2003) 4 German Law Journal, No.6, http://www.germanlawjournal.com.

[22] 30 July 2003 BverfG, 1 BvR 792/03.

[23] BverfG, 2 Bvr 1436/02, 24 September 2003. Noted by Mahlmann in (2003) 4 German Law Journal, No.11, http://www.germanlawjournal.com.

[24] In the aftermath of this decision, the State of Baden-Wurttemberg banned teachers from wearing headscarves in school, the State's Culture Minister commenting that the scarf was an Islamic political statement denoting the subjection of women. Berlin's regional government now plans to ban all religious symbols for public servants working in schools, prisons and the police. See *The Tablet*, 17 April 2004, p.33.

[25] The dissenting judges argued that public servants have restricted rights compared to citizens generally. In particular, they have a duty to be politically neutral and moderate which includes a duty to abstain from the display of religious symbols in schools. The dissenters also took the view that the objective possibility of the wearing of the headscarf to give rise to conflict in schools was sufficient to justify ban. Moreover, they also considered the scarf to be a symbol of the subjugation of women.

for contemporary human rights theory and its individualistic bias.[27] Indeed some fear that religion may be marginalized because of the refusal of supporters of universal human rights to engage meaningfully with religious believers.

> The consequences of failing to address the general question of [why the idea of universal human rights should take priority over other competing models of global ordering] is that it becomes very difficult — if not impossible — for serious debate to take place between human rights adherents and those who espouse other forms of universalist conceptions of the ordering of society. The latter are offered a stark choice: either enter into dialogue with the human rights framework, or be marginalized by it. It seems that this is the position that the religious community has found itself in and has tended to opt for the latter option.[28]

Regulating religion through religiously neutral laws of general application

Finally, a divergence of views is evident on the question of whether religious behaviour must be read subject to religiously neutral laws of general application. In the US and under the European Convention on Human Rights, the view has been taken that such laws prevail over religious beliefs. Thus in *Valsamis v. Greece*,[29] the European Court of Human Rights held that Article 9 does not grant any right to be exempted from rules which apply generally and in a neutral manner — so pupils who were Jehovah's Witnesses were obliged to participate in school ceremonies commemorating the outbreak of war between Italy and Greece in 1940, notwithstanding their religious objection to events with military overtones. The Court also held that these parades could not offend against the students› pacifist convictions, thus substituting its own judgment on a matter of conscience for that of the students. In *Employment Division v. Smith*,[30] the US Supreme Court similarly held that a religiously neutral law must be followed by all persons, including those whose religious beliefs command them to disobey the law. Thus in Smith, a law banning the use of peyote applied to a person whose religious practices entailed the use of that drug,[31] though the Supreme Court did accept that states were free to provide for exemptions from laws of general application, provided that this did not amount to an endorsement of religion contrary to the establishment clause of the US Constitution.[32]

In Ireland, however, the interests of religious believers prevail over laws of general applica-

[26] See, e.g., Perry, *Human Rights: Four Enquiries*, (Oxford, 1998), ch.1; Stackhouse, «Human Rights and Public Theology: The Basic Validation of Human Rights» in Gustafson and Juviler, eds., *Religion and Human Rights: Competing Claims?* (M.E. Sharpe, 1999).

[27] Thus Ahdar states: ‹In general, conservative Christians are disturbed at the individualistic and intolerant tendencies of modern human rights laws. For [such Christians] the root cause is the humanistic foundation of these laws.› — *Worlds Colliding: Conservative Christians and the Law* (Ashgate, 2001), p.123. See also, by the same author, ‹Religious Group Autonomy, Gay Ordination and Human Rights Law› in O'Dair and Lewis, *Law and Religion* (Oxford, 2001), p.275 (concerning the tension between conservative Christianity and the principle of non-discrimination on grounds of sexual orientation) and Smolin, ‹Will International Human Rights be Used as a Tool of Cultural Genocide? The Interaction of Human Rights Norms, Religion, Culture and Gender› (1996) 12 *Journal of Law and Religion* 143 (concerning the tension between traditional forms of Judaism and international norms prohibiting gender discrimination). For an examination of tension between religious beliefs, in particular, Islam and the philosophy underpinning the UK Human Rights Act 1998, see Bradney, ‹Religion and Law in Great Britain at the End of the Second Christian Millenium› in Edge and Harvey (eds.), *Law and Religion in Contemporary Society* (Ashgate, 2000), p.17, especially pp.23–7.

[28] Evans, «Human Rights, Religious Liberty and the Universality Debate» in O'Dair and Lewis, *Law and Religion* (Oxford, 2001), p.224.

[29] (1997) 24 EHRR 294.

[30] 494 US 872 (1990).

[31] See also *Goldman v. Weinberger* 475 US 503 (1986) in which the Supreme Court held that the free exercise clause of the US Constitution did not oblige the Air Force to permit a Jewish serviceman to wear his skullcap while on duty and in uniform. (In response to this decision, Congress subsequently enacted legislation permitting members of the armed forces to wear skullcaps.)

tion. In *Quinn's Supermarket Ltd. v. Attorney General*,[33] which concerned the validity of a ministerial order regulating hours of trading that sought to accommodate Jewish observance of the Sabbath, Walsh J said:

> Any law which by virtue of the generality of its application would by its effect restrict or prevent the free profession and practice of religion by any person or persons would be invalid having regard to the provisions of the Constitution, unless it contained provisions which saved from such restriction or prevention the practice of religion or persons who would otherwise be so restricted or prevented... S.25 of the Shops (Hours of Trading) Act 1938, [under which the Order complained of had been made] did not require that all orders or regulations made ...[thereunder] should be of such strict or general application that no provision could be made to exempt the person or persons whose practice of religion would be restricted or prevented without such exemption. In my view, the section, if it had so intended, would itself have been invalid.[34]

Thus, unlike the situation in the US, the Irish Parliament is *obliged*, and not merely empowered, to provide for exemptions from laws of general application where such exemptions are necessary in order to accommodate religious practice.

The German Constitutional Court has also taken a similar approach to this question. Thus in the *Rumpelkammer* case,[35] it held that a Catholic youth organisation was not subject to general competition laws when engaged in rag dealing for a charitable purpose and in the *Gesundbeter* case,[36] it set aside the criminal conviction of a husband who had refused, on religious grounds, to urge his dying wife to submit to a blood transfusion.

State neutrality

The second important constitutional principle in this debate is that of State neutrality in the face of religion though, again, legal orders differ in the extent to which they demand such neutrality. Most legal orders prohibit discrimination on grounds of religion; some also prohibit state endowment of religion and others also prohibit the establishment of a State religion. Perhaps paradoxically, the principle of State neutrality does not always preclude State support for religious interests, though the circumstances in which such support may be provided may vary from country to country.

The most extensive jurisprudence on State neutrality comes from the US whose Constitution provides, in the First Amendment, that ‹Congress shall make no law respecting an establishment of religion...›. The US Constitution is, of course, much older than the other constitutional arrangements examined here. It was drafted at a time when generalised religiosity was considered beneficial to society but the courts only turned to consider the establishment clause during the latter half of the twentieth century, when attitudes to religion in public life had changed somewhat.[37]

The establishment clause would first appear to have been considered in the context of financial aid to religious schools. In 1947, the Supreme Court held, in *Everson v. Board of Education of Ewing Township*,[38] that the State could not provide any financial or other aid to a religious body. However a complaint about state subsidy of transportation to a parochial school

[32] Congress subsequently sought to nullify Smith by enacting a law (the Religious Freedom Restoration Act 1995) providing that states should not adopt laws of general applicability that substantially burdened religious freedoms unless this was necessary to advance a compelling governmental interest. However in *City of Boerne v. Flores* 521 US 507 (1997), the Supreme Court held that in enacting this law, Congress had exceeded its constitutional power to enforce the Fourteenth Amendment, as the Act purported to interpret, and not merely enforce, that clause.

[33] [1972] IR 1

[34] At pp.24-5. A broadly similar provision is contained in the German Animal Protection Act. This Act generally requires that animals be anesthesized before they are slaughtered but an exception is made in the case of animals killed in accordance with Islamic tradition — see the *Traditional Slaughter* case, 1 BvR 1783/99, 15 January 2002. Noted in (2002) 3 German Law Journal, No.2, http://www.germanlawjournal.com.

[35] 24 BverfGE 236 (1968).

[36] 32 BverfGE 98 (1971).

was dismissed by a 5-4 majority of the Court because this assistance was regarded as a general service to benefit and safeguard children rather than as an aid to religion. In 1971, the Court formulated the following test for determining the constitutionality of religiously neutral state support benefiting religion — a) there must be a secular purpose for the support that neither endorses nor disapproves of religion; b) there must be an effect that neither advances nor inhibits religion; and c) there must be no consequence such that the State becomes entangled in the affairs of a religious body — *Lemon v. Kurtzman.*[39] In this case, a subsidy for salary costs of parochial school education was considered to involve an excessive entanglement of the State in religious affairs because (i) the ‹integrated curriculum› of Catholic schools made it difficult to differentiate between secular and religious education, (ii) teachers might inadvertently advance religion in classroom and (iii) there would be a need for extensive monitoring to ensure that state funds did not advance religion in school. In *Agostini v. Felton,*[40] the Supreme Court, by a narrow 5-4 majority, upheld the provision of remedial education in parochial schools by public school teachers, rejecting as unwarranted, assumptions in earlier cases that any provision of aid to students at religious schools would assist religious instruction or constitute excessive entanglement between government and religion. In the process of coming to this conclusion, the majority reformulated the test in Lemon slightly. Now the Court applies a two part purpose and effect test, namely, has the government acted with the purpose of advancing or inhibiting religion or does the aid have the effect of advancing or inhibiting religion? Entanglement is now regarded as one of the factors for determining whether a government programme has an effect that violates the establishment clause.

Since the 1980s, there is evidence of growing toleration on the part of the Supreme Court of public financial aid that ultimately benefits religious schools where the aid is directed primarily to individual students and their parents, and only reaches the religious school as a result of the independent decision of the students and/or their parents. Thus in *Mueller v. Allen,*[41] the Supreme Court upheld a system of tax deductions for parents in respect of the educational expenses of their children including expenses incurred in respect of denominational schools; in *Witters v. Washington Department of Services for the*

[37] Thus Robertson observed:

> *De jure* institutional non-establishment went hand-in-hand with a *de facto* establishment as the language and symbolism of Protestant religion penetrated all aspects of society and politics. By the middle of the twentieth century, however, this permeation of society by a socially approved but institutionally unsupported religion began to be problematic... Not only were approximately 20 per cent of the population Roman Catholic, but the late nineteenth-century eastern European influx of Jews had swollen with the problems of the twentieth century... Equally importantly, ... the intellectual establishment was as indifferent to organised religion as anywhere in Europe. Part of this shift in elite values involved a change from regarding religion as a necessary binding force for society to seeing secularisation, and the privatisation of religion, as inevitable, and welcome, sociological developments. In part also, this preference for a secular society came about because minority religions, especially Judaism, made the strategic decision that they were probably better protected by a secular State than a tolerant State. The tolerant State, approving religion but unbiased between religions might be distorted — given the *de facto* dominance of Protestantism probably would be distorted. The secular state was in no danger of bias. Only much later did some Jewish intellectuals come to think that the strategic choice had been mistaken.
>
> Thus rather rapidly the Supreme Court shifted its position from keeping an eye only on the *de jure* establishment to deep concern about the equally powerful but much more slippery implications of *de facto* establishment.›

Robertson, ‹Neutrality between Religions or Neutrality between Religion and Non-religion?› in Edge and Harvey (eds.), *Law and Religion in Contemporary Society* (Ashgate, 2000), p.35.

[38] 330 US 1 (1947).

[39] 403 US 602 (1971).

[40] 521 US 203 (1997)

[41] 463 US 388 (1983).

Blind,[42] the Court upheld a state programme providing educational subsidies to children with physical disabilities, even where such children attended denominational schools; in *Zobrest v. Catalina Foothills School District*,[43] the Court held that the State could provide the services of a sign language and speech interpreter for a deaf student attending a denominational school and in *Zelman v. Simmons-Harris*,[44] the Court, by a narrow 5-4 majority, upheld the validity of educational programmes, designed to provide assistance (vouchers) to poor children in a demonstrably failing public school system, that facilitated students in attending parochial schools. However a very recent case, *Locke v. Davey*,[45] indicates that while the State may provide funding that ultimately benefits religious schools in these types of situation, it is not *obliged* to do so in order to vindicate the constitutional right of students to free exercise of religion. Thus the State of Washington was entitled to exclude degrees in devotional theology from the scope of a scholarship scheme directed at students in postsecondary institutions. Moreover a state may not provide state aid to educational institutions that operate racially discriminatory practices on the basis of religious beliefs — *Bob Jones University v. US*.[46]

In addition to cases on financial aid, the establishment clause has also generated litigation in cases concerning symbolic acts violating State neutrality with regard to religion. Thus, the use of prayers or Bible readings for motivational purposes is prohibited by the establishment clause, as is the posting of the Ten Commandments on the classroom wall.[47] Legislation providing for a period of silence for meditation or voluntary prayer was also held to be contrary to the establishment clause as the legislature had been motivated by a religious purpose in enacting the law — *Wallace v. Jaffree*.[48] The principle of State neutrality also precluded a public school board from permitting religious professionals to come into school to conduct voluntary religious classes[49] and precluded the erection of a nativity scene in the foyer of a courthouse at Christmas.[50] However public schools may give students regular time off from ordinary classes to attend religious instruction outside the school and the Supreme Court has also held that the establishment clause was not infringed by permitting a religious organisation to use a public forum for religiously orientated speech activities, so long as that organisation did not get preferential treatment.[51]

German jurisprudence on State neutrality is more limited and more ambivalent than its US counterpart. In the ‹*School Prayer*› case[52] (1979), the Constitutional Court upheld the right of states to permit prayer in compulsory interdenominational schools with the safeguard of voluntary participation, reasoning that ‹we need not fear discrimination against a pupil who does not participate in the prayer›. On the other hand, in the more recent *Classroom Crucifix decision*[53] (1995), the display of a crucifix in a public school was held to violate the neutrality of the state in religious matters and so parents could demand its removal.[54] Article 4 of the Basic Law did not grant the right to have ‹faith commitments supported by the State› but did require the State to ‹protect the individual from attacks or obstructions by adherents of different beliefs or competing religious groups.›

Finally, in Ireland the constitutional prohibitions on State endowment of religion and religious discrimination (from which the Supreme Court has recently inferred a constitutional prohibition on the establishment of a State religion[55]) have featured in ten cases. In six of these

42 474 US 481 (1986).
43 509 US 1 (1993).
44 536 US 639 (2002).
45 Decision handed down on 25 February 2004.
46 461 US 574 (1983).
47 *Engel v. Vitale* 370 US 421 (1962); *School District v. Schempp* 374 US 203 (1963); *Stone v. Graham* 449 US 39 (1980).
48 472 US 38 (1985).
49 *Lee v. Wiseman* 505 US 577 (1992).
50 *County of Allegheny v. ACLU* 492 US 573 (1989)
51 *Lamb Chapel v. Center Moriches Union Free School District* 508 US 384 (1993).
52 52 BverfGE 223 (1979).
53 93 BverfGE 1 (1995).
54 A similar decision was handed down by the Swiss Federal Court in relation to the Swiss Constitution on 26 September 1990.

cases, the courts indicated that these prohibitions have to be read subject to the protection of religious interests. The earlier cases in this series were concerned with religious practices[56] and decisions of ecclesiastical authorities[57] but the more recent cases have broadened this category to embrace the promotion of social conditions which are conducive to, though not strictly necessary for, the fostering of religious beliefs.[58]

In *McGrath and Ó Ruairc v. Trustees of Maynooth College*[59] in the context of a challenge to the validity of a decision of ecclesiastical authorities, Henchy J. said:

> In proscribing disabilities and discriminations at the hands of the State on the ground of religious profession, belief or status, the primary aim of the constitutional guarantee is to give vitality, independence and freedom to religion. To construe the provision literally, without due regard to its underlying objective, would lead to a sapping and debilitation of the freedom and independence given by the Constitution to the doctrinal and organisational requirements and proscriptions which are inherent in all organised religion. Far from eschewing the internal disabilities and discriminations which flow from the tenets of a particular religion, the State must on occasion recognise and buttress them. For such disabilities and discriminations do not derive from the State; it cannot be said that it is the State that imposed or made them; they are part of the texture and essence of the particular religion; so the State, in order to comply with the spirit and purpose inherent in this constitutional guarantee, may justifiably lend its weight to what may be thought to be disabilities and discriminations deriving from within a particular religion.[60]

Conclusion

This overview of the operation of the constitutional principles of freedom of religion and state neutrality in five different legal orders had a very modest objective, namely, to demonstrate how the distinctive cultures of the different legal orders may produce different ways of understanding what these principles entail. Thus in considering the future of democracy and multireligious experience, and in particular, the central issue of whether liberalism has to be modified to take account of religious pluralism or whether religious pluralism must defer to the demands of liberalism, each society will have to shape a response that is in harmony with its own culture.[61]

[55] See *Corway v. Independent Newspapers (Ireland) Ltd.* [1999] 4 IR 484.

[56] Observance of the Sabbath in *Quinn's Supermarket Ltd. v. Attorney General* [1972] IR 1.

[57] Decision of the trustees of Maynooth College in *McGrath and Ó Ruairc v. Trustees of Maynooth College* [1979] ILRM 166.

[58] Employment policies discriminating on grounds of religion in *In re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321, *Greally v. Minister for Education (No.2)* [1999] 1 IR 1, [1999] 2 ILRM 296 and *Campaign to Separate Church and State Ltd. v. Minister for Education* [1998] 2 ILRM 81.

[59] [1979] ILRM 166.

[60] *Ibid.* at p.187.

[61] In response to the question that he himself posed, Timothy Shah suggests that perhaps we need to keep the tension between liberalism and religious pluralism continuously in play.

> If we are not convinced of the reasonableness of the ‹Grotian› liberal project, it may be because we have concluded that it is more humane and less utopian to resist any project that attempts a definitive resolution of this terrible tension, one way or the other. If that is our conclusion, then our search will be for a politics that preserves, not resolves, the tension between political liberalism and religious pluralism in its various forms. Such a politics would in effect be a minimal liberalism that leans less towards Grotian liberalism and its discourse of philosophical authority and more towards democracy and its presumptive respect for all non-violent forms of political participation and all political participants who respect the minimum conditions of democracy. Alfred Stepan aptly describes these conditions as the ‹twin tolerations›, according to which, in effect, the state must respect the autonomy of religious institutions (including their freedom to express themselves politically) and religious institutions must respect the autonomy of the state. An otherwise open democratic politics — open to the irreducible plurality of human goods, open to the irreducible plurality of religious and cultural communities, open to the diverse constitutional means of

At root here is a clash of worldviews and in what follows, I tentatively sketch some propositions for resolving this tension, though it appears to me that, in the final analysis, it may not be possible to remain absolutely impartial in this debate. Thus I should state that my personal bias is in favour of protecting religious freedom.

A number of arguments may be made in defence of group autonomy generally, including religious autonomy.[62] Humans are social beings and groups, including religious groups, facilitate this important aspect of human existence. Groups, and perhaps especially religious groups, may also be a source of new ideas and ways of thinking and may, in some cases, act as a counterweight to the powerful State. The protection of religious freedom also promotes the values of tolerance and respect which, in turn, are conducive to the protection of the dignity and inherent equality of each individual. Religious faith and practice can contribute to the human well-being of society through the promotion of social solidarity and, in some cases, the provision of social services such as education and health services. Respect for religious freedom may also protect privacy, as when the courts refuse to intervene in the internal decisions of religious bodies. Finally, the pursuit of religious knowledge or insight is an aspect of personal liberty.

At the same time, the value of religious autonomy cannot be an absolute one and may, in appropriate circumstances, have to be read subject to considerations of public policy. The critical question is what are such circumstances. As a preliminary point, it is worth noting that, while in the past, laws regulating religion were often specifically enacted for that purpose, the contemporary reality is that religion is generally regulated now by laws that are not explicitly designed for that purpose but rather that seek to promote general secular purposes, catching religious activities in their wake. The issue then becomes, to what extent, if at all, such laws should contain exemptions in respect of religion?

As a means of reconciling the demands of religious freedom with those of contemporary, comprehensive liberalism, I tentatively offer the following six propositions:

First proposition — The State should not concern itself with the content of religious belief, but rather should focus only on religious practice. This is in accord with Article 9 of the European Convention on Human Rights, paragraph 1 of which guarantees freedom of thought, conscience and religion and paragraph 2 of which provides for certain limitations on the freedom to manifest one's religion or belief.

Second proposition — Freedom of religious practice may not be used to deny the essential humanity and fundamental equality of each individual.

Third proposition — Freedom of religious practice should not protect the non-consensual infliction of significant physical harm. By focusing on the issue of consent, this proposition would permit adult Jehovah's Witnesses to refuse blood transfusions, though it would allow the State to intervene to protect the interests of children of Jehovah's Witnesses or adult Witnesses whose will in such matters may be overborne by their spouses.[63] Permitting the non-consensual infliction of insignificant physical harm is intended to permit the circumcision of male infants, though not female circumcision, the physical consequences of which cannot be dismissed as insignificant.

Fourth proposition — Freedom of religious practice must also be read subject to property rights. Thus iconoclasm, no matter how sincere

> respecting these goods and these communities — will avoid the pitfalls of a self-defeating strategy of liberal containment, which is as likely to provoke the radicalisation of religion (as well as contempt for liberalism) as its pacification, and which, in an age of ‹identity politics›, can in any case keep the lid on religious pluralism for only so long.

Shah, ‹Making the Christian World Safe for Liberalism: From Grotius to Rawls› in Marquand and Nettler, *Religion and Democracy*, (Blackwell Publishers, 2000), p.137.

[62] This section borrows heavily from two articles, Ahdar, ‹Religious Group Autonomy, Gay Ordination and Human Rights Law› and Doe and Jeremy, ‹Justifications for Religious Autonomy›, both in O'Dair and Lewis (eds.), *Law and Religion* (Oxford, 2001).

the beliefs of the iconoclast, should remain subject to the criminal law.

Fifth proposition — Subject to the above propositions, laws of general applicability should contain appropriate exemptions where such are necessary in order to facilitate the free profession and practice of religion. Thus, for example, an equality code should continue to permit a religious denomination to discriminate on grounds of gender and sexual orientation in relation to the ordination of ministers where the denomination holds that such discrimination is divinely ordained. In similar fashion, a religious body should be permitted to dismiss any employee whose behaviour deliberately undermines the ethos of that body. However this proposition must be read, in particular, subject to the second proposition above. Quite when a discriminatory practice amounts to a denial of the essential humanity and fundamental equality of an individual may be difficult to predict and this partly explains why the debate over the wearing of Islamic scarves has proven to be so controversial.

Sixth proposition — While a religious body should be permitted to pursue discriminatory policies where that is necessary to facilitate the free profession and practice of religion, the State should avoid any entanglement in such policies beyond permitting them. So, for example, public financial aid should not be provided to a religious body that discriminates on grounds of gender or sexual orientation. In this way, State tolerance of discriminatory practices by religious bodies is shown to be based on the State's understanding of the limited role that it should play in regulating religious practice, rather than on any endorsement of the discriminatory practices in question.

The above propositions are offered tentatively in the hope of provoking further debate on the appropriate relationship between liberalism and pluralism, especially religious pluralism. I have little doubt that some of them, perhaps especially the fifth, may prove controversial. However, in this context, one final point worth making is that we need to be mindful of the limited efficacy of the law in regulating religious conduct. For example, will a ban on the wearing of scarves in public schools and in public employment cause Muslim women to feel less oppressed? Or will it engender in Muslim women a sense of victimisation and alienation and perhaps even result in some Muslim women withdrawing from public schools and employment in the public sector? It may be relatively easy to enact legislation; altering mindsets is an altogether much more difficult task.

[63] See, e.g. the Irish case of *J.M. v. Board of Management of St. Vincent's Hospital* [2003] 1 IR 321 where Finnegan P held that the decision of an African woman who had recently joined the Jehovah's Witnesses not to accept a blood transfusion was not a clear final decision because, as a result of her cultural background, she was preoccupied with her husband and his religion rather than with whether to have the medical treatment and to protect her own welfare. Exercising his parens patriae jurisdiction, therefore, the President directed the respondents to provide the appropriate medical treatment.