



European  
University  
Institute

ROBERT  
SCHUMAN  
CENTRE FOR  
ADVANCED  
STUDIES

# WORKING PAPERS

RSCAS 2016/09  
Robert Schuman Centre for Advanced Studies  
RELIGIOWEST

Rights, Recourse to the Courts and the Relationship  
between Religion, Law and State in Europe and the  
United States

Ronan McCrea



European University Institute  
**Robert Schuman Centre for Advanced Studies**  
RELIGIOWEST

**Rights, Recourse to the Courts and the Relationship between  
Religion, Law and State in Europe and the United States**

Ronan McCrea

EUI Working Paper **RSCAS** 2016/09

This text may be downloaded only for personal research purposes. Additional reproduction for other purposes, whether in hard copies or electronically, requires the consent of the author(s), editor(s). If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper, or other series, the year and the publisher.

ISSN 1028-3625

© Ronan McCrea, 2016

Printed in Italy, February 2016

European University Institute

Badia Fiesolana

I – 50014 San Domenico di Fiesole (FI)

Italy

[www.eui.eu/RSCAS/Publications/](http://www.eui.eu/RSCAS/Publications/)

[www.eui.eu](http://www.eui.eu)

[cadmus.eui.eu](http://cadmus.eui.eu)

## **Robert Schuman Centre for Advanced Studies**

The Robert Schuman Centre for Advanced Studies (RSCAS), created in 1992 and directed by Professor Brigid Laffan, aims to develop inter-disciplinary and comparative research on the major issues facing the process of European integration, European societies and Europe's place in 21<sup>st</sup> century global politics.

The Centre is home to a large post-doctoral programme and hosts major research programmes, projects and data sets, in addition to a range of working groups and *ad hoc* initiatives. The research agenda is organised around a set of core themes and is continuously evolving, reflecting the changing agenda of European integration, the expanding membership of the European Union, developments in Europe's neighbourhood and the wider world.

Details of the research of the Centre can be found on:

<http://www.eui.eu/RSCAS/Research/>

Research publications take the form of Working Papers, Policy Papers, and e-books. Most of these are also available on the RSCAS website:

<http://www.eui.eu/RSCAS/Publications/>

The EUI and the RSCAS are not responsible for the opinions expressed by the author(s).

## **ReligioWest**

ReligioWest is a four year research project funded by the European Research Council and based at the European University Institute, Florence, Italy. It aims at studying how different western states in Europe and North America are redefining their relationship to religions, under the challenge of an increasing religious activism in the public sphere, associated with new religious movements and with Islam.



## **Abstract**

This paper compares the jurisprudence of the European Court of Human Rights and the US Supreme Court to show the weakness of rights-based justifications such as those suggested by Sager and Eisgruber, Dworkin and Nussbaum, for the strict religious neutrality of the state. Justifying secularism in rights terms is likely to lead to minimalist forms of secularism and risks drawing courts into problematic assessments of the compatibility of the beliefs of particular faiths with liberal democracy. The paper closes by suggesting that rights-based litigation is a problematic vehicle through which to regulate the relationship between religion, the law and the state as fundamental rights cannot do justice either to the reasons in favour of strict separation of religion and state or to the richness of religious experience.

## **Keywords**

Religion, Secularism, Human Rights, Courts, Judges.



## Introduction

In this paper I would like to examine some similarities and differences between the approach of pan-European courts and the United States Supreme Court to the principle of the religious neutrality of the state. As a rights-focused court interpreting a charter that lacks a non-establishment clause the European Court of Human Rights has developed a jurisprudence on separation of religion and state that can help to clarify the degree to which rights are relevant to the justification of the separation of religion and state. This comparative perspective should be particularly useful for the United States Supreme Court which must interpret a constitutional text (the First Amendment) which deals with both the right to religious freedom and non-establishment in the same article.

I want to use the comparison in the approach of the different courts to make a broader point about the role of rights and litigation in the development of norms in this area. I will suggest that the prominence of rights and the role played by courts have a distorting effect on debate in this area. Rights alone are incapable of doing justice either to religious experience or to the reasons behind the separation of religion and state. The centrality of rights-based arguments and litigation therefore compromises the development of just and durable arrangements in this important area

## Basis for Protecting the Secular Nature of the State

European and American courts approach the question of separation between religion and state in a context of definite differences but also of great similarities. The two legal systems broadly share the wider overall intellectual structure that characterises Western approaches to the role of religion in public life that assumes the existence of separate categories of “religious” and political”. However, they also approach the judicial regulation of particular conflicts that arise in relation to issues such as symbolic endorsement of a faith by a state or the need for laws to be justified by public reason from somewhat different starting points. These differences can, I suggest, be most instructive and can allow each system to obtain provide valuable clarification of the true principles underlying the separation of religion and state.

In textual terms, there are clear differences between Europe and the United States. The First Amendment of the US Constitution covers both freedom of religion and the separation of church and state. The European Convention on Human Rights (‘ECHR’) has Article 9 guaranteeing freedom of thought, conscience and religion but does not have an article requiring separation of church and state, something that makes the justification for interventions to support the secular nature of the state more complicated. Despite these textual differences, both systems require limits on religious influence over law and politics. The USSC has required “valid secular reasons” if legislation is to be held to be valid as part of a broader commitment to avoiding the entanglement of religion and the state.<sup>1</sup> The European Court of Human Rights (ECtHR) has approvingly mentioned the concept of secularism as being in harmony with the ECHR however it has focused in decisions such as *Refah Partisi v Turkey*<sup>2</sup> (where it upheld the dissolution of a political party held to be seeking the establishment of a religiously-based legal order) on showing the danger to norms such a privacy, popular sovereignty and equality that the establishment of a non-secular legal or political order would bring (in this case an Islamic, sharia-based order).

The European approach is concerned with the fact that religious values may be undemocratic and oppressive where the US approach is (or at least has been) simply concerned with avoiding entanglement of religion and state. There has been lively academic debate over whether the singling

---

<sup>1</sup> *Stone v Graham* 449 US 39 (1980).

<sup>2</sup> [2003] ECHR 87

out of religious values alone for exclusion from acting as the basis of public policy is justifiable<sup>3</sup> but the general approach in the US has been to identify religious values *per se*, irrespective of their content as ineligible to act as the basis of law and policy.

As noted above, the ECHR does not have an article requiring separation of religion and state. Therefore, it can only intervene when recourse to religious values in the political system of a signatory state can be seen as threatening to the human rights contained in the Convention. This has meant that the Court has often been drawn into assessments of whether particular religious beliefs can be seen as compatible with values such as gender equality, democracy, privacy, human dignity etc. We see therefore in *Refah*, claims on the part of the Court that Sharia law is incompatible with democracy by virtue of its immutable nature and because it may violate human rights such as the prohibition of inhuman and degrading treatment (due to the criminal punishments it envisages), privacy rights (due to its regulation of the private and intimate sphere) and equality (due to its rules relating to the treatment of women).<sup>4</sup> Similarly, in *Dahlab v Switzerland*<sup>5</sup> and *Shahin v Turkey*<sup>6</sup> the court made reference to the headscarf being a symbol that was hard to reconcile with gender equality. Such assessment of the substance of particular religious beliefs is highly dangerous territory for a court to enter into and, unsurprisingly, it has brought criticism (most often in relation to stereotyping of Islam and Sharia).<sup>7</sup>

The correctness of the court's analysis of Islam in these cases and the degree to which such statements can be problematic in the light of undoubted societal discrimination against Muslims in Europe, are important questions but they are not the focus of this paper. What is significant for our purposes is to think why the Court has entered into assessment of the substance of religious beliefs which so many courts studiously avoid and which its own Article 9 jurisprudence counsels against (the Court has repeatedly said in Article 9 cases that it is impermissible for the state to 'assess the legitimacy of religious beliefs').<sup>8</sup> While the Court is not assessing religious legitimacy or truth in these cases it is offering particular interpretations of the beliefs of a faith (as task secular courts are poorly equipped to carry out) and assessing whether such interpretations conform to human rights norms.

The answer lies in the textual difference between the US Constitution and ECHR. The lack of an article requiring separation of religion and state deprives the ECtHR of the ability to identify religious beliefs as a category of belief that, irrespective of substantive content, cannot form the basis of law. Therefore, if it is to intervene in cases where theocracy movements may threaten fundamental rights, the Strasbourg Court must justify such intervention in relation to the substantive beliefs of the religious movement in question and their compatibility with human rights norms. The US Supreme Court, in contrast, does not need to enter into the assessment of the substance of religious beliefs and their compatibility with liberal democratic principles or constitutional rights. It can merely identify a lack of secular purpose or an attempt to use the state to advance religion and declare a violation on that basis alone.

---

<sup>3</sup> See for example, Juergen Habermas "Intolerance and Discrimination" (2003) 1(1) International Journal of Constitutional Law 2, Michael W. McConnell 'The Problem of Singling Out Religion' 50 DePaul Law Review 1 (2000), Abner S. Greene, 'The Political Balance of the Religion Clauses' 102 Yale Law Journal 1611 (1993), John Rawls *Political Liberalism* (1993 New York, Columbia University Press) and Kent Greenawalt *Religious Convictions and Political Choice* (1988 Oxford and New York, Oxford University Press). See also the judgment of Laws LJ in the English and Welsh Court of Appeal in *MacFarlane v RELATE Avon* [2010] EWCA Civ. 771.

<sup>4</sup> [2003] ECHR 87, paragraph 123.

<sup>5</sup> Application No.42393/98, judgement of 15 February 2001.

<sup>6</sup> [2005] ECHR 819.

<sup>7</sup> See for example Carolyn Evans 'The Islamic Scarf in the European Court of Human Rights' (2006) 7 The Melbourne Journal of International Law 52.

<sup>8</sup> *Refah Partisi v Turkey* [2003] ECHR 87, paragraph 91.

### ***The Symbolic Neutrality of the State***

A similar difference in approach has been seen in relation to the issue of the presence of religious symbols or messages in state contexts. The USSC has, until recently, had an approach that focused on avoiding entanglement between religion and state. In *Stone v. Graham*<sup>9</sup> the Court found unconstitutional a Kentucky statute mandating the display of the Ten Commandments in public schools on the ground that it lacked a valid secular purpose. The Court, in addition, made it clear that it was irrelevant that the presence of the commandments was not accompanied by obligations to participate in prayer or other religious activities, noting that "it is no defence to urge that the religious practices here may be relatively minor encroachments on the First Amendment."<sup>10</sup> In *Allegheny County v Greater Pittsburgh ACLU* Blackmun J noted that the test was "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non-adherents as a disapproval, of their individual religious choices."<sup>11</sup> In these cases the court found that displays of religious symbols could be unconstitutional if they were seen as endorsement of a religion by the state without needing to investigate whether such endorsement was oppressive of the religious freedom of others. Non-establishment therefore was seen as having a justification relating to avoiding entanglement of religion and state that was, by itself, sufficient to trigger a finding of unconstitutionality without it being necessary to consider whether the non-establishment in question was in some way oppressive of fundamental rights such as religious freedom.

This is in contrast to the approach of the ECtHR. The Strasbourg Court has said repeatedly that the state's role should be confined to acting as the "neutral and organiser of religions",<sup>12</sup> but this statement has most often been made in relation to attempted state interference in the internal affairs of religions and in *Lausti* it was clear that it does impose absolute neutrality or prevent any symbolic links between a faith and a state. In *Buscarini v San Marino* it found a violation of Article 9 in the compulsory use of a traditional oath for legislators in San Marino that required them to say that they swore "on the Holy Gospels".<sup>13</sup> However, this finding of a violation was based on the fact that it violated the religious freedom of the individual deputies concerned to make them take a religious oath as a condition of taking up their seats in Parliament, not on a finding that a religious oath violated a requirement that the State be religiously neutral. The Court recognised that a close symbolic relationship between the state and a particular faith can be oppressive of religious freedom and violate the Convention but is not necessarily so. Oppression of religious freedom (or perhaps another right guaranteed by the Convention) was necessary, not simply demonstrating that the State was appearing to endorse a particular faith.

Perhaps the clearest indicator of this approach is the decision of the Grand Chamber of the Strasbourg Court in *Lautsi v Italy*. Here, an atheist mother complained that the right to freedom of religion of her children and her right to respect for her philosophical convictions in the education of her children were violated by the presence of crucifixes in Italian state schools. Her claim was rejected on the grounds that, such presence was a cultural tradition and in the context of the Italian education system as a whole, the crucifix was not sufficiently indoctrinating or oppressive to violate the ECHR (thus reversing an earlier ruling by a section of the Court).<sup>14</sup> The test therefore was oppression, not entanglement or visible non-neutrality of the state. For the ECtHR, symbolic links between state and a

---

<sup>9</sup> *Stone v. Graham* 449 U.S. 39 (1980).

<sup>10</sup> *Stone v. Graham* 449 U.S. 39 (1980).

<sup>11</sup> *Allegheny County v Greater Pittsburgh ACLU*, 492 U.S. 573 (1989)

<sup>12</sup> See for example *Metropolitan Church of Bessarabia and Others v Moldova* [2010] ECHR 518.

<sup>13</sup> Application 24645/94 Judgement of 18 February 1999.

<sup>14</sup> [2009] ECHR 1901.

faith are problematic only if they become so intensive or indoctrinating that they violate either parental autonomy over children or the ability of an individual to hold a different faith.

It is my view that there should not be crosses in state schools but that the Court was right to rule as it did in *Lautsi*. The European Court of Human Rights (“ECtHR”) is a human rights court, not a constitutional court. Unlike the USSC, it must rule only on whether rights have been violated, not what are the appropriate norms for the conduct of political life in a state. What *Lautsi* shows us is the weakness of the connection between rights and the separation of religion and state. Freedom of religion and separation of religion and state may be dealt with in the same article of the US constitution, but they are conceptually separate. A claim that the state should be religiously neutral that rests on rights claims is bound to fail. The impact on an individual of seeing a particular object in a particular place such as a school or town hall is, absent other forms of coercion, normally so slight as to make a rights claim very weak. State endorsement of religion can be oppressive but is not necessarily so. The problem with an assertive religious presence in the public sphere is not really one that can adequately be articulated in rights terms.

### A Europeanisation of the First Amendment?

There is, however, growing confusion in relation to the American approach to the underlying justification of non-establishment. Recent cases have moved closer to the ECtHR view that oppression is the appropriate test despite the fact that US has unlike ECtHR a non-establishment clause. In *The Town of Greece v Galloway*<sup>15</sup> Kennedy J, writing for the majority, articulated a test for regulating prayer in state contexts that moves closer to the focus on oppression seen in *Lautsi* and *Buscarini* and away from the idea of avoiding any (even slight) entanglement. In my view this is not the correct approach but is a logical conclusion of the growth in the academic and judicial focus on non-establishment as a matter of rights.

Kennedy’s approach is not entirely new but picks up threads in early judgments such as that of O’Connor J in *Lynch v Donnelly* where she argued that symbolic endorsement is unconstitutional on the basis that it may cause a sense of exclusion and inferiority in those of other faiths.<sup>16</sup> Symbolic endorsement, she suggests “sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community”.<sup>17</sup> This individual and rights-focused approach has been strengthened by the academic works of leading American constitutional theorists who favour separation of religion and state.

Ronald Dworkin suggested that equal respect for all citizens precludes the state from endorsing any particular faith as this involves a failure to show equal concern for all citizens. Other leading pro-separation such as Sager and Eisgruber (who characterise establishment of a faith as disparagement of those who do not share that faith)<sup>18</sup> and Nussbaum<sup>19</sup> have similarly sought to justify prohibitions on any symbolic endorsement of a faith by the state on grounds of the potential hurt feelings or sense of exclusion that an individual of a minority faith may feel if they see symbolic association of the state with a particular faith.

---

<sup>15</sup> 572 US \_\_\_(2014)

<sup>16</sup> It should be pointed out that O’Connor J also offered other reasons more consistent with an approach that seeks non-entanglement for non-rights reasons.

<sup>17</sup> 465 US at 688. *Lynch v. Donnelly*,

<sup>18</sup> Christopher Eisgruber and Lawrence Sager *Religious Freedom and the Constitution* (Harvard University Press, Cambridge MA, 2007).

<sup>19</sup> Martha Nussbaum *Political Emotions: Why Love Matters for Justice*, (Cambridge MA and London, Harvard University Press, 2013) at 5-7.

Though such an approach appears to mandate maximal symbolic neutrality, it ultimately undermines the case for such neutrality the separation of church and state by locating its justification in a rights claim that is weak. As Cecile Laborde has pointed out,<sup>20</sup> hurt feelings or a sense that the state does not share one's values are inevitable parts of democratic life. Those who believe in rigid gender roles, racial inequality, dictatorship, parliamentary government or pacifism will all feel alienated by the US constitution or the symbols of the US government. Nussbaum's assertion that "the careful neutrality that a liberal state should observe in matters of religious and comprehensive doctrine does not extend to the fundamentals of its own conception"<sup>21</sup> does not answer the question of why such fundamentals may not be religious in nature when religious norms may be liberal and when non-religious fundamentals may be as deeply felt and may produce equal levels of alienation from those who do not share them.

More importantly for our purposes, none of these theorists shown why there should be a right to have the state avoid expressing disagreement with your religious (or other beliefs) or why expression on the part of a state of religious belief amounts to a violation of a right to equality. There is no human right not to hear particular kinds of arguments in political life nor a right not to see particular symbols in state contexts. As the result in *Lautsi* showed, to rise to the level of actual threats to fundamental rights, symbolic links on the part of the state to a particular faith need to be sufficiently intense to become oppressive. If the main justification for the religious neutrality of the State is to protect individual rights then Kennedy J is correct; no fundamental rights have been violated by a brief voluntary prayer, therefore such prayer is constitutional. By making individual rights central to debate on the requirement of the religious neutrality of the separationist liberals have moved the legal argument onto a terrain which is highly unfavourable to their goals. This is where the European example is particularly instructive. If *Town of Greece* were a European case, say taken by an individual against Orthodox prayers before a municipal meeting in the country of Greece, the applicant would lose. The Strasbourg Court has made it clear that, as a court whose mission is to protect rights and given that it interprets a charter that lacks a non-establishment clause, it must reject claims based on non-oppressive symbolic endorsement of a faith by the state. The same is not true of the United States where the Constitution has a broader remit than fundamental rights protection and where there is an explicit non-establishment clause. Kennedy J is wrong in the US for the reasons that he would have been right in Europe. His judgement in *Town of Greece* and the rights-focused arguments of Dworkin, Nussbaum and others, fail to give adequate weight to the non-rights based reasons for separating religion and state.<sup>22</sup>

## **The Limits of Rights as Justifications for the Secular Nature of the State**

Rights provide very limited support to the fundamental pillars of the secular state: the requirements that laws be justified by secular public reasons and that the state not endorse any particular faith. As Mark Lilla's great work *The Stillborn God* shows,<sup>23</sup> the development of the idea of the secular state was a reaction to the destructiveness of religious contestation for political power. Rawls' idea of

---

<sup>20</sup> Cecile Laborde 'Equal Liberty, Nonestablishment and Religious Freedom, *Legal Theory* 2014 1 at 21-22.

<sup>21</sup> Martha Nussbaum *Political Emotions: Why Love Matters for Justice*, (Cambridge MA and London, Harvard University Press, 2013) at 7.

<sup>22</sup> Such non-rights based justifications have been seen in parts of some previous judgments. See for example See for example O'Connor J's concurring opinion in *McCreary County v ACLU* 545 US 833 (2005) where she stated: 'At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish.[...] Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?'

<sup>23</sup> Mark Lilla, *The Stillborn God: Religion, Politics and the Modern West* (2007, New York, Knopf/Random House).

public reason and overlapping consensus, while linked to a theory of justice that sought to protect a degree of autonomy for the individual, was focused not on rights but was an attempt to resolve the problem of the need for agreement between people of diverse beliefs

If states use the education system to promote a particular faith, the danger of religious contestation for control of state institutions rises and the ability of the state system to serve all declines. The duty to refrain from using religiously-specific arguments when arguing for laws that will bind a religiously-diverse population is not one that can be based on a right not to hear religious arguments. Neither does a failure to exclude religious reasons as justifications for laws necessarily involved breaches of fundamental rights (given predominant religious teachings on gender and sexuality they may well do so but whether religiously justified laws threaten fundamental rights depends on the substantive religious beliefs being legislated for; a Quaker theocracy may not threaten most liberal rights to any significant degree). Rather, using religious arguments in law-making is problematic because it undermines the ethic of citizenship, represents a failure to internalize the legitimacy and permanence of religious difference and undermines the idea of the law-making arena as a place where we make an effort to transcend religious differences.

Religious division is, rightly or wrongly seen as permanent and potentially more disruptive of political stability in a way that political division is not.<sup>24</sup> It is also true that, given the teachings of predominant forms of religion, those who support liberalism, egalitarianism and the idea of popular sovereignty will also support secularism instrumentally, but that fact does not change the reality that promotion of stability, not democracy or liberalism, was the original goal of separating religion and politics.

### **The Limits of Rights in Constitutional Adjudication on Matters of Religion**

I want to conclude by noting particular difficulties that arise from the central role that is now played by ideas of rights and by courts adjudicating on such rights in resolving political disputes, problems that are particularly acute when we are dealing with issues of freedom of religion and the secular nature of the state.

The existence of legally-enforceable fundamental rights is something that is useful and necessary particularly in how it can contribute to correct unfairness that can arise in relation to treatment of minorities whose interests may not get full recognition in majoritarian democratic institutions. However, legally recognised rights should not become the sole or predominant prism through which we approach political disputes. The existence of legally-enforceable rights encourages the use of litigation as a tool with which to resolve disputes, something that also has the potential to distort the way in which we deal with issues of the structural relationship of the state to religion.

I have already noted that justifications for the secular state are only poorly translatable into rights form. I also believe that the full richness of religious life and religious experience not readily translatable into a fundamental right protectable by courts. In Europe we see that the right protected by Article 9 ECHR is a right to freedom of thought, conscience and religion. While this right does cover elements of ritual and collective religious practices the Court of Human Rights has made it clear that Article 9 is “primarily a matter of individual belief”.<sup>25</sup> The Strasbourg court defends religious freedom largely as a choice right. One of the series of rights given to ensure individuals have adequate scope to live autonomous lives that may dissent from collective norms. Collective elements of religion will only fall under Article 9’s protection in so far as they can be reconciled with this notion of individual autonomy.

---

<sup>24</sup> Whether this is a sustainable conclusion is beyond the scope of this paper.

<sup>25</sup> See for example *Metropolitan Church of Bessarabia and Others v Moldova* [2010] ECHR 518.

Critics who state that to view religion as largely a matter of belief and choice does not give recognition to the full richness of the religious experience are correct. Yet it cannot be otherwise. The law always has to reconfigure complex social reality into a form that is legally operational. That always involved a loss of some elements of the rich social reality. A marriage is, under most legal systems, a special form of contract, but that hardly does justice to the nature of the relationship between spouses. Employment is for some a matter of their identity but it is generally treated by the law as contract of exchange of labour for financial reward. The relationship of neighbours goes beyond the duty not to make noise or pollute one's neighbour's property but the law does not and cannot recognize all aspects of such a relationship.

Moreover, as we all have consciences and the ability to hold beliefs and must all be treated with equal concern and respect by the state, the rights guaranteed by Article 9 must be generalisable to us all. The Strasbourg Court has repeatedly stressed how Article 9 is "an equally precious asset for non-believers"<sup>26</sup> and courts have recognized beliefs such as pacifism and ecology as being equivalent to religion for the purposes of Article 9.<sup>27</sup> Therefore, the right to religious freedom is likely to cover only very narrow and limited elements of religion as it is lived. If religion's claims to a role in society are articulated in terms of rights, that role will be fairly narrow. Given the complex and often conflictual relationship between religion and individual autonomy, the claims made by religious bodies risk running up against the liberal underpinnings of Article 9 and failing on that basis. In these circumstances, the fact that so many religious claims have been articulated in rights terms seems rather self-defeating.

### **The Distorting Nature of Litigation**

Leaving it to Courts to resolve conflicts over the relationship of religion to the state involves of course, the usual cost of the side-lining of democratically accountable bodies but beyond that, the very nature of the judicial process itself is distorting. Courts dispense justice in individual cases. When a court is tasked with resolving a case in relation to the relationship between religion, law and state it will generally be faced with an individual and will be focused on assessing the claim and the curtailment of the rights of that individual. This brings various problems. If the other party is a private party, the ability to draw on broader constitutional principles that may be remote from the concerns of the parties and their dispute may be limited. The state can be brought in as a notice party but the court will still be restricted to resolving the particular live dispute between the parties before it. Even where the case is one between a private party and the state, the state must bear the burden of asserting all other potential rights which may be infringed by the right claimed by the claimant. It may not wish for political or other reasons, to assert all of those rights or those theoretical claims may seem remote from the factual scenario at hand and be accorded very limited weight.

Recourse to the courts and particularly to Human Rights Courts such as the ECtHR can encourage each side to focus on articulating a position in which they are accorded the status of victim rather than attempting to define more general norms for a fair resolution of conflicts that treats everyone fairly. A good example of this was the case of Lillian Ladele. She was dismissed from her post as civil registrar as she refused on religious grounds to register same-sex unions. Her, ultimately unsuccessful, case raised an interesting general question of the clash between free conscience rights and anti-discrimination norms, yet her lawyers heatedly rejected any attempt to articulate her case in terms of a general conscience exemption and insisted that all that was necessary was an exemption for her

---

<sup>26</sup> *Kokkinakis v Greece* [1993] ECHR 20. The Court has repeated this statement in almost every Article 9 case since.

<sup>27</sup> *Arrowsmith v UK* (1978) 19 DR 5, *H. v UK* (1993) 16 EHRR DR 44.

religious conscience that would operate only in relation to the kind of discrimination (in relation to sexual orientation) that she wanted to engage in.<sup>28</sup>

Finally, the impetus to win a case can lead parties to embrace arguments that they don't really believe or that they may later regret. Many Christian churches argued vehemently in *Lausti* that parents have no human right have their child protected, in the context of the state education system, from the general Christian flavour of a society. Will they regret this argument when as looks likely, many European societies come to have a generally atheistic flavour and seek to reflect this in their public schools? Indeed from secular side we had a similar approach. Is an absolute parental veto on exposure to the norms of broader society really what secularists, who often value the right of children to dissent from parental choices on religious matters and to exit religious communities, actually want? Similarly, the Beckett Center (which litigates on behalf of religious freedom) hailed the *Town of Greece* decision as a victory for religious liberty.<sup>29</sup> Would they have greeted a decision allowing a majority atheist town council to invite Richard Dawkins to celebrate the virtues of reason and scepticism in with the same enthusiasm? Does the pressure of litigation not encourage this kind of hypocrisy and excessive focus on individuals?

### Trans-Atlantic Lessons

The jurisprudence of a rights court such as the ECtHR which deals with issues of freedom of religion and the secular nature of the state in the absence of a non-establishment clause can provide a useful perspective for the USSC on the true goals underpinning the non-establishment part of the First Amendment. This lesson is that rights-based justifications for non-establishment are weak and ultimately (as in *Town of Greece*) undermine the principle of non-establishment.

One of the valuable features of US jurisprudence (no doubt linked to presence of a non-establishment clause) is the absence of judicial opining on the compatibility of the substance of the beliefs of particular religious traditions with liberal democracy. The ECtHR has been right to see that religion taking over the state can be oppressive and to state that secularism is a principle which is in line with the democratic and liberal values of the ECHR. Post-*Lautsi*, it is also clear that the Court recognises that, given its narrow, rights-focused mandate, mild non-oppressive forms of establishment, whether or not they are desirable (or wise in a diversifying religious context) are not for the Court to disturb.

At the same time, the Strasbourg Court must develop tools to allow its rights-focused approach to take adequate account of the non-rights based but legitimate reasons which may underpin restrictions on religious expression in particular contexts in order to preserve the religious neutrality of the state. Moreover, it needs to do so in ways that avoid the kind of pronouncements on the substantive beliefs of particular faiths that were seen in *Refah, Shahin* and *Dahlab*. Therefore rather than identifying the Islamic headscarf as hard to reconcile with gender equality as it did in *Dahlab*, it could restrict itself to noting that a desire to have a school system characterised by religious neutrality is legitimate. There are some positive signs in this regard. In *SAS v France* (which, it should be noted, related to an extreme religious symbol in social life rather than the relationship between religion and the state) the Court managed to avoid attributing particular meanings to the Islamic face-veil and instead upheld the French prohibition on the public wearing of such garments on the basis that the State had the power "secure the conditions whereby individuals can live together in their diversity".<sup>30</sup>

---

<sup>28</sup> *Eweida and Others v UK* [2013] ECHR 37 (Strasbourg decision) *Ladele v London Borough of Islington* [2009] EWCA Civ. 1357.

<sup>29</sup> See 'Supreme Court Approves Sectarian Prayer at Public Meetings' *The Washington Post*, May 5 2014 [http://www.washingtonpost.com/national/religion/supreme-court-approves-sectarian-prayer-at-public-meetings/2014/05/05/62c494da-d487-11e3-8f7d-7786660fff7c\\_story.html](http://www.washingtonpost.com/national/religion/supreme-court-approves-sectarian-prayer-at-public-meetings/2014/05/05/62c494da-d487-11e3-8f7d-7786660fff7c_story.html) (last accessed 3 December 2014).

<sup>30</sup> [2014] ECHR 695, paragraph 141.

This was criticised by the dissenting judges on the basis that this “does not fall directly under any of the rights and freedoms guaranteed within the Convention [...] [and as] the concept seems far-fetched and vague”. Other critics have rightly noted the danger for minority rights of allowing fundamental rights to be restricted on grounds other than protecting rights and freedoms. The dissenting judges are right that the majority’s reading of this term is strained. However, it is necessary to consider whether any other approach is possible. Whether the approach of the French authorities in this case was or was not proportionate, our life together is about more than the rights that we hold against each other and, as noted above, there are important principles that underpin liberal democratic life that are very imperfectly translated into rights terms. There are non-rights factors that rights-protecting courts must be free to take into account.

### **Complexity and the Limits of Lessons and Analogies**

There is much scope for Europe and the US to learn from our respective approaches to the relationship between religion and state. However, as academics, we must also be cautious and avoid using analogies from other polities or other times in ways that obscure the complexity of multi-faceted issues. There are, as noted, significant textual differences between the relevant legal instruments between Europe and the US and the USSC as a national court has much greater scope than an international tribunal such as the ECtHR to take controversial decisions in areas that are subject to such intense dispute. More broadly, the social reality of religion and religious change is vastly different in Europe and the US. While religion in public life is controversial in US politics, in Europe, religion’s relationship to law, politics and identity is bound up with highly combustible questions around immigration, racial discrimination, colonial attitudes, poverty, exclusion and real fear on the part of some around the compatibility with liberal democracy of religious traditions that have not been subject to the secularising influences that tamed the ambitions of many of the faiths that are long-established in Europe. Most of the most controversial discussions in Europe take place around the issue of Islam and its role in secularised, historically-Christian societies. As the US Muslim population is wealthier and a tiny fraction of the proportion of the population of key Western European countries, analogies from the United States are of limited use. A larger minority makes very different demands from a smaller one and the rest of the population reacts differently when faced with demands from larger groups. If the Amish or Muslims made up 5% to 10% of the US population (the proportion of the French population that is Muslim) the demands they would make and the willingness of the rest of society to agree to such demands would be radically different.

An over-reliance on analogies may lead us to be blind to the complexities of particular situations, to shoe horn current problems into factual matrices from the past and to assume that courts can resolve current problems as successfully as they solved previous ones. Many legal academics have been taught to venerate rights and the role of courts in defending them. Occasions, such as the US Civil Rights movement, where the balance of right and wrong were clear enough to allow courts to successfully resolve an issue are historically rare. Most issues are more complex. Those who are discriminated against in one way can themselves discriminate in other ways. It is vital that academics do not wish away complexity and that they do not assume that the success of courts in bringing justice in one context means that they are capable of doing so in all contexts. Separation of religion and politics is not just complex and multi-faceted, as Lilla noted, it is not an inevitability but rather a rather curious intellectual exercise that comes from particular historical experiences and requires effort. Courts do have some role at the margins in policing the boundaries of such a settlement but the ultimate success of the project of the secular state depends on a political will to share a single set of political institutions amongst a religiously diverse population. Using the courts as the primary vehicle to uphold such a system involves a corrosive attempt to subcontract the duty of elected representatives (and voters who choose them) to think in principled broader terms and leads to distorted and illogical justifications of the separation of religion and state. Finally, focusing on rights forces us to deal with rich and complex phenomena such as religion as it is lived and ideas of citizenship and our life

together to be dealt with through a phenomenon, the law, which must reconfigure and impoverish these concepts in order to make them legally workable. Rights have had a great impact on the treatment of many previously oppressed and excluded individuals and the law is a wonderful tool in advancing justice. We must however be modest in what we as lawyers, judges and jurists can achieve and make sure that we acknowledge that our life together is not just about the rights we hold and that we do not crowd out other necessary participants in the formation of just and lasting arrangements on these issues.

**Author contacts:**

**Ronan McCrea**

Senior Lecturer, Faculty of Laws, University College London, 2014-15

UCL Faculty of Laws

Bentham House

Endsleigh Gardens

London WC1H 0EG

United Kingdom

Jean Monnet Fellow, Robert Schuman Centre for Advanced Studies, European University Institute.

Email: [ronan.mccrea@ucl.ac.uk](mailto:ronan.mccrea@ucl.ac.uk)