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# Half-hearted Support to Pluralist Curriculum Building: The Case of Religion

Jeroen Temperman\*

## ABSTRACT

This article makes two claims, one explanatory, one normative. The former aims at explaining why pluralist religion teaching, be it teaching in the style advocated by the *OSCE Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools* or other forms of pluralist religion teaching or religious literacy teaching, has not become an overwhelming success in Europe. To that effect, the article identifies a number of incentives and disincentives contained in (interpretations of) international human rights law that serve to perpetuate confessional teaching models. The normative claim advanced in this article challenges international human rights monitoring bodies' 'claw-back-clause' reading of educational and religious rights of pupils and parental liberties. Specifically, the article concludes that advances in socio-legal science show that opt-outs are no remedy for the risks emanating from confessional religion teaching within public schools—rather, opt-outs are part of the problem.

## 1. INTRODUCTION

Contemporary curriculum-building endeavours aimed at promoting human rights through education—be it in the form of citizenship education, human rights-per-se education, pluralism or diversity modules, and so on—are all premised on the hypothesis that knowledge and understanding in the long run defeat prejudice and intolerance.<sup>1</sup> Applied to religion specifically, knowing not only one's own religion but

\* Professor of International Law at Erasmus University Rotterdam, the Netherlands, email: temperman@law.eur.nl

1 A plausible hypothesis which is, however, subject to intense debate; at a meta-level also the methods to measure the effects of human rights education are subject to intense debate; while at a meta-meta level it is, moreover (and intensely), discussed whether academic research currently focuses on the right or wrong questions if the aim is to provide a sound framework for (effective) human rights education. These discussions are beyond the scope of the present article (which takes the positive human rights ramifications of pluralist curriculum building for granted), for a tiny selection from a vast field see: Ann Quennerstedt, 'Children's and Young People's Human Rights Education in School: Cardinal Complications and a Middle Ground' (2022) *Journal of Human Rights* [advance online version]; Audrey Osler and Trond Solhaug, 'Children's Human Rights and Diversity in Schools: Framing and Measuring' (2018) 13(2) *Research in Comparative and International Education* 276–298; Felisa Tibbitts and Peter G Kirchschaeger, 'Perspectives of Research on Human Rights Education' (2010) 1 *Zeitschrift für Menschenrechtsbildung* 8.

also having a fair degree of literacy vis-à-vis the religious beliefs and practices of others is part of being a responsible citizen.<sup>2</sup>

UNESCO and the UN Office of the High Commissioner for Human Rights suggest that the value of human rights through education is three-fold and consists of intrinsic gains for the pupil as well as societal gains:

- Improved quality of learning achievements by promoting child-centred and participatory teaching and learning practices and processes, as well as a new role for the teaching profession;
- Increased access to and participation in schooling by creating a human rights-based learning environment that is inclusive and welcoming and fosters universal values, equal opportunities, respect for diversity and non-discrimination;
- A contribution to social cohesion and conflict prevention by supporting the social and emotional development of the child and by introducing democratic citizenship and values.<sup>3</sup>

To be sure, international human rights law supports human rights education. Education, under international law, comes with a mission. Education, within that body of law, is expressly grounded in liberal political values. Specifically, the 196 States Parties to the 1989 Convention on the Rights of the Child have agreed that the education of the child shall be directed towards the

preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all

- 2 In the words of the Parliamentary Assembly of the Council of Europe, 'good general knowledge of religions and the resulting sense of tolerance are essential to the exercise of democratic citizenship ... [K]nowledge of religions is dying out in many families. More and more young people lack the necessary bearings fully to apprehend the societies in which they live and others with which they are confronted. The media – printed and audiovisual – can have a highly positive informative role. Some, however, especially among those aimed at the wider public, very often display a regrettable ignorance of religions, as shown for instance by the frequent unwarranted parallels drawn between Islam and certain fundamentalist and radical movements ... [D]emocracy and religion should not be incompatible. In fact they should be valid partners in efforts for the common good. By tackling societal problems, the public authorities can eliminate many of the situations which can lead to religious extremism ... Education is essential for combating ignorance, stereotypes and misunderstanding of religions. Governments should also do more to guarantee freedom of conscience and of religious expression, to foster education on religions, to encourage dialogue with and between religions and to promote the cultural and social expression of religions. School is a major component of education, of forming a critical spirit in future citizens and therefore of intercultural dialogue. It lays the foundations for tolerant behaviour, founded on respect for the dignity of each human being. By teaching children the history and philosophy of the main religions with restraint and objectivity and with respect for the values of the European Convention on Human Rights, it will effectively combat fanaticism. Understanding the history of political conflicts in the name of religion is essential. Knowledge of religions is an integral part of knowledge of the history of mankind and civilisations. It is altogether distinct from belief in a specific religion and its observance. Even countries where one religion predominates should teach about the origins of all religions rather than favour a single one or encourage proselytising.' CoE Parliamentary Assembly, Recommendation 1720 (2005) Education and Religion, excerpts from paras 1–8.
- 3 UNESCO and UN-OHCHR, *Human Rights Education in Primary and Secondary School Systems: A Self-assessment Guide for Governments* (UN 2012) 2.

peoples, ethnic, national and religious groups and persons of indigenous origin.<sup>4</sup>

The preparation of the child for a responsible life in a free and tolerant society with respect for equality and diversity, naturally, forms a solid basis for human rights-based approaches in education. Respect for religious diversity (ie ‘friendship among all . . . religious groups’ in CRC, which predates our contemporary diversity terminology) is an important component in this foundational clause.

Indeed, various international and European guidelines have aimed at conceptualizing precisely that: endowing pupils, future responsible citizens, with religious literacy and understanding and respect for religious equality and religious freedoms. Existing efforts range from the OSCE’s *Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools* (TGP, 2007), to the Council of Europe’s *Signposts*; to the European Union’s *REDCo* project<sup>5</sup>—initiatives with different nuances but at the end of the day all aiming at promotion of respect for religious diversity and solidly couched on the notion of religious literacy: knowledge defeats prejudice, understanding defeats intolerance.

It is in the face of these pluralist aspirations that ‘confessional teaching may remain the most widespread approach in Europe (with occasional gestures towards religious diversity).<sup>6</sup> And while there are some ‘good practices’<sup>7</sup> and perhaps even ‘trends’<sup>8</sup> towards a somewhat wider adoption of TGP-style pluralist religion teaching, overall we are yet far removed from pluralist religion teaching being part and parcel of the European public school system.

This article investigates this discrepancy between the international policy focus on pluralist religion teaching versus domestic practices that favour different models. The

4 Convention on the Rights of the Child (CRC), art. 29(1)(d).

5 OSCE, *Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools* (2007); the Council of Europe’s *Signposts* (*Signposts - Policy and practice for teaching about religions and non-religious world views in intercultural education* [2014]; and *Inclusive Study of Religions and World Views in Schools: Signposts from the Council of Europe* [2016]); European Union’s *REDCo* project (a Europe-wide initiative on religion in education).

6 Luce Pépin, *Teaching about Religions in European School Systems: Policy Issues and Trends* (NEF Initiative on Religion and Democracy in Europe 2009) 10.

7 eg Sweden has adopted an approach to religion teaching in public schools that resembles relatively closely the model advocated by the TGP. See the comprehensive body of work by Jenny Berglund on Swedish religion teaching.

8 Pépin (n 6) 10–11. Shifts since the 2009 comparative study by Pépin, however, are few and far between. According to EU’s Fundamental Rights Agency, in 2018 the situation was as follows: ‘In the majority of EU Member States, children receive religious education in public schools, either as a compulsory or as an optional subject. In most cases, the possibility to withdraw from religious education is subject to the written consent of parents.’ FRA, ‘Withdrawing From Religious Education at School’ (FRA, 24 April 2018) <<https://fra.europa.eu/en/publication/2017/mapping-minimum-age-requirements-concerning-rights-child-eu/withdrawing-religious-education-school#:~:text=In%20the%20majority%20of%20EU,the%20written%20consent%20of%20parents.>>. One of the most recent comparative studies on the role of religion in European schools, covering 17 countries, shows that in virtually all countries traditional Religious Education is subject to discussion and changes; however, with the exception of some of the Nordic countries (notably Sweden and Norway), these changes do not result in TGP-style teaching becoming the default model for the teaching of or about religions in the public school. European Academy on Religion and Society, *Education and Religion in Europe* (EARS 2021).

article makes two claims, one explanatory, one normative. The article, first of all, identifies a number of incentives and disincentives contained in (interpretations of) international human rights law that serve to perpetuate confessional teaching models within public schools. The normative claim advanced in this article challenges international human rights monitoring bodies' 'claw-back clause' reading of educational and religious rights of pupils and parental liberties.

Accordingly, this contribution investigates the root causes behind the meagre successes of pluralist religion teaching as advocated by international human rights benchmarks. It is hypothesized and illustrated that international human rights law itself (section 2), as interpreted by human rights monitoring bodies, contains disincentives to promote and implement TGP-style teaching as the preferred, let alone as the mandatory, approach to teaching religion within the public school curriculum. Combine this with a cocktail (section 3) of traditional church prerogatives in the area of education as well as formal deals between the state and church on the role of religion in education, and the unwanted competition experienced by religious institutions vis-à-vis TGP-style teaching, and it becomes clear that the plight of religious diversity through education is an uphill battle. Considering socio-legal scholarship (section 4), however, the default system defended by churches and human rights monitoring bodies alike (non-pluralistic teaching with opt-outs) is, it will be concluded, no longer defensible.

## 2. INTERNATIONAL LAW AND TGP-STYLE PLURALIST RELIGION TEACHING

This section investigates international law's position on pluralist religion teaching. While there are nuances that go beyond the aim of this contribution, pluralist religion teaching, religious literacy teaching, or 'TGP-style' teaching—the TGP being arguably the most sophisticated version of pluralist religion teaching with profound respect for the freedom of religion or belief of both pupil and parent/legal guardian<sup>9</sup>—are here used interchangeably, all being modalities of pluralist religion teaching as advanced by international human rights benchmarks, albeit not quite covered directly by hard law (eg human rights treaty) standards.

Global and regional human rights standards do not vary much on the issue of religion and education.<sup>10</sup> Generally speaking, human rights law guarantees the right to

9 Indeed, the Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools (TGP) seem to go considerably beyond mere 'literacy' with regard to the different religions or beliefs, rather aiming for relatively profound levels of knowledge. In its own terms, the TGP offer an 'educational approach that seeks to provide teaching *about* different religions and beliefs as distinguished from instruction in a specific religion or belief. They also aim to offer criteria that should be considered when and wherever teaching about religions and beliefs takes place.' Further on these latter criteria, the first three key guiding principles provide: '1. Teaching about religions and beliefs must be provided in ways that are fair, accurate and based on sound scholarship. Students should learn about religions and beliefs in an environment respectful of human rights, fundamental freedoms and civic values. 2. Those who teach about religions and beliefs should have a commitment to religious freedom that contributes to a school environment and practices that foster protection of the rights of others in a spirit of mutual respect and understanding among members of the school community. 3. Teaching about religions and beliefs is a major responsibility of schools, but the manner in which this teaching takes place should not undermine or ignore the role of families and religious or belief organizations in transmitting values to successive generations.'

10 For a comprehensive account, see Jeroen Temperman, 'State Neutrality in Public School Education (2010) 32 Human Rights Quarterly 866; for religious freedom and educational rights under the

education and, at the same time, the right to freedom of religion or belief, of both pupils and parents. This latter aspect, 'parental liberties' vis-à-vis their children's religious or non-religious upbringing and education do have somewhat differing nexus under the various bodies of human rights law. Specifically, and interestingly, while under the UN International Covenant on Civil and Political Rights (ICCPR) this notion is a species of the fundamental right to freedom of religion or belief (and can be found in its Article 18, fourth paragraph),<sup>11</sup> under the European Convention on Human Rights the drafters rather sought to stipulate similar liberties as an integral aspect of the right to education (where both the right to education per se and parental liberties vis-à-vis their children's education can be found in the first Protocol to the ECHR).<sup>12</sup>

While the right to education is furthermore codified by various international human rights treaties (including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)),<sup>13</sup> importantly the Convention of the Rights of the Child (CRC)<sup>14</sup> also expressly enshrines both the right to education—of the child—and the right to freedom of religion or belief—of the child—while also noting the said parental liberties. The latter convention also emphasizes such notions as the 'best interest of the child' and the 'evolving capacities of the child'. Parental liberties, hence, recede as the child matures.<sup>15</sup> Tensions in the area of education and religion may be settled in favour of the autonomous rights of the child inasmuch as the child is indeed 'evolved', ie mature enough to decide on matters of religion or education. There is, however, no absolute cut-off point in that regard, although it is striking that the Committee on the Rights of the Child, through its state reporting procedure, urges states to report on the legal age for making decisions autonomously in the combined areas of education and religion and the Committee also advises against parental consent, ie dominance of parental liberties, in the same context.<sup>16</sup>

European Convention on Human Rights, see Jeroen Temperman, 'Education and Freedom of Religion or Belief under the European Convention on Human Rights and Protocol No. 1' in Jeroen Temperman, Jeremy Gunn and Malcolm Evans (eds), *The European Court of Human Rights and the Freedom of Religion or Belief: The 25 Years since Kokkinakis* (Brill 2019) 178.

- 11 International Covenant on Civil and Political Rights, art 18(4): 'The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.'
- 12 Protocol [I] to the Convention for the Protection of Human Rights and Fundamental Freedoms (1952), art 2: 'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.'
- 13 Convention on the Elimination of All Forms of Discrimination against Women (1979), art 10; International Covenant on Economic, Social and Cultural Rights (1966), art 13.
- 14 Convention on the Rights of the Child, art 28.
- 15 See also Eva Brems, *A Commentary on the United Nations Convention on the Rights of the Child, Article 14: The Right to Freedom of Thought, Conscience and Religion* (Martinus Nijhoff Publishers 2006) 26.
- 16 States parties to CRC must report on the minimum legal age defined by the national legislation for 'choosing a religion or attending religious school teaching' (*General Guidelines for Periodic Reports, CRC/C/58, para 24*); while, moreover, specific concern was expressed regarding for instance the situation in Poland where 'students require parental consent to attend ethics courses' (*Concluding Observations: Poland, CRC/C/15/Add.194, para 32*).

Furthermore, international monitoring bodies appear agreed on what freedom of religion or belief and the right to education, when taken into conjunction, imply. Generally speaking, states must make accessible without discrimination and free of charge primary schooling and states must abide by the *duty to respect* the right to freedom of religion or belief of both parents and child. Concretely, that means that there may not be any religious requirements or qualifications posed to the enrolment at public schools. Moreover, the public school system and curriculum may not be religiously coercive.

The European Court of Human Rights has come up with a fixed mantra in this context. Since the 1976 landmark case *Kjeldsen, Busk Madsen and Pedersen v Denmark*, the baseline that can be inferred from children's rights to education and to freedom of religion or belief and parental rights in the areas of education and religion (involving compulsory sex education) is that

the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an *objective, critical and pluralistic* manner.<sup>17</sup>

The equally important flipside is that when forms of teaching are in fact 'objective, critical and pluralistic', parental liberties cannot be successfully mobilized against that part of the curriculum. That is, if the educational framework or specific aspects of the public school curriculum are determined to pass the test of pluralism ('objective, critical and pluralistic'), parents do not have (human rights-based) grounds for complaint and cannot even, strictly speaking, rely on exemptions to have their children opted out from the impugned course or other aspect of the curriculum. In the words of the European Court of Human Rights, relevant fundamental rights do

not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable.<sup>18</sup>

The UN Human Rights Committee, monitoring compliance—of the 173 State parties—with the ICCPR, has arrived at a similar conclusion: 'The Committee is of the view that article 18.4 permits public school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way.'<sup>19</sup>

17 *Kjeldsen, Busk Madsen and Pedersen v Denmark* App Nos 5095/71, 5920/71, 5926/72 (ECHR 7 December 1976) para 53 (emphasis added).

18 *ibid*, para 53; *Folgerø and Others v Norway* App No 15472/02 (ECHR, 29 June 2007).

19 Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)* adopted at the Forty-eighth Session of the Human Rights Committee, on 30 July 1993 CCPR/C/21/Rev.1/Add.4, [General Comment No. 22], para 6. From the context it transpires that no exemptions are necessary, as further down the comment in the same paragraph the Committee poses the opt out requirement exclusively in direct relation to 'instruction in a particular religion'.

These profound points of departures, legal avenues or openings for (the shaping of) compulsory TGP-style religious pluralism teaching, again, have not, in Europe or beyond, been widely utilized and have not led to a widespread model of *objective, critical and pluralistic* religious literacy teaching in primary and secondary schools. This contribution hypothesizes this is not because too many parents would be against such teaching and would start demanding sweeping exemptions. This situation has arisen not as a lack of demand for such teaching: non-religious and religious parents alike may very well be interested, for their children, in inclusive religious literacy teaching.

The first reason explaining the absence of a widespread religious literacy model is because international human rights law tolerates alternatives. To be precise, the UN Human Rights Committee has stipulated that ‘public education that includes instruction in a particular religion or belief is inconsistent with article 18.4 unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.’<sup>20</sup> While negatively put—‘religious instruction’ is in principle contrary to the Covenant—it is the sweeping claw-back clause on exemptions that opens the backdoor widely for religious instruction.

In practice, in the jurisprudence, this formulation—instruction in a particular religion is not allowed, unless opt-outs are in place—has translated into a two-prong test. Monitoring bodies, the UN Human Rights Committee and the European Court of Human Rights alike, first apply the ‘objective, critical and pluralistic’ test; that is, the impugned aspect of the public school framework or specific aspect of the curriculum is subject to the test of objectivity, criticalness, and pluralism. If the said framework or curriculum does not pass this test, the public school system and its curriculum may still be saved based on the claw-back clause. That is, if opt-outs are offered—if ‘provision is made for non-discriminatory exemptions’—the school authorities may continue the school subject, or framework aspect, at stake.

For instance, in *Leirvag v Norway* the UN Human Rights Committee first concluded that the religious instruction subject at stake ‘was not neutral in value, and that the main emphasis of the subject was instruction on Christianity’ since ‘at least some of the activities in question involve, on their face, not just education in religious knowledge, but the actual practice of a particular religion.’<sup>21</sup> It then moved on to the claw-back clause: ‘The second question to be examined thus is whether the partial exemption arrangements and other avenues provide “for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents or guardians”.’<sup>22</sup> In this case, the Committee incidentally found that the course did not pass the first test, and upon scrutinizing the second test on opt-outs, found that the exemption policy in place was not adequate either.<sup>23</sup>

20 General Comment No 22, para 6.

21 *Leirvag v Norway*, Comm No 1155/2003 (Human Rights Committee, Views of 3 November 2004), para 14.3.

22 *ibid* para 14.4.

23 *ibid* para 14.6. Concerning the exemption, the Committee ruled that it ‘imposes a considerable burden on persons in the position of the authors, insofar as it requires them to acquaint themselves with those aspects of the subject which are clearly of a religious nature, as well as with other aspects, with a view to determining which of the other aspects they may feel a need to seek – and justify – exemption from. Nor



Be that as it may, the international legal framework as currently understood insists that non-pluralist subjects taught at public schools may in theory and in the final analysis pass the human rights test if proper exemption policies are adopted. This approach goes back a long time. For instance, in the 1981 case of *Hartikainen v Finland*, the Human Rights Committee deemed a parental-liberties complaint (Article 18(4)) altogether inadmissible since Finish law ‘expressly permits any parents or guardians who do not wish their children to be given either religious instruction or instruction in the study of the history of religions and ethics to obtain exemption there from by arranging for them to receive comparable instruction outside of school.’<sup>24</sup> It is also held more generally that ‘[i]f religious instruction according to any specific denomination is given at a government-subsidized primary or elementary school or other institute of learning, a student who adheres to another denomination, or no denomination, shall upon the demand of the guardian be exempted from such religious instruction.’<sup>25</sup>

The European Court of Human Rights has adopted the exact same approach. *Folgerø and Others v Norway* revolves around the same religious subject, albeit with different parents complaining, as in the *Leirvag* case discussed just now. Seeking to replace an older religious instruction course within the Norwegian state school curriculum with a new course that was supposedly more neutral in character, a number of secular-humanist parents complained that the new course was still overly confessional in the way it approached Christianity as compared to other religions. The European Court of Human Rights agreed. It reiterated as a general principle under the Convention (Article 2 of Protocol No 1 to be precise) that

in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents’ religious and philosophical convictions. That is the limit that must not be exceeded . . . .<sup>26</sup>

This new ‘Christianity, Religion and Philosophy’ subject was in fact introduced by way of a reform policy to make the Norwegian curriculum more detached from the former Lutheran state church. Yet it was deemed by the European Court of Human Right to have failed in that mission and to still be overly indoctrinating, chiefly on account of the new school law’s drafting history and the law’s objectives (importantly concerned with instilling Christianity into pupils) and because of certain religious

would it be implausible to expect that such persons would be deterred from exercising that right, insofar as a regime of partial exemption could create problems for children which are different from those that may be present in a total exemption scheme. Indeed as the experience of the authors demonstrates, the system of exemptions does not currently protect the liberty of parents to ensure that the religious and moral education of their children is in conformity with their own convictions.’

24 *Hartikainen v Finland* Comm No 40/1978 (Human Rights Committee, Views of 9 April 1981) para 10.4.

25 *ibid*, para 7.2.

26 *Folgerø and Others v Norway* App no 15472/02 (ECHR [GC], 29 June 2007) para 84; drawing on *Kjeldsen, Busk Madsen and Pedersen v Denmark* (n 17) para 53.

rituals being incorporated into the didactical model such as hymn signing and bible recitals.

As a result, in the Court's understanding of Article 2 of Protocol No 1, the question of opt-outs was asked and assessed, implying that a complete and meaningful exemption to the new subject could have 'salvaged' its introduction after all. Like the mirror decision by the Human Rights Committee in the near-equivalent *Leirvag* case, the Court ruled that the religion subject also could not pass the second prong of the human rights test and breached the claw-back clause on meaningful exemptions. The Court came to that conclusion as it agreed with the parents-complainants that the offered opt-outs were far from complete and were moreover needlessly burdensome to avail of. More recent case law has further entrenched the approach taken by the European Court of Human Rights to non-pluralist religious instruction cases. While time and again such cases lead to violations precisely because the Court finds defects to do with the specific exemption scheme,<sup>27</sup> the official doctrine of opt-outs potentially remedying the freedom encroachments that stem from such teaching is never questioned and remains intact.

In conclusion, the international legal framework on the role of religion teaching in public schools—as interpreted by international human rights monitoring bodies—refrains from proactively enforcing TGP-style religious pluralism didactical models. Moreover, international law, as currently understood, appears to permit alternative models that are far less ideal from a religious pluralism or religious literacy perspective. The models permitted include religious indoctrination models, as long as exemptions are permitted. Under this framework and under these interpretations, then, states are free not to prioritize religious pluralism models and even free to acquiesce in religious indoctrination models, with the only hard and fast requirement that exemption policies are in place. International human rights law as interpreted by monitoring bodies, hence, does not robustly and forthrightly promote religious pluralism teaching; its ambitions are currently confined to the attempt to avoid religious coercion and indoctrination.

Later, in section 4, we will see that international human rights law, moreover, fails in even that non-ambitious mission: exemptions do not remedy the coercive nature of indoctrinating religious education. But before that, let us consider how other players and stakeholders approach the role of religion in the state school curriculum and how the above-described lack of proactive guidance and steering on the issue of religious pluralism strengthens some actors to promote non-pluralist models of religion teaching.

### 3. CHURCH PREROGATIVES AND RELIGION-STATE (INTERNATIONAL) AFFAIRS

A spectrum of ideal types of the—theoretical and varying—roles or 'positions' of religion within the educational framework may very well look like this (see [Table 1](#)).

27 For two noteworthy cases concerning the plight of Alevis in Turkey and their continued struggle for inclusion in the Turkish curriculum or at least proper exemptions from Sunni teachings in Turkish schools, see *Hasan and Eylem Zengin v Turkey* App No 1448/04 (ECHR, 7 October 2007); and *Mansur Yağın and others v Turkey* App No 21163/11 (ECHR, 16 February 2015).

**Table 1: Role of religion in education: A spectrum of ideal types**

Private		Public			
Denominational schools with religious entry criteria	Denominational schools without religious entry criteria	Public schools with religious instruction with-out opt-outs	Public schools with religious instruction with opt-outs	Public schools with no religious instruction yet with TGP-style teaching about religions with opt-outs	Public schools with no religious instruction yet with TGP-style teaching about religions without opt-outs

The proposed spectrum of ideal types runs from a very dominant role of the state religion (or otherwise predominant religion) within education, via forms of a lesser grasp of the predominant/official religion on schooling, to forms where the influence of any official religion has made way to a neutral and inclusive approach to the teaching about *various* religions and non-religious beliefs.

Obviously, this spectrum is far from flawless. Or rather, the ‘ideal-type’ nature of the spectrum cannot be overemphasized. For one thing, various forms appear, in practice, to coexist. For instance, private denominational schools coexist in many countries with public schools where religion also plays an important role, namely one of the two central columns (religious instruction with or without exemptions).

Also, in reality, the public–private divide may be much more obscure. Take Ireland for example, where public law creates so-called national schools, but also mandates these to be effectively administered by church bodies, thus blurring the public–private divide. Are these schools public or private? One may very well argue that, whatever their status under the law, there is not sufficient access to *public schooling* in the proper sense of the word despite or indeed, *because* of the omnipresent of these national (church-led) schools, with very few non-denominational schools being present.<sup>28</sup> Furthermore, at the right-hand side of the spectrum, one could well argue that the last two columns ought to be reversed, since the ‘grasp’ of religion on the curriculum appears stronger when there are no opt-outs compared to a model wherein exemption are made available. However, as will be argued, from a state religion perspective, or from the perspective of the dominant religion, neutral education about various religions may be abhorrent or at least objectionable (at least compared to traditional confessional teaching) and from the same perspective the absence of exemptions may make the situation even more objectionable. Thus, it is in that particular sense that one could reason that (state) religion’s grasp on the public school curriculum is most absent within that particular pillar on the utmost right-hand side.

Be that all as it may, let us reiterate that the previous section established that, putting it bluntly, international law is non-committal when it comes to religious-pluralism-through-education in general and that TGP-style religious pluralism education specifically is not promoted passionately by monitoring bodies. Outright religious discrimination in education is banned, but even there some (international) laws and regulations make exceptions for the private, denominational sphere. And outright religious coercion is prohibited, clearly only at the public side; religious indoctrination within private denominational schools is an important part of their *raison d’être* and international law respects that.<sup>29</sup>

28 As repeatedly criticized by international monitoring bodies (an early example is the UN Human Rights Committee’s concluding observation on Ireland: CCPR/C/IRL/CO/3 [2008] para 8) and as observed in the shadow reports, notably in the work by Alison Mawhinney. See eg Alison Mawhinney, *Submission to the Human Rights Committee with Respect to the Third Periodic Report of Ireland* (Queen’s University Belfast, March 2008); and Alison Mawhinney, *Key Priorities and Challenges Facing Ireland in Complying with Its Obligations Under the ICCPR* (Bangor University, 2014).

29 The Convention on the Rights of the Child protects the right of those who do not wish to avail of the (secular or neutral) public school system to establish private (including denominational) schools. art 29, para 2, provides: ‘No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the

Accordingly, the upshot of these minimal legal considerations enshrined within international human rights law, as interpreted by monitoring bodies, is as follows (see Table 2).

What this second table shows is that nearly anything goes. Merely Model 1 (first column from left-hand side) and Model 3 (third column) are barred.

Model 1 actually forms somewhat of a grey area and it is mostly looking at domestic laws (in liberal democracies) that we can come to the conclusion that discrimination (making distinctions based on the ground of religion or belief) at the enrolment level is prohibited under most equality laws. While protecting religious autonomy is deemed important, the pendulum is shifting from the dominance of allowing private entities to protect their religious ethos and homogeneity, to protecting equality and universal access. There are certainly exceptions to the rule, with Ireland again being a case in point as its Equal Rights Act reserves the possibility of making distinctions on the ground of religion (and gender) in the area of education. In the Netherlands, by contrast, denominational schools may not use religion as a selection ground upon enrolment unless this is firmly enshrined in the school's statutes and serves to protect the school's mission and is consistently implemented (eg not used to exclude pupils with religion *x* but not pupils with religion *y*). Also, distinctions based on other grounds—notably sexual orientation—can never be legitimized by reference to the school's religious mission in the Netherlands. And even if all conditions are fulfilled, the possibility to use religion as an enrolment factor may be overruled by the state in the event public schools are not widely available within that particular region. Monitoring bodies, in any event, have expressed concerns with respect to those countries that permit denominational schools' posing religious entry qualifications. CERD, for example, expressed its concern with respect to Ireland, noting that 'existing laws and practice would favour Catholic pupils in the admission to Catholic schools in case of shortage of places, particularly in the light of the limited alternatives available.'<sup>30</sup>

That leaves only the third model (Column 3) as indisputably outlawed under international human rights law: compulsory religious instruction at public schools, taught in a confessional manner, with no possibility to opt one's child out of it is pretty much the only taboo in the present context. This conclusion we have seen in the previous section and is based on the described reigning two-prong jurisprudential approach to religion-in-education cases: with Step 1 checking the relevant subject's pluralist qualities; and Step 2 checking the existence and quality of exemptions—if both steps lead to the determination of concerns, ie non-pluralist religion teaching and the absence of opt-outs, the combination causes a human rights violation.

Within that particular context, it becomes clear that 'religion' may very well have a stronghold on private education and public education alike. International human rights law directly authorizes parents who do not wish to avail of the public school system, for reasons of that system being *too* public, *too* secular, or *too* neutral, in their eyes, to organize themselves with a view towards establishing and administering

education given in such institutions shall conform to such minimum standards as may be laid down by the State.' art 13, para 4, of the ICESCR also guarantees the liberty to establish private schools.

30 CERD, A/60/18 (2005). Much more can be said about (human rights concerns and) the private side of the spectrum, which goes beyond the aim and scope of the present contribution.

**Table 2: Permissible and non-permissible models of religion in education**

Private		Public			
Denominational schools with religious entry criteria	Denominational schools without religious entry criteria	Public schools with religious instruction without opt-outs	Public schools with religious instruction with opt-outs	Public schools with no religious instruction yet with TGP-style teaching about religions with opt-outs	Public schools with no religious instruction yet with TGP-style teaching about religions without opt-outs
Serious human rights concerns	Permitted	Not permitted	Permitted	Permitted	Permitted

private schools that do respect their rights, freedoms and consciences. International human rights law at the same time permits ‘religion’ to enter public schools. Reigning human rights interpretations are not couched on a need to police the separation of state and religion within the educational context; quite the contrary, these interpretations open the front gates of public schools for doctrinal religion teaching. The only criterion posed is that of exemption policies: opt-outs must be in place, in that way coercion and indoctrination—it is believed—will stay well outside of the school gates.

Obviously the above is put in somewhat dramatic terms. Yet the point on non-regulation—or at least modest regulation—is a profound and significant one. Religious actors, sometimes in tandem with those state authorities interested in promoting dominant religious morality, may well seek to perpetuate traditional church or religious prerogatives in the area of education. That is, in many countries, education and religion have been intertwined for centuries. While international law views education as an important public good and turns sufficient access to non-discriminatory and high-quality public school education into a human right, reasoned from the perspective of ancient church prerogatives, ‘education’ may be viewed as a private affair and outside interference as threats to religious autonomy.

Little variation—too little from a religious pluralism and religious literacy perspective—to the dominant tune of confessional religious instruction is being experimented with, also in nominally liberal and pluralist states. In some instance, any such variation is perpetually forestalled on account of explicit deals between church and state. For example, the Constitution of Malta establishes the Catholic religion as the state religion, spelling out that the ramifications thereof are:

The authorities of the Roman Catholic Apostolic Church have the duty and the right to teach which principles are right and which are wrong . . . Religious teaching of the Roman Catholic Apostolic Faith shall be provided in all State schools as part of compulsory education.<sup>31</sup>

This contracting-out of education to the church, in turn, impacts international law. Malta has made sweeping reservations to educational rights. For example, Malta has reserved expressly to Protocol No 1 (ECHR) stipulating that the education clause ‘is accepted by Malta only in so far as it is compatible with the provision of efficient instruction and training . . . having regard to the fact that the population of Malta is overwhelmingly Roman Catholic.’ Behind the scenes it is the Holy See that is dictating all of the above, since another, peculiar branch of international law—Concordats between the Holy See and predominantly Catholic states—force the latter’s hands.<sup>32</sup>

While it is certainly true that teaching-about-religions, despite excellent international benchmarking (notably the TGP), remains woefully underexplored; traditional religious education, both at public schools and denominational schools (here

31 Constitution of Malta, art 2(2)(3) (numbers omitted from the quote).

32 In the case of Malta, see Agreement between the Republic of Malta and the Holy See on Catholic Education in Public Schools (16 November 1989).

also on account of the coincidence of elements of purely private and state-promoted forms of religious instruction and religious education) has been subject to more or less ‘pluralization’ in different countries.<sup>33</sup> These multi-religious or semi-confessional models remain nevertheless far removed from the ‘teaching-about-religions’ (TGP-style) paradigm in that within the former models at least one religion is taught in a confessional fashion, thus contrasting sharply with the more holistically objective, critical, and pluralistic mindset that underlies the latter model.

Thus, the key reason why TGP-style *teaching about religions* has not become an overwhelming success has to do with organized religion’s traditional prerogatives within public schooling. There is (within the TGP-based geographical region of Europe and many additional western hemisphere states), presently, no separation between religion and the state in the educational sphere: there is confessional religion teaching at private denominational schools and there is *more* confessional religion teaching—at public schools. Churches and religions may nominally be all in favour of religious diversity, but why would they be actively giving up ancient prerogatives that have fostered their proselytism missions for centuries. Indeed, why would the church settle for neutral approaches to religion in education—this is something abhorrent to many a confessional approach to religion. And indeed, why would the church even welcome the competition from neutral teaching about religion when it can have all it desires in the, from its perspective, optimal model of denominational schooling *tout court* plus the religious-instruction-in-public-schools model?

In sum, international standards on religion and education as currently interpreted by monitoring bodies have generated a major perverse incentive. The key stakeholder in the debate, the dominant church, has no interest whatsoever in seeking TGP-style education become a success for if it were to become so, that model would compete directly with the preferred models of religious instruction. And at the same time, TGP-style teaching is premised upon the inclusion and support by organized religions and beliefs, as sounding board for the to-be-developed textbooks, to check whether materials included are fair, correct, respectful, and free of prejudice, as sparring partner in train-the-trainer activities, indeed as advisory boards for the entire mission of *teaching about religions*. The perverse incentive makes for a situation where it is in organized religion’s interest to let every step of that path become a failure. For if TGP-style teaching proves impracticable, we are back at the current default: religious instruction and more religious instruction.

#### 4. A REALITY CHECK FOR MONITORING BODIES? FINDINGS IN SOCIO-LEGAL STUDIES

The position of both the UN and regional European human rights monitoring bodies up until today remains that if knowledge is conveyed in a fashion that is not objective, critical, and pluralistic, human rights of children and parents are not necessarily breached as long as sound exemption policies are in place. In the area of access

33 See Leni Franken, ‘Coping with Diversity in Religious Education: An Overview’ (2017) 38 *Journal of Beliefs & Values* 105–120.



to education and freedom of religion or belief, accordingly, international law as interpreted by international monitoring bodies has staked children's and parents' rights on a safety net. But what if that safety net contains holes?

That is precisely what qualitative research in those countries that work with opt-outs show: Opt-outs are not the solution to religious coercion in the public school classroom, they are part of the problem. Notably, the work of Alison Mawhinney shows that it is an utter illusion that exemptions shield against breaches of the freedom of religion or belief or that exemptions fix each and every obstacle to access to public school education.<sup>34</sup> In addition to such studies focusing on Northern Ireland and Britain, similar studies carried out in, for instance, Turkey show very similar results.<sup>35</sup> In essence, opt-outs foster anxiety, peer-pressure, stigmatization, differential treatment, as well as familial, self-esteem, and identity issues. Opt-outs do not fix coercion, they cause coercion and exclusion. Opt-outs do not fix religious freedom concerns, they foster religious freedom breaches. And opt outs do not foster access to public school education, but form a major obstacle to access to public schools.

The findings of one such study, carried out in Northern Ireland and based on interviews with secondary public school pupils aged 13–18 years and their parents coming from minority religions or beliefs, is particularly striking. The study shows, first of all, that while exemptions exist on paper, hardly anyone is fully aware of their rights, including pupils and parents, or of the legal situation, including teachers and schools' senior managements.<sup>36</sup> And even when pupil and parents are aware of their rights, on the basis of solid school information or otherwise, the exemption system comes with such experienced pressures that opting out is not truly an option. For the child, the 'fear of appearing different', combined with the wish to ensure 'positive relationships with the RE teacher and classmates' as well as other 'academic considerations' may amount to insurmountable obstacles to actually availing of the exemption.<sup>37</sup> That is, the exemption does not liberate the pupil from pressures, it creates pressure and dilemma's, anxiety and fear to stand out and perhaps to miss out, also miss out on opportunities—what if everyone takes that class except me, will that hamper my prospects, academically and/or socially? Parents, too, worry about such matters: 'Most parents who were faced with an opt-out decision spoke of the fear that their child would "stand out" and feel excluded.'<sup>38</sup> All such experiences unveil that the exemption policies do not manage to patch up the coercive nature of religious instruction in public schools, the safety net is an illusionary one, a net full of

34 See eg Queen's University Belfast, *Opting Out of Religious Education: The Views of Young People from Minority Belief Backgrounds* (Queen's University Belfast 2010); Alison Mawhinney and others, 'Religious Education and Religious Liberty: Opt-outs and Young People's Sense of Belonging' in Myriam Hunter-Henin (ed), *Law, Religious Freedoms and Education in Europe* (Ashgate 2012); Alison Mawhinney, 'The Opt-out Clause: Imperfect Protection for the Right to Freedom of Religion in Schools' (2006) 2 *Education Law Journal* 102.

35 Presentation by Gündem Çocuk (Children's Association) at the international expert conference entitled 'Freedom of Religion or Belief in the Education System', organized by Norwegian Helsinki Committee Freedom of Belief Initiative and Ankara University Human Rights Centre, 27 March 2015, Ankara, Turkey.

36 Queen's University Belfast (n 34) 4–6 (conclusions 1 and 10).

37 *ibid* 4 (conclusion 4).

38 *ibid* 6 (conclusion 10).

holes. And even when the exemptions are availed of, experiences by persons from religious minority backgrounds are overall far from satisfactory:

While opt-out clauses were seen as sufficient by some, several parents and community representative expressed dissatisfaction with the overall concept that the opt-out clause could protect and respect minority beliefs in schools, preferring a system where parents would choose to opt their children *into* RE, rather than out, in order to remove the pressure from minority belief parents. Additionally, it was suggested that the right to opt-out was not so much a protection mechanism for minority belief individuals but an ‘exclusion clause’ and that it was damaging to a child’s self esteem if her or his beliefs were not recognized within the school and the curriculum.<sup>39</sup>

Thus, the public school framework that includes religious instruction and that provides for exemptions, is experienced as a system of exclusion. Such a framework raises the threshold for the enjoyment of *public* school education, creates unacceptable dilemmas and fear and anxiety, and makes some people from minority religions feel as persons with beliefs that apparently do not matter. Both access to public school education and the right to freedom of religion or belief, of child and parents, are undermined by the opt-out modality.

A related systemic flaw of exemption policies has to do with privacy per se, the privacy of one’s inner convictions. Operating an opt-out system within public schools inevitably means that people from minority religions are forced to reveal themselves, to step up to the school authorities, and to indicate that they are different, that they do not wish full confessional immersion into the state’s dominant religion for their child.

## 5. CONCLUDING REMARKS

Opt-outs are problematic and do not remedy the coercive and exclusionary nature of confessional religion teaching within the public school framework. Opt-outs cause impossible dilemmas, interfere with religious freedom of both child and parent, and cause unacceptable obstacles to access to *public* school education. In the face of all these concerns, up until the present day international monitoring bodies accept exemption schemes as wholesale solutions to the problem of religious compulsion within public schools. Moreover, the direct side effect of monitoring bodies’ uncritical endorsement of confessional religion teaching within the public school classroom is that objective, critical, and pluralistic teaching about religions never really gets the traction it deserves from a diversity and tolerance perspective.

Banning religious instruction from the public school classroom altogether—naturally leaving the right to establish private religious school fully intact—would foster human rights promotion tremendously. Only in that way would the state be in a position to comply fully with its *duty to respect* the religious freedoms of all children and their parents. And moreover, in that way the state would optimally discharge its *duty to fulfil* and especially promote religious freedom and religious diversity, for in that

39 *ibid* 6 (conclusion 12).

scenario religious literacy teaching would become the likely default option. Religious stakeholders would have a direct stake in making TGP-style teaching a success—lest any knowledge about religions including the dominant one drops off the blackboard altogether.