CHILDREN IN SCHOOLS: THE BATTLE GROUND OF RELIGIOUS BELIEF

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The best interests of the child is the fundamental cornerstone of law regulating the care and upbringing of children. What is looks like in relation to religion and education is contested. This paper explores the different approaches of the courts to religious expression in schools. While some States have sought to establish an educational environment free from religion, others have embraced a multi-faith approach permitting and even encouraging diverse religious expression in schools. Which approach is adopted ultimately depends upon the states understanding of secularism and its role in education. Neither approach is neutral as both involve the privileging of some worldviews over others.

I INTRODUCTION

Children are often a battle ground for well-meaning adults who wish to impose their version of the 'best interest of the child' on the next generation. The quote, attributed to Aristotle, 'give me a child until the age of seven and I will show you the man'[1] aptly sums up the reason children are often caught in the cross hairs. This is true just as much for religion as for other spheres of life. The battle over the religious upbringing of children often plays out at the domestic level, in custody disputes between parents of different faiths or between a religious parent and one with no religion.[2] Increasingly the battles plays out in the public sphere, often in schools. Here the state, or third parties, seek to impose their view of the proper religious upbringing and education upon children. In some cases this is between a dominant religion and a minority faith, however increasingly the State, or a third party, seeks to 'protect' children from the influence or coercion of religion so that they can make an 'informed' decision as adults as to their religious beliefs.

A recent Australian case highlights this battleground. In the *Secular Party of Australia Inc v The Department of Education and Training*[3] the Secular Party of Australia brought proceedings on the behalf of an unnamed child arguing that the Department of Education and Training had discriminated against the child

[1] Aristotle (author), J. L. Creed and A. E. Wardman (translators), *The Philosophy of Aristotle* (Mentor/Signet Books, 1963). This edition is a reproduction of Aristotles famous work, first thought to be produced and published in 322 BC.

[2] See Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2nd ed, 2013) 220 – 233.

[3] [2018] VCAT 1321.

'by imposing on them a religious belief which was detrimental to them and which they were too young to decide upon themselves.'[4] While the case was dismissed on technical grounds it raises a number of important issues regarding children and their right to freedom of religion, belief and conscience. In particular it raises the question of whether it is in the best interests of children to be raised in an environment free from religious influences or one in which multiple religions are present.

As this paper will argue the battle has arguably already been 'lost' when it comes to the family. The courts have consistently made it clear that it is not the place of the court to require parents to raise their children according to any particular religious faith or none. However, the battle is very much still ongoing when it comes to education. This paper will examine the two options presented – an absence of religion in order to preserve the secular nature of public education or a religiously plural environment where the values of multiculturalism and tolerance are promoted. Ultimately which model is adopted is determined by which values a given State values the most. However neither approach is neutral and will have an impact on the next generation.

II THE CASE

The Secular Party of Australia Inc brought an action against the Victorian Department of Education and Training in the Victorian Civil and Administrative Tribunal (VCAT) alleging, *inter alia*, that the Department of Education and Training had discriminated against an unnamed child in contravention of section 38 of the *Equal Opportunity Act 2010* (Vic). Section 38 prohibits discrimination against a student by an educational authority, including on the basis of religious belief or activity.[5] In this case the applicant argued that in permitting the child to wear religious dress the respondent had discriminated against the child.

It is important to note that while the applicant argued the case in terms of the school discriminating against the child the school did not impose the form of dress on the child. As noted by the applicant's own submission "other children in the school were wearing light, comfortable clothing."[6] Instead the applicant argued that in allowing the child to wear clothing, presumably at the insistence of her parents, the school had discriminated against the child, in effect by

[4] *Secular party of Australia Inc v The Department of Education and Training* [2018] VCAT 1321, [1].
[5] S. 38 *Equal Opportunity Act 2010* (Vic) see also s. 6(n) *Equal Opportunity Act 2010* (Vic).
[6] *Secular party of Australia Inc v The Department of Education and Training* [2018] VCAT 1321, [29]

omission.[7] While not made clear in the case, presumably the Secular Party sought a declaration that this child, or perhaps all children attending Victorian schools, be prohibited from wearing 'religious style clothing that covered her body, leaving only her face and hands exposed.'[8]

Victorian schools are permitted a wide latitude in regard to school uniform and clothing under the *Equal Opportunity Act*. Section 42 provides an exception by permitting "[a]n educational authority … to set and enforce reasonable standards of dress, appearance and behaviour for students."[9] The VCAT considered this exemption in *Arora v Melton Christian College.*[10] In that case the applicant, on behalf of his son, sought to overturn Melton Christin College's decision not to allow Sikh boys to wear a head covering known as a patka. The school had an explicit policy requiring that "boys have short hair and that students may not wear any head coverings related to a non-Christian faith."[11] While schools have a wide latitude when it comes to uniforms for their students this is not unlimited. Section 42(2) of the *Equal Opportunity Act* requires that the school take into account the views of the school community in setting their uniform.[12] In *Arora* the tribunal was not satisfied that the uniform policy reflected the views of the school community[13] and that the discrimination suffered by the applicant's child was 'not proportionate to the result sought by MCC in the imposition of the uniform policy.'[14]

Ultimately the substantive issues around discrimination and freedom of religion were not considered in the S*ecular Party of Australia Inc v The Department of Education and Training.*[15] By its own admission the Secular Party Inc had not sought the consent of either the child or their parents to bring proceedings on their behalf.[16] The VCAT further held that consent could not be

[7] Ibid, [1], [7] – [9].
[8] Ibid, [7].
[9] S. 42 (1) *Equal Opportunity Act 2010* (Vic).
[10] [2017] VCAT 1517; see also Renae Barker, 'School uniform policies need to accommodate students' cultural practices' (27 July 2017) *The Conversation* (online) https://theconversation.com/school-uniform-policies-need-to-accommodate-students-cultural-practices-81548.
[11] *Arora v Melton Christian College* [2017] VCAT 1517, [6]; see also [11].
[12] Section 41(2) states "In relation to a school, without limiting the generality of what constitutes a reasonable standard of dress, appearance or behaviour, a standard must be taken to be reasonable if the educational authority administering the school has taken into account the views of the school community in setting the standard."
[13] *Arora v Melton Christian College* [2017] VCAT 1517, [91].
[14] Ibid, [97].
[15] [2018] VCAT 1321.
[16] *Secular party of Australia Inc v The Department of Education and Training* [2018] VCAT 1321, [14].

inferred. As the Tribunal explained '[t]he applicant's argument was founded on a belief that the child was suffering a detriment and would reasonably be expected to consent." The Tribunal was, however, "not satisfied that there was a basis for such a belief."[17] The Tribunal therefore held that 'the Secular Party lacked the necessary consent to bring the application and so the Tribunal lacked the jurisdiction to hear its application. The application was misconceived and is summarily dismissed."[18]

III A BATTLE LOST: PARENTAL RIGHTS

In his well-known book *The God Delusion* Richard Dawkins asserts that there is no such thing as a religious child. That children, especially young children, are incapable of having religious belief.

> I think we should all wince when we hear a small child being labelled as belonging to some particular religion or another. Small children are too young to decide their views on the origins of the cosmos, of life and of morals. The very sound of the phrase 'Christin child' or 'Muslim child' should grate like fingernails on a blackboard.[19]

John Perkins, on behalf of the Australian Secular Party, repeated this assertion in explaining the reasons for bringing the application in S*ecular Party of Australia Inc v The Department of Education and Training*:

> Children are not born with a religious belief. Children can have religious beliefs imposed on them without choice and without consent. To do this in a school is wrong.
>
> …
>
> A five-year-old child is too young to have a freely formed religious belief. To coerce a child into forming a particular belief, particularly by means of inducing fear and guilt, is a breach of the rights of the child. Our society should not permit this to occur in schools.[20]
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> John White has similarly argued that
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> If the parent has an obligation to bring up his child as a morally autonomous person, he cannot at the same time have the right to indoctrinate him with any beliefs whatsoever, since some beliefs may contradict those on which his

[17]Ibid, [59].
[18]Ibid, [63].
[19] Richard Dawkins, *The God Delusion* (2007, Transword Publishers) 381.
[20] https://secularparty.wordpress.com/2018/08/28/vcat-challenge-to-education-department/

> educational endeavours should be based. It is hard to see, for instance, how a desire for one's child moral autonomy is compatible with the attempt to make him into a good Christian, Muslim or Orthodox Jew.[21]

While Joel Feinberg argues that although children have a right to freedom of religion it is different to the adult right to freedom of religion. While adults can exercise their freedom of religion now, the freedom of religion of children is held 'in-trust' as part of a child's 'right to an open future.'[22] A violation of a child's freedom of religion while they are still a child 'guarantees *now* that when the child is an autonomous adult, certain key options will already be closed to him.' (emphasis in original)[23]

If the views of Dawkins, White, Feinberge and the Australian Secular Party are accepted then a child's right to freedom of religion must amount primarily to a freedom from religion, until such time as they can make up their own mind. It is however, from a practical perspective, impossible for parents to raise their children in an entirely religiously neutral environment.[24] Even if it was possible requiring them to do so would violate not only their own freedom of religion but also their rights as parents.[25]

As Claudia Mills points out even raising a child so that they have access 'to the full range of religions available in their community' by, for example, 'visiting different religious services and reading about the various beliefs held by each religious group'[26] is not neutral. What this form of religious upbringing lacks is 'the experience of *belonging* to a religion.'[27] (emphasis in original) As Sylvie Langlaude explains 'from a psychological point of view, children's capacity for religious beliefs is linked to the parents, religious denomination and religious community.'[28] It is only in belonging to a religious community that a child can

[21] John White, *the Aims of Education Restated* (Routledge & Kegan Paul, 1982), 166.
[22] Joel Feinberg, 'The Child's Right to an Open Future' in William Aiken and Hugh LaFollette (eds) *Whose Child? Children's Rights, parental Authority, and State Power* (Rowman and Littlefield, 1980) 124, 124 – 128.
[23]Ibid, 126.
[24] Claudia Mills, 'The Child's Right to an open Future?' (2003) 34 (4) *Journal of Social Philosophy* 499, 503.
[25] For a discussion of the right of parents to bring up their children in their own religious tradition see Rex Ahdar and Ian Leigh, above n 2, 203 – 205. See also Article 18(4) International Convention on Civil and Political Rights.
[26] Claudia Mills, above n 24, 502.
[27] Ibid, 502.
[28] Sylvie Langlaude, 'The Rights of the Child to Religious Freedom in International Law' (Martinus Nijhoff Publishers, 2007), 6.

truly understand religion.[29] 'Avoidance of all mention of religion by a child's principal role-models, her parents, simply sends the message to the child that religion is unimportant to the people she is most connected with.'[30] I would agree with Mills assessment that a child raised in the way described is unlikely to grow up to select any one of the multitude of religions presented to them as an academic exercise by their parents.[31] Equally a child raised with no mention religion is unlikely to suddenly select a religion upon reaching maturity. As Geer J observed in the Canadian case *Avitan v Avitan:*

> [the mother], on the other hand, thinks that Daniel can make up his mind about religion when he grows up. [The mother's] view is surely naive. No child, without religious training of any sort, is in a position to make up his or her mind about religion whenever that magic day comes.[32]

Raising a child with no religion or as an atheist is no more religiously neutral than raising a child as a Buddhist, Hindu or Sikh. Far from giving the child an 'open future' raising them with no religion in effect closes off the possibility of them having the religion of their family. Just as raising them in one faith may cut off the option of having no religion. While some children raised in religious families grow up to reject religion and some children raised with no religion may grow up to embrace it –this is unlikely to be the norm. There is no 'neutral' way to raise a child so that on becoming an adult they can suddenly acquire all the necessary knowledge, skills and understanding to choose a religion or not. While allowing parents, or others, to cut off or curtail a child's future options may seem extreme or unacceptable it is far from unique to the question of religious upbringing. We readily accept that parents may make choices for their children in other spheres which effectively limit their future options as adults. This is because 'some options only become available to adults because they have prioritized them to the exclusion of many others in childhood.'[33]

It is therefore for good reason that Courts have been reluctant to make orders regarding the religious upbringing of children, absent parental disagreement or substantial harm to children. In the South African case *Kotze v Kotze*[34] the Court refused to endorse a statement in a divorce settlement that

[29] Rex Ahdar and Ian Leigh, above n 2, 212.
[30] Ibid.
[31] Claudia Mills, above n 24, 502 – 503.
[32] *Avitan v Avitan* (1992) 38 RFL (3d) 382, 401 (Ontario Court of Justice).
[33] Rex Ahdar and Ian Leigh, above n 2, 244.
[34] 2003 (3) SA 628, 629 (T) (S Afr.)

'both parties undertake to educate the minor chid in the Apostolic Church and undertake that he will fully participate in all religious activities of the Apostolic Church.'[35] Acting Judge Fabricius commented that '[i]f a child is forced, be it by order of the parents, or by order of Court, to partake fully in stipulated religious activities, it does not have the right to his full development,…"[36] While this case has been cited in support of the proposition that children should be raised in a religiously neutral environment[37] so that they have an open future the Court did not order that the child not be raised in the Apostolic Church. The Court did not order that the child's upbringing be free from religion. Instead it refused to make the religious upbringing of the child a matter for the Court. It was not the role of the Court to force the child (or indeed the parents) to follow any particular religion. Presumably, given the parents agreement on the matter, the child was in fact raised as a member of the Apostolic Church.

The Unites States case *Jones v Jones*,[38] similarly rejects any suggestion that it is the role of the court to make orders about a child's religious up brining. In that case the Court of Appeals of Indiana overturned a trial court judge's order that the parties 'shelter [the child] from involvement and observation of these non-mainstream religious beliefs and rituals.'[39] Both parents were practicing Wiccan. In the words of the Appeal Court '[t]he trial court's inclusion of this term in the Decree would appear to reflect the judge's personal opinion of the parties' Wiccan beliefs and rituals.' Given that there was no dispute between the parents as to the child's religious upbringing and no suggestion that the parent's religious beliefs would endanger the child's physical health or impair his emotional development the appeal court found 'the trial court lacked the authority to specifically limit the parents' ability to direct their child's religious training.'[40]

In *re Guardianship of Faust*[41] the Supreme Court of Mississippi affirmed that '[g]enerally speaking, an apart from teachings subversive of morality and decency, the court have no authority over that part of a child's training which

[35] Johan D van der Vyver, 'Municipal Legal oblications of State Parties to the Convention on the Rights of the Child: The South African Model' (2006) 20 *Emory International law Review* 9, 27.
[36] *Kotze v Kotze* 2003 (3) SA 628, 629 (T) (S Afr.).
[37] See Sylvie Langlaude, above n 28, 51.
[38] 832 NE 2d 1057 (Ind App 2005).
[39] *Jones v Jones,* 832 NE 2d 1057, 1061 (Ind App 2005).
[40] *Jones v Jones,* 832 NE 2d 1057, 1061 (Ind App 2005).
[41] 123 so 2d 218.

consists in religious discipline.'[42] In that case the Supreme Court of Mississippi struck from an order of the Pike Country Chancery Court an order that 'it would be to the best interests of said minors to attend the church of their own choosing and to have the right to worship God according to the dictates of their own conscience.'[43] The Court did not order that the boys not attend church, nor is there any evidence that the children's father, the applicant in this case, objected to their attendance at the church. The Court specifically refused to consider the religious beliefs of the children's father or mother (deceased).[44] Instead the Court affirmed that it is not the role of the Court to dictate the religious beliefs of children.

While, as Ahdar and Leigh accept, it is unlikely many cases would come to the attention of the Court requiring parents to raise children in a religiously 'neutral' way is not the role of the Courts. '[T]he adults best equipped to administer a regime of religious autonomy for children remains the parents'[45] as the adults that are in the best position to know the child and therefore know what is in that child's best interests. To do as Dawkins, White, Feinberge and the Australian Secular Party suggest and raise children either without religion or in a religiously 'neutral' environment is to substitute one set of adult's view of the best interests of the child for that of the parent.[46]

Further even if it was practically possible to raise children in a 'religiously neutral' environment such a legal requirement by the state would inevitably impinge upon the parent's rights as parents and their own freedom of religion. International law recognises the right of the parent to raise their child in accordance with their own religious beliefs. Article 18(4) of the *International Covenant on Civil and Political Rights* states:

> 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.

Similarly Article 14(2) of the *Convention on the Rights of the Child* states:

[42] *Re Guardianship of Faust* 123 So 2d 218, 220.
[43] Ibid, 219.
[44] Ibid, 219.
[45] Rex Ahdar and Ian Leigh, above n 2, 220.
[46] Ibid.

> States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

As a result an attempt by the court or the state to restrict the ability of a parent is inconsistent with international human rights law. Such an attempt would also be impractical and infringe upon the parents own freedom of religion. If required to raise their child in a religiously 'neutral' environment a religious parent would, in many circumstances, have to give up taking part in religious rituals such as attending Church, Mosque or Temple as they would likely be unable to find appropriate childcare every time they wanted to engage in a religious activity. Similarly an atheist parent would be required to take part in a multitude of religious activities to which they object in order to give their child a smorgasbord of options.[47]

The applicant in *Secular Party of Australia Inc v The Department of Education and Training*[48] framed their argument in terms of the harm to the child from wearing 'religious style clothing that covered her body, leaving only her face and hands exposed.'[49] In particular they argued that the wearing of such clothing in hot weather was detrimental to the child.[50] The applicant went so far as to label the clothing "inhumane."[51] John Perkins, on behalf of the Secular Party went further arguing:

> It was not just the cruelty of the dress code in extreme heat, and the associated health risks, that was discriminatory. Such clothing is an encumbrance, which is detrimental to the child's physical development. It unnecessarily differentiates the child from others. It imposes psychological detriments. It imposes a mindset that inhibits critical and creative thinking. It limits the child's educational development and opportunity.[52]

There is precedent for the Court stepping in to curtail the exercise of religious beliefs by a parent (and child) where the exercise of those beliefs are harmful to the child. This has most commonly occurred in relation to refusal by parents, or, mature children, of medical treatment. The often quoted statement

[47] Raising a child as an atheist is no more religiously neutral than raising them as a Catholic, Orthodox Jew and Sunni Muslim.
[48] [2018] VCAT 1321.
[49] *Secular party of Australia Inc v The Department of Education and Training* [2018] VCAT 1321, [7].
[50] Ibid, [1], [7] – [10], [32] -[33].
[51] Ibid, [33].
[52] https://secularparty.wordpress.com/2018/08/28/vcat-challenge-to-education-department/

from Justice Rutledge in United States case *Prince v Massachusetts*[53] sums up the approach of the Courts to the refusal of potentially lifesaving medical treatment for minors by their parents on religious grounds:

> Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.[54]

However the Courts are much more reluctant to step in to prohibit other, less harmful religious practices. For example, despite increasing attempts to ban it, infant male circumcision remains legal in many places around the world.[55] It is therefore unlikely that the Courts would prohibit the wearing of religious clothing purely on the basis that the clothing was hot.

While there are those who continue to argue for children to have an independent 'freedom of or from religion' requiring children to be raised without religion is, from a practical point of view, a battle which has already been lost. As a result it is schools, an environment which the state controls, which is the perfect battle ground for debates about children and religion. State control over education, including in schools run by religions, raises the possibility for at least the education of children to be religiously neutral. This however raises secondary questions such as does religious neutrality involve exposure to a wide range of religious beliefs and practices or the complete absence of religion? To what extent can and should the State support religious education in the form of specific religious instruction as opposed to comparative religious or cultural studies?

IV THE BATTLE GROUND: RELIGION AND SCHOOLS

In a similar vein to Dawkins, White, Feinberge and the Australian Secular Party, Hugh Lafolette has argued that '[p]arental indoctrination, normally well within the scope of legitimate parental authority, can harm the child.'[56] However he also argues that 'parents not only have a right to teach their children moral and religious beliefs, they have a solemn duty to do so.'[57] The apparent conflict between these two statements can be reconciled when the context in which Lafolettte was writing is understood. He was writing about the United States of

[53] 321 US 158 (1944).
[54] *Prince v Massachusetts* 321 US 158, 170 (1944).
[55] For a discussion of infant male circumcision see Rex Ahdar and Ian Leigh, above n 2, 332 – 337.
[56] Hugh Lafollette, 'Freedom of Religion and Children' (1989) 3(1) *Public Affairs Quarterly* 75, 81.
[57] Ibid, 82.

America case *Mozert v Hawkins Country Public Schools*, [58] in which parents had:

> … challenged the use of certain readers in elementary reading class. The readers in question depicted children who questioned parental authority, discussed situation ethics, consider the tenability of divergent religious beliefs, and advocate tolerance of opposing views – views to which the parents of the children strenuously object.[59]

Lafolette was challenging the presumption in that case that the only two rights concerned were that of the parents and those of the State.[60] Instead, he argued, that the 'children have the same right [as the parents] – even if not as children, then as the adults the children will become.'[61] This does not mean that the State and parents must raise their child free from religion in order for those children to be able to exercise their freedom of religion either as children or as future adults.

Lafolette's arguments, and the case which acted as the catalyse for them, highlight the importance of schools as the legal battle ground over children and religion. The school is the best environment for the State to present multiple options to the child and therefore give the child the best chance of an 'open future' argued for by Feinberg and others. However the best approach for the Courts and States to take to achieve this is far from clear. There currently appear to be two main options in a secular state, one in which religion is conspicuous by its absence or a religiously plural environment.[62]

In many countries education is compulsory and school is therefore one of the few places where parents cannot have full control over their children. Even where children are home-schooled or attend a religious school the State can in impose 'minimum educational standards.' [63] In *Mozert* the parents sought to exert their control of their children's religious upbringing with in the school environment. Lafolette's apparently contradictory statements can therefore be reconciled by understanding his argument as being that while a parent have the right, and even obligation, to educate their children about moral and educational

[58] *Mozert v Hawkins Country Public Schools* (827 F 2nd 1058)
[59] Hugh Lafollette, above n 55, 76.
[60] Ibid, 80 – 81.
[61] Ibid, 83.
[62] This paper does not consider whether a State should permit religious schools to operate in addition to secular public schools and the extent to which these schools, if permitted, should receive state funding.
[63] Jane Fortin, *Children's Rights and the Developing Law* (LexisNexis UK, 2003) 347; article 13(3) *International Convention on Economic, Social and Cultural Rights*

matters according to their own conscience this cannot go so far as to deny the children all exposure to competing ideas, including competing ideas about religion.

V CONSPICUOUS BY ITS ABSENCE

The option advocated for by the Secular Party of Australia in *Secular Party of Australia Inc v The Department of Education and Training*,[64] is for religion to be absent from public schools. The absence of such symbols from schools is usually argued for on the basis of the supposed neutrality or secularity of these public spaces and an assumption that religion is a matter for private spaces only.[65]

France is perhaps the most well-known example where religion is conspicuous by its absence in public schools. Since 2004 a statute has provided that [i]n public elementary schools, middle schools, and high schools it is forbidden to wear symbols or clothing through which students conspicuously display their religious affiliation.'[66] Public officials, including school teachers, are also banned from wearing conspicuous religious symbols and dress.[67] While the law itself is couched in neutral language the debate leading up to its enactment focused on Muslim girls and the wearing the veil.[68] Arguments made in favour of bans of this type include safety and security, a desire to encourage integration and prevent segregation and separation, that some forms of religious dress impinge on communication, to promote equality between men and women and to preserve the secular nature of the state.[69] While these arguments are usually made with either specific or implied reference to the Islamic veil many apply equally to other religious symbols. In *Multani v Commission scolaire Marguerite-Bourgeoys*[70] the school argued that a male student should not be permitted to wear his kirpan as it "is essentially a dagger, a weapon designed to

[64] [2018] VCAT 1321.
[65] Rex Ahdar and Ian Leigh, above n 2, 261.
[66] See Catherine J Ross, 'Accommodating Children's Religious Expression in Public Schools: A Comparative Analysis of the Veil and Other Symbols in Western Democracies' in Martha Albertson Fineman and Karen Worthington (eds) *What is Right for Children* (Ashgate, 2009) 283, 296.
[67] Erica Howard, *Law and the Wearing of Religious Symbols European Bans on the Wearing of Religious Symbols in Education* (Routledge, 2012), 2.
[68] Catherine J Ross, above n 66 ,296 – 298; The correct word to use to describe Islamic dress worn by Muslim women is contentious see Renae Barker, 'Of burqas (and niqabs) in courtrooms: the neglected women's voice' in Rex Ahdar (ed) *Research Handbook on Law and Religion* (Edward Elgar Publishing, 2018) 397, 399 – 400.
[69] Erica Howard, above n 67, 31 – 39.
[70] [2006] 1 SCR 256, 2006 SCC 6.

kill, intimidate or threaten others."[71] They therefore argued it was a threat to the safety of other students and teachers. The argument that a ban on religious symbols is necessary to preserve the secular nature of the state, and more specifically education, applies equally to all religious symbols, although it is usually non-Christian symbols which are targeted for elimination from the school environment.

In *Leyla Sahin v Turkey*[72] the European Court of Human Rights upheld a ban, similar to that imposed in French schools, on the wearing of Islamic head scarfs in tertiary institutions. While this case involved an adult, rather than a child, it was referred to with approval in *Dogru v France*[73] in which the European Court of Human Rights also upheld an earlier restriction on the wearing of the hijab during school sport. In that case France argued that the requirement to remove the hijab during sport was necessary because of health and safety concerns.[74] While the incident at the centre of the case occurred in 1999, before the introduction of the 2004 bans, the Court made reference to the 2004 laws.[75] While the case of *Dogru* concerned the wearing of the hijab in a specific educational context, school sports classes, rather than in education generally the Court devoted considerable time to discussing France's policy of secularism. While the health and safety concerns of the French school did form part of the reasoning of the case the need to uphold secularism more generally was an important factor in the Court's decision. This is despite the fact this is not the reason given to the student for the request to remove her hijab and at the time there was no general law prohibiting the wearing of 'ostentatious' religious symbols at school.[76] In particular

The Court also notes that in France, as in Turkey or Switzerland, secularism is a constitutional principle, and a founding principle of the Republic, to which the entire population adheres and the protection of which appears to be of prime importance, in particular in schools. The Court reiterates that an attitude that fails to respect that principle will not necessarily be accepted as being covered by

[71] *Multani v Commission scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256, 2006 SCC 6, [37].
[72] (2007) 44 EHRR 5 (Grand Chamber); (2005) 41 EHRR 8 Appl No 4474/98, European Court of Human Rights, 29 June 2004.
[73] Dogru v France, Appl No 27058/05 (4 December 2008), [65] – [66].
[74] Ibid, [68].
[75] Ibid, [30] – [32].
[76] Ibid, [50].

the freedom to manifest one's religion and will not enjoy protection of Article 9 of the Convention.[77]

Earlier in the judgment the, when discussing the history and importance of secularism in France, the Court noted:

> In return for protection of his or her freedom of religion, the citizen must respect the public arena that is shared by all.

The notion of the need for the citizen to respect the public arena was raised again in *SAS v France*[78] in which the European Court of Human Rights upheld France's ban ion the wearing of face coverings in public, including the *Niqab* and *Burqa*. In that case the Court found that the ban was permissible on the basis of the minimum requirements of 'living together' or *le vivre ensemble.*[79] Other arguments in support of the ban such as security and equality between men and women were rejected.

The battle over religion in schools often revolves around the presence of religious symbols worn by students, teachers or simply present in the school environment. Symbols can be very powerful.[80] The wearing, or not wearing, or particular clothing in particular can be an important symbol of a person's religious belief and identity.[81] The symbolic nature of religious dress as symbols of women's oppression or of extremism is often cited in arguments to ban such items. In the context of schools and children the European Court of Human Rights appears to draw a distinction between active and passive symbols.[82] There also appears to be a concern that the presence of religious symbols may have the effect of proselytising to children. For example In *Dahlab v Switzerland*[83] the Court upheld a prohibition on the wearing of an Islamic Headscarf by a primary school teacher. In upholding the prohibition the Court noted:

> that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children.

[77] Ibid, [72].
[78] (European Court of Human Rights, grand Chamber, Application No 43835/11, 1 July 2014)
[79] *SAS v France* (European Court of Human Rights, grand Chamber, Application No 43835/11, 1 July 2014), 4 – 5, 17, 55, 57.
[80] Renae Barker, Rebutting the Ban the Burqa Rhetoric: A Critical Analysis of the Arguments for a Ban on the Islamic Face Veil in Australia (2016) 37(1) *Adelaide Law Review* 191, 211.
[81] Catherine J Ross, above n 66, 285 – 287.
[82] Rex Ahdar and Ian Leigh, above n 2, 288 – 296.
[83] Appl No 42393/98 (15 February 2001).

And in particular that 'it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect.'[84] Concern that the mere presence of the Islamic head scarf as a religious symbol has been cited in several decisions of the European Court of Human rights Decisions as justification for their prohibition.[85] For example in *Dogru* the Court commented

> it [is] for the national authorities, …, to take great care to ensure that, in keeping with the principle of respect for pluralism and the freedom of others, the manifestation by pupils of their religious beliefs on school premises did not take on the nature of an ostentatious act that would constitute a source of pressure and exclusion.[86]

In her Judgment in R(on the application of Begum) v Head Teacher and Governors of Denbigh High school, Baroness Hale similarly expressed concern that if the student in that case was permitted to wear the jilbab other students may feel pressure to also adopt this more extreme form of Islamic dress.[87] She also expressed concern that the student in that case had not made the decision to wear the jilbab of her own volition, drawing a distinction between a child and an adult.[88]

> If a woman freely chooses to adopt a way of life for herself, it is not for others, including other women who have chosen differently, to criticise or prevent her. … But schools are different.[89]

The above cases are all examples were religious symbols are excluded because they are religious symbols. The religious symbols are excluded in order to preserve the secularity or neutrality of education or to protect children from proselytising by either their teachers or fellow students. More 'neutral' school uniform rules can also be used to restrict, if not eliminate, the wearing of religious symbols in public schools.

In the United States of America the Establishment Clause prohibits the State from preferring one religion over another or religion over no-religion. As Justice O'Connor explained in *Lynch v Donnelly* '[e]ndorsement sends a message to

[84] *Dahlab v Switzerland* Appl No 42393/98 (15 February 2001), 13.
[85] See Dogru v France, Appl No 27058/05 (4 December 2008),[71]; *Karaduman v Turkey* (1993) 74 DR 93, [108]
[86] Dogru v France, Appl No 27058/05 (4 December 2008), [71].
[87] R (on the application of Begum) v Head Teacher and Governors of Denbigh High school [2006] UKHL 15, [98].
[88] Ibid, [94] – [97].
[89] Ibid, [96] – [97].

nonadherents 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. Disapproval sends the opposite message.'[90] School prayer and bible reading is, for example, prohibited.[91] 'School officials [in the United States of America] sometimes erroneously conclude that Student expression of religious ideas in school violates the Establishment Clause because it might be attributed to the teacher or institution.'[92] This does not mean however that no restrictions are permitted on religious dress in American schools. Schools cannot prohibit the wearing of religious symbols or dress on the basis that they are religious. However a school may prohibit the wearing of religious dress or symbols if the prohibition is based on other rational reasons such as security.[93] Hats or headwear, for example, are often prohibited in American schools 'ostensibly to eliminate gang paraphernalia, to eradicate one means of hiding contraband items, and to teach proper behaviour.'[94] A ban on headwear impacts on Muslim, Sikh and Jewish students, all of whom may choose to wear a head covering as an expression of religious faith. While exceptions to school dress codes have been granted for students wishing to wear religious clothing the burden of arguing for such exemptions inevitably falls on the students and their family.[95]

VI RELIGIOUSLY PLURAL SCHOOLS

The alternative to the exclusion of religion from secular public schools is to find ways to permit, and even encourage, staff and students to practice their diverse range of religious beliefs. One of the best known, and well regarded judgment, which upheld the right of school students to wear religious symbols is the Canadian case *Multani v Commission scolair Margueritte-Bourgeoys.*[96] The case involved a devout Sikh school boy who wanted to wear his Kirpan, a ceremonial dagger.[97] While other Sikh school children were prepared to wear a

[90] *Lynch v Donnelly* 465 U.S. 668, 688 (1984).
[91] Rex Ahdar and Ian Leigh, above n 2, 255; The provision of substantial direct funding of sectarian schools is also prohibited by the Establishment Clause.
[92] Catherine J Ross, above n 66, 289.
[93] Ibid, 287 – 288, 291 – 292.
[94] Ibid, 288.
[95] Ibid,292 – 294; 295 -
[96] [2006] 1 SCR 256.
[97] The orthodox Sikh dress code requires men to wear religious symbols known as the five Ks: the kesh (uncut hair), the kangha (wooden comb), the kara (a steel bracelet), the kaccha (undergarment)a and the Kirpan (metal; dagger or sword. See *Multani v Commission scolair Margueritte-Bourgeoys* [2006] 1 SCR 256, 280.

symbolic Kirpan in the form of a pendant the student in this case sincerely believed he was required to wear a real Kirpan.[98] He was however prepared to accept restricts on how he worse it including that '[t]he kirpan must be enclosed in a wooden sheath and the sheath must be sewn inside a cloth envelope, which must itself be attached to a shoulder strap worn under the student's clothing.'[99]

The appellants in *Multani* argued, *inter alia*, permitting the student to wear his Kirpan to school would have a negative impact on the school environment as other students would feel that it was unfair that they were not permitted to carry similar objects. In support of their assertion they argued that many students found it unfair that Muslim girls were permitted to wear the Chador while they are prohibited from wearing a cap, hat or scarf.[100] The Supreme Court of Canada rejected this argument. In particular they were critical of viewing religious symbols such as the Kirpan and Chador to mere weapons or caps stating that such a view was 'indicative of a simplistic view of freedom of religion.'[101] Instead the Supreme Court argued that if students saw the wearing of religious symbols as somehow unfair it is the school's role to educate their students about freedom of religion and tolerance:

> Religious tolerance is a very important value of Canadian society. If some students consider it unfair that Gurbaj Singh may wear his kirpan to school while they are not allowed to have knives in their possession, it is incumbent on the schools to discharge their obligation to instil in their students this value that is …, at the very foundation of our democracy.[102]

In *MEC for Education: KwaZulu-Natal v Pilloy*[103] the Court noted that 'Granting Exemptions will also have the added benefit of inducting the learners into a multi-cultural South Africa where vastly different cultures exist side-by-side.'[104] In that case the student wished to wear a small gold nose stud as part of her South Indian, Tamil and Indian heritage.[105] The case therefore involved consideration of discrimination on the interrelated grounds of religion and culture.[106] The school had a uniform code which allowed only very limited

[98] *Multani v Commission scolair Margueritte-Bourgeoys* [2006] 1 SCR 256, 280.
[99] Ibid, 305.
[100] Ibid, 294 – 296.
[101] Ibid, 295.
[102] Ibid, 296.
[103] [2007] ZACC 21.
[104] *MEC for Education: KwaZulu-Natal v Pilloy* [2007] ZACC 21, [102].
[105] Ibid, [7], [50].
[106] Ibid, [47].

jewellery[107] to be worn and had requested that the student remove her nose stud. The Constitutional Court of Canada found that the student had been discriminated against and that a reasonable accommodation could have been found.[108]

Similar to *Multani* the Court in *Pilloy* saw the role of education including '[t]eaching the constitutional values of equality and diversity.'[109] The Court in *Pilloy* cited with approval the comment in *Christian Education South Africa v Minister for Education*[110] that:

> It is true that to single out a member of a religious community for disadvantageous treatment would, on the face of it, constitute unfair discrimination against that community. The contrary, however, does not hold. To grant respect to sincerely held religious views of a community and make an exception from a general law to accommodate them, would not be unfair to anyone else who did not hold those views.[111]

If other girls felt that it was 'unfair' that the student in question be permitted to wear a nose stud for religious and cultural reasons while they were denied the opportunity to wear it for reasons of fashion the Court suggested that the reasoning from *Christin Education* be explained to them.[112] The Court also rejected a suggestion from the school that nose studs be treated differently to other religious symbols because, unlike many other religious symbols, it is 'a popular fashion item.'[113] As the Constitutional Court explained:

> Asserting that the nose stud should not be allowed because it is also a fashion symbol fails to understand its religious and cultural significance and is disrespectful of those for whom it is an important expression of their religion and culture. In addition, to uphold the School's reasoning would entail greater protection for religions or cultures whose symbols are well known; those in fact often the ones least in need of protection. It would also have the absurd result that if a turban, yarmulke or headscarf became part of popular fashion they would no

[107] Ibid, [5].
[108] Ibid, [112].
[109] Ibid, [104].
[110] 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC).
[111] *Christian Education South Africa v Minister for Education* 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC), [42]; *MEC for Education: KwaZulu-Natal v Pilloy* [2007] ZACC 21, [103].
[112] *MEC for Education: KwaZulu-Natal v Pilloy* [2007] ZACC 21, [103] – [104].
[113] Ibid, [105].

> longer be constitutionally protected, while they have constitutional protection as long as they remain on the fringes of society.[114]

While a slightly different situation the problems of treating items of clothing differently based on fashion versus religious connotations has been seen in France in relation to France's ban on the wearing of religious symbols at school. In 2015 a French School girl was sent home to change after arriving at school in a long skirt that the head teacher felt showed religious affiliation and therefore flaunted the secular attire rules.[115] In this case an otherwise permissible fashion item was 'banned' because it might have also had religious connotations demonstrating the absurd results that can occur in this space.

Similarly in *Arora*[116] the school argued that the wearing of a Sikh patk was analogous to a 'New Blance cap,' which was also prohibited.[117] In that case the school prohibited, *inter alia*, the wearing of 'any head coverings related to a non-Christian faith'[118] The school accepted students from a range of faiths so long as as the student did not look like they were not a Christian. The Court found this approach to be unreasonable and that it indirectly discriminated against the student concerned. [119]

Religious pluralism at school does not, however, mean chaos or that a student can do as they please simply by asserting that they are wearing a particular item of clothing or behaving in a particular way on the basis of their religious beliefs. As Lord Hoffman explained in *R (on the application of Begum) v Headteacher and Governors of Denbigh High School*:

> Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's choosing. Common civility also has a place

[114] Ibid, [106].
[115] The student in question already removed her head scarf before entering the school see 'French Muslim student banned from school for wearing long black skirt', *The Guardian* (online), 29 April 2015 < https://www.theguardian.com/world/2015/apr/28/french-muslim-student-banned-from-school-for-wearing-long-skirt>.
[116] *Arora v Melton Christian College* [2017] VCAT 1517.
[117] See Emma Younger, Melbourne Sikh family challenge 'inclusive' Christin school's ban on boy's turban', *ABC News* (online), 24 July 2017 < https://www.abc.net.au/news/2017-07-24/sikh-family-challenge-christian-schools-turban-ban/8737716>; Renae Barker, 'School uniform policies need to accommodate students' cultural practices' *The Conversation* (online), 27 July 2017 < https://theconversation.com/school-uniform-policies-need-to-accommodate-students-cultural-practices-81548>.
[118] *Arora v Melton Christian College* [2017] VCAT 1517 [6], [11].
[119] Ibid, [66] see also [110].

in the religious life … people sometimes have to suffer some inconvenience for their beliefs.[120]

In that case a student sought permission to wear a jilbab, a form of Islamic dress which is a 'long coat-like garment.'[121] The School had a significant Muslim population and, in consultation with the local community, had come up with an alternative to the school uniform, the shalwar kameez, which met the requirements of the local Muslim school children.[122] Ultimately the Court concluded that '[t]he School had taken immense pains to devise a uniform policy which respected Muslim beliefs but did so in an inclusive, unthreatening and uncompetitive way.'[123] As a result, the school's refusal to allow her to wear the jilbab instead of the shalwar kameez was upheld.

In a number of the cases discussed above the Court noted the importance of school uniforms and the role they play in school discipline and cohesion. However as the Constitutional Court noted in *Pilloy* '[t]he admirable purpose that uniforms serve do not seem to be undermined by granting religious and cultural exemptions. There is no reason to believe, nor has the school presented any evidence to show, that a learner who is granted an exemption from the provisions of the Code will be any less disciplined or that she will negatively affect the discipline of others.'[124]

While not all of the students were successful in their claims to wear religious clothing or symbols at school in each case the prohibition of the item was not based on the religiosity of the item. Further in each case the school sought to find a way to accommodate the religious beliefs of the students. In the case of *Begum* the student (or more likely her brother) rejected the accommodation on offer. By contrast in *Multani* the student was prepared to put in place reasonable accommodations in order to make sure his Kirpan did not pose a danger to other students. As Catherine J Ross observed:

It seems clear that Multani would not have prevailed in his claim if he insisted on carrying a visible foot-long dagger, because that insistence would make the school's concerns about safety more than reasonable. Similarly, if Shabala Begum refused to compromise about her jilbab, it is possible that a Canadian school would be able to state convincing reasons for asking her to do

[120] *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] 2 All ER 487, 505
[121] Ibid, 493.
[122] Ibid, 503.
[123] Ibid, 501
[124] *MEC for Education: KwaZulu-Natal – Pilloy* [2007] ZACC 21, [101].

her part in compromising in order to reach an accommodation with the school.'[125]

Writing about an incident in Quebec in which a 12 year old school girl was sent home after wearing a hijab to school. Shauna Van Praagh observed that:

> Here we are confronted with a community of school children who embrace the notion of mixing with other in the classroom as long as they can also assert their religious identity … rather than opting for exit, or pursing the route of separate schools, religious children may go to public school prepared to participate at the same time that they claim the promise of multiculturalism.[126]

The child concerned switched school and no formal legal proceedings eventuated.[127] Intense public debate however led to the Quebec Human Rights Commission '[coming] out strongly against the prohibition of the hijab.'[128]

VII CONCLUSION - WHICH APPROACH SHOULD A SECULAR STATE ADOPT?

While it is practically impossible for parents to be required by the Courts to raise their children in a religiously neutral way – such an outcome is, at least theoretically, possible in the school environment. What that looks like in each state will depend on factors such as 'the fundamental values of the body politic, the laws and covenants that govern decision making, and societies basic premises about the relation between religion and the State.'[129]

It is important to note that neither excluding religion from schools nor permitting (and even encouraging) a plurality of faiths is a truly neutral approach. As noted above it is not possible to be truly neutral. Indeed it is not truly possible for a State to be 'neutral' when it comes to the position it takes in terms of the relationship between the State and religion generally[130]- let alone in the context of the education of children where so much is at stake. For every choice another possibility is excluded. The question therefore is not how can the

[125]Catherine J Ross, ' above n 66, 305.
[126] Shauna Van Praagh, 'The Education of Religious Children: Families, Communities and Constitutions' (1999) 47(3) *Buffalo Law Review* 1343, 1378.
[127] Ibid, 1377 – 1380.
[128] Ibid, 1380.
[129] Catherine J Ross, above n 66, 310.
[130] Renae Barker, *State and Religion The Australian Story* (Routledge, 2019), 22 – 23.

State be neutral in its presentation of religious matters to school children but what is in the best interests of children. Here again opinions will and do vary.

Ultimately the difference between excluding religion from schools to promote a 'neutral' secular environment and encouraging a plurality of religions in order to create a 'neutral' and multi-faith / multi-cultural environment comes down to the formulation of which values are most important to transmit to students. Is it in the best interests of children to be free from religious influence, especially in schools, until they are mature enough to make up their own mind or is it in their best interest to be exposed to the full plurality of religious experiences? Canada and France have come to very different conclusions.[131] As we have seen above Courts around the world have taken divergent approaches. In *Multani* the Court considered 'the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others' to be of paramount importance.[132] By contrast in *Dogu* the Court noted that 'secularism is a constitutional principle, and a founding principle of the Republic, to which the entire population adheres and the protection of which appears to be of prime importance, in particular in schools.'[133] It is upon this distinction that the decision of the best approach to the presence of religion in schools rests.

As noted at the outset children and schools are the battle ground for issues around freedom of and freedom from religion because of the perceived power in educating the next generation. While values such as tolerance and multiculturalism are not necessarily incompatible with secularism which is prioritised does influence perceptions around the best interests of children.

Ahdar and Leigh, for example, would argue that excluding religion from schools can breed intolerance and resentment. They argue that this approach is like 'viewing religion as a form of contagion which should not be allowed to pollute or infect school premises. There is an implicit message of disapproval here; after all, if religion were benign why would it be necessary to protect schools from contamination?"[134] Dawkins, of course, would argue that this is exactly the point. He has described religion as a virus of the mind.[135] For him, and those

[131] Note however that Quebec has in the past sought to adopt the French approach.
[132] *Multani v Commission Scolair Margueritte-Bourgeoys* [2006] 1 SCR 256, 297.
[133] Dogru v France, Appl No 27058/05 (4 December 2008), [72].
[134] Rex Ahdar and Ian Leigh, above n 2, 261.
[135] Richard Dawkins, 'Viruses of the Mind' in Bo Dahlbom (ed) *Dennett and his Critics* (Blackwell, 1993), 13.

who similarly argue that children should be raised without religion, religion is far from benign and this is exactly why it should be excluded from schools.

Australia has so far adopted the default position of permitting multiculturalism and therefore multiple faith expressions in public schools. However, like Australia's approach to religion and the state generally,[136] this is a pragmatic response to the existence of multiple faiths in the community generally rather than a deliberate principle to be promoted to students. *Secular Party of Australia Inc v The Department of Education and Training*[137] was decided on technical grounds and leaves open the question of the place of religion in Australia's education system. Should we like Canada encourage multiple expressions of faith by Australia's school children or should we like France promote a secular educational space free from any overt symbols of religious adherence.

[136] Stephen Monsma and J Christopher Soper, *The Challenge of Pluralism: Church and State in five Democracies* (Rowman 83, Ch 4. ittlefield publishing Group, 2nd ed, 2009), 83, Ch 4.
[137] [2018] VCAT 1321