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UNIVERSITY OF DURHAM
Law Department

THESIS FOR M.JUR.

The Protection of Religious Education as a Human Right: A Critical
Approach to Greek, UK and ECHR Law

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Durham 2000



26 APR 2002

Christina Vayanos

**«The Protection of Religious Education as a Human
Right: A Critical Approach to Greek, UK and
ECHR Law»**

Presented for the Degree of M.Jur.

Durham 2000

Abstract

In an increasingly multicultural Europe, Greece and more intensively Great Britain are faced with the need for protection of religious freedom of individuals or social groups. The question becomes more precise but also acute if it is approached with regard to the right to manifest own religious beliefs in the frame of RE as primary instrument of educational policy, but also in the frame of collective worship. This study is focused on the legislation and the administrative practice concerning primary and secondary schools. It covers both the national and international law provisions permeating the Greek and the British legal order.

Leading case law of the Greek Council of State has recently confirmed the obligatory character of attending RE at primary and secondary schools. However, protection is also guaranteed by case law to the parental right to declare in writing before the school authorities that due to conscientious reasons a pupil should be exempted from the duty to attend RE and/or collective worship. Notwithstanding the above a survey of school practice today has shown that only a very limited percentage of parents or guardians have made use of this right. Individual application according to art. 25 ECHR offers additional legal security to Greek citizens in case of a human right infringement.

In Britain the ERA 1988 provides for the protection of religious freedom concerning RE, while granting the parents the right of withdrawal of their children from RE and collective worship. Beyond any questions of legislative background it remains always a matter of government policy to support effective protection of the right to RE in favour of minorities.

ECHR and case law concerning art. 2 of the First Protocol offer a safe legal basis for ultimate correction of possible unfair judicial handling on national level concerning the right to religious freedom.

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INTRODUCTION

The issue of education today is one that attracts a high interest from the community throughout Europe. The European states recognise it as a national investment. Indeed, education has a prominent place in the pronouncements of party leaders and in the pledges of Parliamentary candidates. Parents, on the other hand, are highly concerned over the scope of education provided by the State and over the attainment of the highest reasonably practicable educational standards, in the realisation that education is fundamental to the development of children to their full potential as autonomous adults.

Furthermore, religious education as part of the curricula in primary and secondary schools is closely connected not only with state policy in the field of Church - State relations but, more importantly, in the field of the protection of two fundamental rights, that of freedom of religion and that of freedom of education.

This study is mainly concerned with religious education in Greece and in Great Britain. The choice of these two national legal orders is not occasional but deliberate. A common element between Greece and the United Kingdom is that they both belong to those countries where there is a mutual dependence and close co-operation

between Church and State¹. Moreover, in both countries live religious minorities which contribute to the multicultural character of their societies. This common element is depicted, among others, in the fields of education and religious freedom. On the other hand, Greece belongs to the countries with a continental legal system, whereas Great Britain is a typical case law country. Thus, it is both theoretically interesting and practically useful to examine how these two countries cope on a legislative level with the recognition and practice of religious education as a human right; the more so as citizens of both countries are entitled to raise individual applications before the European Court of Human Rights according to art. 34 (old 25) ECHR. In fact both countries have been brought before the ECHR for cases which refer to the right of religious freedom². The vast majority of cases which were brought before the ECHR authorities against Greece were by Jehovah's Witnesses or members of the Muslim community in Greece, including the famous *Kokkinakis* case³. This study hence cannot be

¹ See Chapter I A2-2.1 and Chapter II B.

² For example the UK was involved in the cases *X Ltd and Y v. UK*, No. 8710/79, 28 DR 77 (1982); *X v. UK* No. 8160/78, 22 DR 27 at 36 (1981); *Choudhury v. UK*, No. 17439/90, 12 HRLJ 172 (1991).

³ See below Chapter III.2.4.

seen only statically in time; it also has an intertemporal perspective: each ECHR Court's decision is subject to the political control of the Council of Ministers according to art. 42 par. 2 ECHR (old art. 54). In this sense social developments affecting religious education in both countries are being dealt with by the ECHR authorities, notwithstanding their regular control by the legitimated politicians. The final aim of this study is therefore to locate common elements and differences in the state policy and legislation on religious education which might be held constructive concerning these two countries.

In the context of multinational treaties⁴ the European Convention of Human Rights, to

⁴ Apart from the ECHR which has a direct effect on the Greek and English legal order, there were several international treaties in the text of which one can find direct reference to the religious education as specific expression of religious freedom and the parental right to raise children according to the parents' religious beliefs. Some of the most important of them are: 1) Article 5 par. 1 of the Declaration on the Elimination of all forms of Intolerance and of discrimination based on Religion or Belief (1981), 2) Article 13 par. 3 of the International Covenant on Economic, Social and Cultural Rights (1966), 3) Article 18 par. 1 of the International Covenant on Civil and Political Rights (1966), 4) Article 14 of the Convention on the Rights of the Child (1989), 5) Article 5 par. (b) of the Convention against Discrimination in Education (1960), 6) Paragraph 9.4 of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990). For texts see BROWNLIE, I. (ed.), *Basic Documents on Human Rights*, p.

which both Greece and Great Britain belong, is not only an influential forum of constitutional approach of this subject; it has repeatedly dealt through the Commission's and the Court's case law with the implementation of the right to religious freedom and that of education in the member states.

A comparative analysis of RE presupposes a possibly brief presentation of the different types of schools in Greece and in Great Britain.

Especially with regard to the Greek legal order (Chapter I.) an approach of the most leading cases of the Greek Council of State is attempted concerning both the parental right to withdrawal from RE and the position of teachers in the whole subject.

As far as Great Britain is concerned (Chapter II.) special attention is given to the different types of schools and the position of RE in them. The

109 (111). The legal qualification of international law provisions as soft law lacking direct applicability in the national legal order might be considered as the *prima facie* common characteristic of these provisions most of which are not ratified by Greece yet. However, according to Article 28 par.1 of the Greek Constitution the generally acknowledged rules of international law, as well as international conventions after their ratification, are integral part of the domestic Greek law prevailing over any contrary provision of the law. Consequently, the almost unified and consistent reference in numerous international treaties to the discussed right to religious education can not be considered as legally irrelevant and thus unnecessary.

Education Reform Act 1988 has ensured the survival of the subject in state schools and given fresh impetus for its development.

Finally, articles 9 (1,2) ECHR and 2 of the First Protocol are discussed with regard to the judicial interpretation of the human right to religious education in the international legal order (III. Chapter). The permeation of the Greek and English legal order by the ECHR rules makes it imperative to compare the organisational frame of religious education as well as the national legal rules. Such comparison is aimed at the State's better corresponding to the requests of religious minorities for non-discriminatory treatment of children at school, for religious education according to parents' religious convictions, resp. their right to withdraw their children from RE in case of dissenting opinion.

I. Chapter

A. The role of the Greek-Orthodox Church for the maintenance of the national identity and its relation to the Greek State

1.- The historical role of the Greek-Orthodox Church

Greek people belong to one of the most religious nations, from antiquity to the present day⁵. One could say that this religiosity was one of the main reasons of the historical unity between the ancient Greek, Byzantine and modern cultures, and also one of the key factors for the survival of this nation throughout the centuries. This religiosity, together with the deep spirituality of the Greeks, has been incorporated in the personalities of two of this nation's greatest intellectuals, namely in Socrates and in Plato, who were also major theologians⁶.

During the Byzantine era the Church undertook the responsibility of education, whereas

⁵ See among others GEORGOPOULOU-NIKOLAKAKOU N.D., *The philosophical conception of divine in Greece from Homer until Renaissance*, Athens 1985, and CROIZET M., *The civilization of ancient Greece*, Athens 1982

⁶ Cf. VOLIOTIS N., „Religious and metaphysical quests in the 4th century. The theology of Plato and Aristotle in comparison with the theology of Isokrates“, *PLATON*, vol. LB and LC,

Christianity promoted the dissemination of learning, by stressing its importance and value. The State and the Church were two inseparable institutions, and Christianity formed a powerful sense of national unity over a variety of nations, customs and cultural features for more than 1000 years⁷.

However, it is correct to differentiate between Hellenismus, Christianity and the Byzantine state. In fact the Orthodox Church being the official ecclesiastical and spiritual power in the 10 centuries of the Byzantine Empire held a rather negative attitude towards the Greeks. This approach was reasoned with the claim that the Ancient Greeks were idolaters⁸. In any case the cultural and spiritual contribution of the Orthodox Church of these early stages and their positive impact on the modern Greek cultural identity cannot be denied⁹.

Issues 63, 66, Athens 1982, pp. 356, 364-365; BRATSIOTIS, P., "Church and Education in Greece", *EKKLESIA*, pp. 432.

⁷ The french historian Charles DULE underlines that „modern Greece owes much more to christian Byzantine than to Athens of Pericles and Feidias“, *History of the Byzantine State* (Greek translation of Emm. Kapsabelis), Athens 1923, p. 8.

⁸ IOANNIS CHRYSOSTOMOS considered Christianity and Hellenismus „incompatible“, and the historian AMANDOS, K. classified the denomination „Greek“ as having negative impact in the sense of „non-Christian“, PLORITIS, Marios, „About Helleno-Christianism“, *TO BEMA TIS KYRIAKIS*, 11.06.2000, B2 with further references.

⁹ Ibid.

The fall of Constantinople was marked by the flight of most Greek scholars to Western Europe and the Church undertook once again the responsibility of education in an attempt to replace the impotence of other state vehicles to fulfil the educational duty¹⁰. Besides, the Turks had granted the Church the privilege of conditional religious freedom, which was important for the restructuring of the national educational system. Despite any inefficiencies the supreme aims of education during the Turkish occupation were to maintain the national language, cultural traditions and national identity, and the Church was apparently the only institution that guaranteed the promotion of these aims¹¹.

After the establishment of the Modern Greek State in the early 1830s the Church autonomy in the field of education was abolished. In this sense the state control over the Church and the educational system was introduced. The ideas of Renaissance were strongly encouraged, whereas the notion that education in the Modern Greek State should aim at creating Greek Christians, upholders of the Orthodox tradition, was criticised. However, after 1840 the Greek people

¹⁰ Cf. FEIDAS VI., „The problem of the aim of Education in Modern Hellenism“, *SYNAXI*, p. 12

¹¹ SPYROPOULOS, Ph., *Constitutional Law in Hellas*, p. 163.

actively protested their opposition to the lack of spirituality, forcing the State to rescind and bring back to the curricula the teaching of religion.

2.- Church - State relations

2.1.- Systems of Church - State relations

Generally speaking Church - State relations have been shaped differently at different times in Greece, as in other countries as well. Despite the various deviations, one could speak of two major systems¹²:

- a) the system of mutual dependence, and
- b) the system of clear separation.

According to the first system a certain Church, or religious community¹³ and the State cooperate closely. Indeed, in this case the State protects this particular Church, or religious community, over and above others to the extent that the authorities of this Church or religious community enjoy the status of public law institutions, and can exert their influence on the mechanism of the State and the development of social life. Moreover, the State helps this

¹² MARINOS, Anast., *Legality and Canon Law - Legal order of the State and legal order of the Church*, pp. 17 f.; STATHOPOULOS, Mich. *State and Church relations*, pp. 12-14.

¹³ The term „Church“ is used here to specify Christian communities. The term „religious community“ is used for other religions.

Church, or religious community to implement the decisions of its authorities¹⁴. Examples of this system - though with certain differentiation in subjects of minor importance - are to be found in the following countries: Spain, Portugal, the Scandinavian countries, Ireland, Great Britain, Greece, etc.

According to the second system there is a clear separation between Church and the so-called secular State. The State remains totally impartial and even indifferent towards the religious convictions of its citizens. It neither opposes nor co-operates with any particular religious creed. It tolerates religions on the condition that they observe the legal foundations of the State. In this system the various Churches or religious authorities are private law institutions, i.e. simple associations (unions) and have no authority whatsoever to regulate matters of public life. They are restricted to handling only purely religious matters without interference of the State. Indeed, the State does not take any direct or indirect measures in order to force upon the believers of a Church or religious community the decisions of its authorities. Examples of such

¹⁴ Cf. Art. 18 of Greek Law No. 898/1943, which stipulates that the decisions of the Ecclesiastical Tribunals will be implemented with the help of police authorities.

secular states are France, Germany, Belgium, Holland, the USA¹⁵, India, Japan etc.

It is the first system that has been adopted by Greece following its emancipation from Turkish occupation. The mutual dependence of Church and the Greek State has influenced the legal status and the form of religious education in Greece in various ways. How and why this came about is explained briefly below.

2.2.- Development of Church - State relations from the establishment of the modern Greek State to the present

a.- From the establishment of the Greek State to 1975

The Constitutions of the revolutionary era (1821 onwards) included a provision which recognised the Greek Orthodox Church as the „prevailing religion“ of Greece¹⁶. But there were no other provisions pertaining to any details in the relations between Church and State. There was simply in the headings of these Constitutions the opening phrase „In the name of the Holy and

¹⁵ As Thomas Jefferson said characteristically on the occasion of the enactment of the American Constitution, the latter was intended to „raise a wall of separation between the Church and the State“.

¹⁶ Cf. Section A par. a of the Constitution of Epidaurus (1822), Section A par. a of the Constitution of Astros (1823), Section A art. 1 of the Constitution of Troizina (1827).

Con-substantial and Indivisible Trinity“ which gave all of them a „religious orientation“.

It was the Constitution of 1844 which first came up with additional provisions regarding tolerance of every known religion and the forms of its worship, prohibition of proselytism against the prevailing religion, oath of the King to protect the prevailing religion of the Greeks, oath of the Greek MPs in the name of the Holy Trinity.

The above mentioned Constitution remained in force until 1952, when by virtue of the Constitution 1952 the following new privileges were granted to the Greek Orthodox Church:

i. Distraint on printed matter could be applied to the case of committing an offence against the Christian Religion (here not only against the prevailing one)¹⁷.

ii. The teaching of religion at schools according to the Orthodox dogma and more precisely based on the ideological directions of the Greek-Christian culture was to be compulsory¹⁸.

iii. The King, the Crown Prince and the Regent had to be Christian-Orthodox¹⁹.

It should be clarified that the notion of the „prevailing religion“ does not in any case mean that the Christian-Orthodox Church dominated

¹⁷ Art. 14 par. 2 of Constitution of 1952.

¹⁸ Art. 16 par. 2 of Constitution of 1952.

¹⁹ Art. 49, 51 and 52 of Constitution of 1952.

over the other known religions within the Greek territory. It was merely the official religion which enjoyed the above mentioned privileges granted by the State²⁰.

b.- The Church - State relations under the Constitution of 1975/86

The system adopted under the now valid Constitution of 1975/86 is that of the moderately predominant State²¹. The following important changes were introduced by virtue of this new Constitution:

- i. The constitutional legislator maintained the provision which stated that the „prevailing religion in Greece is that of the Eastern Orthodox Church of Christ“²². But it was furthermore regulated that the Holy Synod assembles as specified by the Statutory Charter of the Church which is voted by the Parliament in full session²³.
- ii. As from 1975 proselytism has been prohibited against any known religion and not only against

²⁰ TROIANOS, Sp., Lectures on Ecclesiastical Law, pp. 92-93.

²¹ SPYROPOULOS, Ph., Die Beziehungen zwischen Staat und Kirche in Griechenland, pp. 135.

²² Art. 3 par. 1 of the Constitution 1975/86.

²³ Art. 72 par. 1 of the Constitution 1975/86. See also Law No. 590/1977 „about the Statutory Charter of the Church of Greece“, according to which the Greek State has now the power to interfere in the administration of the Greek Church.

the prevailing one²⁴.

iii. Dstraint on printed matter can now be applied in case of offence not only against the Christian religion but against any other religion as well²⁵.

iv. The development of religious conscience is still one of the basic aims of education, but no reference is now made to the „ideological directions of the Greek-Orthodox culture“²⁶.

v. The provision that the Head of the State, now the President of the Republic, has to be a member of the Eastern Orthodox Church is *not* repeated in the new Constitution.

vi. The obligation of the Head of the State to take the oath to protect the prevailing religion is also abandoned.

vii. As privileges of minor importance one could mention the payment of the orthodox clergy by the State²⁷, the prohibition to missionaries from other churches to practise mission in Greece, the fact that ministers of other churches are obliged to have the Greek citizenship²⁸, the fact that

²⁴ Art. 12 par. 2c of the Constitution 1975/86.

²⁵ Art. 14 par. 3 of the Constitution 1975/86.

²⁶ Art. 16 par. 2 of the Constitution 1975/86.

²⁷ Cf. Law No. 536/1945 „about the regulation of the payment of the Orthodox Clergy of Greece and the way of their payment and the covering of the relevant expenses“.

²⁸ Cf. Art. 3 par. 2 of law No. 1657/1951 which orders that the General Archrabbi of Greece must have the Greek citizenship.

religious leaders of other religions need to have an authorisation from the Ministry of Education and Religions in order to practise their ministry²⁹.

The above points indicate an essential alteration in Church - State relations. In fact in the Greek theory authors talk already about an existing tendency of separation between Church and State³⁰. According to that the first steps towards a secularisation of the State have been made. Moreover, it must be stressed that today, although the constitutional legislator has maintained the provision regarding the „prevailing religion“, it is generally accepted that this religion does not play a dominant role

²⁹ Cf. Art. 1 of law No. 1672/1939.

³⁰ After the enactment of law No. 1700/1987 governing the status of Church's property, an *ad hoc* Committee was formed upon a decision of the Minister of Education and Religions to study the topic of Church - State relations. Although the Report of this Committee was not taken into account as it ought to, the majority of the members were in favour of the system of the so-called by-law predominant State (= mutual interference and interdependence). Prof. Stathopoulos, though, belonged to the minority who supported the clear separation of the two institutions; see details in STATHOPOULOS, Mich. Church - State relations, pp. 19 ff. See also MANESIS A. / VAVOUSKOS K., "A statement of opinion", *EKKLESIA*, pp. 304 ff., and *NoB*, p. 1033. SPYROPOULOS, Ph. "A system of Church - State relations in Greece", *Ephimeris Demosiou kai Dioikitikou Dikaiou*, vol. 25(1981), p. 341, and KOSTARAS, G., Church - State relations according to the Constitution in *Ecclesia* issue 1/15.07.1978 pp. 255-256.

over other religions. The provision is simply a declaration of the fact that the Greek people in their overwhelming majority are Christian Orthodox, but this does not have any further legal consequences, as religious freedom is generally protected³¹. Thus, the legislator is now free to further loosen the Church - State relations, unless this is prohibited by a specific provision of the Constitution. As long as no such intervention by the common legislator takes place, the Church preserves its character as a public law institution and maintains its privileged treatment.

The most recent development in the matter of Church - State relations may prove to be the forthcoming constitutional revision of the now valid Greek Constitution of 1975/86. Especially those believing in the complete secularization of the Greek State support that the constitutional revision would be an excellent occasion for abandoning the aforementioned privileged position of the Greek Orthodox religion in law and society in favor of a totally neutral position of Orthodoxy beside all other existing religious minorities in the country such as Muslims, Catholics, etc. This is meant to happen irrespective of the statistically confirmed vast

³¹ TROIANOS, Sp. Lectures of Ecclesiastical Law, pp. 94-95. Contra POULIS, G., "The constitutional frames of Church - State relations", *Armenopoulos* 36 (1982) 970, 969 ff.

majority of Greek Orthodox people (97%) in comparison to the quantitatively much smaller religious minorities in the population. It is indicative for the above tendency to refer to a declaration signed by parliamentarians, euro-parliamentarians, university professors, artists, publishers and journalists³². According to this declaration there still exist a considerable number of legal provisions and institutions which inevitably lead to a discriminatory treatment of religions other than the Christian Orthodox one in Greece. For example, the compulsory reference in the personal identity cards to the confession of the bearer of the card and the requirement of the Orthodox Church's consent as part of the administrative procedure for issuance of a license to build a new praying facility for a non Orthodox religion³³.

³² See the main points and also the well known signatories of this declaration in the daily newspaper *EXOUSIA* of 5.5.1998, p. 7.

³³ Compulsory Law No. 1672/1939, art. 1. This provision has been criticised as obviously unconstitutional due to unacceptable exercise of power by the Orthodox Church upon the other churches violating the principles set forth in Art. 3 par. 1 Gr.C for the protection not only of the prevailing but also of every known religion. This provision is also violating religious equality deriving from art. 13 par. 1 Gr.C.; see CHRYSOGONOS, K., *Individual and social rights*, Athens 1998, pp. 233-234; DAGTOGLOU, P.D., *Individual rights A'*, 1991, pp. 380-381.

3. Recent secularisation trends

The Church-State relations in Greece are entering a new era of profound reconsideration. This was triggered by the abolition of any reference to one's religious belief on the Greek police identification cards. For many decades now these ID cards mentioned obligatorily the holder's identity with regard to the confession that he/she held, i.e. Greek Orthodox, Catholic, Jew, atheist, etc. According to Law No. 2472/1997 "for the protection of personal data" any reference to certain sensitive personal data such as political, religious, ideological convictions, etc. is prohibited unless the person has granted his/her explicit consent³⁴. This development has led to thorough social discussions and unrest, including public protestations organised by the Greek Orthodox Church for the abolition of the new legal frame³⁵.

Publicly known religious discriminations are generally avoided. It cannot be coincidental however, that all the leading positions in the public sector, including the Supreme Courts of

³⁴ MANESIS, A., „Unconstitutional even the optional reference to the religious conviction“, in *TO BEMA TIS KYRIAKIS*, 21.05.2000, p. A25.

³⁵ See the official website of the Greek Orthodox Church in the address: <http://www.ecclesia.gr>.

the country, the armed forces, education, public administration and the members of Government all happen to be of Greek Orthodox confession. As one of the “unhappy” political events one could mention the resignation of Mr. Christos Rozakis as Deputy Minister of External Affairs for “health reasons” in December 1996. It became public later on that he was repeatedly attacked in the Parliament for his “incompetence” to defend Greek national interests as not being a member of the Greek Orthodox Church. Shortly afterwards he was nominated as judge at the ECHR Court³⁶.

The Greek Orthodox Church and the conservative part of the society believe that this is only the beginning of a longer series of State acts aiming at the separation of the Orthodox Church from the Greek State organisation with all the institutional legal and financial consequences thereof³⁷.

The current Minister of Justice and Professor at the Athens Law School Mr. Michalis

³⁶ POLLIS, Adamantia, Greece: A problematic secular State, in: CHRISTOPOULOS D. (ed.), *Legal Topics of Religious Difference in Greece*, 1999, pp. 165ff. (p. 187).

³⁷ Such consequences would refer to the verbalistic recognition of the Orthodox Church as the prevailing religion in the Greek Constitution, to whether the Charter of the Greek Church will remain a formal law passed by the Government, whether the legal status of Orthodox clergymen as public servants bein paid by the State will remain as it is, etc.

Stathopoulos has as early as in the beginning of the nineties submitted a long list of proposed legislative provisions, including among others³⁸:

- a) abolition of the preface of the Greek Constitution's reference "in the name of the Holy and Consubstantial and Indivisible Trinity",
- b) abolition of Art. 3 of the Greek Constitution with regard to the Orthodox Church as being the prevailing religion in Greece,
- c) abolition of Art. 13 par. 2 last sentence of the Greek Constitution providing for the prohibition of proselytism,
- d) the amendment of Art. 16 par. 2 of the Greek Constitution by deleting the development of religious conscience as a task of the State education and its substitution through the religious neutrality of the State. This amendment would lead to the change of the now valid legal frame for teaching RE at schools (Law No. 1566/1985) in terms of limiting the hourly lessons of the Orthodox dogma in favour of History of Religions, and

³⁸ STATHOPOULOS, M., „Constitutional protection of religious freedom and Church-State relations“, in: CHRISTOPOULOS, D., *Legal Topics of Religious Difference in Greece*, 1999, pp. 199ff. (p. 214-223).

- e) introduction of any kind of religious oath of the President of the Greek Republic instead of the now provided Orthodox one.

B. RE and the Greek educational system

1.- Primary and Secondary Schools in Greece

1.1.- General - Public and Private Schools - Aims

The legal regime of primary and secondary schools is contained in law no. 1566/1985 about “structure and operation of primary and secondary education and other provisions”³⁹.

Primary education is provided by kindergartens and primary schools, whereas secondary education is offered by gymnasiums and different types of lyceums.

Primary and secondary schools may from the ownership point of view be either public or private. Whereas gymnasiums have a unitary form and orientation, Lyceums may belong to four categories, i.e. general, classical, technical-vocational and unified multi-branch (“polycladica”).

The above classification covers the *public schools*. The establishment of *private schools* is safeguarded by the Greek Constitution in article 16, whereas article 16 par. 8 provides for the right of people who follow a different dogma or religion than the prevailing one to establish

³⁹ Published in Official Gazette No. 167/30.09.1985.

private schools. A private school may be owned by a Greek or by a non-Greek citizen or legal entity.

The aims of primary and secondary education are expressed in this law in a rather general and thus legally not enforceable way⁴⁰. More specifically, article 1 par. 1 of law 1566/1985 stipulates *inter alia* that:

“... pupils should be loyal to their country and to the pure element of the Orthodox Christian tradition. ...”.

Article 4 par.1 of the same law refers specifically to primary education:

“ The purpose of primary schools is the all round intellectual and physical development of the pupils. ... Primary School helps the pupils: ... e) to familiarise gradually with ethnic, *religious*, national, humanitarian and other values and to organise them into a system of values”.

Furthermore, the purpose of gymnasiums as part of the secondary education is, according to article 5 par. 1a of law 1566/1985,

“to boost the overall progress of the pupils ... Secondary School helps the pupils: a) to widen their system of values (ethical, religious, national, humanitarian and other values), so that they may regulate their behaviour accordingly”.

⁴⁰ SKOURIS, V., “The Law of Education”, *V.Skouris/An.Tachos: Specific Administrative Law*, Issue No. 6, p. 53.

Finally, article 6 par. 2 refers to the aims of the highest level of secondary education and stipulates that:

“The lyceum is designed to complete all the educational goals. Especially, it helps the pupils ... b) to realise the deeper meaning of the Christian-Orthodox ethos and of the fixed convictions in universal values ...”.

1.2.- Foreign Schools

The legal frame of *foreign schools* is to be found in law no. 4862/07.01.1931. It must be underlined that foreign schools are supervised by the same authorities as Greek private schools⁴¹.

It is also important to note that Greek pupils are forbidden to attend foreign primary schools and there are penalties for those not complying with the law. Penalties are connected with the refused recognition of possible certificates granted to a Greek pupil and also with his parents' disobedience to comply with the rule of the nine-years' obligatory school attendance.

As far as secondary foreign schools are concerned Greek pupils may attend them since their Certificates are equivalent to those of the Greek secondary schools.

⁴¹ The supervision of foreign and Greek public and private schools is carried out by the Ministry of National Education and Religions together with the Collective Institutions provided for by Law No. 1566/1985 articles 22, 23-27, 48-52.

In these schools pupils are divided according to their confession into orthodox and/or Catholics and are taught RE by separate teachers.

1.3.- Ecclesiastical Schools

The first Governor of modern Greece, Ioannis Kapodistrias, believed that the intellectual and ethical improvement of the Greek nation could not be achieved without the help of educated clergymen. From this belief, and after having overcome several difficulties, Ioannis Kapodistrias finally established in 1830 on the Greek island of Poros the first School for Priests, the so-called “Ecclesiastical School”, which was however annulled after his death because the monarchy did not support it.

Nevertheless, the institution of ecclesiastical schools was maintained and developed over the years. Article 2 par. 2 of law 1566/1985 makes special reference to an extra type of the so-called “ecclesiastical lyceums” to be governed by ad hoc provisions of a specific law. This is law no. 476/1976 about “Ecclesiastical Education”⁴².

Today there exist and operate several ecclesiastical schools of secondary⁴³ and graduate school⁴⁴ education.

⁴² Published in Official Gazette No. 388/10.11.1976. For more details concerning the ecclesiastical schools see p. 15.

⁴³ According to Art. 6 par. 1 of Law No. 1025/1977 the secondary ecclesiastical schools are: the Secondary Ecclesiastical Tutor Schools (4 schools), the three-year

According to Art. 3 par. 1 of Law No. 476/1976 “on ecclesiastical education” ecclesiastical schools are established or abolished according to presidential decrees issued after a proposal from the Minister of National Education and Religions and a relevant report from the Supervisory Council on Ecclesiastical Education. Consequently, the State has total control over these schools.

The provisions for the teaching staff of secondary schools regarding their service status, promotions and wages also apply to the teaching

Ecclesiastical Gymnasiums (6 schools), the four-year Ecclesiastical Lycaeums (18 schools) and the Rizareios Higher Priest School of Athens. Information thereon can also be found in the web site of the Ministry of National Education and Religion <http://www.ypepth.gr/07bb-eklekp.html>. Furthermore, according to the National Statistic Authority of Greece regarding secondary ecclesiastical education schools for the school-year 1992/93, the number of public ecclesiastical schools is 23, hosting 1.427 pupils and 142 teaching staff; on the other hand, there is only one private ecclesiastical school, hosting 92 pupils and 59 teaching staff; see the web site of the National Statistical Authority <http://www.statistics.gr/gr/data/tables/table44.htm>

⁴⁴ According to Art. 6 par. 2 of Law No. 1025/1977 the ecclesiastical graduate schools are the following four: the Ecclesiastical Pedagogical Academy Vellas, the Ecclesiastical Pedagogical Academy of Thessalonica, the Pedagogical Department of the Athonias Ecclesiastical Academy and the Higher Ecclesiastical School of Athens which accept pupils who have finished any secondary schools (ecclesiastical or not). (Presidential Decree No. 287/92, Off. Gazette 146 issue A’/92).

staff of secondary ecclesiastical schools according to Art. 69 par. 2 of Law 1566/1985.

All pupils of ecclesiastical schools - boys only are accepted - receive state scholarships, with the exception of the pupils of Rizareios Ecclesiastical School⁴⁵ and the graduates usually become priests.

As far as their Certificates are concerned, they are equivalent to the ones of the general schools of secondary education. Also in ecclesiastical schools the pupils have the opportunity, if they want, to take the Panhellenic entrance examinations in order to proceed to university studies. Alternatively, they can stay on for an extra year - a fourth year in Lyceum - and acquire further training for the priesthood. Thus, the main difference between ecclesiastical schools and general schools of secondary education is that the first include in their curricula more hours for teaching religion.

In summary we would say that ecclesiastical schools combine three main aims:

- a) offering secondary level education,
- b) education in preparation for the priesthood, and
- c) financial assistance for their poorer pupils, i.e. they exercise a kind of charity.

⁴⁵ Art. 3 par. 4 of Law No. 1025/1977.

These broad aims have forced ecclesiastical schools to shape their curricula in line with these of general schools of secondary education. Moreover, as their certificates are equivalent to the ones of the general schools of secondary education, they enable pupils either to change school during their studies, or to decide to follow professions other than priesthood. Thus, the religious lessons, although they have a higher profile in the curricula of ecclesiastical schools, do not anymore play as important a role in the character of these schools.

1.4.- Minority Schools

In view of the importance of the exercise of the right to religious education special reference should be also made to the minority schools. As minority schools are meant the schools attended by pupils belonging to the Muslim minority of Western Thrace⁴⁶. The right to establish minority schools was introduced by article 8 of the Treaty of Sebres of 1923. Furthermore, minority schools are considered equivalent to Greek public schools, as the Minister of National Education and Religions has specified on the condition of reciprocity⁴⁷. There are approximately 234 schools in Western Trace

⁴⁶ Law No. 694/1977, art. 1 par. 2, published in Official Gazette No. 264/16.09.1977. Special provisions about the staff of minority schools are included in Law No. 695/1977.

⁴⁷ Article 5 par. 6 Law No. 694/1977.

today, two Gymnasiums and one Lyceum in Komotini (the so-called Jelal Bayar), which have 13.000 - 14.000 pupils. In the minority schools the teaching of the Turkish language is compulsory⁴⁸.

2.-Teaching religion as main instrument of RE

2.1.- Aims of teaching RE

Until 1981, when the social-democratic political change took place in Greece after a long period of conservative governments, the main aim of RE was the development of religious sense of the pupils in terms of both a profound belief and relevant experience through active participation in the religious life of the Greek people (e.g. going to church, participation in common prayer at school etc.)⁴⁹.

The same regime was adopted for the gymnasiums and lyceums (secondary schools) as well. In this sense RE was aiming at “disclosing

⁴⁸ Apart from the Muslim minority, which seems to be the biggest and the best organised one in Greece, there are also several other smaller minorities such as: the Catholics in Crete, the Cyclades and Corfu, the Jewish community in Thessaloniki, Larissa and Athens, the Armenians, the Protestants, the Jehovah's Witnesses et.al. See TSITSELIKIS, K., *International and European regime for the protection of linguistic rights of minorities and the Greek legal order*, 1996, p. 306.

⁴⁹ Article 3 of the Presidential Decree No. 1034/1977 about “the taught subjects and the analytical and weekly programme of the primary school” published in Official Gazette A' 347/12.11.1977.

the truths of Christ about God, the world and the man, the introduction of the pupils into the doctrines of Christianity ..., the knowledge of the historical evolution of the Christian-Orthodox Church and its contribution to the world.”⁵⁰

Nevertheless, since the early 80’s the general orientation of RE was redefined, especially with regard to the gymnasiums and lyceums. A tendency to abandon the ideologically manipulative practice of obligatory introduction to the principles of the Orthodox Church becomes clear. The neutral character of the subject in terms of history of religions is gradually introduced. More specifically it is attempted that pupils acquire a global view of the values of Christianity so that on the basis of adequate information they can freely form their personal attitude towards religion in general⁵¹.

2.2.- The practice of the teaching of RE

Although the constitutional frame of RE guarantees the development of religious conscience of the pupils without prejudice in favour of any specific dogma or religion, the

⁵⁰ Article 2 of Presidential Decree 831/1977 published in Official Gazette A’ 270/20.09.1977.

⁵¹ For an analytical approach of the curricula in each one of the classes of primary and secondary schools see SOTIRELIS, G., Religion and Education according to the Constitution and the European Convention, pp. 48-54.

legislative provisions specialising this principle tend to be affected by the prevailing religion. The realisation of these provisions through the school books and the RE teachers is broadly orientated to the convictions and beliefs of the Orthodox Church in a rather axiomatic and absolute way, thus leaving no real alternatives to the young listeners to build a global attitude towards the subject.

According to the curricula applied in primary and secondary schools until now RE is taught two (2) hours a week, except for the ecclesiastical schools, where RE is taught three (3) hours a week at least. A significant innovation is being introduced by a draft law for primary and secondary education presented by the Minister of Education and Religion during August 1997. In particular teaching RE in the third class of Lyceum, i.e. in the last class of secondary education, is being abolished and substituted by History of Religions to be taught twice a week as well⁵².

3. - Liturgy attendance and morning prayer as subsidiary instrument of RE

Whereas teaching religion is considered to be the primary instrument of religious education, liturgy attendance and morning prayer are

⁵² "New page opens in education", *KATHIMERINI*, 2 August 1997.

evaluated as secondary means of collectively exercising religious education and developing religious conscience⁵³. Upon queries submitted to the Ministry of Education and Religion by ecclesiastical authorities, parents of pupils and school directors the responsible Ministry issued the administrative directive of 1977 on this matter⁵⁴.

The administrative directive has no normative character. It is rather an official assistance tool offering interpretation guidelines to the parties involved⁵⁵. Such guidelines, however, affect the administrative practice greatly since they are generally and unitary applied by the Administration.

According to the administrative directive of 1977 the regular (once a month at least) participation in the liturgy and the morning prayer are obligatory for the pupils, since they constitute the necessary instrument for the development of religious conscience of the pupils.

⁵³ SOTIRELIS, G., *ibid*, pp.64-67.

⁵⁴ See Administrative Directive of the Ministry of Education and Religion ΥπερΦ-Φ.200.21/16/139240/26.11.77. This initial Administrative Directive was followed by others which confirmed it in its basic guidelines. These Directives are: ΥπερΦ-Γ/6251/22.10.79 and Γ/2875/30.4.81.

⁵⁵ DAGTOGLOU, P., *General Administrative Law*, 1984, p.59, par. No. 166.

Although it is clearly stated that the teachers who are called to accompany the pupils to the church for the liturgy attendance are not legally obliged to do so and in any case their participation is not allowed to be combined with any personal or financial disadvantages, it is often general practice that such activity is considered to be undeniable duty for the teaching staff⁵⁶.

The possibility of discharging a pupil from the obligation to participate in the RE and/or the secondary means of liturgy attendance and morning prayer is discussed further below in the frame of the contents and limitations of the right to religious education.

4. - Other instruments of religious education

It is worth mentioning that according to the above administrative directive of 1977 the school directors are supposed to advise the pupils to participate in Sunday liturgies on a regular basis. This is a clear hint of the administration's aim to expand the religious educational policy also outside schools.

Furthermore, the circulation of religiously orientated brochures and periodicals is tolerated⁵⁷.

⁵⁶ SOTIRELIS, G., op.cit., p. 66.

⁵⁷ SOTIRELIS, G., op.cit., p.67.

C. The right to religious education

1.- The constitutional frame: main concepts and definitions

The right to religious education is related to both the right to religious freedom and the right to education. These two rights are classified by the Greek constitutional order as fundamental rights which are worth being specifically protected as provided for by articles 13 and 16 of the Greek Constitution of 1975/86. In particular:

According to article 13 par. 1 Gr.C.:

“Freedom of religious conscience is inviolable. Enjoyment of individual and civil rights does not depend on the individual’s religious beliefs.”

Article 13 par. 2 Gr.C. stipulates that

“All known religions shall be free and their rites of worship shall be performed unhindered and under the protection of law. Proselytism is prohibited”⁵⁸.

Article 16 par. 2 Gr.C. deals with the freedom of education. It reads:

“Education constitutes a basic mission for the State and shall aim at the moral, intellectual, professional and physical training of Greeks, the development of national and religious conscience and at their formation as free and responsible citizens.”

⁵⁸ For the translation of the text of the Greek Constitution 1975/86 see TRAGAKIS, G., CARATZAS, H., ZOMBOLA, H., English-Greek Greek-English Dictionary of Law Terms & The Constitution of Greece, Athens 1991, pp. 413 ff.

Religion as such is the object of other social sciences than the law, such as theology and philosophy. In this sense we are obliged to restrict our approach to the meaning of the term as used in the above constitutional text.

The earliest reference to religious freedom was made in art. 16 of the Bill of Rights of the State of Virginia (USA) of 1776, followed by art. 10 of the Declaration of the Individual and Civil Rights of 1789.

The earlier Greek Constitutions included only provisions for the protection of religious tolerance. Provisions for the preservation of religious freedom were added later. In the currently valid Constitution of 1975/86 the main legal basis for the protection of religious freedom is to be found in the above mentioned art. 13. In the more general constitutional “network” of human rights, however, religious freedom is closely connected with the respect for the value of human beings and with the protection of human dignity, as well as with the free development of human personality (arts. 2 par. 2 and 5 par. 1 of the Constitution).

The special importance that the constitutional legislator grants to the fundamental right of religious freedom can be seen from the position of the aforementioned art. 13 Gr. C. in the hierarchy of the constitutional provisions.

Firstly, art. 13 par. 1 protecting religious freedom has not been included in the constitutional provisions, which can be suspended, according to art. 48 par. 1 Gr. C. The latter provision governs the state of siege, i.e. an extreme case of internal or external danger when most of the rest constitutionally protected freedoms can under strict conditions be suspended⁵⁹. Thus, religious freedom including its more specific expression of the right to religious education can be enjoyed under the constitutional guarantee even during politically anomalous periods of state of siege.

Secondly, the provisions of Art. 110 par. 1 Gr. C. concerning the revision of the Constitution differentiate explicitly between those provisions which can be amended or abolished following an

⁵⁹ The function and the potential dangers of legal and political misinterpretation and misuse of Art. 48 Gr. C. in the frame of parliamentary democracy have been criticised; see CHRYSOGONOS, K., *Individual and social rights*, 1998, p. 63, who holds that Art. 48 Gr. C. has to be abolished *de constitutione ferenda* since there are other more effective “security clauses” in the constitution to be applied in case of internal or external danger. We believe this approach to be rather hyperbolic given that the declaration of state of siege and the suspension of most of the fundamental rights can not exceed the duration of fifteen days (Art. 48 par. 1 subpar. b. Gr. C.), any prolongation thereof must be decided by the Parliament even if it has been dissolved (Art. 48 par. 3 Gr. C.), and the decision of the Parliament for the declaration of state of siege can only be taken with the qualified majority of three fifths of the total number of the parliamentarians (Art. 48 par. 6 Gr. C.).

elaborate constitutional procedure, and those which cannot be revised as belonging to the core of the present constitution given their superior importance. Besides the provision safeguarding the political form of presidential parliamentary democracy in Greece, art. 110 par. 1 Gr. C., excludes art. 13 par. 1 Gr. C. which protects religious freedom from the possibility of being revised under any circumstances⁶⁰. In other words, the prohibition of revision of the constitutional provision protecting religious freedom means that any attempt to either amend or suspend this provision would constitute a direct breach of the constitution. This prohibition being the exception to the rule of constitutional revision denotes the higher degree of importance this freedom enjoys in the hierarchy of constitutional normative system.

Furthermore, it is not coincidental but indicative of the above underlined increased constitutional qualification that Art. 13 par. 1 Gr. 1 introduces an unreserved fundamental right, i.e. the wording of this provision includes - unlike other constitutional rules - no reservation of protection. This does not mean, however, as in every fundamental right, that judicial interpretation has not set limitations to the

⁶⁰ GEORGOPOULOS, K., *Constitutional Law*, 3rd Ed., 1991, p. 409 ff.

enjoyment of this right⁶¹, as will be shown further below.

The term “*religious tolerance*” denotes impartiality and/or indifference of a State both towards the religious allegiances of its citizens, and towards their choice to have any religion they want. In the name of religious tolerance citizens have the right to practise the religion of their conscience but they cannot claim State support in their act of worship, because the State, having a prevailing religion, is simply an “impartial viewer” as far as the other religions are concerned, unless, of course, other religions became a threat to the State religion, in which case they could be restricted or banned at any time.⁶²

The term “religious freedom” has a much broader meaning, inasmuch as it denotes the legal guarantee provided by a State to its citizens that they will be free to form and demonstrate

⁶¹ CHRYSOGONOS, *Individual and human rights*, 1998, p.79, who supports that the specification of possible limitations of fundamental rights is a matter of interpretation and cannot be excluded simply because the text lacks reference to legal reservations.

⁶² Cf. TILBERG, Cedrig, W., *Religious Liberty*, Board of Social Ministry (Lutheran Church in America, 1968) p. 25: “Religious liberty is not to be confused with religious tolerance. Tolerance as a legal concept is premised on the assumption that the State has ultimate control over religion and the churches and that whether and to what extent religious freedom will be granted and protected is a matter of state policy”.

their religious conscience, or that their religious practices will be protected. In consequence under religious freedom citizens have a legal right *vis-à-vis* the State for an unobstructed religious formation (freedom of religious conscience) and demonstration (freedom of religious worship) of their religious beliefs. The State in this case is not an “impartial viewer” anymore, because it is expected to be a guardian of religious freedom (including unbelief) and is obliged not to proceed to any legislative or administrative measures which might obstruct it directly or indirectly.⁶³

In view of the above religious freedom is found in the Greek Constitution as a concept which includes the right to the freedom of conscience and the right to the freedom of worship.⁶⁴

The conceptual analysis of the term “freedom of religious conscience” provides the scope of constitutional protection granted to this human right. More specifically, theory⁶⁵ and to a

⁶³ Cf. TILBERG, Cedrig, W., op. cit.: “Like other basic freedoms which find recognition in the Constitution, religious freedom is deemed to be not a concession or grant by the State, but an indefeasible right of the person which the government must recognise, respect and protect”.

⁶⁴ TROIANOS, Sp. “Religious Education in the frame of the human right of Religious Freedom”, *Charistirion G. Papachatzi*, p. 285.

⁶⁵ MARINOS, An., Religious Freedom, 1972, pp. 102 ff., PARARAS, P., The Constitution of 1975-Corpus, Vol. 1, art.

considerable extent case law have accepted that the freedom of religious conscience includes:

- 1.- the right of an individual to believe in a religion of his/her own choice (*libertas confiteri*)⁶⁶,
- 2.- the right of an individual to believe in no religion whatsoever, i.e. to be non-religious or atheist⁶⁷,
- 3.- the right of an individual not to disclose his/her own religious convictions⁶⁸,
- 4.- the right of an individual to change religious beliefs, in the sense of becoming member of another religion⁶⁹,
- 5.- the right of an individual to declare his/her religious convictions (*libertas profiteri*)⁷⁰,
- 6.- the right to convene for religious purposes⁷¹,
- 7.- the right of association for religious purposes⁷²,

13, pars. 17-20, DAGTOGLOU, P.D., Individual Rights (concised edition), p. 310ff., MANESIS, Ar., Individual Freedoms, pp. 251ff., CHRYSOGONOS, K., Individual and Social Rights, p. 219-232.

⁶⁶ MARINOS, Ar., Religious Freedom, Athens 1972, p. 102-103.

⁶⁷ Op.cit. p. 103-105.

⁶⁸ Op.cit. p. 105-106.

⁶⁹ Op.cit. p. 106-107.

⁷⁰ Op.cit. p. 107-117.

⁷¹ Op.cit. p. 117.

- 8.- the right to religious equality⁷³,
- 9.- the right to personal freedom in the sense of prohibition of any restriction in the exercise of personal freedom for religious reasons⁷⁴,
- 10.- the right to religious education⁷⁵,
- 11.- the right of an individual to respect specific dietary habits dictated by his/her religion⁷⁶,
- 12.- the right of an individual to bear special distinctive signs, such as clothing, emblems of his/her religion⁷⁷,
- 13.- the right to raise funds and/or organise lotteries for religious purposes⁷⁸,
- 14.- the right of an individual to be buried according to the rules of his/her religion⁷⁹,
- 15.- the right to establish schools according to one's own religious beliefs⁸⁰.

⁷² Op.cit. p. 117-118.

⁷³ Op.cit. p. 118-124.

⁷⁴ Op.cit. p. 124-126.

⁷⁵ Op.cit. p. 126-138. See also SPYROPOULOS, Ph., Constitutional Law in Hellas, p. 134 SPYROPOULOS, Ph., Constitutional Law in Hellas, p. 134

⁷⁶ Op.cit. p. 138-140.

⁷⁷ Op.cit. p. 140-141.

⁷⁸ Op.cit. p. 141-142.

⁷⁹ Op.cit. p. 143-146.

⁸⁰ Op.cit. p. 147-154.

From the above it becomes obvious that the right to religious education, which constitutes the object of this study, is one of more expressions of the right to religious conscience deriving from the constitutionally protected right to religious freedom.

Apart from freedom of conscience, religious freedom includes also freedom of worship, the so-called freedom to exercise one's religion⁸¹. In fact the conceptual and functional interdependence between freedom of conscience and freedom of worship should be stressed upon. In other words, the borders between these two rights are not always clearly distinguishable, given that the exercise of freedom of worship is a *de facto* expression of conscience, whereas freedom of conscience remains an empty word without the practical possibility of exercising acts of worship.

It is worth mentioning that in case of religious communities, as the Muslims and the Israeli are, these are subject to the state supervision as long as they are organised to form legal entities. This supervision is constitutional, however, only if it confines itself to the control of legality of the activities of these communities⁸². In this way, we

⁸¹ DAGTOGLOU, P.D., *Individual Rights* (consice edition), Athens 1991, p. 315 ff.

⁸² DAGTOGLOU, *ibid.*, p.323.

believe that a satisfactory degree of state neutrality in the sense of non-discrimination of religious minorities is safeguarded.

As far as Art. 16 Gr.C. and the “formation of religious conscience through education” as constitutional state aim is concerned, it should be noted that the presidential decree No. 583/1982, art. 2 specifies this aim as “making the children share the Christian-Orthodox beliefs”. Thus, the crucial but controversial point is to determine whether the formation of religious conscience is indeed extended to all known religions as well.

According to the more conservative approach⁸³ the parents are entitled to raise their children according to their own religious convictions and at the same time the State is obliged to offer the subject of RE in the curriculum corresponding to the principles of the Christian-Orthodox dogma, since this depicts the religious identity of the vast majority of the Greek people.

The liberal approach of the matter is in favour of RE in the form of introduction into the different types of religions and not only into the Christian-Orthodox one. According to this attitude the duty of the State in the sense of art. 16 par. 2 Gr.C. is to grant the pupils the opportunity to get

⁸³ MARINOS, An., Constitution, Democracy and the subject of RE, 1981, pp. 19-20.

acquainted with more and different religions and dogmas and let the final choice up to them⁸⁴.

The drawback of this approach is that the children can only make their own religious choices after they have reached a certain age of maturity⁸⁵ and until then they keep on relying on their parents' decisions. Moreover, having RE as a monolithic introduction into the prevailing religion is susceptible to suspending the exercise of the right to the free development of one's own personality, as provided for in art. 5 par. 1 Gr.C⁸⁶.

For an adult who decides to enter the academic educational society, religious freedom in combination with the right to education acquires an interesting dimension when the student's convictions deviate from the majority's ones. Freedom of religious education should guarantee the student's possibility to study without any restrictions due to his/her religion or atheistic

⁸⁴ SOTIRELIS, G., *Religion and Education*, 1993, pp. 330 f.

⁸⁵ It is not always easy to determine a general rule concerning the age that a child must have reached in order to be able to decide on his/her own about their current religious convictions. It can not be denied, however, that other than in previous generations, in our times of the so-called "universal village", due to the revolutionary communication technologies, opportunities have increased dramatically for children to gain access to foreign cultures and religions, thus enabling them to have an overview earlier and form quite mature opinions on religious matters as well.

⁸⁶ TSATSOS, D., *Constitutional law*, C, 1988, p. 323-324.

beliefs. In this context it has been judged that the banning of a student of the Theological Faculty of the University for his being an atheist is unconstitutional⁸⁷. Furthermore, the election of a candidate as a member of teaching staff of the Theological Faculty of the University presupposes the possession of a Ph.D. in a subject relevant to the scope of research and teaching interests of the Faculty's Department, and not necessarily a Ph.D. of a Christian-Orthodox University⁸⁸. This nomology is not only an important application of the constitutional freedom of religion and education; it is also closely connected with the academic freedom as protected in art. 16 par. 5 and 6 Gr.C., which would otherwise be undermined, especially in the theological studies, if dedication to the Christian-Orthodox religion would constitute a prerequisite.

After an overview of the typical laws and other normative provisions of the Greek administration governing the exercise of the right to religious education in the primary and secondary schools we shall examine the vehicles of this human right, its functional content and also its limitations in practice as seen by the nomology of the Greek Civil and Administrative

⁸⁷ Council of State dec. No. 194/1987, *NoB* 1987, 607.

⁸⁸ Council of State dec. No. 1798/1989, *Index of Council of State's decisions* 1989, 643.

Courts. In this approach it is attempted to give an outline of how the above mentioned constitutional frame is interpreted and applied in the juridical practice.

2.- Laws governing religious education in primary and secondary schools

2.1.- Law No. 309/76 “about general education”⁸⁹

This is the first legal text on matters of educational policy after the restitution of Democracy in Greece in 1974. It is a rather modest regulatory frame with neutral provisions as to the direction of the religious education of the children.

In particular there is no special reference to any aims of religious education concerning the kindergarten, whereas one of the educational aims of the primary schools is “to awaken the moral conscience of the pupils and set the basis of their religious, moral and humanitarian education”⁹⁰.

In the provisions for the aims of religion taught in Gymnasium and in Lyceum the intention of the lawmakers to remain impartial towards any known religion becomes clear inasmuch as the development of critical thought and the free

⁸⁹ Official Gazette A 100/30.04.1976, *Kodix NoB* 24, page 256 f.

⁹⁰ Art. 11 par. 1 of Law 309/1976.

religious conscience of the pupils are promoted⁹¹.

Law No. 309/1976 complies therefore literally with the content and wording of the constitutional provisions of arts. 13 and 16 Gr.C. which are free of any prejudice in favour or against the prevailing religion and the known ones. The study of the Introductory Report of this law and the Parliamentary Minutes⁹² show the clear intention of the constitutional legislator to provide a sound basis for a free formation and development of the religious conscience of pupils who should later become freely thinking citizens under social conditions of self-determination concerning their religious choice.

2.2- Law No. 1566/85

Other than law No. 309/1976, law No. 1566/1985 incorporates the constitutional “preference” of the prevailing religion, i.e. of the Christian Orthodox one. More specifically, article 1a of this law stipulates that

“... pupils should be loyal to their country and to the pure elements of the Orthodox Christian tradition...” .

Article 4 par. 1 of the same law refers especially to primary education and specifies that:

⁹¹ SOTIRELIS, G., Religion and Education, pp. 33-35.

⁹² Parliamentary Minutes, Period A, Second Session, 4th Band 1976, pp. 4017 ff., 4111 ff., 4153 ff. ad 4254 ff.

“The purpose of primary schools is the all round intellectual and physical development of the pupils. ... Primary School helps the pupils: ... e) to familiarise gradually with ethnic, religious, national, humanitarian and other values and to organise them into a system of values”.

The purpose of Gymnasiums (secondary schools) furthermore, is

“to boost the overall progress of the pupils... Secondary School helps the pupils: a) to widen their system of values (including religious values), so that they may regulate their behaviour accordingly”.

This purpose is given in article 5 par. 1a of this law.

Finally, article 6 par. 2 refers to the aims of the highest level of secondary education and stipulates that:

“The Lyceum (Sixth form School) is designed to complete all the educational goals. It helps the pupils: ... b) to realise the deeper meaning of the Christian Orthodox ethos and of the fixed convictions in universal values...”.

It is worth mentioning that it was the declared ambition of the Government which introduced the discussed law to facilitate the conjunction of a well organised educational system and building at the same time of a deeply rooted Christian Orthodox conscience of the pupils⁹³.

⁹³ SOTIRELIS, G., Religion and Education, pp. 35-36, fn 5. See also SKOURIS, V., Law of Education, pp. 41 ff who doubts the normative value of the pompous wording of art. 1 of law 1566/1985 concerning the aims of the educational system.

Given the fact that religion constitutes the main tool for the realisation of the religious educational aims it is useful for the interpretation of the existing legal frame to bear in mind the already abolished Presidential Decrees No. 390, 392 & 393/11.11.1990 about the organisation and function of primary and secondary (Gymnasiums and Lyceums) schools⁹⁴. These Presidential Decrees governed the obligatory everyday prayer prior to the beginning of the lessons in a common concentration of pupils and teachers in the school-yard on the one hand and the regular participation of all members of the school community in church liturgies, at least three times a year. Although all three of the Decrees were abolished shortly after their introduction, they were the first legal texts to provide for the possibility of a non-Orthodox pupil or an atheist to be excluded from the obligation of his/her participation in the above mentioned forms of worship upon written petition of the parents or guardians. This possibility was given without the need of the applicant to give a reasoned explanation of his choice, which would have led the pupil or his parents to a possibly unwilling disclosure of his religious beliefs. The abolition of these Decrees, which was attributed to the strong objection of various social groups, did

⁹⁴ Official Gazette A 154, 155, 156/21.11.1990.

not affect the validity of law 1566/1985 and its implementing provisions.

Further below we shall discuss the way in which the above legal frame was interpreted by the judicial practice in cases defining the content and the limits of the right to religious education.

2.3.- Administrative Guidelines

These Guidelines govern the liturgy attendance and the morning prayer by the pupils. The contents of these administrative guidelines are discussed further above with regard to subsidiary instruments of RE (see under p.31).

3.- The right to education in relation to RE

The right to education in its general form covers the freedom of the individual (or the right of parents during childhood of the individual, or, when applicable, the right of legal guardians) to decide freely whether, how (object and method) and where the pupil will be educated⁹⁵.

This general right to education includes, among various aspects, the right to choose the religious and philosophical direction of one's education. This latter aspect is a consequence of the religious freedom and the general right for the development of personality⁹⁶ provided for in

⁹⁵ DAGTOGLOU, Pr., Constitutional Law - Individual Rights, Vol. A, page 717, par.984.

⁹⁶ DAGTOGLOU, Pr., Individual Rights, Vol. A, p.719, par. 986.

articles 5 and 13 of the Greek Constitution 1975/86 respectively.

Especially concerning the parental right of choosing the religious direction of education of his children, article 21 of the Greek Constitution 1975/86 stipulating the protection of family constitutes the legal basis thereof. The subject of parents as holders of the constitutional right to religious education is discussed further below.

The practical importance of this specific form of the right to education is that parents are entitled to choose the sort of their children's school, whether public or private⁹⁷.

4.- Holders of the human right to religious education

The right to religious education can be perceived, firstly, from the point of view of the persons being introduced into, acquainted with and educated with the principles of a certain religion or dogma, i.e. *passively* receiving education from school or an other similar party.

In this case the holders of the right to religious education are basically the pupils and their parents exercising parental rights according to Art. 1511 Gr. CC or, under the presuppositions of the law, their legal guardians.

⁹⁷ DAGTOGLOU, Pr., Individual Rights, Vol. A, p.720, par. 986.

More specifically the right of parents to educate their children according to their religious convictions belongs to both of them as far as both are entitled to exercise the right of parental care⁹⁸. Parental care and, consequently, the right to religious education is entrusted only to one of the parents during marriage if the other one can not exercise parental care because of objective difficulties⁹⁹ or because he/she is totally or partially incapable to proceed to a legal act¹⁰⁰. The right in question belongs exclusively to one of the parents in case of death, disappearance, or forfeiture of the other parent's right to parental care¹⁰¹.

Although, according to the above, both parents are entitled to decide on matters of religious education of their child, it is possible that there might arise a disagreement between them. In this case the court will be called to decide what is to be done, always taking into account what is best

⁹⁸ The right to religious education as part of the parental care is provided for in art. 1510 Gr.CC.

⁹⁹ Temporary absence or emigration for a limited period of time is held to be an objective difficulty leading to the exercise of the parental care by only one of the parents, provided that the action or decision to be taken can not be postponed and will affect the direct interests of the child, e.g. registration at school or an urgent surgical operation. See KOUMANTOS, Family Law, Band II, 1989, p.171-2.

¹⁰⁰ See art. 1510 par. 3 Gr.CC .

¹⁰¹ See art. 1510 par. 2 Gr.CC.

for the juvenile according to his family environment¹⁰². The court is not bound by any proposals of the two parents. It can order a third objectively advisable solution, although it is expected that either a combination of the possibly different opinions of the parents or the opinion of at least one of them will be the most suitable, since the parents are likely to know better what is for the benefit of their child.

In case of divorce or annulment of marriage and given that both parents are alive, parental care is decided by the court. It can be entrusted:

- a) to one of the parents, or
- b) if they agree, and have decided on the residence of the juvenile, parental care can be entrusted to both of them.
- c) The court might also decide to allocate parental care between the parents, or
- d) entrust it to a third person¹⁰³.

Furthermore, the right to religious education can be exercised either by individuals or by groups of individuals having the common denominator of the same religious convictions, or even by legal entities of private or public law. Either of

¹⁰² The court's power to decide in such cases derives from art. 1512 Gr.CC.

¹⁰³ See art. 1513 par. 1 Gr.CC.

them may *actively* undertake the initiative to diffuse their religious convictions to others.

At this point the question is raised as to whether the right to religious education as a more specific case of religious freedom is mainly guaranteed to *physical persons*, or to groups of persons or legal entities as well.

It is generally accepted that a fundamental right may also be exercised by a *legal person*, provided that this does not contravene the nature of the very right or the nature of the legal person¹⁰⁴. This can be explained with the fact that religious conscience is a subjective expression of an individual, whereas a legal entity has none. Instead, its legal will is always that of its organs, which are mainly collective ones (Board of Directors, General Assembly of Shareholders, etc.). Even if one should assume that the legal entity's religious conscience could be that of its organs, it will be seldom the case that the religious conscience of all organ's members coincide.

According to the general theory of individual rights, these are held by individuals and, under special conditions, by legal entities of private law. Legal entities of public law can, however, not be holders of individual rights. This is

¹⁰⁴ SPYROPOULOS, Ph., Constitutional Law in Hellas, p. 127, par. 386-387.

because the State and the legal entities of public law cannot be simultaneously bound and favoured by individual rights. Actually these rights have been introduced to protect individuals or private legal entities against state authority¹⁰⁵.

Specifically with regard to religious freedom, it is accepted as a deviation from this rule, that also associations in the form of legal entities of public law should enjoy religious freedom. Otherwise, the legislator might annul the application of these associations' right through converting them by law into legal entities of public law¹⁰⁶. The only legal entity of public law in Greece at the moment is that of the Orthodox Church of Greece. The Greek Orthodox Church not being an integral part of the Greek State it is entitled to the enjoyment of religious freedom. Besides, it should not be overseen that the practical application of acts of worship requires the active participation of more than one persons, i.e. clergymen, congregation, etc. The victims of an infringement of religious freedom, including the right to religious education, must not necessarily be members of a church; they can be atheists or religiously

¹⁰⁵ DAGTOGLOU, P.D., *Individual Rights* (concised edition), 1991, p. 67.

¹⁰⁶ DAGTOGLOU, P.D., *Individual Rights* (concised edition), 1991, p. 326-327.

indifferent persons¹⁰⁷. As it will be shown further in this text¹⁰⁸, the ECHR Commission holds that religious freedom in the sense of Art. 9 ECHR is not only an individual right¹⁰⁹. It is also a collective one, provided that the legal entities as holders of this right do not pursue any commercial profit¹¹⁰, and do not constitute a governmental organisation¹¹¹, regardless of their legal form¹¹².

It should be stated here that *foreigners*, who are bearers of the right to religious freedom and

¹⁰⁷ According to the *Kokkinakis v. Greece* judgment (1993) art. 9 ECHR protects religious freedom as a foundation of the democratic society in favour of atheists, agnostics, sceptics and the unconcerned; par. 31 of the judgment.

¹⁰⁸ Chapter III 2.1.

¹⁰⁹ *Pasteur X and Church of Scientology v. Sweden* judgment (5.5.79) D&R 16, p. 68.

¹¹⁰ *Kustannus oy Vapaa Ajattelija Ab et al v. Finland* Judgment 15.4.1996 D&R 85-A, p. 29

¹¹¹ See the Greek case *Holy Monasteries v. Greece* (1994); also in Chapter III 2.1. According to the Court's judgment the monasteries pursue mainly ecclesiastical and spiritual goals, but also cultural and social ones under circumstances and therefore do not constitute any governmental or state organisation established for public administrative reasons.

¹¹² *Canea Catholic Church v. Greece* judgment, according to which the applicant was indeed entitled to appeal the case before the Strasbourg authorities claiming protection of religious freedom despite the fact that his legal form, if any, was doubted.

specifically to that of religious education,¹¹³ are also protected when they exercise the right to assemble and the right to form non-profit associations and unions for religious purposes according to articles 11 and 12 of the Greek Constitution. It is accepted in theory that foreigners enjoy protection concerning these two individual rights also in case these are exercised for religious aims.¹¹⁴ The right to religious freedom and consequently also that to religious education is guaranteed to persons having no citizenship¹¹⁵.

Religious freedom as a fundamental right refers to the legal relations of the individual to the State. It has no application to the relations among individuals as such. However, it is possible that the legal relations among individuals be affected *indirectly* by the constitutional guarantee of religious freedom. It is generally accepted, for instance, that the debtor cannot be released from his obligation to fulfil the contract unless he is able to terminate the contract on legal grounds which might be in a conflict with his personal beliefs (Art. 672

¹¹³ MANESIS, A., Constitutional Rights, Band A' Individual Freedoms, p.250.

¹¹⁴ TROIANOS, Sp. Lectures of Ecclesiastical Law, p. 75.

¹¹⁵ TSATSOS, D., Constitutional Law, Band C, Fundamental Rights, p.146 f. DAGTOGLOU, Pr., Individual Rights, Vol. A, p. 389, par. 585

Gr. CC on the termination of a worker's contract)¹¹⁶. As to the right to religious education an analogical application of the indirect effect thereof to the private law relations could be the case at least with regard to the active exercise of this right by a teacher or a legal entity against third persons.

In view of the different holders of the freedom of religious education on the one hand, and of the consequently various ways in which the exercise of this fundamental right could be confined by the State or by third parties, it is vital to define its legal and functional content and also its limits.

5.- Contents of the human right to religious education

5.1.- Religious education and parental care

Parental care according to art. 1510 Gr.CC includes

“the custody of the person, the administration of the finances and the representation of the child in every action or court case concerning its person or its property”.

Furthermore, art. 1518 Gr.CC reads:

“The custody of the child's person includes especially the upbringing, the supervision, the teaching and the education of the child, as well as the definition of the place of his/her permanent residence.

¹¹⁶ DAGTOGLOU, Pr., Individual Rights, Vol. A, p. 390, par. 587.

In view of the above mentioned, also about the vehicles of the right to religious education, it is generally accepted both in theory¹¹⁷ and in case law¹¹⁸ that parents are the ones who will determine:

a) what religion, if any, will their child adopt (e.g. being baptised and thus enter the respective religious community) and

b) what kind of religious education it will be granted.

Accordingly, the right to religious education contains the constitutional safeguard of the freedom of the parents or legal guardians to choose the religious education of their children¹¹⁹.

In this sense it is useful to define the criteria of the decisions and actions which are taken in the frame of the parental care.

¹¹⁷ TROIANOS, S., "Religious Education in the frame of the individual right of religious freedom", *CHARISTIRION PAPACHATZI*, p.285 f. KOUMANTOS, G., Family Law, Band II, p. 206. POULIADIS in GEORGIADIS / STATHOPOULOS, Civil Code - Commentary, Band VIII, p.187.

¹¹⁸ Areios Pagos No.612/1974, *NoB* 23,168, Areios Pagos' Prosecutor Advice No. 20/1969, *NoB* 17, 1164.

¹¹⁹ SOTIRELIS, G., Religion and Education, p. 152; DAGTOGLOU, P., Individual Rights, Band A, par. No. 558; TROIANOS, S., Lectures on Ecclesiastical Law, p. 81.

Greek Family Law as part of the Greek Civil Code attempts in a rather successful way to define the criteria of parental decisions in art. 1511 and 1512 Gr. CC. According to art. 1511 Gr. CC

“every decision of the parents concerning the exercise of parental care must aim at the interest of the child. The interest of the child must also be the aim of any court’s decision when the latter, according to law, is entrusted to decide with regard to the vehicle and the way of exercising the parental care.

Furthermore, the court’s decision must respect equality between parents and make no discrimination because of sex, race, language, religion, political or other convictions, citizenship, national or social origin or property. Depending on the maturity of the minor the opinion of the child has to be asked for with regard to parental care as far as the decision concerns its interests”.

From these provisions it becomes clear that three are the legal criteria on which any decision affecting parental care has to be based on:

- a) the interest of the child,
- b) equality among the parents, and
- c) the opinion of the minor himself.

Even in cases when one or both of the parents are substituted by the court in their parental rights, every decision of the court should be taken for the benefit of the juvenile, should follow the principle of equality between parents and should not neglect the opinion of the child involved. Moreover, the benefit of the child should be taken into consideration even if this is

given priority against the general interests of the parents¹²⁰.

The notion of the “interest of the child” is defined on a case-to-case basis taking into account the specific circumstances and characteristics of the child and the family altogether. The expertise of psychologists and sociologists may prove vital in many of the cases, which mostly seem to be different from each other¹²¹.

As a consequence of the general constitutional principle of equality between men and women art. 1511 Gr.CC stipulates that either of the parents are theoretically capable of undertaking the exclusive parental care and no prejudice in favour of one of them should be allowed, unless special circumstances are accepted, for instance, the very small age of the child making the mother indispensable.

Discriminations because of religious differences between the parents are also prohibited by the provision in discussion. It must be underlined, however, that the impact of religious convictions on the allocation of parental care or its realisation in every day life the best interest of

¹²⁰ KOUMANTOS, G., Family Law, Band II, 1989, p. 174

¹²¹ AGALOPOULOU in GEORGIADIS/STATHOPOULOS, Civil Code - Commentary, Band VIII, 1993, p.138-139 with further notes on case law.

the child is taken into consideration by the court. Such a criterion is applicable especially when the child remains helpless by the parents due to their religious beliefs in the sense that these prohibit blood transfusion despite the undeniable urgency of the child's health state which would objectively dictate such medical measure¹²².

Furthermore, if the juvenile is mentally mature enough to judge the circumstances and decide about personal affairs guided by the own interest, then his/her opinion should also be considered¹²³. This provision constitutes a legislative novelty introduced by law 1329/1983 about the new family law. No records are kept while the judge discusses with the child asking for its own opinion¹²⁴. A court's decision deviating from the expressed opinion of the child which offers indications of maturity is

¹²² See Decision No. 245/1986 of the Heraklion Civil Court of I.Instance (One-Member Chamber) published in *Archeion Nomologias* 37, 125.

¹²³ See art. 1511 Gr.CC. Refer also to the new articles 1647, 1648 GrCC as amended by Law 2447/30.12.1996 [*Kodix NoB* pp. 1907 (1919)] governing the new legal status of adoption, tutelage, etc.

¹²⁴ AGALOPOULOU in GEORGIADIS/STATHOPOULOS, Civil Code - Commentary, Band VIII, 1993, p.140-141.

possible, although it must be profoundly reasoned¹²⁵.

Nevertheless, the fact that parents as bearers of parental care are entrusted with the right to choose the religious education of their child practically deprives the pupils from any competence to exercise the own fundamental right. In the usual average case, where parental care is exercised by both parents without any disagreement between them on the religious orientation, the opinion of the child involved is normally not asked for. The question of maturity of the child as a presupposition of an influential expression of own attitude towards primary or secondary methods of RE (lesson of religion, participation in collective worship, morning prayer) is vital for the consideration of the child's opinion by the court responsible to meet a decision concerning parental care.

It is generally accepted that a child is capable of deciding on its own matters falling into parental care only shortly before his/her becoming an adult¹²⁶, which formally happens, according to Greek Civil Law, at the age of 18.

¹²⁵ AGALOPOULOU in GEORGIADIS/STATHOPOULOS, Civil Code - Commentary, Band VIII, 1993, p.-141. Contra KOUMANTOS, G., Family Law, Band II, p.178.

¹²⁶ KOUMANTOS, G., Family Law, Band II, 1989, p. 178

In this context it must be stressed upon that a child of 14 years or a child who has married with the consent of the court according to art. 1350 par. 2 Gr.CC is entitled to co-define his/her religious choices¹²⁷.

Case law of the Supreme Civil Court (Areios Pagos), however, has relativated the practical value of the child's opinion in deciding matters of parental care¹²⁸. It is worth mentioning hereto that the Supreme Civil Court did not follow the two trends prevailing in the theory¹²⁹: according to the first trend the omission of the court to examine orally the child and take into account its opinion must be separately and specifically reasoned in the court's decision, whereas the second trend introduces the rebuttable presumption that a child approaching the age of becoming an adult (i.e. the age of 18 years) must be adequately mature according to general empirical findings. The negative and, to a certain extent, remarkably conservative attitude of the Supreme Court's case law grants the courts the liberty to ignore the child's opinion without the obligation to provide any special reasoning and - more importantly - remains beyond the judiciary

¹²⁷ POULIADIS in GEORGIADIS/STATHOPOULOS, Civil Code - Commentary, Band VIII, p.188.

¹²⁸ Areios Pagos Decision No.180/1986, *NoB* 35/1987, p.516 f., Areios Pagos Decision No. 283/1986, *NoB* 35/1987, p.500.

¹²⁹ KOUMANTOS, G., Family Law, Band II, 1989, p. 178

control by means of revision before the Areios Pagos (cassation procedure).

Furthermore, according to a rather marginal theory, the child should be left unaffected by any parental convictions to decide on its own at a later time about its confession¹³⁰. Such proposals are rejected not only as unconstitutional (art. 13 and 16 Gr. C), but they also seem to ignore the fact that religious neutrality is unrealistic since the family environment is in any case expected to influence the child's attitude towards religion in his life.

As far as atheism is concerned, the following is worth noting: Art. 13 par. 1 Gr.C provides for the freedom of the individuals to follow any of the known religions or even none. In this sense it is possible that parents are atheists. In this their belief they are entitled in the frame of their parental right concerning religious education to teach their child to respect atheism. Such activity is not to be considered as unconstitutional¹³¹.

In conclusion it must be underlined that the right of religious education covers the fundamental freedom of the parents or guardians to choose the religious education of their children. This right can also be perceived negatively in the

¹³⁰ About this theory see TROIANOS, S., *Religious education*, p. 286, rejecting it on constitutional grounds.

¹³¹ TROIANOS, S., *Religious education*, p.290.

sense of the parents' actionable claim against the State to refrain from any activity apt to change or abolish the orientation they wish to give their children's religious education¹³². Such State interventions may concern apart from entering a religion (e.g. through baptising), the instruments of religious education which aim at the development of the children's religious conscience.

5.2.- Instruments of religious education and the pupils' exemption from their attendance

As already explained above, RE is mainly exercised through the participation or non-participation in the lesson of religion (primary instrument of RE) and also through the liturgy attendance and the morning prayer (secondary instruments of RE).

Special provisions allow the pupils, however, to have themselves discharged from the obligation to attend both the primary and the secondary instruments of RE.

If the family of the child is opposed to religion then the child is expected to follow the way of his/her parents. If he/she is then forced to take part in the religious lessons at school and to "accept" what he/she has already rejected within his/her physical family it is possible that tensions, emotional pressures and internal

¹³² SOTIRELIS, G., Religion and Education, p.152.

conflicts will arise causing him/her an inner turmoil. As a result of this, and in line with the protection of religious freedom as laid down in the Constitution, the parents or parent/guardian who exercises parental care can demand that their child will not take part in school prayers, go to the church with the other pupils or attend RE which is taught according to the principles of the prevailing religion in Greece.

According to several Circulars of the Minister of National Education and Religion¹³³ pupils who are not Christian Orthodox are entitled to exemption from the teaching of RE as well as from the morning prayer and liturgy attendance. Necessary presupposition for the lawful exemption is that the parents, or the parent assigned by Court to exercise parental care, or the guardian, submit to the Director of the School a written declaration of Law No. 1566/1985 stating that they themselves and their children, due to deviating religious beliefs, are not prepared to follow RE, liturgy and morning prayer. This declaration and the exemption to be granted are not allowed to deteriorate the pupil's general level of notes and his/her position in the school community.

¹³³ See Administrative Directives/Circulars of the Minister of Education and Religion ΥΠΕΠΘ Φ.077/Λ/2737/15.11.1979, Γ1/1/1/2.1.1990, Γ2/3887/19.10.1990.

As mentioned above, the secondary instruments of religious education (morning prayer and liturgy attendance) are governed by administrative guidelines¹³⁴ which were only temporarily substituted by the already abolished presidential decrees nos. 390, 392 and 393 of 1990¹³⁵. The difference between an administrative guideline and a presidential decree - which are both sources of administrative law - is the binding degree of the relevant provisions: a presidential decree is issued by the President of the Republic upon proposal of the competent minister, in our case the Minister of Education and Religious Affairs, and has the normative quality of a substantial law, in other words it is legally binding *erga omnes*. An administrative guideline, on the other hand, has no direct enforceability and can be issued by any administrative organ such as minister, prefect or police authority; it constitutes, however, a useful interpretation tool for the application of law by courts, especially with regard to the attitude of the administration towards a legal question.

¹³⁴ The most important of these administrative guidelines is: Ministry of Education F.200.21/16/139240/26.11.77 which was afterwards repeated by several others, such as Ministry of Education C/6251/22.10.79 und C/2875/30.4.81. All of these administrative guidelines were issued by the competent minister after the submission of petitions by parents, church authorities and/or school directors.

¹³⁵ See above p. 48.

According to the said administrative guidelines teachers are not legally obliged to participate at the secondary instruments of RE. The ministry is merely recommending the fulfilment of the teachers' duty to contribute actively to the formation of pupils' national and religious conscience. From the legal point of view the participation of teachers is not compulsory. The same above administrative guideline of 1977 urges the school directors to recommend liturgy attendance on Sundays, i.e. even independent of school programme. Attending Sunday schools is also advisable according to this guideline depicting the attitudes of the Holy Synod of the Greek-Orthodox Church.

The abolished presidential decrees provided for the obligatory morning prayer but allowed at the same time exemption from this obligation. They also restricted the mandatory participation to the so-called ordinary liturgy attendance on three distinct occasions during the year, but left the matter of such participation on other occasions and its frequency to the discretion of the teaching staff.

These presidential decrees lack legal enforceability since they are not in force any more. However, they serve as a frame of future possible solution to relevant questions as they introduced two important novelties alleviating

the previous strict regulatory frame¹³⁶: *Firstly*, the compulsory character of liturgy attendance was limited to the “ordinary” occasions, thus not covering the “extraordinary” ones. *Secondly*, exemption from the duty of liturgy attendance does not refer only to pupils belonging to other dogmas or religions, but also to Greek-Orthodox one, whose parents are willing to submit the written petition for exemption to the school direction. *Thirdly*, the only presupposition of the exemption is the written petition to this end. In this way parents are not obliged to disclose their own religious convictions by having to give special reasoning to their decision.

The abolition of the aforementioned presidential decrees has led to the re-introduction of the previous regime of the administrative guidelines. The positive outcome of this rapid legislative development is, however, a useful precedence both in the sense of interpretation and of application guideline concerning the obligatory character of liturgy attendance and morning prayer.

The exempted pupils are not allowed to leave the school premises during RE; instead they are supposed to rest in another school classroom or in the school yard. As far as the morning prayer is concerned, the pupils are entitled either to stay

¹³⁶ SOTIRELIS, G., *Religion and Education*, p. 64 ff. and 144

in another school classroom, or, if prayer takes place in the school yard, to stay at the end of the pupils' row, thus enabling the rest of the pupils to pray in respect and without being annoyed or distracted. Furthermore, as far as attendance of liturgy is concerned, the exempted pupils are allowed to be absent while the School's Director is supposed to give a notice to the pupils' parents with regard to the forthcoming liturgy attendance so as to enable parents and guardians to take all necessary measures for their children's secure residence elsewhere during liturgy.

The exercise of the right to exemption from RE has been object of Court decisions discussed below.

5.3.- Case law

The Supreme Administrative Court of Greece, the "Symvoulion tis Epikratias", in the broadly discussed decision no. 3356/1995 has confirmed the right to religious education and also the right of the pupil to be exempted from RE¹³⁷.

ff.

¹³⁷ See the text of Decision No. 3356/1995 of StE (Symvoulion tis Epikratias) in *NoB* 1995, p.925 ff. For some of the commentaries see DIMITROPOULOS, P., "Issues of Religious Freedom in the Field of Education", Athens 1997, pp. 55 ff., SOTIRELIS, G., "The development of religious conscience on the procroustis bed of the prevailing religion", *NoB* 1995, p. 982 ff.. See also TROIANOS, *NoB* 1995, p. 929 ff; ALEXIOU, Sp., "RE at schools", *TO BEMA*, 23.7.1995, A10; "8 out of 10 want RE", *TA NEA*, 19.5.1995, p. 12; FEIDAS, Vl., "Church - State relations cannot be settled by law

This decision deals with a pupil of the 3rd class of the III. Gymnasium of Patras who had repeatedly caused troubles to the school authorities and his co-pupils with his behaviour. In particular, he insulted the English teacher, he refused to recite the morning prayer in front of all other pupils, although all of them were doing so on a rotation basis and, finally, during RE he pretended he were a priest imitating the way a clergyman reads the Gospel. The Director of the Gymnasium decided the expulsion of this pupil for two days due to the above described behaviour. Following that expulsion the parents of the pupil, as vehicles of parental care, brought a charge against both the Director and the English teacher for defamation of their child. At the end of the school year the Board of teaching staff decided to classify the pupil's behaviour as reproachable. The parents attacked the latter of the Board of teaching staff before the Supreme Administrative Court, which, from its part, had

provisions only”, *KATHIMERINI*, 20.8.1995, p. 8; ALEXIOU, Sp., “Despite all circumstances RE is not abolished”, *TO BEMA*, 3.9.1995, A14; Archbishop CHRISTODOULOS, “European Practice”, and TSATSOS, D., “What do Germans do”, *TO BEMA*, 30.7.1995, A11; Arch. CHRISTODOULOS, “The western-orientated intellectualism - On the occasion of obligatory or optional class of RE”, *TO BEMA*, 20.8.1995, A11; Arch. CHRISTODOULOS, “Yes to RE - The proposal for its abolition and the european legislative practice”, *TO BEMA*, 28.5.1995, A17; TSATSOS, D., “Church oppresses our life”, *KYRIAKATI KI ELEFTHEROTYPIA*, 22.1.1995, p. 10.

an opportunity to clarify the content of the right to religious education and the presupposition of the pupil's exemption from his duty to join the respective instruments of RE.

The Court confirmed, on the one hand, that the participation in the RE and in the morning prayer is obligatory for all the pupils. This because the right to religious education is protected both by the Greek Constitution in articles 13 and 16 and by article 9 of the ECHR which has been ratified by the law no. 2329/1953 and 53/1974 and has therefore become part of the Greek law. RE and morning prayer constitute, according to this decision, the main tools of the State to develop religious conscience in the sense of the vast majority of Greek citizens being Orthodox. The mandatory character of both the primary and secondary instruments of RE for all pupils - either Orthodox, or non-Orthodox Christians or atheists - is confirmed notwithstanding the right of the parents exercising parental care to file the necessary written declaration before the authority to the opposite¹³⁸.

¹³⁸ The reasoning of the Christian-orthodox orientation of RE by making reference to the vast majority of the Greek orthodox citizens in the decision was strongly criticised as being contrary to the nature of the human rights as such. See SOTIRELIS, G., "The development of religious conscience on the Procrustis bed of the prevailing religion", *NoB* 1995, p.988.

On the other hand, the Court has accepted the petition for cassation filed by the parents of the pupil insofar as the Director has omitted to examine in a complete and serious manner whether the behaviour of the pupil could be attributed to deviating religious convictions which might have been enough for an exemption from the duty to participate in RE and in the morning prayer¹³⁹.

¹³⁹ See the intensively discussed decision of the Federal Constitutional Court of Germany, the so-called “*Kruzifix Urteil*” of 16.5.1995 (*NJW* 1995, p. 2903), where parents attacked provisions of the educational law of the federal state of Bayern as well as the practice of the school authorities to hang on classroom walls right above the blackboard, i.e. exposed to direct optical access to all pupils, the Cross or the crucified Jesus. The Supreme Court finally accepted that the attacked provisions indeed violate the freedom of religious belief and should be left up to the decision of the parents or guardians to accept and continue this practice in non-ecclesiastical public schools. Despite numerous conflicting commentaries, this decision confirms a liberate approach to the right to manifest one’s religion concerning a geographic region which is known for a traditional catholic orientation. Meanwhile, unofficial statistics show that only a few classes, resp. parents and/or guardians have made use of this new constitutional circumstance, whereas the vast majority in Bayern seems to be following the old practice. See *inter alia* CZERMAK, G., “Der Kruzifix-Beschluß des Bundesverfassungsgerichts, seine Ursachen und seine Bedeutung”, *NJW*, 1995/51, pp. 3348 ff.; LINK, Chr. “Stat Crux- Die Kruzifix Entscheidung des Bundesverfassungsgerichts”, *NJW*, 1995/51, pp. 3353 ff.; MUELLER-VOLBEHR, J., “Das Grundrecht der Religionsfreiheit und seine Schranken”, *DÖV*, 1995/8, pp. 301 ff.

In other words, this important decision of the Supreme Court introduces the obligation of the teacher to investigate possible religious or other reasons of parental objection to RE on the one hand, or opinion's deviation between parents and children on the other hand¹⁴⁰.

In another basic decision No. 3533/1986 the Supreme Administrative Court dealt with the question whether teachers belonging to another dogma or religion than the Christian-Orthodox are allowed to be appointed in primary and secondary schools.

Until recently the State Administration refused to appoint Roman Catholics as teachers in primary schools because they followed a dogma other than the prevailing religion. The courts accepted that the refusal to appoint as a teacher of religion in secondary schools, or as a general teacher in primary schools, teachers who held a dogma or religion other than the prevailing one was not unconstitutional. The reason was that in both cases it was felt that teachers had to have the same convictions as the Orthodox Church in order to teach these believes to the pupils with the necessary commitment¹⁴¹.

¹⁴⁰ See decision No. 3356/1995 of the Greek Council of State (Supreme Administrative Court) issued on 19.06.1995.

¹⁴¹ Cf. Decisions of the Athens Administrative Court of II. Instance Nos. 2704/1987 and 299/1988.

The Supreme Administrative Court with its decision No. 3533/1986 accepted that the refusal of the Administration to appoint a Jehovah's Witness as a Greek language teacher in the secondary schools was contravening the constitutional principles of equality and religious tolerance and was therefore unlawful and unconstitutional. This is because, according to the wording of this decision, "the main task of the teachers of the Greek language is anything but the development of the religious conscience of the pupils...".

In order to give legislative coverage to this question law No. 1771/1988 was introduced which refers in article 16 to the appointment of teachers who hold a dogma or religion other than the prevailing one. More specifically, it stipulates that

"1. Those primary school or kindergarten teachers who have applied for a teaching appointment and who hold a dogma or religion other than the prevailing one will be allocated in public multi-seated primary schools, or in two seated kindergartens respectively, provided that they have the qualifications of arts. 12 and 13 of law No. 1566/1985. 2. In the cases of the preceding paragraph, these teachers will not teach religion except to pupils of the same dogma or religion, if this lesson is provided. 3. It is possible that the teachers cited in par. 1 will be appointed to single-seated primary schools and kindergartens, if the pupils of these schools hold the same dogma or religion with the teacher".

The Minister of Education in a decision of December 1997 proceeded to the reduction of the RE teaching hours from two to one weekly in the curriculum of the second lyceum class only. This very hour was intended to be “invested” in other disciplines. The 6th Chamber of Supreme Court in a not published yet decision which was issued in the last week of May 1998 found that this ministerial decision was contrary to the provisions of ECHR governing the right to religious education. The Court admits that the precise time schedule of the RE lessons belongs to the sphere of the administrative competence, but, on the other hand, the reduction of one hour weekly of the RE teaching in one class is according to general rules and experience to the detriment of the development of the religious conscience of the pupils. This very recent court judgement goes beyond the constitutionally acceptable boundaries between the judiciary and the administrative power and is criticised as extreme¹⁴².

The contents of the right to religious education are better understandable if the limits of same are clearly set by the law and possibly unitarily interpreted by the corresponding nomology.

¹⁴² See ALIVIZATOS, N., “Religion Education and the Truth”, *TO BEMA*, 31.05.1998 p. A26.

6.- Limitations

As mentioned above, the right to religious education is a specific expression of the more general fundamental right of religious freedom which is protected by article 13 of the Greek Constitution. Furthermore, fundamental rights are subject to limitations in their exercise, according to the general theory and case law¹⁴³. Consequently, the exercise of the right to religious education is subject to those limitations as well. In particular with regard to the limitations of religious freedom the Greek Constitution provides in art. 13 par. 2:

“... The practice of rites of worship is not allowed to offend public order or moral principles. Proselytism is prohibited.”

whereas in art. 13 par. 4 it reads:

“No person shall be exempt from discharging his obligations to the State or may refuse to comply with the laws by reason of his religious convictions.”

¹⁴³ The principle of *in dubio pro libertate* is generally accepted and guarantees that, what is not forbidden, is allowed and cannot be prohibited in any way. MANESIS, AR., Constitutional Rights, A'-Individual Freedoms, p.78. Limitations of fundamental rights can be preventive and repressive, must be stipulated in either the Constitution or the statutory law and may not affect negatively the core of the right to be protected. See among others, SPYROPOULOS, PH., Constitutional Law in Hellas, pp.128-130.

It is also worth mentioning the general constitutional prohibition of abuse of right provided for in art. 25 par. 3 of the Greek Constitution. However, this provision has been judicially qualified as *lex imperfecta* destined to be applied only in conjunction with other constitutional provisions¹⁴⁴. Also art. 281 of the Greek Civil Code has frequently been used for providing the legal basis for the prohibited abuse of the right to religious education, despite the fact that this article governs the legal relations between individuals and belongs systematically to the general part of the Greek Civil Code and consequently to private law¹⁴⁵.

According to the above mentioned constitutional wording public order and *bonos mores* constitute two autonomous limitations of religious freedom and, thus, of religious education. Nonetheless, they are examined commonly, since the notion of public order contains in its generality *bonos mores* as well. It is accepted by theory that public order covers the entirety of the fundamental political, social, economical and moral principles and attitudes prevailing in

¹⁴⁴ PARARAS, P., Constitution and ECHR, 1996, p. 117, DAGTOGLOU, P., Constitutional Law - Individual Rights, Band A', pp. 131 ff. Par. Nos. 227 ff.

¹⁴⁵ MICHAILIDI-NOUAROOU, G., The right to education, *Symmeikta Vegleri: The crisis of State Institutions*, Athens 1988, Band 1, p. 28.

Greece at a certain time¹⁴⁶. The question as to when the principles of a religion or a dogma and religious education, according to them, contravene the Greek public order will be judged on a case to case basis by the Administration as well as by the Courts¹⁴⁷.

A further group of limitations refers to the duties before the State on the one hand, and to the Law, on the other hand. These forms of limitations are examined commonly, given the fact that all citizens' duties before the State must be provided for in the Law. It is understood that only the fulfilment of vital obligations in favour of the State would allow an exception to the rule of protection of religious education. Such obligations are military service¹⁴⁸, payment of due taxes, etc. In this sense a citizen cannot refuse to pay taxes claiming that contribution to State revenues is contrary to his/her religious beliefs.

The above mentioned constitutional provision refers to the law as a limitation of religious

¹⁴⁶ TROIANOS, S., *Elements of Ecclesiastical Law*, 1984, p. 89.

¹⁴⁷ TROIANOS, S. *ibid*, MARINOS, A., *Religious Freedom*, Athens 1972, pp. 172 ff., GEORGIADI - STATHOPOULOU, *Civil Code: Commentary, Band VIII*, Athens 1993, p. 190, par. No. 97.

¹⁴⁸ According to art. 5 of Law No. 731/1977 citizens rejecting armed service were allowed to serve twice as long bearing no rifle. See also Law No. 2510/27.6.1997

freedom in a rather general manner. The restrictive interpretation of this provision is advisable, since otherwise and apart from statutory laws, any legal provision, even of minor hierarchical value, could be used as legal basis for degrading the fundamental right to religious education. In this sense case law has accepted that only “general laws” are meant herewith, i.e. those governing matters of major importance for the society such as matters of education, national defence, public health and functional rules of State Authorities¹⁴⁹.

According to this case law, if the Ministry of Public Health should order preventive vaccination of children to avoid epidemic incidences, parents would not be allowed to oppose invoking their religious convictions. In the same sense, refusal of work of a civil servant on a certain date declared as a holiday according to a dogma or religion - other than the lawful national holidays - is unlawful if it is reasoned exclusively with religious beliefs.

Special reference should be made to the nomology of the Council of State (decision No.

¹⁴⁹ Areios Pagos decision No. 653/1977, *Poinika Chronika* 28/1978,20 and Council of State Decision No. 4079/1976, Third Chamber.

4079/1976)¹⁵⁰. In this case Adventists (believers of the Seventh Day) tried unsuccessfully to let their children be legally discharged from their obligation of going to school on Saturdays in view of the fact that according to their convictions Saturday, not Sunday, is their official free day of the week. The Court rejected the petition of the Adventists for issuance of a presidential decree for the exemption of those pupils from Saturday lessons whose dogma dictates rest on that day. Law No. 229/65 providing for the days of the week when the schools obligatorily function was thus classified as a “general law” of major importance for the society which would not allow any exemptions due to religious beliefs.

One of the important limitations of religious education is proselytism which is prohibited according to the aforementioned constitutional provision. Since religious education remains in the average case in the hands of those exercising parental care, the crucial question arises as to whether parents are apt to commit the crime of proselytism according to the Greek Penal Code.

¹⁵⁰ See *TO SYNTAGMA* No. 3/1977, p. 157. See also similar case in decision of Council of State No. 2706/1977 published in *TO SYNTAGMA* No. 3/1977, p. 643.

This question has been handled repeatedly both in theoretical discussions and case law¹⁵¹.

It is generally accepted that parents of the same religious belief, or parents with different religious beliefs but with coinciding attitude concerning religious education of their children, are allowed to give their children the religious education of their choice without conducting any crime. On the contrary, such behaviour constitutes the core of the fundamental right of religious education. However, it is also accepted by case law that proselytism could be conducted even by parents¹⁵². In this context it should be pointed out that punishable parental behaviour must be considered as abusive and lying beyond the average means of exercising parental care. When this happens it will be judged by the courts on a case to case basis.

Two groups of cases should be underlined herein. In the first belong those cases where parents belong to different religions or dogmas and parental care has been assigned to one of

¹⁵¹ Areios Pagos Decision No. 612/1974, *NoB* 23/1975, pp. 168 ff., Athens Civil Court of 2nd Instance Decision No. 9926/1987, Areios Pagos Decision No. 728/1983 *Poinika Chronika* 23, p. 937, Heraklion Civil Court of 1st Instance Decision No. 245/1986 *Archeio Nomologias* 1986, pp. 125 ff., MARINOS, An., *Religious Freedom*, 1972, pp. 220 ff., SOTIRELIS, G., *Religion and Education*, pp. 162 ff.

¹⁵² TROIANOS, S., *Religious Education in the frame of the individual right of religious freedom*, p. 294

them either due to common agreement or to a court decision. Should in this case the parent who is not responsible for the religious upbringing of the child try to influence his child's conscience contrary to the beliefs of the other parental party, thus breaching the common agreement or the respective judicial order, then this would constitute an act of proselytism¹⁵³.

The second group of cases refers to parents of common religion or dogma who decide to change their convictions after having introduced their children to their prior religious beliefs. Any attempt of the parents to let their children follow their new religious orientation would constitute an act of proselytism provided that the children have reached an age of adequate maturity to decide on their own¹⁵⁴.

It has to be admitted that the vast majority of case law grants an unreasoned privilege in favour of that parental party who has the prevailing religion against the other party having a different dogma or religion. Although this attitude is sometimes based on socially unaccepted religious expressions such as the Jehovah's Witnesses rejecting blood transfusion

¹⁵³ *ibid.*

¹⁵⁴ *ibid.*

and armed service, it is strictly criticised as unilateral and unconstitutional¹⁵⁵

Finally, the *interest of the child* in the sense of art. 1510 Gr. CC can be considered as a legal limitation of religious education as exercised by the parents. Parental care includes the right and the duty to define the religious orientation and education of the child, while at the same time it has to be exercised in a way which takes into serious consideration the general interests of the child and is not to be considered an abuse of the parental right¹⁵⁶.

The interpretation of this provision with regard to a certain behaviour or decision of the parents belongs to the civil courts.

D. Critical Remarks

The position of the Greek Orthodox religion in the modern Greek State has gone through different historical stages in which it has played for a very long period a decisive and predominant role. Recent political developments in Balkans and Eastern Europe, however, have had considerable repercussions in the long-standing religious homogeneity of the Greek

¹⁵⁵ SOTIRELIS, G., Religion and Education, pp. 164-174.

¹⁵⁶ For a detailed analysis of the content and the limits of the parental right to decide on matters of personal and financial character based on the interests of the child see KOUMANTOS, G., Family law, 1989, Band II, p.167 et sequ.

population. Massive movements of numerous ethnic groups from neighbouring countries with lower living standards have led to the unavoidable intrusion into the Greek society of various national groups with different religious backgrounds¹⁵⁷.

This situation makes the problem of protection of religious education in the modern Greek society more actual, if not acute.

An attempt to categorise the arising tendencies concerning the assessment of religious education in the light of protection of the constitutional freedoms of religion and education could locate three main orientations.

Firstly, politicians tend to support that RE should offer the pupils not only an introduction to Christian Orthodoxy but an overview of all religions and dogmas, either represented or not in the Greek society¹⁵⁸.

¹⁵⁷ Other than the 50s and 60s, when Greeks expatriated to the USA, Canada, Germany and Australia massively, Greece is now receiving economic refugees from other countries such as Albania, Iran, Irak, Kurdistan and Georgia. This situation has created a clearly visible multicultural environment in the Greek society and has made the integration of the different ethnic and religious groups imperative. See also POLLIS, Adamantia, „Greece: A problematic secular State“, in: CHRISTOPOULOS D. (ed.), *Legal Topics of Religious Difference in Greece*, 1999, pp. 165ff. (p. 193).

¹⁵⁸ More about this tendency in VAYANOS, G., *Religious Education in the elementary school*, 1989, p.11-15.

Secondly, intellectuals tend to overtone the ancient Greek legacy and cultural influence over the centuries drawing a harsh borderline - if not a hostile fortress - against Orthodoxy, as social phenomenon and ideology. In fact they depart from the assumption that Orthodoxy has always been trying to suppress or even substitute the values of ancient Greek classical culture¹⁵⁹.

Thirdly, average society members seem to follow the attitude according to which the Greek Orthodox beliefs do not merely represent religious convictions, but constitute also a considerable part of their cultural identity¹⁶⁰ and in result tend to approve that RE is taught giving *de facto* priority and dedicating its major part to the Christian Orthodox faith. This disposition mainly derived from the fact that the Christian-Orthodox Church during the four centuries of Turkish occupation symbolised the maintenance of Greek culture and the Greek language to such a extent that Hellenism is actually identified with the Orthodox faith. Therefore, it is not coincidental that RE builds part of the curriculum, which is planned on a national level

¹⁵⁹ Representative of this approach are the contributions in *DAVLOS*, issues 212-213, August-September 1999, pp. 13376 f. and issue 214, October 1999, p. 13464.

¹⁶⁰ For example the light Greek popular music composed by the famous Greek composers Mikis Theodorakis and Manos Chatzidakis has been obviously influenced by the Byzantine church hymns.

by the competent Minister of Education and Religious Affairs.

The aforementioned emerging differentiation in the structure of population makes it worthwhile to study the experiences of foreign societies who have for a longer period of time been confronted with the questions of multicultural and multi-faith school classes, preferably from the European family of laws. Such a case is the UK one.

II. Chapter

A. Freedom of Religion and RE in the English

legal order

Freedom of religion is classified as a more specific case of freedom of conscience¹⁶¹. The right to education is also recognised by statute in a double sense: on the one hand LEAs are obliged to provide primary and secondary schools in their areas and on the other hand parents have the duty to ensure that their children receive suitable full-time education¹⁶².

B. Types of schools in England

In order that one may be able to understand and evaluate the role of a certain type of school within the English educational system, one must be acquainted with the different types of schools that exist in England today. Although it is apparent that all schools exist and operate as parts of one unified and centrally controlled educational system, yet there are evident differences between them, which give each type of school its own character.

In the following paragraph our aim will be to try and present in a few words the main traits of

¹⁶¹ HALSBURY'S Laws of England, 4th ed. Reissue, Vol. 8(2), par. 108.

¹⁶² ss. 8 and 36 of the Education Act 1944.

each category. Further details, especially regarding the teaching of religion in schools, will follow in the subsequent paragraphs.

1.- State Maintained Sector

1.1.- County schools

County schools are state schools. They are established and maintained by local education authorities (LEAs). These schools form rather the majority of schools in England, have no special admissions policies, are mostly coeducational and operate according to the provisions of the Education Act in force, and the National Curriculum dictated by it.

1.2.- Grant-maintained schools

Grant-maintained schools are a new category of maintained schools created under Chapter IV of the Education Reform Act 1988¹⁶³. They are independent of LEA control and funded directly by central government grants. Thus, when a county school becomes a grant-maintained school the cost of the school's financial support is transferred from the LEA to the Secretary of State¹⁶⁴, and the governors gain a greater measure of autonomy.

¹⁶³ ERA 1988, Chapter IV, ss. 52-104.

¹⁶⁴ ERA 1988, s. 52 "Duty of Secretary of State to maintain certain schools".

1.3.- Church schools

The existence and role of Church schools in British history goes far into the past. Actually, in the Middle Ages the Church was the sole provider of education in Britain, with the monasteries being the most important centres of learning¹⁶⁵. In the Industrial Era private benefactors joined in the education as the State itself was doing nothing whatsoever for the schooling of the children of the poor. So all was left to private efforts, including those of the Churches. This meant that later, when the State began to intervene, taking over more and more of what had once been the Church's role, the Churches regarded it as an intruder in the field where they had established firm rights¹⁶⁶. A national system of education was therefore organised as a partnership between public authorities and the Churches.

As the public system grew, the Churches, with their limited resources, suffered in competition with their wealthier rivals and began to surrender numbers of their schools. After the passing of the Education Act 1944 most Church schools, otherwise called Voluntary schools, formed part of the newly established maintained sector and

¹⁶⁵ DUMMET, A. and McNEAL, J., *Race and Church Schools*, p. 8.

¹⁶⁶ *op.cit.*, p. 13.

became either Voluntary-Aided or Voluntary-Controlled schools¹⁶⁷. In this mechanism the State would support religious groups which felt that the education provided by the County schools was incompatible with their religious ethos. Indeed, Church schools have offered a more overtly "religious" education in contradiction to that found in other state maintained schools.

As already mentioned, the 1944 Act introduced two main categories of Voluntary schools¹⁶⁸ whose running costs are paid for by the local education authority:

a.- Voluntary-Aided schools

Under the Education Act 1944 the governors of an aided school had to provide 50 per cent of all capital costs of external maintenance. However, this was far beyond their means, and progressively between 1944 and 1975 the size of

¹⁶⁷ They were schools which had been established privately, usually by a certain Church, but had been voluntarily brought within the state system.

¹⁶⁸ There is also the category of "special agreement schools", first introduced under the Education Act of 1936, which however form a minor category of secondary Church schools. They share the same characteristics as voluntary-aided schools. In addition, each has a special agreement with the local education authority generally relating to the particular interest of the school. See O'KEEFE, B. , Faith, culture and the Dual System. A comparative study of Church and County Schools, p. 14.

the Churches' capital contribution was reduced to 15 per cent. Aided schools remained denominationally directed and the foundation governors, who hold a majority in the governing body, have a duty to preserve the voluntary nature of the school in accordance with a Trust Deed. Religious education must also be in accordance with the provisions of the Trust Deed, i.e. it can reflect the credal assumptions of the Church which founded the school in the first place¹⁶⁹. More importantly, aided schools are responsible for their own curriculum and admissions policy. Today, there are nearly 4.000 voluntary-aided schools Britain. Church of England schools are just in the majority with 1.875. There are 1.817 Roman Catholic schools, 17 Jewish and 4 Methodist¹⁷⁰.

b.- Voluntary-Controlled schools

In these cases capital expenditure is met by the LEA, although, in most circumstances, the schools remain the property of the trustees or foundation governors. Furthermore, the local authority nominees are the ones who have a majority on the governing bodies (with the governors representing the foundation being in a minority), and the admissions policy and

¹⁶⁹ McLURE, St. , op.cit. p. 80.

¹⁷⁰ *GUARDIAN EDUCATION*, 23 March 1993, p. 6. See also p. 121 below.

curriculum of the school are established by the local education authority as well¹⁷¹. A majority of the Church of England schools became controlled; on the other hand, the Roman Catholics insisted on aided status for their schools.

Summarising, one could say that the differences between schools with a voluntary-aided and voluntary- controlled status relate to where the power and responsibilities rest: for aided schools the power and responsibilities are with the school governors, whereas in controlled schools they rest with the local education authority.

Nonetheless, Church schools have not been unaffected by changes in educational practice or by social trends generally. Today, the number of children in Church schools who come from a Christian background has over the years significantly dropped in line with the general decrease in Christian observance. It often happens that demand for Church school places comes from families whose Christian practice is either non-existent or has been acquired rather "suddenly" for the purpose of securing admission for their children, and Church schools do accept them¹⁷². As a matter of fact, many

¹⁷¹ McLURE, St., *op.cit.*, p. 80.

¹⁷² "Fewer than half the pupils in London church primary schools are children of church-going parents despite that being top-priority in these schools' admission policies. In 1 in 3

parents, both Anglican and Catholic, tend to judge schools by educational rather than religious criteria. Where a choice exists locally between two or more schools of their own denomination, the parents might opt for the one with a good academic reputation and better social standing. But where the choice is between a Church school and one or more County schools, weight is still given to the same considerations¹⁷³. It is true that some Church schools would have to close down altogether if they relied strictly on admitting children of their own denomination. So, many of them, particularly primary ones, have for some time been admitting children who are not Christian. Others, with some spare capacity but in no danger of closure, take Christian children of denominations other than the school's own. Such changes of policy, however, have caused reactions both from Christian parents who want their children to go to a Church school for

schools pupils of church-going parents number only 1 in 10 or fewer. Only 16 schools out of 100 claim more than half their pupils are from church-going families. The figures are revealed in a survey conducted by the Culham College Institute among all Church of England-aided primary schools in the London diocese. It shows that in 6 schools practising muslims form the majority of pupils; in 10 schools they amount to 40 per cent or more and in 17 schools 20 per cent or more". See LODGE, B., "Anglican doubts are Fuelled", *TES*, 5 July 1991, p. 10.

¹⁷³ DUMMETT, A. and McNEAL, J., op.cit., p. 16.

genuinely religious reasons and from the dioceses¹⁷⁴.

On the other hand, where demand for places is very high, Church schools are usually much stricter about giving first preference to children of their own denomination and requiring definite evidence of Christian practice from the parents. This practice applies especially to Catholic schools, which see themselves first of all as providing a service for the Catholic Church. One should always bear in mind, however, that the British society is a multiracial/multicultural one, where there is extensive racial discrimination and racial disadvantage. In such a society, every example of less favourable treatment in terms of religion or race reinforces discrimination, and Church schools should be very careful not to encourage such a discriminatory attitude.

2.- Independent Sector- Private schools

The independent private schools have long offered an alternative for those parents who are dissatisfied with the schooling offered by the state, although even in these cases, there is still a

¹⁷⁴ An example thereof is the Church school in Petersborough, which “lost a 123.000 pounds grant from diocesan funds because it refused to admit more children of practising Anglicans... The governors insisted the school should serve the wider community and admit pupils of other denominations or faiths”. See *TES*, 5 July 1991, “Diocese withholds funding:”, p. 3.

significant element of state involvement through inspection and control. Such schools are fee-paying and therefore the "clientele" are inevitably, with few exceptions, well-to-do and middle class. Although independent schools are nowadays chiefly secular, schools offering education suitable for a particular religious ethos have always formed part of the independent sector¹⁷⁵.

Since this research is mostly concerned with state maintained sector, which absorbs the majority of pupils, independent schools will not be examined as extensively. Indeed, the vast majority of parents delegate educational functions substantially and effectively to the state authorities. Nevertheless, it is worth noting that there is a wide range of religious independent schools in England serving both the established denominations of the Anglican and Roman Catholic persuasions, as well as Muslims¹⁷⁶ and Orthodox Jews¹⁷⁷.

¹⁷⁵ BRADNEY, A., *Religions, Rights and Laws*, p. 69.

¹⁷⁶ "There are 250.000 muslim school children in this country... Most of them go to state schools. There are 28 private Muslim schools educating about 2.500 children... About six of the schools for older children offer religious training for pupils preparing for vocation. Two are schools for children of expatriate workers, well resourced and separate". See BERLINER, W., "Muslims stand their ground", *GUARDIAN EDUCATION*, 23 March 1993, p. 6.

These *religious* independent schools, however, which are established and operate with money coming from the relevant religious communities, often have financial problems. Consequently, they are criticised by the HMI for the facilities they offer, their staff and even the content of their curriculum¹⁷⁸. These criticisms have posed even greater difficulties for those religious groups who want to set up independent schools in order to serve the needs of their community, and their tendency nowadays is to try and win state support in the form of voluntary-aided status, which would help solve their problems. Otherwise, the financial debts and burdens which are now borne by the founders, parents and governors may become unbearable and lead to financial bankruptcy and liquidation of these schools. In other words, "whilst independent religious schools for religious minorities continue to exist, they do so in a climate which is hostile to their aims"¹⁷⁹.

¹⁷⁷ DURHAM, M., "Tories arouse fundamental anger", *THE OBSERVER*, 22 August 1993, p. 6.

¹⁷⁸ BRADNEY, A., *op.cit.*, pp. 69-70.

¹⁷⁹ *op.cit.*, p. 70.



C. The Education Reform Act 1988

1.- General Characteristics of the ERA 1988

The Education Reform Act of 1988 was the most significant and extensive statute law regarding the educational system in England (and Wales) since the Education Act of 1944. The alterations and innovations it introduced led to a new power structure within the education system. As these changes reversed a long tradition of local policy-making and administration by increasing the powers of the Secretary of State for Education and Science and restoring to central Government powers over the Curriculum, they became highly controversial.

Among other things the ERA 1988 instituted:

- a) The competition between schools, by introducing the so-called "open-enrolment" policy. This was meant to be a motive for quality and reflects the philosophy of individualistic freedom: the individual should enjoy the maximum practically achievable freedom of choice.
- b) The prescription of more powers and duties to governors, who were actually "among the major beneficiaries of the redistribution of power", and "who now hold a key position in all plans for the decentralisation of the administration of the

education system"¹⁸⁰.

c) The provision of a new category of schools, already mentioned in the previous paragraphs, financed directly by the Department of Education and Science, the so-called "grant-maintained" schools. These arose great controversies, not only because they aimed at breaking the local authorities' monopoly on "maintained" schooling, but also because, as far as previous voluntary schools were concerned, "the procedures for acquiring grant-maintained status...could bring governors into conflict with their trustees and, in extreme circumstances, lead to schools being removed from the system of Roman Catholic or Anglican schools within an area, against the wishes of the diocesan authorities"¹⁸¹.

2.- The case for religious education

It would not be an exaggeration to say that "it is granted to this day that religion should have a place in all schools in Britain"¹⁸². Indeed, even

¹⁸⁰ McLURE, St., op.cit., p. xi (Introduction).

¹⁸¹ Ibid.

¹⁸² "The Church of England is a minority taste, embracing only a fifth of religiously active Britons. The Roman Catholic Church does only slightly better. The two big churches together lure just 41% of regular worshippers. ... In Britain today, religious vitality is mainly to be found outside the big traditional churches. The growing religions fall into four broad categories: a) Immigrant religions (mainly Islam, Sikhism and Hinduism), b) Cults, that is groups that follow a leader, c)

though the majority of the population practise no religion regularly , the only subject the law compels to be in secular schools under the Education Acts of 1944 and 1988 is religious education. According to the Swann Committee Report: "Religious education is an aspect of school life which involves far more than the imparting of a particular body of knowledge to pupils, since it raises complex questions relating to the spiritual and aesthetic development of the individual young person as well as impinging very directly on the essential beliefs and values of his/her family and community"¹⁸³. Certainly, religion is not a subject that can be "taught", in the literal meaning of the word "teach", since it is a combination of abstract ideas, experiences, moral values and personal beliefs developed mostly through the family and the Church. And although the very principle of religion having a place within the School Curriculum has been challenged on the grounds that "schools exist primarily to equip their pupils with a range of practical skills and factual information, and it is

"Enthusiastic" Christian churches and d) New Age. See *THE ECONOMIST*, 13 March 1993, "Worship moves in mysterious ways", p. 35.

¹⁸³ Education for All. The Report of the Committee of Inquiry into the Education of children from Ethnic Minority Groups, Chairman: Lord Swann, Cmnd. 9453, London, HMSO, March 1985 (henceforth called: THE SWANN COMMITTEE REPORT), p. 467.

beyond their role to seek to educate pupils in an area of experience which is uniquely personal and in which there is no single accepted corpus of knowledge"¹⁸⁴, the majority of educationalists, theologians and parents seem to think that religious education is indeed a crucial element in the education process.

3.- The status of religious education in the ERA 1988

3.1.-Basic provisions regarding religious education

The changes introduced by the Education Reform Act, especially regarding religious education and religious worship, reflect the Government's commitment to strengthening the position of RE and collective worship in schools. Their special place in the school curriculum is affirmed in section 1(1)(a)-(c) of the Act. This requires the Secretary of State, local education authorities, governing bodies and head teachers to exercise their functions (including those in respect of religious education, religious worship and the National Curriculum¹⁸⁵) with a view to securing that the requirements of the National Curriculum are met and that each maintained

¹⁸⁴ op.cit., p. 468. See also FRANCIS, L., *The Logic of Education, Theology and the Church School*, p. 5.

¹⁸⁵ The Education Reform Act requires all maintained schools to provide for all pupils, within the years of compulsory schooling, a basic curriculum, known as the "National Curriculum".

school:

a) promotes the spiritual, moral, cultural, mental and physical development of pupils at the school and in society; and ,

b) prepares such pupils for the opportunities, responsibilities and experiences of adult life¹⁸⁶.

These wide aspirations are perhaps of limited practical significance, but the Act goes on to spell out more explicit requirements in sections 2 and 3. There are two essential curricular components: first, provision for religious education¹⁸⁷ and worship for all registered pupils irrespective of age; and second, for pupils of compulsory school age, a secular curriculum which meets state requirements¹⁸⁸. Thus, religious education and worship are given a distinctly high profile¹⁸⁹.

Section 3 of the Act designates three core subjects and seven foundation subjects which

¹⁸⁶ ERA 1988, s. 1(2).

¹⁸⁷ The Education Act 1944 used the term “Religious Education” to encompass Religious Instruction, Collective Worship and Religious Education generally. The Education Reform Act 1988 refers throughout to “Religious Education” in place of “Religious Instruction” and separately to “Collective Worship”; all previous legislation has been amended accordingly. See DES Circular 3/89, 20 January 1989, “Education Reform Act 1988: Religious Education and Collective Worship”, par. 19.

¹⁸⁸ ERA 1988, ss. 2(1)(a)(b) and (2)(a)-©.

¹⁸⁹ MEREDITH, P., *op.cit.*, p. 80.

must be taught¹⁹⁰. Religious education has a special status as part of the "basic" but not the National Curriculum. This ensures that RE has equal standing in relation to the "core" and other "foundation" subjects of a school's curriculum, but it is not subject to nationally prescribed attainment targets, programmes of study, and assessment arrangements¹⁹¹. On the contrary, it must be in accordance with a locally agreed syllabus, prepared by a Conference set out under Schedule 5 of the 1944 Act (as amended by the ERA 1988). This Conference is convened by the local education authority for its area and consists of four committees which must seek unanimous agreement upon a syllabus of religious education to be recommended for adoption by the local

¹⁹⁰ The core subjects are: Mathematics, English and Science. The foundation subjects are: History, Geography, Technology, Music, Art, Physical Education and (at the secondary stage) a modern language. See ERA 1988, s. 3(1) (2).

¹⁹¹ Nevertheless, the opinion is also formed that the fact that RE does not appear within the "magic circle" of the "core" curriculum, nor even among the "foundation" subjects gives it an alleged impressive status, "yet without being regaled with all the paraphernalia of assessment at key stages, and served by national guidelines under the protection of the National Curriculum Council, it is likely to remain the outsider to which scant acknowledgement is given". See WATSON, B., "Introduction: The Need for Priorities", *Priorities in Religious Education: A Model for the 1990s and beyond*, edited by WATSON, B., p. 3.

education authority¹⁹². This requirement adds the unique position in which the Act places religious education, since it is the only subject in the school curriculum for which a legally supported syllabus is required. The justification for it is generally held to be that it safeguards denominational interests and also relieves teachers of the direct responsibility for determining what is taught in an area of the curriculum which is particularly sensitive and controversial¹⁹³.

Moreover, all syllabuses must "reflect the fact that the religious traditions in Great Britain are in the main Christian, whilst taking account of the teaching and practices of the other principal religions represented in Great Britain"¹⁹⁴. This provision denotes that, while it is taken for granted that Christianity features clearly, the syllabuses must also provide for teaching about other important faiths which are held in contemporary British society. A further proof for that is that the "committees" mentioned above, consist, among other institutions, of persons representing Christian and other religious denominations as, in the opinion of the authority,

¹⁹² For further details regarding the preparation or reconsideration of locally agreed syllabuses on RE, see DES Circular 3/89, 20 January 1989, ANNEX E.

¹⁹³ The Swann Committee Report, *op.cit.*, p. 483.

¹⁹⁴ ERA 1988 s. 8(3).

this will appropriately reflect principal religious traditions in the area¹⁹⁵.

3.2.- Religious education in each type of school in England

The measures contained in the 1988 Act are complex, varying in their content depending on the status of the school under consideration:

a.- County and voluntary-controlled schools

The Education Reform Act 1988 provides that the religious education which these schools are required to offer is to be in accordance with the relevant provisions of ss. 26 and 28 of the 1944 Act.

According to these provisions, in both county and voluntary-controlled schools religious education must be: i) in accordance with a locally agreed syllabus, and ii) of a nondenominational character; however, teaching about denominational differences is permitted¹⁹⁶; especially what voluntary-controlled schools are

¹⁹⁵ Schedule 5 of the Education Act 1944 (as amended by the Education Reform Act 1988), par. 1.

¹⁹⁶ The exact wording of the provision is as follows: "No such (agreed) syllabus shall provide for religious education to be given to pupils at such a (county) school by means of any catechism or formulary which is distinctive of any particular religious denomination; but this provision is not to be taken as prohibiting provision in such a syllabus for the study of such catechisms or formularies". See s. 26(2) of the Education Act 1944 (as amended by the ERA 1988), in DES Circular 3/89, 20 January 1989, ANNEX C.

concerned, if the parents of any pupils in attendance so request, arrangements should be made for religious education to be provided for their children in accordance with any trust-deed or the practice followed before the school became controlled¹⁹⁷.

b.- Voluntary-aided schools

In the case of voluntary-aided schools religious education is to be determined by the governors of the school in accordance with the trust deed, which usually means that religious education remains denominationally directed. Where such a provision is not made by a trust deed, religious education is determined in line with the practice observed in the school before it became a voluntary-aided one. However, if parents of pupils in attendance desire their children to receive religious education in accordance with the local education authority's agreed syllabus, and those pupils cannot, with reasonable convenience, attend any school at which that syllabus is in use, arrangements to meet their wishes must be made¹⁹⁸.

c.- Grant-maintained schools

The ERA 1988 provides that religious education in grant-maintained schools should reflect what

¹⁹⁷ op.cit., s. 27(1), ANNEX C.

¹⁹⁸ op.cit., s. 28(1B), ANNEX C.

was previously provided by the school¹⁹⁹.

Consequently, the precise arrangements at each school vary according to whether it was formerly a county, controlled or aided one. Thus: a) In grant-maintained schools that were formerly county or voluntary-controlled, the religious education provided should be in accordance with the appropriate agreed syllabus²⁰⁰ and b) in grant-maintained schools that were formerly voluntary-aided, the religious education provided should be in accordance with the provisions made by the trust deed²⁰¹ (See also previous paragraphs a. and b.).

3.3- The issue of collective worship

When the Education Act 1944 laid down a requirement for a daily act of collective worship in schools, it was thought that it was merely lending statutory support to what was already at that time a recognised procedure in most schools having its roots in the last century, when the Church played a central role in education and, although the provisions of the 1944 Act did not specify that the act of worship should be explicitly Christian, this was undoubtedly the intention²⁰². The English nation was at that time

¹⁹⁹ ERA 1988, ss. 84-88.

²⁰⁰ DES Circular 3/89, 20 January 1989, ANNEX D(1) and (2).

²⁰¹ op.cit., ANNEX D (3).

²⁰² The Swann Committee Report, op.cit., p. 479.

far less pluralistic, and religious perceptions and assumptions about religious allegiances went largely unchallenged.

Today, when the situation of schools with pupil populations encompassing a range of beliefs and non-religious belief systems has been raised, the relevance and appropriateness of the collective act of worship has increasingly come to be questioned.

Nevertheless, the requirement of section 2 of the 1944 Act that all pupils attending a maintained school should on each school day take part in an act of collective worship, is re-enacted²⁰³. The difference is that the ERA 1988, reflecting present practice in many schools, provides for flexibility in timing and organisation of this daily act of worship. Thus, it need no longer be held at the start of the school day, but can be held at any time during the latter. Moreover, there may be a single act of worship for all pupils or separate acts for pupils in different age groups or in different school groups²⁰⁴.

²⁰³ ERA 1988, s. 6(1).

²⁰⁴ ERA 1988, s. 6(2). For this purpose, a "school group" means any group, or combination of group in which pupils are taught or take part in other school activities; it does not mean a group reflecting particular religious beliefs. See DES Circular 3/89, 20 January 1989, op.cit., par. 31.

With regard to the character and content of collective worship in each type of school, the following must be noted:

In county schools responsibility for arranging the form of worship lies with the head-teacher after consultation with the governors; in voluntary schools the governors are meant to make the arrangements after consultation with the head-teacher²⁰⁵. And in grant-maintained schools it will follow what would have been required according to their former status as county or voluntary schools.

However, the ERA 1988 added the rider that collective worship "shall be wholly or mainly of a broadly Christian character"²⁰⁶. And an act of worship is of a "broadly Christian character" if "it reflects the broad traditions of Christian belief without being distinctive of any particular Christian denomination"²⁰⁷. Schools are thus given discretion to vary the content and character of the act of worship they provide, considering also the family backgrounds, ages and aptitudes of their pupils²⁰⁸. Nevertheless, in varying the act of worship, the school must still

²⁰⁵ ERA 1988, s. 6(3)(a).

²⁰⁶ ERA 1988, s. 7(1).

²⁰⁷ ERA 1988, s. 7(2).

²⁰⁸ ERA 1988, s. 7(5).

continue to comply with its duties under sections 6(1) and 6(3) of the ERA 1988²⁰⁹.

The only exception to the general rule regarding the provision of acts of worship occurs if a head-teacher of a county school applies to the local SACRE²¹⁰ after having consulted the school's governing body to lift or modify the requirement "wholly or mainly of a broadly Christian character", either in relation to the school as a whole or in relation to some class or description of pupils at the school. The purpose of this procedure is to allow for acts of worship according to a faith or religion other than Christianity, where for some or all of the pupils the requirement for worship of a "broadly Christian character" is inappropriate²¹¹. This type of worship is called "alternative collective worship".

²⁰⁹ ERA 1988, s. 7(4).

²¹⁰ The SACREs, that is to say the local Standing Advisory Councils on *Religious Education*, are committees set up by local authorities with representatives from the religious denominations of an area, the Church of England, the teachers and the LEA, whose principal function is: "to advise the authority upon such matters connected with religious worship in county schools and religious education, to be given in accordance with an agreed syllabus as the authority may refer to the council or as the council may see fit". See ERA 1988, s. 11.

²¹¹ ERA 1988, s. 7(6).

In any case, parents do have the right to withdraw their children from any act of worship²¹², a right to which we will refer more explicitly in the following paragraphs.

Despite the fact that this is the letter of the law, many maintained schools have abandoned regular prayers for more secular assemblies. This process towards a secularisation of acts of worship, otherwise called "assemblies",²¹³ started in the 1960s, as the societal changes were matched in the world of schools. In an attempt to respond to the variety of religious backgrounds from which their pupils now come, many multiracial schools have in recent years tended to move away from the notion of a spiritual act of worship towards seeing the school assembly as a social and administrative occasion. So, "rather than the exposition of religious truth, the starting point of assembly today is much more that of what pupils are concerned about: families, friends and relationships, success, failure, the future, concerns about society and awareness of the world wide community... School assembly,... offers a wide range of

²¹² ERA 1988, s. 9(2)(a).

²¹³ It must be recognised that an "assembly" may include an "act of collective worship" or, it may not. Thus, the two terms are neither synonymous nor interchangeable, as so often seems to be assumed. See The Swann committee Report, op.cit., p. 481.

subjects and attitudes to be explored. Its function is not to commitment nor to profess faith but to deepen understanding and facilitate choice"²¹⁴. Still, even though this is the current tendency, it should be pointed out that this change in the character of collective worship in schools has not remained unchallenged²¹⁵. New researches show that three in five Christian parents want their children to take part in school prayers. The survey of 2,400 adults, by Social and Community Planning Research, an independent institute, has revealed that 87% of Roman Catholics and 82% of those in the Church England support daily worship²¹⁶.

3.4.- The parental right of withdrawal

In today's society, for practical reasons, the vast majority of parents delegate the education of their children to the state. However, they do not do so unreservedly; most of them regard it as essential to retain a significant element of

²¹⁴ SUTCLIFFE, J. ed., A Dictionary of Religious Education, p. 28.

²¹⁵ "About 300 schools have so far been given permission not to hold Christian assemblies, although official figures show wide variations in the number of schools exempted. ... The figures range from more than nine in ten schools (98%) in Brent to about one in fifty in Wolverhampton (2,2%), Birmingham (1,3%) and Manchester (nil)". See NELSON, F. and HYMAS, C., "Mother goes to court to save school prayers", *The Sunday Times*, 6 December 1992, p. 8.

²¹⁶ Ibid.

personal discretion in order to secure that their children are educated in a way which corresponds with certain important aspects of their own personal conscience, convictions, religious and cultural beliefs and practices and social priorities. As a starting point for this interest one should certainly consider the centrality of the impact of the nature and substance of the school curriculum upon the entire development of the child.

Given the fundamental nature of parental concern in this matter, the provision of Article 2 of the First Protocol to the European Convention on Human Rights²¹⁷ requiring education "in conformity with parents' religious and philosophical convictions"²¹⁸ has a real force in this context. Accordingly, it becomes vital that the process of formulation of the school curriculum should be based upon an institutional

²¹⁷ UK Treaty Series No. 46 (1954), Cmnd 9221, 1954.

²¹⁸ The letter of Article 2 provides that: "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". This provision the United Kingdom government acceded to subject to the formal reservation, reflecting the terms of section 76 of the Education Act 1944, that the second sentence was accepted only so far as compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure. See MEREDITH, P., *op.cit.*, p. 16.

framework in which citizens represented by parents have an effectively articulated voice²¹⁹.

In Great Britain all parents have a legal duty to ensure that their children, between the ages of five and sixteen "receive efficient full-time education either by regular attendance at school, or otherwise, suitable to their age, ability and aptitude and to any special educational needs they may have²²⁰. However, having entrusted their children's education to the State, parents are not permitted to pick and choose between aspects of the curriculum available. The only exception is the right of withdrawal that exists in relation to religious education and worship.

The justification for this provision is the fact that, alongside their legal duty to send their children to school, adherents to different religions may find that one of the duties of their faith is to educate their children under the terms laid down by that faith, something that is hardly possible in state maintained schools, where

²¹⁹ "...the individual should be effectively incorporated on a representative basis into the institutional process at the formative stages (of the curriculum). ...the government has sought to establish more substantial parental representation on governing bodies in Education Act (No. 2) 1986, while giving them somewhat stronger curricular responsibility". See MEREDITH, P., *op.cit.*, p.87.

²²⁰ Education Act 1944, ss. 35 and 36. If they do not comply with this duty, school attendance orders may be issued. See Education Act 1944, s. 37.

religious education and worship must be "wholly or mainly of a broadly Christian character".

Initially, the Education Act 1944 established the right of parents to withdraw their children from religious education and collective worship, if they wished so. In the Education Reform Act 1988 this right was re-enacted, and extended to the parents of children of grant-maintained schools.

Some of the main provisions of the ERA regarding the parental right of withdrawal are the following:

- i. If the parent asks that a pupil should be wholly or partly excused from attending any religious worship or religious education given in the school, then the school must comply.
- ii. A pupil may be withdrawn from the school premises to receive religious education elsewhere, if the parent requests this, so long as the LEA (or in the case of a grant-maintained school, the governing body) is satisfied that this will not interfere with his or her attendance at school other than at the beginning or end of any school session.
- iii. If the parent of a pupil attending a county secondary school wishes him or her to receive religious education according to the tenets of a particular religious denomination and this cannot conveniently be provided elsewhere, the LEA is required to allow such education within the

school, provided it does not consider that because of special circumstances it would be unreasonable to do so, and does not have to meet the cost²²¹.

From the wording of the law it becomes clear that these, so-called "conscience-clauses", give rights exclusively to parents. Children, who are after all the subjects of the enforced instruction and worship, have no such rights. "This is in accordance with the general pattern of British law which does not normally treat children as independent creatures"²²². Indeed, the recognition of childrens' rights in education is negligible. The Education Acts merely assume that the rights of the children are subsumed by those of their parents, and that parents' will in all material respects represents the interests of their children. As P. Meredith points out: "The law assumes a coincidence of interests in the sphere of education between parents and children and real recognition of any autonomous interests in the child, although a glimmer of such recognition may in due course emerge in education..... It is possible that there will in time develop an increased legal recognition in a range of contexts, including perhaps education, of

²²¹ DES Circular 3/89, 20 January 1989, *op.cit.*, par. 41 regarding s. 9 of the ERA 1988, and BEVAN, H K, *Child Law*, p. 483.

²²² BRADNEY, A., *op.cit.*, p. 63.

children's rights in English law, a recognition that has long been given through international treaties and conventions"²²³.

The only exceptions to this rule are formed in the cases of judicial proceedings relating to the welfare of children, for instance in the context of actions for divorce. There, the children's rights and interests are considered independently of those of their parents"²²⁴.

Another issue that relates to the conscience clauses is their actual operation. It is not clear to what extent parents have been aware of their right to withdraw their children from religious education or religious worship. Although education authorities should systematically inform parents of their rights to withdraw their children from these subjects, "in 1969, 25 years after the 1944 Act had been passed, a National Opinion Polls survey found that 64% of declared non-believers were unaware that religious education was compulsory in schools; 73% were unaware that an act of worship was compulsory"²²⁵. And even in the cases when the parents had been aware of their rights, they often felt that the exercise of their right of withdrawal

²²³ MEREDITH, P., op.cit., pp. 7-8.

²²⁴ *R v. Governors of Bishop Challoner Roman Catholic School ex parte C and Another* [1992] 1 FLR 413, [1992] Fam Law 200.

²²⁵ BRADNEY, A., op.cit., p. 63.

would damage their child's place in the school community²²⁶. Not to mention the fact that, sometimes they were, and are subtly persuaded by the school itself not to do that, as they are told by head-teachers that there will be no one to supervise their children if they withdraw them²²⁷.

But if parents are not aware of the compulsory nature of a school subject and a school activity, in this case religious education and collective worship, one cannot expect that they would be aware of a conscience clause which allows their children to be withdrawn from these. Such facts can only lead to the conclusion that the existence of the conscience clauses has had much less effect on the operation of the law than initially thought.

4. - Teachers and Religious Education

4.1.- The role of teachers in the educational procedure

The role of the teacher of religious education in British schools is a very sensitive and important issue, especially because of the diversity of the English society of today, which includes a wide range of different races, religious beliefs and cultures, and is therefore characterised as

²²⁶ ATTAR, D., "No Easy Choice", *Times Educational Supplement*, 4 November 1988.

²²⁷ BERLINER, W., "Muslims stand their ground", *GUARDIAN EDUCATION*, 23 March 1993, p. 6.

multiracial, multifaith and multicultural. Since the implementation of the 1944 Act an immediate demand for special RE teachers in all schools was created. Until then, any teacher who was willing to teach this subject and who had some knowledge of the Bible could be appointed to teach RE²²⁸.

The next step was the establishment of religious education departments in many colleges of education, and the appointment of specialists in religious education on the staffs of a number of university education departments²²⁹. One would therefore expect that at least the problem of special RE teachers' supply would have been solved by now, but recent data show that the demand for specialists is still much higher than the supply. According to an article in the Times Educational Supplement, "the Department of Education and Science has been accused of conspiring(!) to keep the supply of RE teachers down to less than half the number required by the Education Reform Act 1988, although there has been a national shortage of trained RE teachers for more than ten years and the ERA 1988 made it imperative to double the amount of specialist support". In the same article it was also noted that, "target numbers published in April 1990 for the subsequent three years of

²²⁸ The Swann Committee Report, op.cit., p. 494.

secondary-level teacher training revealed that, the smallest annual increase, 9,2% over the 1990 target, had gone to religious education, compared with 73% to History and 72% to English²³⁰.

Apart from the matter of adequate numbers of special RE teachers, however, it is the content of their "special training" that raises most questions. Religious education teachers nowadays have to teach significant numbers of children from religious backgrounds that are other than Christian. Many of them are enthused by the presence of so much living religion that could be explored in the classroom. Others have reservations about the broadening of religious education to include religions other than Christianity²³¹. Nevertheless, diversity in British schools does exist and religious teachers need special training in order to be able to meet efficiently the needs of their pupils with various religions, such as Hindus, Sikhs, Muslims and of course, Christians. In other words, they have to develop a multicultural approach to their work. They also need to prepare the children to live in a multiethnic society. In this regard, initial introduction training and in-service training are

²²⁹ Ibid.

²³⁰ LODGE, B., "RE shortage "conspiracy" claim", *Times Educational Supplement*, 15 March 1991, p. 8.

²³¹ JACKSON, R., ed., *Approaching World Religions*, p. 54.

all relevant. In connection with the above, M. Anwar notes that "all teachers should have some experience in a multiethnic classroom as part of initial and in-service training. ... We need to seek support for such an approach. Because in this context the teachers' attitudes both to develop positive policies to cultural diversity and to consider the implications of a multiethnic society for their teaching, are important to bring about the changes required"²³²

Unfortunately though, as stated in the Swann Committee Report, those RE teachers who are teaching in schools with multifaith pupil populations do not feel that their training has prepared them adequately to deal with faiths other than Christianity. Many of them have themselves made the effort, when they found themselves in a multiracial school, to attend in-service courses or specialist seminars to update their skills and to examine new resources, and in several cases they have been forced to rely on their own initiative in obtaining relevant material or in devising appropriate schemes of work, often in consultation with religious leaders from the ethnic minority communities in their area²³³.

²³² ANWAR, M., "Muslims, community and the Issues in Education", O'KEEFE, B. ed., *Schools for Tomorrow-Building Walls or Building Bridges*, p. 94.

²³³ The Swann Committee Report, op.cit., p. 496.

4.2.- Case law

Although parents are the essential holders of the right to religious freedom, as explained above, the importance of the teachers' influence is shown in case of conflict of their own right to religious freedom with their educational obligations. One of the leading English cases which the ECHR-Court has dealt with is the case of *Ahmad vs. ILEA* in 1978²³⁴. Ahmad, a Muslim full-time teacher used to leave the school premises on Fridays earlier than the schedule allowed due to his religious obligations connected with the attendance of Friday prayers in a nearby mosque. Section 30 of the Education Act 1944 provided for the guarantee that teachers will not receive "less emolument" by reason only of their attending religious worship. Such clauses have automatically become part of the contracts of such teachers. The school authorities requested the change of Ahmad's full-time teacher's contract into a part-time one covering four and a half days which led to his resignation.

The Court of Appeal confirmed that his dismissal had not been unfair. It judged that in view of the conflict between Ahmad's right to religious freedom, including freedom of worship (art. 9 par. 1 ECHR) on the one hand, and the

²³⁴ *Ahmad v. ILEA* [1978] QB 36 (CA).

ILEA's rights based on the teacher's contract and the rights of the pupils to be taught on the other hand, the latter should prevail. The European Commission decided that this conclusion did not exceed the State's margin of appreciation under art. 9 par. 2.

Further cases which have been brought before the European Commission of Human Rights have confirmed the limitations of the right to religious freedom which are acceptable in the light of art. 9 par. 2 ECHR²³⁵.

D. The role of minorities, esp. of the Muslim one, in multicultural Britain

The defining characteristics of minority status may vary from one group to another, such as national or ethnic, religious or linguistic ones. In the frame of this study we are obliged to concentrate only on religious minorities and to the conditions of their members exercising the right to religious freedom.

The Church of England enjoys the status of an established religion safeguarded by successive laws²³⁶. As a consequence the Sovereign must be

²³⁵ *R. v. Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury* [1991] 1 All ER 306, *X. v. UK* (1978) 14 Dec. & Rep. 234, Application 17439/90, (1991) 12 Human Rights LJ 172, *ISKCON v. UK*, application 20490/92, *ISKCON v. Secretary of State for the Environment* (1992) 64 P & CR 85.

²³⁶ McELDOWNEY, J.F., Public Law, p. 652, Canon A1 of the Canons of the Church of England (Canons Ecclesiastical

a member of the Church of England because he is the Supreme Governor of the Church of England. In any case, it is the Christian religious traditions in general which prevail in Britain and must therefore be reflected in any new agreed syllabus produced after 29 September 1988 according to s. 8 (3) of the ERA 1988.

Furthermore, it is supported in the general human rights theory that the protection of a human right in a democratic society is tested mainly with regard to the members of a minority, since the prevailing majority has better chances to protect its right through legislation. After all, “a freedom loses its effectiveness if it finally becomes a privilege”²³⁷. In this sense the claims of the Muslim minority could be considered as one of the main sources of cases in which the content as well as the limitations of religious freedom in the English educational system are controversially discussed. Notwithstanding the approach of international legal aspects in the third chapter, it is worth mentioning the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 18 December 1992 safeguarding

promulgated by the Convocations of Canterbury and York in 1964 and 1969), *BAILEY, S.H., HARRIS, D.J., JONES, B.L., Civil Liberties - Cases and Materials*, 3rd ed., Butterworths, London 1991, pp. 533ff.

²³⁷ MANESIS, A., *Constitutional Rights - A' Individual Freedoms*, pp. 34 and 58ff.

the right of persons belonging to minorities to profess and practise their own religion and to use their own language in private and in public freely and without interference or any form of discrimination²³⁸.

1.- The Muslim community in Britain and its attitude towards the education system

In any State which provides education and practises religious toleration "religious difficulties" inevitably arise, since the educational policy of the State must reconcile its concern for its own unity with the fact that its citizens may hold widely differing views on religion and their children are to be educated in accordance with these views.

Britain is nowadays a multiracial and multicultural society. It includes several racial, national and religious groups, commonly known as "ethnic minorities". This fact is also acknowledged by the Government, which, in a Department of Education and Science Paper, stated that: "Our society is a multicultural and multiracial one and the curriculum should reflect a sympathetic understanding of the different cultures and races that now make up our

²³⁸ *Human Rights Law Journal*, Vol. 14, No. 1-2, p. 54-56.

society... the curriculum of schools... must reflect the needs of this new Britain"²³⁹.

Among these ethnic minority groups are the Muslims, with an estimated number of about one million²⁴⁰. Until recently this community did not seem to be at all satisfied with the system of education in this country. Strong debates were taking place about education in Britain, mostly regarding the problem of maintaining the identity of children in accordance with parental wishes.

Muslims kept arguing for a long time that they saw education "as a means to an end; to produce good citizens who preserve and transmit to their children the Islamic heritage, while also shouldering the duties of British citizenship. For Muslims, education has a specific and significant purpose: ...to enable children to live and die in accordance with the will of Allah, to train them for life and after life"²⁴¹. According to them "sadly, the British system of education is

²³⁹ Department of Education and Science, in "Education in Schools: A consultative Document", Cmnd 6869, HMSO, London, 1977, pars. 10, 11. See also the Framework Convention for the Protection of Minorities which was adopted in 1994 (ETS 157).

²⁴⁰ Number taken from *The Economist*, 13 March 1993, "Worship moves in mysterious ways", p. 35.

²⁴¹ AKHTAR, S., "The Muslim Parents' Handbook: What every Muslim Parent should know", *ISLAMIA, National Muslim Education Newsletter*, Issue No. 21, June 1993, p. 11.

largely secular and based on considerations relevant only to this worldly life²⁴². As S.C.W. Mason, points out²⁴³: "The dividing line between Islamic and western concepts... rests on the fact that, whereas western philosophy allows religious knowledge as a distinct form of knowledge in isolation, Islam only acknowledges the validity of the true faith and confines all knowledge, within the parameters of the Koran and the Hadith". Thus, "a clash occurs between educational aims: one system (western) seeks individual autonomy by which the educational process invites young people to think and act for themselves within society, whilst the other (Islamic) attempts to maintain a strong sense of community and family solidarity within a religious framework".

Moreover, Muslims accuse the state authorities of forgetting that "their secularist policy is regarded by the Muslim community as an attempt to brainwash(!) Muslim children, uproot them from their cultural moorings, create tension between the house and the school, the parents and the children, and...does not provide children with certainty and a reliable, sustaining and accepted and acceptable norm to fall back

²⁴² Ibid.

²⁴³ MASON, S.C.W., "Islamic Separatism?", *British Journal of Religious Education*. Vol. 8, No. 2 (Spring 1986), p. 109.

upon²⁴⁴. For this reason "there are many parents in the Muslim community who express total dissatisfaction with the state schooling of their children". They are "frustrated and angry"²⁴⁵. What they would like to see is, the emphasis on Christianity clearly outlined in the ERA 1988 deleted from legislation. They believe that "stressing Christianity to Muslim children at best confuses and at worst undermines the spiritual teaching which the children receive at home, at the mosque and in the supplementary schools"²⁴⁶.

In other words, Muslims are of the opinion that state school and the British educational system

²⁴⁴ ASHRAF, S.A., "A View of Education - an Islamic Perspective", in *B. O'Keefe, ed. Schools for Tomorrow - Building Walls or Building Bridges*, The Falmer Press, London, 1988, p. 71.

²⁴⁵ AKHTAR, S., op.cit. "A major worry for muslim parents is the fact that their children soon begin to adopt English standards and ideas. They start to question not only traditional customs but religious ideas which seem to be strangely alien to life in a Western materialistic society. Islam is not something which can be learnt and adhered to overnight. It must be lived, breathed and fostered until it cannot be separated from life itself. It requires constant practice, and it is this fact that creates the dilemma for a muslim parent in Britain today. Most muslims acknowledge that Britain is a fair place to live, and in many ways they have come to depend upon it for their livelihood, but it is hard to judge how possible it is to live as a muslim within the society as a whole". See The Swann Committee Report, op.cit., p. 504.

²⁴⁶ BERLINER, W., op.cit.

in general, "are alienating them from their values and culture and are subjecting their children to an atmosphere in which secular values are presented as a norm. From the Muslim perspective the main problem is that the Curriculum is secularist and utilitarian and is based on a fragmentary view of reality"²⁴⁷, and that it marginalises religions completely.

Based on these beliefs, they strongly feel that they should be allowed to have their own schools, where a religious and spiritual ethos will prevail, so that their children will have the kind of education which will allow them to grow culturally, morally and spiritually according to the Islamic values.

2.- The major Muslim concerns on religious education and the dispute over separate schools

As we noted in the previous paragraph, Muslims, along with several other religious minorities, motivated primarily by religious concerns, have tried to establish their own "separate" schools as an alternative to the existing mainstream system, thinking that such schools would provide a more appropriate and acceptable environment for the education of their children.

²⁴⁷ MABUD, S. A., "A muslim response to the Education Reform Act 1988", *British Journal of Religious Education*, Vol. 14, No. 2 (Spring 1992), p. 95.

According to the Swann Committee Report, the main reasons that have been put forward by Asian groups, including Muslims, in their requests for establishing their own schools are as follows:

a.- Their disagreement with the "Christian-dominated" religious education provided by the existing mainstream schools, and a consequent desire to give their children the opportunity to learn about the religious traditions of their own faith in a positive and accurate manner.

b.- Their concerns regarding also the balance and bias of much of the rest of the Curriculum, for example the lack of attention given to the varied history, literature and culture of the Asian community.

c.- The lack of adequate support and encouragement for their "mother-tongue" languages, which the establishment of their own schools would be able to counter.

d.- Their concerns regarding the "rights and duties" of Muslim parents and their children in an educational context, i.e. in relation to matters such as school uniform, school meals, physical education and religious instruction.

e.- Their attempt to insulate themselves from racist action that often takes place against them in mixed schools, and to prepare their youngsters for its experience in their separate schools. In

this way they are convinced that they would not only become good citizens, but also develop a confident and balanced view of their place in this society, free from the sense of alienation which they might experience in mixed schools, thus avoiding the deadening pressures of being in a permanent minority²⁴⁸; and ,

f.- Their belief that it would be much more beneficiary for the minority children to be taught by teachers who share same religious and cultural background with them²⁴⁹.

Furthermore, some Asian teachers, concerned about the influence that racism is having on their prospects of employment and promotion within the teaching profession, see the potential establishment of Muslim and other minority schools as offering them wider opportunities for career advancement free from such obstacles²⁵⁰.

Another major concern of Muslims is the need for single-sex education for girls. From the point of view of Islam, to which the Muslim

²⁴⁸ See also comments on the "Dewsbury Dispute" in MEREDITH, P., op.cit., pp. 37-39.

²⁴⁹ The Swann Committee Report, op.cit., pp. 501-503.

²⁵⁰ Ibid. See also *Times Educational Supplement*, 30 July 1993, "Still in the minority", p. 6, where it is noted that: "Figures obtained...from the DFE operation, showed that minority groups were seriously under-represented among teachers. Just 3,3% were from minority groups, yet they make up an estimated 5,5% of the population".

commitment seems uncompromising, it is necessary to have single-sex schools, where Muslim girls will be educated with a view to their future role as mothers and wives in a particular Islamic sense, "with other subjects receiving less attention and with notion of careers education being seen as irrelevant to the pattern of adult life which the girls are likely to pursue"²⁵¹.

In fact, this concept of single-sex schools differs fundamentally from the philosophy underlying existing single-sex schools in the British education system, which have the same core curriculum as the mixed-sex schools, and where the same educational standards in terms of public examinations have been sought²⁵².

On the other hand, over the last fifteen years there has been a decline of single-sex schools in Britain, many of which have become co-educational. That has caused confusion and frustration to Muslim parents, who sometimes prefer to send their daughters to Roman Catholic or Anglican girls' schools, than to any other mixed ones²⁵³. In some extreme cases, they have even kept their primary or secondary-aged girls

²⁵¹ The Swann Committee Report, *op.cit.*, p. 505.

²⁵² *Ibid.*

²⁵³ MANUEL, G., "City faces single-sex schooling dilemma", *TES*, 1 November 1991, p. 1.

at home, when they could not get them into girls' schools. "In law, lack of space in girls' schools is not a valid reason for refusing to send a child to school. Currently, the authority is attempting to counsel parents about the choices available, but it may take action against them"²⁵⁴.

In any case and for whatever reason, the Muslim efforts have almost always focused on establishing "separate" schools for their children within the state-maintained sector, in the form of voluntary-aided schools. Indeed, the right of such communities to seek to establish their own voluntary-aided schools is firmly enshrined in law. Under the provisions of the Education Act 1944²⁵⁵ ethnic minority communities, along with any other group of individuals, are entitled to make proposals for the establishment of a voluntary-aided school to cater for their children's educational needs. The final decision on whether or not to approve the proposals rests with the Secretary of State for Education and Science. Where an ethnic minority community, which wishes to establish a voluntary-aided school, is of a distinct religious character, their school will be parallel to existing Church of England, Roman Catholic and indeed Jewish and

²⁵⁴ *TES*, 12 July 1991, "Muslim girls kept at home".

²⁵⁵ The Swann Committee Report, *op.cit.*, Chapter 8, ANNEX E.

Methodist schools²⁵⁶, which already form part of the British educational system.

However, in practice, although there are Church of England, Jewish and Roman Catholic voluntary-aided schools, other religions have consistently failed to meet the legal tests in order to receive state assistance²⁵⁷. With regard to state funded Muslim schools however, this has not happened because of lack of effort on the part of the Muslims²⁵⁸. Indeed, among the about 50

²⁵⁶ See paragraph on Church schools.

²⁵⁷ At this point it would perhaps be interesting to mention that the first state funded muslim school in Ireland has opened in new premises in Dublin. The opening ceremony was held on the 24th April 1993. This school has 120 pupils, both boys and girls, who will study the Irish National Curriculum in addition to Arabic and Islamic studies. The Irish Government has now granted funding to pay the salaries of the teachers, so the parents will pay no fees. The Irish President Mrs. Robinson opened the school stating that, "she was delighted to open the first permanent State funded Muslim school in the British Isles. The establishment of such a school with children who are both Irish and Muslim could only serve to broaden and enrich our sense of Irishness". Furthermore, Imam Yahya Muhammad Al-Hussein stated, "Muslims wanted to play a full role in the Irish society and anticipated support for this, not just in terms of equality and non-discrimination, but in terms of positive benevolence from the majority". See "Irish Government backs its first Muslim school", *ISLAMIA*, op.cit., p. 15.

²⁵⁸ In 1983 Bradford Council rejected an application for five voluntary aided schools from the Muslim Parents Association. Similarly in 1984, Kirklees Council turned down a request by the Muslim Ahmadiyya sect to establish a single voluntary aided school at Batley. In 1989 an application for voluntary status from the Muslim Zakaria Girl's High School was also

schools in Britain which the Muslim community has established, many would not seek state funding because their teachers and governors do not wish to apply the national curriculum in full. But the absence of any Muslim state schools has been a reason which has caused resentment among Muslim adherents.

When the Secretary of State for Education and Science was asked to approve such applications from religious minority groups, especially from Muslims - who have also filed the largest number of applications for voluntary-aided status²⁵⁹ - arguments like: the state of buildings, lack of qualified teachers, ability to deliver the National Curriculum and surplus places in other schools in the area, were advanced to them²⁶⁰. Furthermore, the opponents of state funding for Muslim schools, have quite vigorously argued that such schools "would be different from Anglican or Catholic schools. They are fundamentalists committed to bringing up indoctrinated true believers. Once one set of religious zealots succeed, all the others will queue up behind them"²⁶¹. As M. Barber

rejected. See Cumper, P., «Muslims knocking at the classroom door», *New Law Journal*, August 4, 1989, Vol. 139, no. 6419, p. 1067ff.

²⁵⁹ BRADNEY, A., op.cit., p. 68.

²⁶⁰ op.cit., p. 70.

comments²⁶²: "There is no doubt that the fear generated by scenes of militant Muslim fundamentalism has not helped the advocates of state funded Muslim schools".

On the other hand, advocates from within these (Muslim) communities have powerful allies outside²⁶³, who claim that Muslims have a right to equal treatment and that the well-established Muslim communities are denied what is available to Christians only on the principal of blatant religious discrimination, not to mention that Muslim parents' rights to raise their children according to their own wishes²⁶⁴ are thus not respected by the State.

²⁶¹ BARBER, M., "Rectify the religious anomaly", *TES*, 25 September 1992, p. 22. See also *ISLAMIA*, Issue No. 21, June 1993, "Muslims and the law in Multifaith Britain: The Need for Reform", p. 8.

²⁶² Ibid.

²⁶³ Ibid, regarding advocates from the Labour party. See also MACLEOD, D., "Muslims seek state funding for schools", *The Times*, 14 December 1992, p. 9., where it is noted that: "Muslim education campaigners, backed by right-wing Conservatives, will this week press the Government to fund Islamic schools and strengthen the rights of minority faiths in State schools".

²⁶⁴ s. 76 of the 1944 Education Act provides that: «the Minister and Local Education Authorities shall have regard to the general principle that, so far as is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure, pupils are to be educated in accordance with the wishes of their parents».

3.- The Swann Committee Report on "separate" schools

The Swann Committee, after considering the issue of "separate" schools from many different points of view, taking into account not only the concerns of the religious minority groups (esp. the Muslims'), but also the situation in schools as it has developed in the last years, and possible future developments regarding the education system, has come to the conclusion that the establishment of such separate schools would not be the best solution.

The report's main argument has been that "all pupils should share a common educational experience which will prepare them for life in a truly pluralist society", and that in order to achieve this aim "all schools, both multiracial and those with few or no ethnic minority pupils, will need to reappraise their curricular provision and the attitudes and assumptions which underlie their work, so as to challenge and indeed overcome the "barriers",... which at present exist between the majority and minority communities in our (the British) society"²⁶⁵.

Accordingly, they did not favour the opinion of creating an artificially separate situation, in which groups of children would be taught exclusively by teachers from the same ethnic

²⁶⁵ The Swann Committee Report, op.cit., pp. 508-509.

group. This counteracts the Committee's motto for an ideal pluralistic society, where religious, cultural and linguistic heritage will be respected, and where full equality between the members of the community will be accorded. On the contrary, "separate" schools would rather "exacerbate the very feelings of rejection... which they (the minorities) are seeking to overcome, and "...might well serve to reinforce and extend these rather than ...help to remove them"²⁶⁶.

On the other hand, what regards the "physical security" of ethnic minority youngsters from "racial attacks", the Committee argues that "the very existence of a visibly identifiable "Asian" school may serve to polarise the attitudes of members of other communities in the area", and since under such circumstances "the scope for interracial misunderstanding and tension is surely greater", much rather so "the experience of the racism which the Asian pupils may then face will be "all the more traumatic for its unexpectedness and their unpreparedness"²⁶⁷.

As far as the issue of single-sex schools for girls is concerned, the Swann Committee felt that "existing coeducational schools with multiracial pupil populations could do more to ensure that,

²⁶⁶ op.cit., p. 510.

²⁶⁷ Ibid.

where there is parental concern about girls participating in certain activities in a mixed group, there is a degree of single-sex provision in certain areas of the curriculum" and they proposed that, the possibility of establishing single-sex schools will be given serious consideration²⁶⁸. However, the members of the committee made it clear that they do not agree with the idea of a "strictly Islamic education for girls", which some members of the Muslims have proposed, because "the principle of full equality of opportunity for both boys and girls... is fundamental to the philosophy of education in Britain... and of course enshrined in law"²⁶⁹.

Finally, the Committee pointed out the fact that many Muslim parents in Britain do send their children to coeducational schools even when the option of single-sex education is available, without that meaning that they see themselves as failing in their Islamic duty²⁷⁰.

4.- The case of the Islamia School

The first application for voluntary-aided status from a private Muslim school was filed in 1990, and relates to the hugely popular, 188-pupil (of both sexes) Islamia Primary School in Brent, north-west London, run by the Islamia Schools

²⁶⁸ op.cit., pp. 511-512.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

Trust. Islamia charges quite high fees (apprx. GBP 2.200,- a year) and has a substantial waiting list.

Islamia was founded in 1983 by Yusuf Islam, the former pop star Cat Stevens, and began as a mixed Muslim playground. A girls' secondary school was established later and now has 250 pupils.

The school teaches the full National Curriculum plus Arabic, the Koran and Islamic studies, which take up between 15 and 20% of the time, and do not exceed what would be expected in most Christian or Jewish voluntary-aided schools; what it lacks, compared with the state sector, is resources and teacher support in the classroom, and it has revealed that it is threatened with closure if it fails to secure state funding which it has been campaigning for over 10 years²⁷¹.

The Government initially rejected Islamia's application for voluntary-aided status, because there were surplus school places in Brent, although the school's backers have challenged the basis of the department's surplus places calculations, and in addition to that they have pointed out that many pupils come from

²⁷¹ BERLINER, W., "Ex-pop star's cash keeps Muslim dream school alive - for now", *GUARDIAN EDUCATION*, 23 March 1993, pp. 6-7.

boroughs where there is a shortage²⁷².

Nevertheless, ministers have later permitted a Catholic school in Birmingham to expand, despite the existence of surplus places in the area, thus undermining the argument against Islamia²⁷³.

Anyway, the school won a judicial review of the case in the High Court in May 1992 and the Education Secretary was ordered to reconsider the case. The school then submitted new evidence which, Mr Justice MacPherson expected "would require careful preparation of arguments for consideration by the Education Secretary"²⁷⁴.

²⁷² The Government's figures on surplus places in schools came under further attack from the Association of Metropolitan Authorities. They said that the target figure of 1.5 million surplus places in England and Wales was "wildly overestimated" and that a better system of calculating classroom capacity needed to be devised. See MACLEOD, D., "Muslims seek state funding for schools", *The Times*, 14 December 1992, p. 9.

²⁷³ Ibid. See also G. Manuel, "City faces single-sex schooling dilemma", *TES*, 1 November 1991, where it was stated that: "... the Government has sanctioned two new voluntary-aided Jewish schools in the London boroughs of Redbridge and Enfield in the past 6 months - a development resented by some Muslims. Ibrahim Hewitt, deputy director of the Muslim Educational Trust said that, while he was pleased for the Jewish community, "it does show that there is one law for one group and another law for another group".

²⁷⁴ *ISLAMIA*, op.cit., p. 8 "Islamia school holds its breath". Lord Justice MacPherson also described Islamia as a "splendid

However, in the evening of August 18th, 1993, Baroness Blatch, the Education Minister, issued her decision to reject Islamia's application reiterating the department's original argument: "This school cannot receive Government funding, because it is demographically unnecessary"²⁷⁵ due to surplus places in the borough's local authority primaries.

Naturally, this decision has caused a lot of anxiety to the Muslim community, which sees the recognition of its right to religious education as being a major test of acceptance by the State. The argument is that, "with this symbolic action, the Government appears to be refusing to acknowledge the religious legitimacy of Islam or the permanent existence of a large Muslim population in this country"²⁷⁶. "It is an outrage", said Yusuf Islam, the school's main backer. "We have come to expect a great deal of injustice. We get the impression that the Government just does not want to see Muslim schools and is pursuing a policy of starving us of funds"²⁷⁷.

and remarkable" school, and said that there had been manifest unfairness in its treatment", MACLEOD, D., op.cit.

²⁷⁵ *The Times*, 20 August 1993, "Perversity and Prejudice" (leading article).

²⁷⁶ *Ibid.*

²⁷⁷ PYKE, N., "New Slight for Muslims", *TES*, 27 August 1993, p. 1.

The Islamia Trust considered further legal action, that is an appeal to European Court of Human Rights²⁷⁸ and they threatened the Government that they would sue it over the year-long delay in its application to join the state system²⁷⁹. Moreover, Muslim groups plan to establish a national network of after-hours Islamic schools. Ten schools teaching Muslim pupils about their history, culture and religion in the evening and at weekends, are expected to open in big cities soon²⁸⁰.

According to the latest developments however, and after the mounting pressure by the Muslim community, in January 9th, 1998, the Government finally agreed to fund two Muslim schools and thus accepted the applications of the Islamia Primary School in Brent, and of the Al Furqan Primary School in Sparkhill, Birmingham²⁸¹. This has of course been welcomed by the Muslim community with great relief, although a trust officer of the Islamia

²⁷⁸ PRESTON, B., "Muslims to set up national network for Islamic schools", *The Times*, 20 August 1993, p. 1.

²⁷⁹ BBC News Online:UK, «Government agrees to fund Muslim schools», found under the Internet address: <http://www.news.bbc.co.uk/low/english/uk/news>

²⁸⁰ PRESTON, B., op.cit.

²⁸¹ BBC News Online:UK, «Govenment agrees to fund Muslim schools», op.cit.

school said that «the decision was a long time in coming».

In connection with the Government's decision Mr. David Blunket, the Education and Employment Secretary expressed his satisfaction that on the one hand these schools should provide a good standard of education by delivering the National Curriculum and by offering equal access to the curriculum for both boys and girls, and on the other hand they would be financially viable²⁸².

E. Critical remarks

The above study of the English educational system with regard to RE offers useful hints and proposals to questions with which also the Greek educational system is or may be soon confronted with.

Whereas the English society is a multicultural one, including a considerable number of minority churches, the Greek society has been for many centuries homogeneous in the sense of the Greek-Orthodox belief but is now slowly changing through the recent intrusion of other races and ethnic minorities from neighbouring countries, countries of eastern Europe, the Balkans and western Asia.

²⁸² Department for Education and Employment: «Four new schools to join the maintained sector» found under the Internet address: <http://www.coi.gov.uk/coi/depts/GDE/coi6521d.ok>

The fact that the two big churches, the Church of England and the Roman-Catholic one, represent less than half of the religiously active population, the rest of which belong to a number of different religions, has not prevented the Government of UK from adopting the Education Reform Act of 1988 and thus promoting the strengthening of power of governors and creating a new equilibrium in the distribution of the administration of the educational system. In this way the Local Educational Authorities lost a part of their absolute power to determine educational matters as previously, in favour of the central government. Furthermore, the position of RE and collective worship was strengthened.

This model can be classified as an attempt to combine rather successfully the element of central definition of educational policy, on the one hand, with the “open-enrolment” policy and the individual freedom of choice, especially in view of the variety of existing religious minorities and the undeniable parental right to determine their children’s religious education, on the other hand.

In Greece, both the general educational policy and the curricula are being defined centrally by the Ministry of Education and Religious Affairs. It could be considered as helpful if one would leave some freedom to a local authority (“Local

Paedagogikon Instituton”)²⁸³ knowing better the needs of schools of a certain area to adapt RE in a way that although Christianity is given the prior role, an introduction to other religions’ homologues or religious faiths and acts of worship is not *a priori* excluded, especially in areas where different religious groups are existent²⁸⁴.

Furthermore, it might serve as a useful idea for the future Greek state policy on the subject of RE in view of the increasing role of religious minorities in the country if one could take advantage of the English experience in this field. Should there be in the classroom pupils of more than one religious origins, then it is recommended that acts of collective worship should seek to fulfil educational rather than religious community aims²⁸⁵. In the frame of this

²⁸³ According to Law 1566/1985 the “Paedagogikon Instituton” is an independent advising authority specialising on preparing and submitting proposals on educational policy, educational technology developments, teachers’ training and other topics falling within the scope of competence of the Ministry of Education and Religious Affairs; SKOURIS, V., The Law of Education, p. 77; MIHOPOULOS, AN., Legal frame and institutions of education, 1994, p. 106.

²⁸⁴ Muslims in Komotini, Albanians in North-western Macedonia, Romeo-Catholics in the Cyclades Islands of Aegean Sea, Protestants in Katerini, etc.

²⁸⁵ McCREERY E., *Worship in the primary School*, 1993, p. 33, where it is stressed that in case of religious pluralism at school the aim should be not to separate the children in groups

educational procedure the unifying element should prevail. Besides the role of unifier RE is also meant to sensitise, to inform about different religious faiths and alternatives, to foster spiritual awareness and provide the children with principles which are necessary for a sound social life²⁸⁶. Thus, it is expected that RE in Greece, which is dedicated to Orthodox Christianity with the exception of the last two school years, should start becoming more a subject about history of religious gradually losing its initial catechetical character.

In this context it is interesting to investigate the approach of RE from the point of view of a European human right in the light of religious freedom nomology.

of the same religion but to teach them how to coexist peacefully with people of deviating religious convictions.

²⁸⁶ For the various aims of collective worship in England see among others R.JACKSON/D.STARKINGS (Ed.), *The Junior RE handbook*, 1990, p.8 f., 15f.

III. Chapter

The European Convention for the Protection of Human Rights and Fundamental Freedoms

1.- Introductory remarks

1.1.- ECHR and its instruments

The European Convention on Human Rights²⁸⁷ is a Treaty of international law prepared under the authority of the Council of Europe in 1950 and set into force in 1953. All of the 40 member states of the Council of Europe have ratified the Convention until now. Its scope of protection was extended and strengthened by the addition of further rights provided for by the First, Fourth, Sixth and Seventh Protocols to the Convention. The European Convention protects mainly civil and political rights, as economic, social and cultural ones were at the time of its adoption rather controversial among the governments involved²⁸⁸.

²⁸⁷ see among others HARRIS, BOYLE, WARBRICK, *Law of the European Convention on Human Rights*, pp. 1ff; FROWEIN & PEUKERT, *Europäische Menschenrechtskonvention: EMRK-Kommentar*, 1985; P. VAN DIJK/G.J. VAN HOOFF, *Theory and Practice of the European Convention on Human Rights* (3rd ed.), Kluwer; J.E.S. FAWCETT, *The application of the European Convention on Human Rights*, Clarendon Press, Oxford 1987; J. VELU/R. ERGEC, *La Convention Europeee de Droits de l'Homme*, Bruxelles 1990.

²⁸⁸ HARRIS, BOYLE, WARBRICK, *Law of ECHR*, pp. 3-4.

The bodies provided for in the Convention were initially the European Commission of Human Rights, a body of independent experts, and the European Court of Human Rights. Under the terms of the Eleventh Protocol, the Court and the Commission merged to form a single Court²⁸⁹. The “new” Court is expected to correspond to the increased expectations of the member states for effective protection of human rights²⁹⁰. This development constitutes the most important institutional change of the ECHR system since its inauguration in 1950. Such an evolution was imperative given the rapidly increasing number of applications which were registered annually

²⁸⁹ The ratification procedure of the 11th Protocol was already concluded and the new Court began operating in November 1998. Greece ratified this Protocol with Law no. 2400/1997, Official Gazette no. 96 A’.; see also SARMAS, J., The case-law of the European Court of Human Rights and the Commission, 1998, p. 515 f., 523 f.; PETROGLOU, J., The merger of the Commission and the Court of Human Rights into one jurisdictional body, in *Dike* 28, p.119; VOGIATZIS, P., The eleventh Protocol and ECHR. Towards the creation of one European Constitutional Court, in *To Syntagma* 1996, p. 391 f.

²⁹⁰ It is supported, however, that the newly institutionalised court is only an improved form of the initially established court given that a.- the new court has no *ad hoc* institutional order by the signatory parties to become a completely autonomous new organ, b.- the future case-law will definitely be based on and function as a substantial continuation of the pre-existing one, and c.- the members of the new court will include a considerable number of personalities who served either as judges of the court or as members of the Commission; SARMAS, J., The case-law of the ECHR Court, p. 521-522.

with the Commission and which the Court could not deal with in sustainable time limits. This situation endured the danger of the public losing its confidence in the ECHR system²⁹¹. ECHR also provides for both state and individual applications which go to the European Court of Human Rights (new Articles 33 and 34). The application is filed at the Secretariat of the Court and a judge Rapporteur is assigned in order to decide subsequently, together with two other judges, whether the application should be admitted for consideration on the merits. Only when the Three Judges, including the Rapporteur, do not come to an unanimous vote, will the application be referred to a Chamber to decide on its admissibility²⁹². When a case is declared admissible the Court examines the facts and the legal arguments and tries to achieve an amicable solution between the parties. If this is not possible, the Court adopts a report stating whether the defendant state has indeed infringed the Convention. The Committee of Ministers of the Council of Europe, which consists of Government representatives of all member states, is responsible for the supervision of the enforcement of the Court's decisions²⁹³.

²⁹¹ HARRIS, BOYLE, WARBRICK, p. 706 f.

²⁹² HARRIS, BOYLE, WARBRICK, p. 708 f.

²⁹³ Art. 46 ECHR

Among other sources of international law, the ECHR constitutes that multilateral international treaty with the comparatively most effective mechanisms of implementation as to the protection of human rights, especially in view of the individual application under art. 25 of the Convention²⁹⁴.

Furthermore, it should be underlined that the Convention provisions are to be interpreted not only according to the Vienna Convention on the Law of Treaties 1969²⁹⁵, but also according to the so-called teleological approach which emphasizes upon the object and purpose of the Convention. As object and purpose of the Convention the case law has recognized the protection of individual human rights²⁹⁶ and the maintenance and promotion of the ideals and values of a democratic society, i.e. pluralism, tolerance and broadmindedness²⁹⁷. Although the Convention is a legal text whose adoption dates back to almost five decades its provisions avoid the danger of becoming obsolete and old-fashioned due to the dynamic interpretation by

²⁹⁴ FROWEIN, J.A., *FROWEIN/PEUKERT, EMRK-Kommentar*, Einführung par.4; GURADZE, H., *Europäische Menschenrechtskonvention*, Einleitung § 4 Note I.

²⁹⁵ *Golder v. UK* A 18 par. 29 (1975); *Johnston v. Ireland* A 112 par. 51 (1986).

²⁹⁶ *Soering v. UK* A 161 par. 87 (1989).

²⁹⁷ *Handyside v. UK* A 24 par. 49 (1976).

the Commission and the Court²⁹⁸. The principle of proportionality and the national law standards of the European countries permeate the implementation of the Convention serving as important interpretation guidelines.

Religious education as a fundamental right is encompassed in two distinct provisions of ECHR, that is in art. 9 of ECHR and in art. 2 of the First Protocol of 20.03.1952. Both these provisions, which are discussed further below, are being referred to in the leading case law of the Greek Council of State as decisive legal basis for securing religious freedom and religious education in Greece²⁹⁹.

It should also be noted that granting and securing fundamental rights to the individuals of the member states belongs to the priority aims of the Convention. In this sense the Convention not only provides for subjective rights of the individuals, which are subsequently protected by the Commission and the Court, but also it provides for objective human rights standards, thus safeguarding a sort of *sui generis* “ordre

²⁹⁸ HARRIS, BOYLE, WARBRICK, *Law of ECHR*, p. 7.

²⁹⁹ Greek Council of State decision No. 3356/1995 (see Chapter I).

public” which must be respected by the legal orders of the member states³⁰⁰.

1.2.- ECHR and the Greek legal order

As to the higher normative rank of international treaties after their ratification, according to Art. 28 of the Greek Constitution it is worth mentioning the following:

After issuance of the ratification law, that is the Legislative Decree 53 of 19.09.1974, ECHR has become integral part of the Greek legal order. In case of conflict between international law provisions and national law, the first ones prevail, as they possess a superior position in the hierarchy of legal norms. Furthermore, given that such international law provisions do not violate the Greek constitutional order (Greek Constitution of 1975 as amended in 1986), they constitute a binding legal standard for the court decisions. As Art. 87 par. 2 Gr.C. stipulates,

„judges shall in the discharge of their duties be subject only to the Constitution and the laws; in no case whatsoever shall they be obliged to comply with provisions enacted in abolition of the Constitution.“

A further safeguard of the maintenance of the Greek constitutional order is included in Art. 93 par. 4 Gr.C., according to which

³⁰⁰ FROWEIN, J.A., “Das Bundesverfassungsgericht und die Europäische Menschenrechtskonvention”, *Festschrift für W.Zeidler*, Band II, p.1763 f.

„the Courts shall be bound not to apply laws, the contents of which are contrary to the Constitution“.

In other words the Greek Courts are entitled to guarantee for the conformity of international law provisions with the Greek constitutional order.

In this sense, a judge is not obliged to apply an international law provision if he deems that it abolishes the core of the constitutional system. Furthermore, a judge is supposed to apply international law provisions integrated into the Greek legal order via art. 28 Gr.Const. automatically, i.e. without the need of any further implementing provisions to be issued by the national Parliament.

In this respect art. 9 ECHR is to be deemed as an international obligation of Greece to protect religious freedom, principally in the way provided for in art 13 Gr.C. As far as religious education is concerned, it is necessary to consider the combined application of art. 9 ECHR together with art. 2 of the First Protocol.

1.3.- ECHR and the UK legal order

A comparative approach of the position of ECHR in the legal systems of Greece and the UK shows a remarkable difference: Greece belongs to those countries where ECHR as a legal source of international law is being

awarded a rank between the Constitution and the statutory law³⁰¹.

On the other hand, the UK has belonged for a long period of time to the category of countries where ECHR has no direct application in the internal legal order. Since the obligations of ECHR derive from treaty, legislative action is required in order to secure their performance³⁰². Regardless of the pending issuance of the necessary implementing acts by the legislator³⁰³, ECHR plays an important role as an instrument

³⁰¹ Such countries are Luxembourg, Belgium, the Netherlands, Portugal, France and Spain; BLUM, N., *Die Gedanken-, Gewissens- und Religionsfreiheit nach Art. 9 der Europäischen Menschenrechtskonvention*, p. 22. See also HARRIS, BOYLE, WARBRICK, p. 24.

³⁰² WADE, E.C.S. & BRADLEY, A.W., *Constitutional and Administrative Law*, 10th edition by A.W. Bradley, Longman, London, 1985, p.321.

³⁰³ According to Human Rights Act 1998 s. 13 (1) : „If a court’s determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right“. The aforementioned Act has incorporated the Convention recently. Accordingly, if a person believes that his rights are violated by an act of a public authority, he is entitled to require from the court to correct this situation. The courts, however, are not in a position to disregard statutory law in case it is considered as contravening the Convention, which still requires legislative amendment by the Parliament in order to adapt national law to the Convention standards; see “Britons will not have to go to Strasbourg”, *TO BEMA TIS KYRIAKIS* of 02.11.1997 p. E7

containing interpretation guidelines for those cases where the national law is unclear or even inapplicable³⁰⁴.

2.- Art. 9 of the Rome Convention for Human Rights 1950 (ECHR)

Article 9 of the ECHR reads as follows:

“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

Before analysing contents, holders and limitations of religious freedom and consequently religious education it should be stated that state interference may not necessarily affect one’s religious belief only. It may also affect freedom of expression (art. 10 ECHR) or freedom of assembly and association (art. 11 ECHR). These three fundamental rights are not totally irrelevant to each other; on the contrary, they may be thought to be simultaneously applicable in the same circumstance. This is

³⁰⁴ Such countries are Denmark, Iceland, Norway, Malta and Ireland, BLUM, N., *ibid.*

understandable given that the manifestation of religious belief could be interpreted as a freedom of expression, whereas such manifestation through concrete acts of religious practice usually presupposes peaceful assembly with others. In all three rights state interference is explicitly provided for by ECHR. In case of a clash of fundamental rights there will invariably be a wide margin for the state in how to resolve it. Thus, in the cases *Otto Preminger*³⁰⁵ and *Wingrove*³⁰⁶ the applicant claimed that his art. 10 right had been interfered with. The state justified the interference as being necessary to protect the religious rights of others and in each case the court upheld the state's action. In art. 9 ECHR the state has to secure positively the peaceful enjoyment of religious freedom from hostile attacks by others. This is a power rather than a duty. Furthermore, art. 9 ECHR right enjoys enhanced protection in comparison to arts. 10 and 11 ECHR rights, since in case of a clash the latter may be subject to regulation and even expungement in order to enable protection of religious freedom³⁰⁷.

³⁰⁵ *Otto-Preminger-Institute v. Austria* Judgment A 295 (1994)

³⁰⁶ *Wingrove v. UK* Judgment No. 17419/90 (1995)

³⁰⁷ HARRIS, BOYLE, WARBRICK, *Law of the European Convention on Human Rights*, p. 363-365.

2.1.- A collective and individual right

At first it is decisive to answer the question whether freedom of religion is a *collective* or an *individual* right. Whereas the Commission of ECHR used to interpret art. 9 ECHR in its prior case law in a sense that this right was protected only with regard to individuals and not with regard to legal entities³⁰⁸, recent case law changed this attitude and has repeatedly confirmed that a church body itself is capable of possessing and exercising the rights contained in art. 9 par. 1 ECHR in its own capacity as a representative of its members³⁰⁹. This is the case provided that this church body is not a governmental organisation and does not pursue any commercial profit. In other words, a public liability company cannot become holder of the right to religious freedom³¹⁰.

In view of the above, religious freedom of art. 9 par. 1 ECHR is interpreted as a *collective*

³⁰⁸ *X v. Switzerland*, DR 16, p. 85; *Church of X v. the UK*, 29 Coll. P. 70 and *X v. Sweden*, Yearbook (1971) 14, p. 664.

³⁰⁹ *X & Church of Scientology v. Sweden*, DR 16, p. 68 at p. 70.

³¹⁰ With regard to Greece it was thus safeguarded that all religious communities, either orthodox or not, and irrespective of their legal form, can become holders of religious freedom as an ECHR protected right and can claim protection by the ECHR Court; BEIS, K., Remarks on the Commission's Report

*right*³¹¹ reserved among others for an association with religious and philosophical aims which is able to exercise the rights inherent in the freedom of religion³¹².

The collective character of the right to religious freedom was also confirmed in two Greek cases: Firstly, in *Holy Monasteries v. Greece*³¹³, where the Greek Government wrongly supported the opinion that the Holy Monasteries were a governmental organisation and could therefore not seek protection before the ECHR Court against infringement of their right to religious freedom. The Court confirmed that the Monasteries do in fact pursue not only ecclesiastical and spiritual goals, but also cultural and social ones and could therefore not be classified as governmental organisation for the fulfilment of public administrative tasks³¹⁴. Secondly, in the *Canea Catholic Church* case the ECHR Court acknowledged the right of the applicant as a non-governmental organisation to appeal the matter in Strasbourg despite the

and the Court's Judgment in the case *Canea Catholic Church v. Greece*, in *DIKE* 29, p. 575.

³¹¹ Contra BLUM, N., op.cit., p. 51, who claims that Art. 9 par. 1 is conceived as a pure individual right introducing fundamental rights of the individual against the State.

³¹² *Omkananda and the Divine Light Zentrum v. the UK*, DR 25, p. 105.

³¹³ Court's decision of December 9th 1994.

³¹⁴ *Ibid*, par. 49.

ambiguous qualification of the legal form thereof³¹⁵.

In this sense the Greek-Orthodox Church is qualified as a non-governmental organisation and is therefore legitimated to claim the aforementioned legal protection.

2.2.- Contents of the right to religious freedom (art. 9 par. 1 ECHR)

The basic elements of the freedom of religion as contained in art. 9 par.1 ECHR include:

- i. the freedom to have a religion,
- ii. the freedom to change religion³¹⁶,
- iii. the freedom to manifest a religion in worship, teaching, practice and observance.

Hence, religious freedom is protected in two different ways, i.e. the subjective scope of one's belief or even non-belief³¹⁷ and the active scope of manifestation of the former. Freedom to have and change one's religion is immune from any restriction under art. 9 ECHR, whilst freedom to

³¹⁵ *Canea Catholic Church v. Greece* Judgement (1996), par. 30-31.

³¹⁶ This specific aspect of religious freedom is not explicitly included in the Greek Constitution (art. 13). One could be led to such a protection form, either by teleological interpretation or by direct application of art. 9 ECHR.

³¹⁷ Article 9 ECHR is understood as an affirmation of tolerance and pluralism in a democratic society governing the orientation and the principles of the whole Convention; HARRIS, BOYLE, WARBRICK, p. 357.

manifest one's religion is subject to limitations. In this sense freedom of thought, conscience and religion is indeed being awarded considerable protection.

Greece belonging to those parties of ECHR having a State church system³¹⁸ it is important to note the European Commission of Human Rights' opinion according to which the existence of a State church as such is not considered as a violation of art. 9, although a State church system in order to satisfy the requirements of that article, must include specific safeguards for the individual's freedom of religion. In particular, no-one may be forced to enter or prohibited from leaving a State church³¹⁹.

Freedom of religion is classified as one of the foundations of a democratic society in the sense of the Convention and as one of the most vital elements making up the identity of believers and their conception of life, but also a precious asset for atheists, agnostics, sceptics and the unconcerned.

In particular, the European Court of Human Rights in its judgement in the case of *Kokkinakis v. Greece* (31/1992/348/421) found that the

³¹⁸ See Chapter I A 1. for the character of the Christian Orthodox Church as the prevailing church in comparison to other known ones.

³¹⁹ *Darby v. Sweden*, report of the Commission adopted 9 May 1989, pp. 8-9.

conviction of Mr. Kokkinakis, a Greek Jehovah's witness, by the Greek courts based on section 4 of Law No. 1363/1938 concerning "improper proselytism" for trying to convince his neighbour by improper means, constituted a violation of art. 9 par. 1. On March 2, 1986, Mr. Kokkinakis and his wife visited Mrs. Kyriakaki, the wife of the cantor at the local Orthodox church in Sitia, Crete, and after telling her that they were bringing "good news" they entered her house, and engaged in a discussion with her attempting also to sell to her some booklets of their faith. The cantor informed the police who arrested them and they were prosecuted and brought before court for having breached Law No. 1363/1938 which made proselytism an offence³²⁰. The 1st Instance Criminal Court found Mr. and Mrs. Kokkinakis guilty of proselytism and sentenced them to a 4 months' imprisonment, convertible into a pecuniary penalty. They appealed this decision and the

³²⁰ Law No. 1363/1938, section 4, made proselytism a criminal offence for the first time. In 1939 Law No. 1672/1939 amended that section by section 2 and the term "proselytism" was clarified as follows: "By proselytism is meant, in particular, any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion, with the aim of undermining those beliefs, either by any kind of inducement or promise of a inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naivety."

Court of Appeal discharged Mrs. Kokkinakis' conviction and sustained her husband's but reduced his prison sentence. Further to that decision Mr. Kokkinakis submitted an appeal before the Court of Cassation (Areios Pagos) on points of law. The Court of Cassation dismissed the appeal rejecting the plea of unconstitutionality. Mr. Kokkinakis eventually made use of art. 25 ECHR and lodged an application against the Hellenic Republic which was referred to the Court by the European Commission of Human Rights.

According to the decision of the ECHR the interference of the Greek courts with the applicant's right to manifest his religious belief was not shown as justified, in the circumstances of the case, by a pressing social need. In other words the court found that the evidence provided did not show that the applicant had proceeded to "improper proselytism"³²¹. In this sense, the legislative and judicial measures taken against the applicant in order to restrict his freedom to manifest his religion had been disproportionate to the legitimate aim pursued, i.e. the protection

³²¹ The Court accepted that there is a distinction between "evangelism", which is defined as acceptable, being the essential mission of the Church, and "improper proselytism", which is defined as a devious attempt to convert one's beliefs by offering material or social benefits or taking advantage of the need or incapacity of others. See HARRIS, BOYLE, WARRICK, p. 365 f.

of the rights of others, and were not necessary in a democratic society³²².

Convictions of Jehovah's witnesses for breaching the said law have been rather usual over the decades and have led the European Court of Human Rights to conclude that the State did not have an unlimited right to interfere with the exercise of the evangelical mission of members of a minority religion³²³.

In the case of *Dragasakis v. Greece*³²⁴, the Commission has decided that not every individual conduct is to be protected simply because it is motivated by certain religious or other convictions of the applicant. Thus, the applicant was finally obliged to comply with the administrative regulation according to which the grave of his relative had to be removed to another place of the cemetery due to general reasons of public health and public order as it had happened with other graves as well. Consequently, the conduct of the Administration was not found to be a violation of Art. 9 ECHR.

³²² See below p. 160.

³²³ BLUM, N., op.cit., p. 71-72, who notes that convictions for improper proselytism are not compatible with art. 9 ECHR and should be avoided in the future, thus allowing only a narrow interpretation of the legal prohibition of improper proselytism.

³²⁴ Eur. Comm. Appl. No.12902/87.

Manifesting one's religious beliefs as such is within the scope of protection of art. 9 ECHR. It is decisive, however, to differentiate manifestations of religious belief from those having different aims. In the case *X and Church of Scientology v. Sweden*³²⁵ the Commission found that the activity which the State sought to regulate was commercial advertisements which, instead of a connection with religious manifestations, aimed at convincing the addressees to buy devices produced by the church.

The fact that a concrete activity is protected as being a manifestation of one's belief or religion does not necessarily mean that such a behaviour is beyond regulation by a provision of a general law dictated by the pursuit of public interest. In the case *Omkaranda and Divine Light Zentrum v. Switzerland*³²⁶ the Commission held that the fact that an alien priest was ordered to be expelled due to his being convicted of serious public order offences was justified under art. 9 par. 2 ECHR.

Although "worship" is undoubtedly falling into the field of application of art. 9 par.1 ECHR, it is not clear in case law what the exact meaning of "teaching" is. It is accepted that this notion does

³²⁵ Eur. Comm. Appl. No. 7805/77, 16 DR 68 at 72 (1979)

³²⁶ Eur. Comm. Appl. No. 8118/77, 25 DR 105 at 118 (1981).

not necessarily cover school classes (RE)³²⁷. Teaching at primary and secondary school is covered by the more specific provision of art. 2 of the First Protocol to ECHR of 1952 (see below). However, “teaching” in the sense of art.9 par. 1 ECHR refers to both adults and children and is supposed to cover dogmatic questions and religious traditions. Furthermore, it is doubtful whether teaching people belonging to different dogmas or religions is also covered by the provision in question. According to the more convincing attitude, this question is to be answered positively provided that the people taught are free to participate or to interrupt their participation at the “teaching” if and whenever they wish to³²⁸. Similarly, diffusion of own religious beliefs and missions are also considered as falling into the application field of art. 9 ECHR with regard to the notion of “teaching”³²⁹.

2.3.- Limitations of the right to religious freedom (art. 9 par. 2 ECHR)

Religious freedom provided for in art. 9 par. 1 ECHR is subject to the following limitations:

³²⁷ BLUM, N., *ibid*, p. 65.

³²⁸ GURADZE, H., *Europäische Menschenrechtskonvention, Art. 9 Anm. 10, Konvention zum Schutze der Menschenrechte und Grundfreiheiten nebst Zusatzprotokollen, Kommentar Berlin/Frankfurt, 1968.*

³²⁹ BLUM, N., *ibid*.

Firstly, limitations prescribed by the **law** of the country in which the ECHR is applied³³⁰, in the sense of a sufficiently accessible and precise regulation. In *Kokkinakis v. Greece* the Court found that the “prescribed by law” requirement of art. 9 par. 2 ECHR was fulfilled by the Greek law providing for the “improper proselytism”.

Secondly, the interference should be for an identified **legitimate aim**, such as public safety³³¹, public order³³², health or morals³³³, protection of the rights and freedoms of others. The wording and the *ratio* of this limitation of religious freedom included in par. 2 of art. 9 ECHR correspond to art. 5 Gr. C. According to the latter:

“all persons shall have the right to develop freely their personality and to participate in the social, economic and political life of the country, insofar as they do not infringe upon

³³⁰ With regard to Greece the specific limitations have been presented in Chapter I.C6.

³³¹ This is an abstract legal notion and is specified in each national legal system by the national judge. See “known religion” in art. 13 par. 2 in comparison with the “prevailing religion” in the Greek Constitution in art. 3 par. 1.

³³² The obligation of Sikhs motorcyclists to wear crash-helmets is compatible with the limitations of the freedom to manifest one’s religion according to art. 9 par. 2 for reasons of public safety: *X vs. UK* No. 7992/77, 14 DR 234 (1978).

³³³ In application *X vs. UK* it was held that a Sikh prisoner, despite practice, was required to clean the floor of his cell for reasons of health protection. These notions are dealt with in Chapter I under “Limitations”.

the rights of others or violate the Constitution and moral values”.

According to the nomology of the Greek Council of State, art. 5 providing for the freedom to develop freely the personality cannot be applied autonomously, but always in conjunction with another constitutional *lex specialis*³³⁴.

Compliance with obligations deriving from general law might under circumstances appear as conflicting with one's conscience. In *C v. UK*³³⁵ the applicant, a Quaker, refused to pay a proportion of his taxes claiming that this corresponded to an amount which was supposed to be invested in military purposes. The Commission has held that such conscientious objections are inadmissible and the fulfilment of obligations prescribed in general laws is not to be considered as a violation against religious freedom in the sense of article 9 par. 1 ECHR. If one would accept such conscientious objections of dissenters, then such an exemption would lead to a discriminating practice to the detriment of the rest of the civilians who would be expected to undertake the burden of taxes alone³³⁶.

³³⁴ For the limitations of the fundamental rights in the Greek Constitution see DAGTOGLOU, P., *Constitutional Law - Individual Rights A'*, pp.110 f.

³³⁵ Eur. Comm. Appl. No. 10358/83, 37 DR 142 at 147 (1983).

³³⁶ The Court has rejected claims for refusal to comply to general law obligations outside the military service. Refusal of

Thirdly, the interference should be **necessary in a democratic society**, a society which is broad-minded and tolerant, all these notions requiring judicial interpretation each time³³⁷. Such interpretation may vary between the national courts of the member states and in this sense ECHR should be seen as a subsidiary system for the protection of human rights guaranteeing only the minimum standards, and not a uniform regime. These notions are being discussed immediately below under 2.4.

military service on conscientious grounds, however, is an ambiguous question especially after issuance of the recommendation of the Council of Europe's Committee of Ministers proposing the recognition of a right of conscientious objection; see HARRIS, BOYLE, WARBRICK p.369. In Greece a considerable part of the theory and the nomology are against the introduction of the so-called "alternative military service", see among others the contributions of N. KANIOURAS, The Constitution and the alternative (social - civil) instead of the military service, K. BEIS, Religious freedom in Greek everyday practice, and N.SOILENTAKIS, Concise thoughts on the conscientious deniers and the alternative military service, in *K.BEIS, Religious freedom*, Athens 1997.

³³⁷ For the definition of a democratic society according to the nomology of Strasbourg see CHRISTOPOULOS, D., „Illustration of the fundamental components of the concept of european democracy through the case-law of the European Court of Human Rights“, in: MILIOS, J. (ed.), *Social policy and social dialogue in the perspective of the economic and monetary union of the „Europe of citizens“*“, *Kritiki et European Cultural Centre of Delphi*, pp. 329-342.

The principle of proportionality governs the sometimes difficult balance between the interests in conflict, especially when a right is restricted in its exercise³³⁸. In *Kokkinakis v. Greece* the Commission held that the application of Greek law forbidding the improper proselytising behaviour of a Jehovah's Witness was disproportionate to the aim protecting the rights of others³³⁹. According to the findings of the Court the applicant had only been persistent in attempting to persuade another person to adhere to his own convictions. The *Kokkinakis* case serves as an example of an unjustifiable interference of the state with the individual's right under art. 9 par. 1. The opinion of the Court's minority went further and requested the positive duty of the state to take all necessary measures to protect persons from proselytising activities, thus enabling them to enjoy their freedom of religion³⁴⁰.

It should therefore be stated that the limitations of religious freedom provided for in art. 9 par. 2 ECHR apply only to **manifestations** of belief and not to belief itself. In this sense it is irrelevant how firm the beliefs are; it suffices that they are manifested in a way and have to be

³³⁸ For the implications and applicability of this principle see HARRIS, BOYLE, WARBRICK p. 11.

³³⁹ A 260-A (1993) Com Rep par. 69-74.

³⁴⁰ op. cit. opinion of judge Valticos.

limited for any of the aforementioned reasons (the law, public safety, public order, rights of others, etc.). Furthermore, it is necessary that the manifestations of religious belief reflect a **systematic belief** and not a coincidental one which happens to conflict with any of the aforementioned reasons for limitation. Only under these circumstances will the state interference be justifiable according to art. 9 par. 2 ECHR leading to the lawful limitation of religious freedom. Thus, it was held to be justifiable and necessary interference to prohibit a prisoner from accessing a religious book which contained a chapter on martial arts for the protection of public order and the rights of others³⁴¹. On the contrary, playing religious music in breach of general noise ordinances would not be classified as justifiable interference of the state according to art. 9 par. 2 ECHR since its religious character is irrelevant to the purpose of general law.

2.4. Critical Remarks on the contents and limitations of religious freedom

The leading *Kokkinakis* case was the first case in which the Court of ECHR had the opportunity to interpret art. 9 ECHR and give guidelines as to the scope of protection of this fundamental right which is considered - at least in the Greek

³⁴¹ *X v. UK* No. 68866/75, 5 DR 100 (1976).

constitutional order³⁴² - as one of the cornerstones of a democratic society.

The conviction of Greece in this case can be seen as a positive contribution of the Court in three ways:

Firstly, the Greek criminal justice was controlled for not having given a convincing reasoning in the decisions by which the Jehovah's Witnesses were convicted for improper proselytism. These national courts must therefore be more cautious in the future, especially when judging the behaviour of religious minorities.

Secondly, religious minorities, such as Jehovah's Witnesses in Greece, were given a clear message that the so-called "European public order" is not an empty notion but an effective controlling mechanism over the national judicial systems of the contracting states, where apparent rules of general application were applied to members of minority religions.

Thirdly, Greek legislation on the penal prosecution for improper proselytism was found by the Court not to be infringing the principles of ECHR. On the contrary the Court confirmed that freedom to manifest one's religious

³⁴² Belonging of Art. 13 Gr. C. to the non-revisionable minimum of the constitutional provisions and the fact that religious freedom cannot be suspended in case of declaration of state of siege according to Art. 48 Gr. C.

convictions is subject to concrete limitations which are essential for the protection of the rights of third parties³⁴³.

This latter aspect requires special attention since it develops repercussions in the everyday exercise of religious freedom. In fact the court acknowledges the acceptability of religious propaganda. This situation involves the participation of two parties one of which is trying to convince the second party to change his/her religious convictions and adopt those of the former. Whether such behaviour is permitted or is violating the fundamental right of religious freedom is a question connected with the interpretation of the notion "teaching". As mentioned above, "teaching" presupposes the freedom of the one being taught to accept or reject this behaviour, which is not the case

a.- when the third party cannot identify the background and the intentions of the approaching party, and

b.- when the third party does not straightforwardly declare his convictions and

³⁴³ "... article 9 refers only to "freedom to manifest one's religion or belief". In so doing, it recognises that in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected", in European Court of Human Rights, *Kokkinakis* case, Judgment 3/1992/348/421, p. 14.

plan to lead the other party to the decision to change religion.

In conclusion we may underline that the religious right includes some right of proselytising . The key criterion to balance them is the “civilised” discourse between believers. In countries such as Greece, where the majority of citizens are found to belong to the Greek Orthodox Church, evangelism proves to be a matter of major importance to minority religions. Once established, the protected zone of quiet enjoyment of belief is part of the regime of pluralism protected by the Convention. The right to hold a belief may not be interfered with.

3. Art. 2 of the First Protocol (Paris, 20.03.1952)

3.1.- Introductory remarks

After the ECHR had been worked out by the Ministerial Committee in 1950 and signed in Rome on November 4, 1950, three fundamental rights had remained as object of conflict in the frame of the negotiations. These were the right to possession, the parental right and the right to free elections. These rights have been included in the so-called First Protocol which was signed two years later, that is on March 20, 1952. It must be underlined that the legal provisions contained in the Protocol constitute a *quasi* continuation of the provisions of ECHR and are

considered to be of equal normative value as the latter³⁴⁴.

Art.2 of the First Protocol reads as follows:

„No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions“.

The negative way of expression of this article is connected with the considerable number of reservations appended by different states during the adoption of the Protocol³⁴⁵. The State is urged to facilitate pluralism, to educate but not indoctrinate. In other words, the State is expected to respect the existing conscientious positions and, being the main provider of the educational system, enable the fair and effective access of pupils to education.

Although the Court interpreted the right to education in the *Belgian Linguistic* cases³⁴⁶ as applying to all levels of education, that is to nursery, primary, secondary and higher school, the Commission said that art. 2 of the First Protocol was “concerned primarily with

³⁴⁴ BLUM, N., op.cit., pp. 19-20.

³⁴⁵ See HARRIS, BOYLE, WARBRICK p. 541.

³⁴⁶ Judgment of 23.07.1968, Series A, No. 6, p. 22.

elementary education”³⁴⁷. With regard to higher educational levels it is the obligation of the State to simply secure fair conditions for admission to the different educational phases and it is therefore not quite precise to recognise a *stricto sensu* right to education³⁴⁸.

The term “education” is used in a broader meaning than “teaching”. Education is, according to the Court’s opinion, “the whole process whereby adults endeavour to transmit their beliefs, culture and other values to the young”³⁴⁹. The State having the competence to regulate the school system it is anticipated that the Convention and especially Article 2 of the First Protocol do not permit the State to intervene between the pupils and any possible private educational provider such as a religious body or a cultural institution³⁵⁰.

The First Protocol (Paris, 20.03.1952, art. 2) was ratified in Greece by the Legislative Decree 53 of 19.09.1974

³⁴⁷ Eur. Comm. Appl. No. 9824/82, decision 16.07.1982, EuGRZ 1983, p. 429; No. 7671/76, decision 19.05.1977, DR 9, p. 185 (187); No. 6094/73, decision 06.07.1977, DR 9, p. 5 (8); No. 5962/72, decision 13.03.1975, DR 2, p. 50.

³⁴⁸ HARRIS, BOYLE, WARBRICK p.540.

³⁴⁹ *Campbell and Cosans* judgment of 25.02.1982, Series A, n. 48, par. 33

³⁵⁰ HARRIS, BOYLE, WARBRICK p. 542.

3.2.- Scope of State obligation

By not stipulating specific obligations to member states, Art. 2 of the First Protocol secures to the states the right to form their own national educational systems³⁵¹ with the mere obligation to:

- i.- secure equal access and use of the educational institutions without any kind of discriminatory limitations, and
- ii.- safeguard the religious and philosophical convictions of the parents³⁵².

Since all the Contracting Parties of ECHR do have, in principle, an educational system, it is not required by virtue of the examined provision that an extra system is *ad hoc* established.

Especially for those not having the necessary financial means it is vital that the State's obligation is to assure equal access to a minimally effective public educational system.

This equal access to the available means must be safeguarded³⁵³.

In the *Belgian Linguistic* case the Court confirmed that education must also be effective

³⁵¹ *Kjeldsens, Busk, Madsen and Pedersen* judgment of 7 December 1976, Series A no. 23, par. 18

³⁵² *op.cit.*, par. 50

³⁵³ MALCOLM D.EVANS, *Religious liberty and international law in Europe*, Cambridge 1997, p.343-344.

and not useless³⁵⁴. In particular, that qualifications gained outside the State system should be recognised.

However, the states are not required to provide special facilities, i.e. private or special schools, to accommodate particular parental convictions³⁵⁵. Parents have no right to single-sex schools or to selective schools³⁵⁶.

Furthermore, the right to education does not imply any fixed answer to questions concerning the age to begin school or the length of compulsory education or organisational systems of schools or the gratuitous character of the different levels of education.

It is not always clear what the opinion of the Court is with regard to the right to start and run a private school. In the *Jordebo* case this question is answered positively³⁵⁷. The State has the power and the duty to regulate the educational system, either public or private. In no case is the State entitled, when exercising its power, to injure the substance of the right to education.

³⁵⁴ *Campbell and Cosans v UK* A48 para 33 (1982).

³⁵⁵ VELU, J. and ERGEC, R. Ergec, *La Convention europeenne des droits de l'homme* (1990), pp. 633 No. 774.

³⁵⁶ *W & DM and M & HI v. UK* Nos 10228/82, 37 DR 96 (1984).

³⁵⁷ *Ingrid Jordebo Foundation of Christian Schools and Ingrid Jordebo v. Sweden* No. 11533/85, 51 DR 125 at 128 (1987).

Since, on the other hand, the State is asked to respect the sometimes varying religious and philosophical convictions of parents, it seems inevitable that operation of private schools is permitted³⁵⁸. In other words, the State will not be called on the basis of Article 2, First Protocol, to finance private schools. However, it will have to consider alternative solutions aiming at the possibly balanced satisfaction of the educational need of the dissenting parents and their children. Whereas the Court admitted that it is not affordable to establish two sorts of schools depending on the acceptance of corporal punishment or not, it pointed out practical alternatives such as the exemption for individual pupils being a measure with almost the same effect but with considerably lower costs³⁵⁹.

3.3.- The guarantee of non-discrimination (Art. 14 ECHR) and the minorities' right to religious education

Having in mind the above explained rather limited scope of State obligation it is vital to examine whether Art. 14 ECHR could offer an adequate legal basis for securing minorities' members from discriminatory State behaviour in the field of religious education. This was actually the main argument of Muslim parents in the UK who were confronted with differential

³⁵⁸ See HARRIS, BOYLE, WARBRICK p. 544.

³⁵⁹ *Campbell and Cosans v. UK*, A 48 para 37 (1982).

treatment consisting of the State unwillingness to finance Muslim schools, while the Jewish and other Christian ones received State funding.

Art. 14 of the ECHR reads as follows:

«The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status».

As the wording of the article shows no additional fundamental right is being introduced with a general applicability in favour of individuals or minority groups.

Characteristically, this provision was qualified as a «parasitic» one³⁶⁰ in the sense of its subsidiary function to other Convention provisions stipulating autonomous fundamental rights. Indeed the Convention does not include an explicit protection scope of the principle of equality of individuals or minority groups permeating the national legal orders and introducing a new constitutional guarantee³⁶¹. The Convention instead prefers the declaration of a non-discrimination principle which is understood to be legally softer.

Non-discrimination in the enjoyment of freedoms and rights set forth in the Convention

³⁶⁰ See HARRIS, BOYLE, WARBRICK p. 463.

³⁶¹ *Abdulaziz, Cabales and Balkandali v. UK*, A 94 (1985).

does not necessarily mean that differential treatment of persons or groups in analogous situations is prohibited³⁶². On the contrary, such treatment could, under certain circumstances, be justified by the State and not forbidden by Art. 14. Thus, in *Rasmussen v. Denmark* case³⁶³ in reply to a husband's complaint as to his shorter time-limits to contest paternity of a child born during the marriage in comparison to the timely unlimited possibility of his wife to do so, the Court found that there was no violation of Art. 14 ECHR as the Danish legislator moved within the State's «margin of appreciation».

In the *Belgian Linguistic* case³⁶⁴ the Court introduced the subtle difference between permissible differentiation and unlawful discrimination. The decision whether the first or the second is the case each time is made after a test based on two elements: a) the existence of a legitimate State aim allowing the introduction of different treatment, and b) the reasonable relationship of proportionality between the different treatment and the aim pursued, the

³⁶² *Van der Musselle v. Belgium*, A 70 (1983), *Pine Valley Developments Ltd v. Ireland*, A 222 (1991), *Dudgeon v. UK*, A 45 (1981), *Airey v. Ireland*, A 32 (1980).

³⁶³ A 87 (1984).

³⁶⁴ (Merits) A 6 (1968).

applicant bearing the burden to substantiate the eventual lack of proportionality³⁶⁵.

As a result of this approach criticism was expressed against the Court's attitude towards Art. 14 ECHR considerably favouring the States to the detriment of individuals or minority groups³⁶⁶.

In conclusion minorities do not seem to be favoured at all in their enjoyment of religious and educational freedom by Art. 14 ECHR³⁶⁷.

This because of the difficulty to prove the State obligations which were violated by a possibly differentiated treatment on the one hand, and because of the possibility of the State to claim plausibly that its obligations to satisfy legal aims were fulfilled without seriously injuring minorities' rights on the other hand.

3.4.- Parents' religious and philosophical convictions

Whereas the first sentence of Article 2, First Protocol, deals with the undeniable right to education, the second sentence thereof stipulates that the State must ensure respect of parents' religious and philosophical convictions in the frame of teaching and education. In *Campbell*

³⁶⁵ *Belgian Linguistic case*, (Merits) A 6 (1968), p. 34.

³⁶⁶ See HARRIS, BOYLE, WARBRICK p. 486. Also *Nelson v. UK*, No. 11077/84, 49 DR 170 at 174 (1986).

³⁶⁷ *48 Kalderas Gipsies v. FRG and Netherlands*, No. 7823/77 and 7824/77, 11 DR 221 (1977).

*and Cosans v. UK*³⁶⁸, the Court confirms the priority of the first above State obligation in comparison to the subsidiary character of the second one. However, the Court has developed a series of requirements which must be met by the individual parent for the substantiation of the State obligation to respect the parents' religious and philosophical convictions. In particular:

- the basis and the content of parent's belief³⁶⁹,
- the fact that it is the parent himself who holds this specific belief and this is why the parent is offended by the State action within the teaching and education procedure³⁷⁰,
- the fact that the parent involved has duly brought to the attention of the responsible authorities his dissenting religious and/or philosophical opinions³⁷¹, and
- that it is a systematic confrontation between the parent's deviating religious and/or philosophical convictions and those presented in the teaching procedure, and not an occasional one which is incidentally dictated by the objective and critical presentation of

³⁶⁸ A 48 para 37 (1982).

³⁶⁹ *Campbell and Cosans v. UK* B42 Com Rep, para 93(1980).

³⁷⁰ *Warwick v. UK* No 9471/81, 60 DR 5 at 18 (1986).

³⁷¹ *B and D v. UK* No 9303/81, 49 DR 44 at 50 (1986).

different convictions according to the teaching needs³⁷².

The meaning of the term „philosophical convictions” of the parents is broader than the term “religious convictions”, given the fact that the first might contain attitudes of parents covering also trivialities, i.e. moments of everyday life of minor importance³⁷³.

As the Court mentioned in the *Kjeldsens* case, „art. 2, which applies to each of the State’s functions in relation to education and to teaching, does not permit a distinction to be drawn between religious instruction and other subjects. It enjoins the State to respect parents’ convictions, be they religious or philosophical, throughout the entire State education programme“. In other words, parents, whose natural duty it is to determine the kind of education that their children shall receive, entrust the State with this task and accordingly require it to respect both their religious and their philosophical convictions, which are thus closely linked with one another and with the right to education in general. The State, on the other hand, must meet the limitations set by law, and take care that any information or knowledge

³⁷² *Kjeldsens, Busk Madsen and Pedersen v. Denmark*, A 23 para 53 (1976).

³⁷³ *Case Campbell and Cosans*, Series A No. 48, p. 16.

included in the curriculum is conveyed in an objective, critical and pluralistic manner, avoiding any kind of indoctrination, which could be criticised as a breach of art. 2 of the First Protocol. This interpretation is in conformity with the general spirit of the Convention which is an instrument to maintain and promote the ideals and values of a democratic society.³⁷⁴

The qualification of a State act as violating the right of parents to educate their children according to their convictions or not, is not always obvious. In the *Efstratiou* case³⁷⁵ the Court found that the educational penalty of two days' and then one day's suspension from school of a pupil because of non-participation in the school parade with the reasoning of pacifism aspects of Jehovah's Witnesses as both parents and pupil were, constituted no direct violation of Article 2, First Protocol. The Court admitted that the allegations of the applicants were arguable but it finally ruled that there was only a violation of Article 13 ECHR together with Article 2, First Protocol, since the applicants were not given the procedural opportunity to obtain remedy in the frame of the national judicial system.

³⁷⁴ op.cit., pars. 51-53

³⁷⁵ *Efstratiou v. Greece*, Court Judgment of 18.12.1996 (77/1996/696/888).

The conflict between the State school system and the parental right to raise their children according to their own religious and philosophical convictions has been determined by Commission and Court in favour of the latter. That means, firstly that art. 2 phrase 2 of the First Protocol introduces a general obligation of pupils to attend school regardless of the parental convictions, who might possibly oppose to this obligation in general³⁷⁶. Secondly, the religious and philosophical convictions of parents must be duly respected insofar as their children may choose to opt out of RE without having any negative effect on their general position at school³⁷⁷.

Finally, as to the linguistic minorities and the possible claim of their members to educate children in their mother tongue, the *Belgian Linguistic case*³⁷⁸ has shown that they are excluded from the scope of Article 2, First Protocol in the absence of any claim of discrimination under art. 14.

³⁷⁶ Commission Decision of 06.03.1984, Appl. No. 10233/83.

³⁷⁷ JACOBS, F.G., *The European Convention on Human Rights*, p. 174.

³⁷⁸ A 6 (1968).

4.- The use of Art. 25 par. 1 ECHR for individual applications by Greek citizens

4.1.- The situation until now

Since 20.11.1985 , that is since Greece accepted the competence of the ECHR to examine applications of individuals as well as of „non-governmental legal entities“ for violations of rights protected by ECHR and its First Protocol, the Greek citizens too have the right to make an application to the European Commission and Court of Human Rights for the interpretation of the provisions of the Convention of Rome, after having exhausted all instances of the Greek judicial system. This new possibility of the Greek citizens is undoubtedly of great importance, since it provides individuals and non-governmental legal entities with an additional procedure of protection of their rights and creates the presuppositions for a „dialogue“ between the Greek jurisprudence and the judicial organs of Strasbourg regarding the way in which ECHR is finally exercised within the Greek territory.³⁷⁹

Until 1990 around 200 applications had been filed before the European Commission against Greece, with the request of interpreting certain

provisions of the Roman Convention, and 65 of them were registered as applications in the sense of art. 25 par. 1 ECHR. None of them referred exclusively to religious education. Nevertheless, few cases dealt with the exercise of the human right of religious freedom in the sense of art. 9 ECHR³⁸⁰.

The first application against Greece was No. 12902/87 (*Dragasakis vs. Greece*) and was caused by a decision of the Chairman of the Local Community of Paidochoria by Chania, Crete. According to that decision, the applicant had to move the grave of his father, which was by the provincial road, inside the community cemetery. The applicant claimed that this decision violated his right to express his religious beliefs as a Christian Orthodox. At this point it should be mentioned that the local Orthodox Ecclesiastical Authorities had chosen not to interfere in the dispute of the applicant with the local administrative authorities. Furthermore, other people who had had the same problem, had obeyed the decision of the local administrative authorities and had moved the

³⁷⁹ GIAKOUMOPOULOS, Chr., "Individual applications against Greece in the European Commission of Human Rights", *Rev. Hell.Dr.Eur.*, 2:1990, p.282

³⁸⁰ SHAW, M.N., *Freedom of Thought, Conscience and Religion*, pp. 445f.

graves of their relatives within the community cemetery.

The European Court of Human Rights rejected the application based on the thought that art. 9 ECHR does not protect each and every individual conduct which simply derives from one's religious beliefs. The Commission goes further, requiring a close connection between religious conscience and the conduct in question, in a way that „a concrete and essential expression“ of the first would be hindered if the citizen should have to comply with the administrative law provisions of the local community. By the rejection of this application the European Commission confirms the admissibility of limitations of religious freedom strictly imposed by reasons of public health and public interest.

Another two cases against Greece which were brought before the European Commission were Nos. 13270/87 and 13271/87. In these cases, some adherents of the Free Evangelical Church had asked the Minister of National Education and Religion in 1985 to approve the establishment of „praying houses“ in the cities of Argos and Rhodes. The Minister had then rejected these applications and the applicants submitted a recourse before the Council of State, which vindicated them. However, the Administration did not comply with the Council

of State's decision and the applicants eventually addressed the European Commission, claiming that this delay of the Administration infringed their right to religious freedom, as expressed in art. 9 par. 1 ECHR, especially their right to manifest their religion in worship.

Consequently, the Commission asked the Greek Government to report on the development of these cases. The outcome was that the applications were finally erased from the list of cases of the European Commission, because both the Greek Government and the applicants asserted in writing that the matter had been solved in favour of the latter.

The fact that the Greek Government accelerated its complying to the Council of State decisions confirms its dedication to the principle of religious freedom and its expressions whatsoever as provided for in art. 9 ECHR³⁸¹.

4.2.-Recent ECHR Case-Law and the envisaged Greek Constitutional Revision

A number of Judgements of the Court of ECHR concerning cases coming from Greece have shown that this country was found to be violating either Art. 9 ECHR or Art. 6 par. 1 ECHR combined with Art. 14 ECHR. In these cases the exercise of religious freedom in general by religious minorities seems not to be

³⁸¹ For both Greek applications see GIAKOUMOPOULOS, Chr., Rev.Hell.Dr.Eur., pp. 283 f.

as equally guaranteed for all interested parties. These cases do not necessarily refer to the right to religious education itself. However, they are useful to concretise the scope of protection for notions such as proselytism, prevailing religion, discriminatory power of the state administration, non-discrimination of a minority, which are all vital for understanding the limitations according to Art. 9 par. 2 ECHR. Art. 14 ECHR guarantees the principle of non-discrimination in the enjoyment of the rights provided for in the ECHR. Thus, the parental right to religious education and the right to withdrawal according to Art. 2 First Protocol do not fall in the scope of Art. 14 ECHR.

Apart from the *Kokkinakis* case³⁸², the *Manoussakis* case³⁸³, the *Tsirlis and Kouloumpas* case³⁸⁴, the *Georgiadis* case³⁸⁵, the *Canea Catholic Church* case³⁸⁶ and the *Larissis and others*³⁸⁷ case versus Greece revealed

³⁸² See above Chapter III, 2.2 and 2.4.

³⁸³ *Manoussakis and others v. Greece*, ECHR Court Decision of 26.09.1996

³⁸⁴ ECHR Court Decision of 26.09.1996 (Judgement 54/1996/673/859-860)

³⁸⁵ ECHR Court Decision of 26.05.1997

³⁸⁶ ECHR Court Decision of 16.12.1997 (Judgement 143/1996/762/963)

³⁸⁷ ECHR Court Decision of 28.02.1998 (Judgment 140/1996/759/958-960)

different aspects of discriminative behaviour of the State with regard to religious minorities.

In the *Manoussakis and others* case the applicants, Jehovah's Witnesses, were condemned by the Greek courts for having established praying houses without the necessary permission of the Ministry of Education and Religion as well as without the permission of the locally responsible orthodox Bishop according to the provisions of Law No. 1363/1938 and the King's Decree No. 20.5/2.6.1939. The Court found that the broad discriminatory power of the Minister of Education and of the local Bishop, who had remained inactive towards the said applicants since 1983, constituted a violation of art. 9 ECHR.

Tsirlis and Kouloumpas, two clergymen and Jehovah's Witnesses, who applied for their exemption from their duty for military service, were imprisoned for more than one year and although they were finally found innocent and left free by a decision of the Court of Appeal they received no compensation for their unfair imprisonment. A comparison of the handling of clergymen has shown that those belonging to the prevailing religion would have been exempted from their military service without great difficulty or delay. Such situation was found by the ECHR Court to contravene Art. 5 para 1 a ECHR.

It was similar circumstances that were examined in the *Georgiadis* case that led the Court to the conclusion that Greece violated Art. 6 para 1 ECHR.

In the *Canea Catholic Church v. Greece* case the Court found that Greece violated Art. 6 par. 1 in combination with Art. 14 ECHR since no legal personality and ability to become litigant before court was acknowledged to the Canea Catholic Church in Crete which was thus not in a position to defend its property duly against different territorial offences.

In the *Larissis and others v. Greece* case three Greek air force officers, followers of the Pentecostal Church, were convicted by the Permanent Airforce Court for trying to proselytise some of their subordinate airmen as well as some civilians. The Commission as well as the Court made a clear distinction between the relation of the applicants to their subordinates on the one hand, and the civilians on the other: the subordinate air men were in a hierarchically lower position and thus could not refuse to enter into a conversation initiated by their officers who were in a position to exercise easily a kind of ethical pressure. Nevertheless, there was no such special relation between the air force officers and the civilians who could freely accept to be involved or not in such a religious discussion and could also freely express their

views, either positive or negative, to the officers. In view of this differentiation the Court found that there had indeed been a breach of art. 9 par. 2 ECHR with regard to the convictions of the officers for trying to proselytise the civilians but there had been no breach of the same article for trying to proselytise the subordinate airmen. Accordingly, the Greek authorities had the right to interfere in the manifestation of the air force officers' religious beliefs in order to protect the rights and freedoms of subordinate members of the armed forces and insofar there was no violation of Art. 9 par. 2 ECHR.

These judgements are obviously negative for the judicial and administrative image of Greece in the context of the respect of religious freedom of religious minorities and have made it indispensable that an unofficial Committee was built by the Ministry of Exterior Affairs to examine the situation and submit concrete proposals in view of the constitutional revision in process at the Greek Parliament³⁸⁸.

CONCLUSIONS

Having presented the legal system and the relevant case law in Greece and the UK, as well as the ECHR approach regarding the protection of religious freedom and religious education in the first two levels of education, i.e. primary and secondary, we feel that the following points of our study should be highlighted:

- I. According to **Greek law** and practice **the right to religious education is being exercised by parents until the minor has become an adult** in the sense of law, i.e. has reached his 18th year of age. After that time a person is considered mature enough to exercise independently his right to either participate in worship, to abandon or to change religious convictions, regardless of the attitude of his parents on this matter³⁸⁹. Until this point of legal maturity the parental right for the exercise of religious freedom is protected by the law in the sense of expression of children's religious beliefs through parents' decision. Thus, the **right to**

³⁸⁸ See CHATZIS, N., "The battle of religious minorities", *TO BEMA* 01.02.1998 pp. 38-39.

³⁸⁹ DAGTOGLOU, Pr., *Individual Rights*, Vol. A, p. 372, par. 560.

the exemption from RE is recognised as parents may submit a written declaration before the school authorities stating their wish for their child not to attend RE as well as the so-called secondary instruments of liturgy attendance and morning prayer. However, a serious dissenting opinion has to be borne in mind, according to which the general social environment expressed by the majority of the Greek population believing in the Greek-Orthodox dogma is exercising a pressure upon the pupils and their parents who would wish to express freely their conscientious differentiation from the others. In practice only few dare to declare their unwillingness to participate in the lesson of RE since it is broadly accepted that participants in this lesson have a definite advantage against non-participants as regards the average level of notes given by all other teachers for different lessons³⁹⁰. In our opinion, this is a rather

³⁹⁰ On the occasion of issuance of decision no. 3356/1995 of the Council of State on the content and limitations of religious freedom and the mandatory character of the lesson of religion the daily press conducted searches concerning the status of religion in the Greek schools. Pupils who apply either themselves or by a declaration of their parents to avoid the obligation to take the lesson of religion are entitled to spend the time of this lesson in the school-yard while other pupils are taught in the classrooms. The fact that only few pupils till now made use of their legal possibility to have themselves legally dismissed from this lesson without being punished on

extreme attitude from the point of view of the interpretation of the Constitution and the implementing legal provisions and case law. The prohibition of discrimination due to religious differences does not necessarily contradict with the social and statistical fact that the majority of the Greek population belongs to the same dogma, a situation which has, among other explanations, also **historic roots**³⁹¹. On the contrary, this constitutional guarantee acquires its actual significance with respect to those few differentiated groups who are trying to keep their beliefs untouched from the overwhelming majority. This is the ultimate core of the respective fundamental right³⁹². Nevertheless, it should be noted that

disciplinary grounds was confirmed. Newspaper *TA NEA* of Friday May 19th, 1995, with more details.

³⁹¹ Contra PLORITIS, M., "About Helleno-Christianism", *TO BEMA THS KYRIAKIS* of 11.6.2000, p. B2.

³⁹² According to R.Luxemburg, "freedom loses its effectiveness when it is reduced to a privilege", whereas MANESIS, A., *Individual Rights*, p. 34, points out that the only meaningful freedom is that of those who disagree, not of those who agree with the majority. HAROLD F. BING, said that "an essential characteristic of democracy and perhaps its most important feature - at least in the British view - is not the fulfilment of the will of the majority but the right of the individual to freedom of expression and the living of his own life without unnecessary interference by the state - that the right of the minority as against the majority is as important as the right of the majority to shape policy ..." in: *Historical*

the situation in Greece is in a process of **profound social changes**. Greece is currently undergoing a phase of social unrest because of the decision of the Minister of Justice to **abolish the reference to one's religious belief from the police identification cards**³⁹³. This has caused serious objections from the more conservative part of the society; especially after the motivation of the Archbishop Christodoulos and the clergymen in general two big demonstrations have taken place, with which the people wanted to exercise pressure upon the Greek Government not to enforce this decision, i.e. to abolish the reference to religion from the ID cards. On the other hand the more progressive part of the Greek society seems to be satisfied that this "long expected" change is finally coming true, so that the "sensitive" information referring to one's personal beliefs will not any more be obligatorily mentioned on the ID cards and thus possibly play a negative role on one's appointment in the public sector in certain positions, such as teachers, etc. Moreover, the composition of the Greek society is rapidly changing, as in the last years more and more economic immigrants from

materialism and the role of the economic factor, History, February 1951, p. 107.

³⁹³ See also point XIII below.

Balkan, Asean and African countries are coming to live in Greece and sooner or later acquire the Greek nationality, thus forming a **new multicultural Greek society** composed by different national and religious groups.

II. The normative differentiation in the Greek Constitution between “**known**” and “**unknown**” religions contravenes art. 9 ECHR, as was found in the *Manoussakis* case. Legal protection deserve only those churches whose practice in worship is accessible but not secret.

III. The criminalization of **proselytism in Greece** is compatible in principle with the spirit of the ECHR, as was confirmed in the *Kokkinakis* and *Larissis* cases. The Court found, however, that the national (Greek) courts must include explicit reasoning with regard to those elements of behaviour of the accused person that constitute the infringement of religious freedom of a third person. A careful review of the constitutional and legal frame concerning proselytism imply the imminent need for the *de lege ferenda* restriction of the condemnation of proselytism only if and when it is improper. Further specification of the concept, the content and the borders of abusive or improper proselytism would definitely contribute to the safeguard of religious freedom, especially of

those not belonging to the prevailing Greek-Orthodox religion.

IV. As far as the **UK** is concerned it should be noted that, although all schools pay the very important service of education to the community, **Church schools**, mainly Church of England and Roman Catholic ones, have played a very important role in the general development of British education. The majority of Church schools still offer a religiously-focused "ethos" to their pupils and thus they often enjoy a higher "status" in the community than their secular state-maintained counterparts.

The dilemma they are faced with nowadays is the following: Should they maintain their own existence, keeping strict admissions policies only for children of their own faith, or should they alter their character, becoming much more consistently than now, a **social service** by the Church, rather than for the Church, and admitting children of all religions on some criterion of service to those most in need, regardless of belief? In fact, some Church schools are indeed changing their policies and accept pupils from different religious backgrounds, thus doing something positive to overcome social segregation or racist attitudes. This is a very valuable role for Church schools to perform.

V. The provisions of the **ERA 1988** relating to religious education and religious worship owe their origins to a series of back-bench amendments to the Education Reform Bill. These amendments sought to secure the centrality of Christian education in religious education³⁹⁴, although to many it seemed paradoxical that the "Christian" character of religious education and worship in schools was restated and enshrined in law at a time when the school population was more "multi-faith" than ever before.

Whilst the ERA 1988 provides for a form of education in which **Christianity is the dominant religion**, it also provides "**conscience clauses**" for those parents who do not want their children to be brought up in this way. Thus, children must be excused from attending classes of religious education or participating in acts of collective worship if their parents so wish³⁹⁵.

However, surveys have shown that quite a high percentage of parents are either not aware of their right to withdraw their children from religious education and worship, or feel that by withdrawing their child they would harm its place in the school community.

³⁹⁴ ERA 1988, ss. 7(2) in regard to the act of worship and 8(3) in the matter of religious education.

³⁹⁵ ERA 1988, ss. 9(2) (a) and 9(3).

Consequently, "conscience clauses" are considered to be much less effective in practice than in theory.

VI. In recent years several religious minority communities, and above all **Muslims**, have sought to establish their own **denominational schools**, in the form of voluntary-aided ones within the maintained system. Their main aim has been to create an Islamic ethos permeating every aspect of school life. They want their children to be educated foremostly as "good Muslims", something that is not the case in the multiracial and multi-religious state-maintained schools. Their efforts had remained unsuccessful until recently, thus causing strong disputes about the attitude of the British Government towards their right to choose the schools of their preference and their special need. However, in the beginning of 1998 and after quite a lot of pressure had been exercised upon the authorities by the Muslim community, two Muslim schools were finally approved to receive state funding and thus become grant-maintained schools. This approval came after a long time of waiting from the part of Muslims who were arguing that such status had already been given to schools of other faiths, i.e. to Anglican, Roman Catholic and a small number of Jewish schools. This development

of course is expected to change things towards a more liberal attitude of the English community concerning Muslims and should function as a stabilizing factor to keep the sensitive balance in such difficult social relationships.

VII. Although both England and Greece have established churches, the problems of the protection of religious belief in the educational sphere present themselves in rather different ways: In **England**, the governing principle is the provision of "**Christian**" (rather than Anglican, i.e. established) **education**, to the extent that anything is required of a predominantly secular system. The real difficulties arise mainly with respect to non-Christian religions and these are complicated by other considerations of the protection of minorities more generally, e.g. language, dress, food, religious holidays. On the other hand, in **Greece** the conflicts have mainly concerned **non-Orthodox Christian groups** seeking protection against legislative rules supported by the substantial Orthodox majority, i.e. establishment in Greece is actively supported by the majority, rather than being the default religious claim as it is in England. Consequently, the issue in Greece is almost wholly a religious one, whereas in England it

has other and complicating factors covering broader aspects of social life.

VIII. In view of the above legal and social situation concerning RE in Greece and the UK it cannot be denied **that art. 9 par. 1, 2 ECHR and art. 2 of the First Protocol** as interpreted by the Court are vital for the protection of religious education according to one's religious beliefs. Despite the undoubted dogmatic differences between the UK and Greek law, ECHR has not remained without a **positive impact** on these two national legal orders. This impact can be seen clearly in the legal possibilities of minorities' members whose protection through the political system is remote. Besides, the Court in the leading **Kokkinakis case** has underlined the importance of religious freedom as a cornerstone of a democratic society. Furthermore, the increasing significance of values such as "tolerance" and "broadmindedness" in coping with politically and socially thorny disputes arising from the legitimate request of ethnic or religious minorities to enjoy their religious freedom and their right to religious education should be emphasised.

It is said characteristically that no Greek Supreme Court should after all consider itself

to be the last instance in jurisdiction³⁹⁶ since all Supreme Courts' decisions are subject to European judicial control. This evolution signifies a new era in which the **national legal orders - as the Greek and UK ones - must adapt to supranational controlling institutions and rules.**

IX. It should be clear that the **Convention** system is a **subsidiary system** for the protection of human rights, the main responsibility lying with the national legal systems. In this sense the Convention cannot guarantee a uniform regime but introduces only minimum standards which are protected as a common denominator in all different national legal orders. Thus, ECHR has served only as a protection against the worst violations and has left a substantial margin for the States to cope with their different traditions and problems, especially in the field of education.

X. The Council of Europe in an attempt to deepen the -from the point of view of legal enforceability rather soft- provision of **Art. 14 ECHR** concerning the principle of non-discrimination in the enjoyment of the right to

³⁹⁶ SARMAS, ECHR case-law, 1998, p. 505, who notes that even the Greek Constitution and its hierarchically higher norms are subject to judicial control by the Court of ECHR as if they were ordinary legal norms of an administrative act.

religious education on any grounds, including religion, is keen to adopt new instruments. One of those is the Framework Convention for the Protection of National Minorities 1994³⁹⁷. In this respect a Protocol to the Convention on Minorities, including equality before law and equal protection of the law is now being considered³⁹⁸.

XI. A fruitful **reconciliation** of the sometimes **conflicting interests of pupils of different dogmas or religions** obliged to attend RE at primary and secondary schools in Greece may be the following³⁹⁹: Christian-Orthodox pupils should be bound to attend dogmatic RE and alternatively history of religions, whereas pupils of other dogmas or minority religions should obligatorily attend history of religions, unless the legal provisions for the introduction of the relevant dogmatic RE are met; in the latter case a choice between their dogmatic RE and history of religions should be available. As far as atheists are concerned, these pupils should be obliged to attend history of religions. This scheme would correspond to the constitutional state duty to

³⁹⁷ European Treaty Series 157. See HARRIS, BOYLE, WARBRICK, p. 370, 488.

³⁹⁸ See HARRIS, BOYLE, WARBRICK, p. 487-488.

³⁹⁹ KYRIAZOPOULOS, K., Limitations in the freedom of teaching minorities' religions, 1999, p. 401-402.

organise the educational system in a way to safeguard the formation of national and religious conscience of the pupils.

XII. The matter of religious freedom and especially religious education develops crucial repercussions in the **Greek policy of external affairs**. One of the existing minorities, the Muslim one, is greatly affected by the state policy with regard to minority schools in which RE is one delicate subject. The long-standing unresolved **dispute** between Greece and Turkey **might** under circumstances **be gradually settled** with the recently adopted policy of the “step-by-step approach”. Turkey namely shows special interest for the **Muslim minority residing in Western Thrace**. It can thus be easily understood that flexibility in the construction of syllabuses so as to satisfy the educational and simultaneously religious needs of minority pupils may contribute decisively to problems of national importance⁴⁰⁰. It is also worth underlining that the Greek Ministry of

⁴⁰⁰ There are two muslim educational institutions in Greece operating in Komotini and Echinus the alumni of which are destined to teach RE in minority schools in Greece or to become muslim clergymen in Mosches. It is worth mentioning that state subsidy is granted to them as a partial contribution to the functional costs of these schools; KYRIAZOPOULOS, K., *Limitations in the freedom of teaching of minorities' religions*, Athens 1999, p. 349-352.

External Affairs has recently established a Committee with the assignment to study problems of religious freedom in Greece⁴⁰¹.

XIII. The legislative abolition of any reference to religious convictions on the Greek ID cards could be interpreted as one of the **steps initiating the secularisation of the Greek State**. The settlement of the current vigorous social dispute and reactions by the Orthodox Church is not foreseeable at the moment. If the Government however would proceed to the consistent interpretation of the constitutional protection of religious freedom, especially with regard to the constitutional revision in process, severe legislative amendments would be envisaged, including the abolition of the State educational aim to develop the religious conscience of pupils, on the one hand, and, the introduction of a more balanced teaching of History of Religions to the primary and secondary schools, on the other hand. Such changes would constitute a

⁴⁰¹ Ministerial Decision no. 1302/14.06.1999 published in the Official Gazette no. 1316/B/24.06.1999. The Greek Orthodox Church seems to disagree with the establishment of this Committee without its participation and claims that this Church being the one of the vast majority of Greek citizens should be not only represented but also consulted with regard to such initiatives; see the public letter of the Archbishop Christodoulos to the Minister of External Affairs in *Ecclesiastiki Alithia* of 16.09.1999, p.6. See also *H KATHIMERINI TIS KYRIAKIS* of 11.06.2000, "The train of the great approach", p. 36.

deliberate State response to the dramatically changing demographic composition of the Greek society and the imminent need to integrate numerous groups of economic refugees arriving daily in Greece from Asean, African and neighbouring Balkan countries. It was said characteristically that, at least as far as Greece is concerned, we are abandoning the model of a citizen acting on the basis of his belief, and are moving towards a new model of citizen acting on the basis of his knowledge⁴⁰².

XIV. It is hoped that, without having to change the established and over the decades deeply rooted national identity of the peoples involved, a legally guaranteed standard is practised for the effective protection of the right to religious education, especially that of the minorities. Time will show if this aim is realistic and achievable.

⁴⁰² KARAKATSANI, Despoina, „School and RE“, in *TO BEMA TIS KYRIAKIS*, 11.05.2000, p. B4.

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LIST OF ABBREVIATIONS

BVerfG	Bundesverfassungsgericht
CSCE	Conference for the Security and Co-operation in Europe
DES	Department of Education and Science
DÖV	Die Öffentliche Verwaltung (journal)
DR	Decisions and Reports of the EurComm of HR
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
EEC	European Economic Community
EHRR	European Human Rights Reports
EHRLR	European Human Rights Law Reports
EMRK	Europäische Menschenrechtskonvention
ERA	Education Reform Act
ETS	European Treaty Series
EU	European Union
GrC.	Greek Constitution of 1975/86
GrCC	Greek Civil Code
HRLJ	Human Rights Law Journal
ILEA	Inner London Education Authority
KodixNoB	Kodix Nomikou Bematos
LEA	Local Education Authority
NJW	Neue Juristische Wochenschrift
NoB	Nomikon Bema (Journal)
Off.Gaz.	Official Gazette
P.D.	Presidential Decree
Rev.Hell.Dr.Eur.	Revue Hellenique de Droit Europeen
Rev.Trim.Dr.Eur.	Revue Trimestrielle de Droit Europeen
SACRE	Standing Advisory Councils of RE
TES	Times Educational Supplement
UNO	United Nations Organisation

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