

RELIGION IN PUBLIC EDUCATION – SLOVENIA

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I. INTRODUCTION

The role of religion and religious education in public schools has been and remains one of the most disputed issues in Slovenia. As a post-communist country Slovenia has a specific historical experience with secularization and the totalitarian state. The introduction of a Communist system in the Socialist Federative Republic of Yugoslavia (SFRY) and in the Socialist Republic of Slovenia as a constituent part, in theory implied the imposition of the principle of the separation of church and state together with the principle of state neutrality. However, de facto it brought a system of strict state control over religion.¹ According to the Marxist ideology atheism was the privileged belief in Slovenia. All religious communities were prohibited by law to take part in public life and religion was belittled as such. Private schools were prohibited. The Roman Catholic Church (Catholicism was and remains the dominant religion in the Slovene nation) was held to be the most important "permanent internal enemy" of the Communist regime.² The imposition of atheist ideology was a severe blow to freedom of education and has encompassed the area of education as a whole. Religious education was expelled from public schools (in 1952) and, in a way similar to that which occurred e.g. in the Czech Republic, schools became an instrument for secularization and the teachers were instructed to play the role of "priests of atheism".³ Only after democratic changes that started in 1990 did freedom of education, the role of religion, and the organization of public and private schools, become matters of public debate.

II. GENERAL BACKGROUND

1. Facts and Figures

- **Demography**

According to the 2002 Census the religious and denominational structure of the population of Slovenia (total population is approximately 1,964,036) presents the following picture:

- Roman Catholic	57.80%	(1,135,626)
- Protestants	0.80%	(16,135)
- Orthodox Christians	2.30%	(45,908)
- Muslims	2.40%	(47,488)
- Other religions	0.30%	(1,950)

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¹ The Constitution of the Socialistic Federal Republic of Yugoslavia (1974; Art. 174).

² See also: Šturm, L. (2004), p. 607-650.

³ Tretera, J. R. (2005), p. 37.

- Believers without specific religion	3.50%	(68,714)
- Atheist	10.10%	(199,264)
- Response denied	15.70%	(307,973)
- No response known	7.10%	(139,097) ⁴

- ***Numbers of Private and Public Schools in the Country***

Up until today 99% of all schools in Slovenia are public schools. With regard to elementary schools there are only three private schools (the Waldorf School and two catholic schools) among 802 elementary compulsory public schools. There are also six private and 158 public upper secondary schools.

- ***Description of the General School System***

The basis for the modern Slovenian School Law is the relevant fundamental constitutional provisions which relate to education. The Constitution of the Republic of Slovenia (hereinafter: the Constitution),⁵ in Art. 57, ensures freedom of education and sets up a compulsory primary education, which is publicly financed. The state has to create the opportunities for citizens to obtain a proper education.⁶ Thus, the State has a duty to create the necessary legal framework for the establishment and operation of private schools and to recognize the public validity of an education obtained from private schools. The prohibition of private schools would not be consistent with the notion of a democratic society.⁷

In Slovenia, basic education (ISCED level 1 and ISCED level 2) lasts 9 years and overlaps with compulsory education. The same institution (Grammar School) provides education in all 9 grades. The structure of upper secondary education in Slovenia includes: general upper secondary education (gimnazija), technical education and vocational upper secondary education.

The Education Act

A crucial piece of modern Slovenian School Legislation is the *Organization and Financing of Upbringing and Education Act* (hereinafter: the *Education Act*),⁸ which regulates the relations between public and private school systems, the internal organization of schools and their financing.⁹ According to the Education Act, religious communities may establish kindergartens and schools under the same conditions as other private-law subjects. Private educational institutions may be financed in two ways: they are either granted licences or financed directly

⁴ Statistični urad Republike Slovenije, Popis prebivalstva, gospodinjstev in stanovanj 2002 – Statistical Office of the Republic of Slovenia, Census 2002). (URL: <http://www.stat.si/pxweb/Dialog/Saveshow.asp>)

⁵ The Constitution of the Republic of Slovenia (1991).

⁶ Art. 57 of the Constitution: “(1) Freedom of education shall be guaranteed. (2) Primary education is compulsory and shall be financed from public funds. The state shall create the opportunities for citizens to obtain a proper education”.

⁷ Šturm (2002), p. 582.

⁸ Organization and Financing of Upbringing and Education Act (Zakon o organizaciji in financiranju vzgoje in izobraževanja), Official Gazette RS, Nos. 12/96, 23/96 – corr., 101/1999, 22/2000, 64/2001, 101/2001, 108/2002, 34/2003, 79/2003, 65/2005, 117/2005, 129/2006.

⁹ The Education Act is supplemented by the Kindergartens Act (Official Gazette RS, No. 12/96 et seq.), the Primary School Act (Official Gazette RS, No. 12/96 et seq.) and the Technical Education Act (Official Gazette RS, No. 12/96 et seq.).

under statute. In order to receive a licence the private school or kindergarten has to include itself in the public network and execute only a public programme. Non-licensed private kindergartens, private elementary and music schools and private general secondary schools (but not also professional schools), which carry out public programmes and comply with statutory conditions, have the right to public funds to the extent of 85% of the funds that the State or local community designate for salaries and material costs per student in public schools.¹⁰

2. Religion as a Subject of Instruction and Its Substitutes

• *Religious Instruction (i.e. Confessional Teaching)*

Art. 41 of the Constitution provides for freedom of conscience and belief (hereinafter: the right to religious freedom). It broadly protects the freedom of self-definition and it refers not only to religious beliefs but also to moral, philosophical and other worldviews. This article gives the assurance of freedom of conscience (the positive entitlement), the right of a person not to have any religious or other beliefs, or to not manifest such beliefs (the negative entitlement), and the right of parents to determine their children's upbringing in the area of freedom of conscience.¹¹ Article 7 of the Constitution of the Republic of Slovenia¹² enshrines: (1) the principle of separation of the state and religious communities, (2) the principle of equality among religious communities, and (3) the principle of free activity (autonomy) of religious communities within the legal order.¹³ The most controversial part of the Education Act is Chapter XI. (having only one article: Art. 72) regulating the “Autonomy of School Premises”, because of its prohibition of not only religious teaching, but also of any other kind of denominational activity in public schools and kindergartens. Paras. 3 and 4 of Art. 72 of the Education Act (as first enacted by the National Assembly) provided as follows:

"(3) Denominational activities are not permitted in public kindergartens and schools or in licensed kindergartens and schools.

(4) Denominational activities determined in the previous paragraph of this article encompass:

- religious lessons or denominational religious lessons aimed at raising students in that religion,
- lessons in which a religious community decides on the substance, textbooks, teachers' education and the suitability of individual teachers for teaching,
- organized religious rites."

¹⁰ Art. 86 of the Education Act. About transitional rules on funding of the private religious schools and their staff that were granted licenses before adoption of the Education Act and were/are provided with 100% state funding see detailed in: Šturm (2004), p. 632.

¹¹ Art. 41 of the Constitution:

“(1) Religious and other beliefs may be freely professed in private and public life.

(2) No one shall be obliged to declare his religious or other beliefs.

(3) Parents have the right to provide their children with a religious and moral upbringing in accordance with their beliefs. The religious and moral guidance given to children must be appropriate to their age and maturity, and be consistent with their free conscience and religious and other beliefs or convictions.”

¹² The Constitution of the Republic of Slovenia (1991); Para. 1 Art. 41.

¹³ Art. 7 of the Constitution: “(1) The state and religious communities shall be separate. (2) Religious communities shall enjoy equal rights; they shall pursue their activities freely.”

From the relevant statutory provision it follows that the Legislator did not first regulate the manner of ensuring the positive aspect of religious freedom and consequently introduced also some limitations or measures in order to protect the negative aspect of religious freedom (e.g.: the prohibition of mandatory attendance of religious lessons; the organization of religious lessons prior to the beginning of or after lessons so that the students who do not want to take part in such lessons may uninterruptedly leave etc.).¹⁴ On the contrary, the Legislator not only embraced the idea of French secular school (*l'école laïque*)¹⁵ or the United States of Americas' model,¹⁶ but surpassed them by introducing an ultra-strict model of separation of religion and state/school, which is quite different from that of the majority of European countries where the laws guarantee religious instruction within the framework of the public school.¹⁷ The legislator's approach of ensuring only negative neutrality in public (and also in private) schools was heavily inspired by the idea of strict or negative *Läicité* (ideological secularism) and its negative perception of religion (e.g. the supporters and the drafters of the Education Act regarded Catholicism as an ideology and not as a religion).¹⁸ The system of a private or "free" education system at the level of elementary schools in Slovenia is – 20 years after the change to a democratic system – still in its initial development phase.

- ***Instruction about Religions and Ethics***

The Grammar School Curriculum introduced 1. a facultative non-confessional subject Religions and Ethics, and 2. a compulsory subject Civic and Patriotic Education and Ethics. The subject Civic and Patriotic Education and Ethics takes place in the 7th and 8th years of grammar school and amount to one hour per week (totally 70 hours). A pupil may decide to take the subject Religions and Ethics in last three years of grammar school. Also in the area of upper secondary education the subject Religions and Ethics remains an optional subject (having totally 15 hours per year). Churches and religious communities do not have any influence on the content or the execution of the mentioned subjects.

- ***Religion within the Framework of Classes in Literature, History, Philosophy, Arts, and Language***

The school legislation does not have special provision concerning religious content in subjects such as History, Philosophy, Literature, Arts, Language Classes etc.

¹⁴ Umek, S. (2004) p. 22.

¹⁵ Detailed about the notion of *Läicité* and the current development towards a *Läicité nouvelle*: Robert, J. and Duffar, J. (1996), p. 552.

¹⁶ Kodelja, Z. (1999), p. 153.

¹⁷ Judge of the Constitutional Court F. Testen in his separate opinion stressed that: "Ultimately also the traditionally lay-oriented France allowed e.g. the founding of vicariates in public (secondary) schools, and the U.S. Supreme Court ordered the New York public school district to enable a student group to organize on the premises of the public school outside school hours meetings for students to pray and study the Holy Bible. In these countries school premises as State symbols were not thereby given religious connotations." See the decision of the Constitutional Court *Mihael Jarc et al.* No. U-I-68/98.

¹⁸ Kodelja for instance holds Catholicism to be a mere ideology, equally dangerous as has been the Marxist ideology in the past. See Kodelja, Z. (1999), p. 153.

III. RELIGIOUSLY MOTIVATED BEHAVIOUR IN PUBLIC SCHOOLS

- ***Religion Within the Framework of Working Conditions of Teachers and Other Staff, Religious Symbols at School (e.g. Crucifix Case in Italy) and Religious Garments***

There are no specific provisions in the public school law concerning religious symbols and religious garments at public schools. The statute deals with religious elements within the framework of working conditions of teachers and other staff.

- ***The Possibility of a Benediction of School Buildings***

There are no legal impediments concerning the benediction of a private school building. In relation to public schools legal rules enshrined in Article 72 of the Education Act are not clear enough. Benedictions of public schools are more or less a general and non-disputed practice.

- ***Special Issues, e.g.: Religiously Motivated Behaviour of Pupils, Teachers and Staff in School, Prayers in Public, Prayer within the Framework of Classes or Other School Events, Religious Services***

Article 72 of the Education Act prohibits organized religious rites (e.g. religious services) in public schools and does not address other matters of religiously motivated behaviour of pupils, teachers and staff.

- ***Constitutional review***

In the case of *Mihael Jarc et al.* No. U–I–68/98 (November 2001) the Court reviewed the question of whether the provisions of the Education Act interfere with the positive aspect of the freedom of religion,¹⁹ the principle of equality,²⁰ the rights of parents,²¹ and the right to free education.²² The Court first declared that the general prohibition of denominational activities in public schools²³ is not inconsistent with the Constitution and the ECHR. The only inconsistency with the Constitution is the prohibition of denominational activities in licensed kindergartens and private schools in regard to the denominational activities which take place outside the scope of the execution of a valid public programme financed from State funds.²⁴ The Court instructed the National Assembly to remedy the established inconsistency in a time limit of one year and the Legislator consequently changed the provision of Art. 72 of the Education Act by allowing the licensed kindergartens and schools to carry out denominational activities which take place outside the scope of the execution of a public service.

The Principle of Separation vs. the Right to Religious Freedom

The Court first acknowledged that the Constitution “does not specially regulate denominational activities in (public and licensed) schools, which means that it neither prohibits nor requires such...”. This would (rightly) suggest that the matter was left to be

¹⁹ Para. 1 Art. 41. of the Constitution.

²⁰ Art. 14 of the Constitution.

²¹ Para. 3 Art. 41. of the Constitution and Art. 2 of Protocol No. 1 to Convention for the Protection of Human Rights and Fundamental Freedoms.

²² Art. 57 of the Constitution.

²³ Para. 4 Art. 72 of the Education Act.

²⁴ Para. 3. Art. 72 of the Education Act.

regulated by the Legislator. However, the Court then argued that the general principle of the separation of the State and religious communities (on the basis of which the State is bound to neutrality, tolerance and a non-missionary manner of operation)²⁵ means that on school premises the religious content cannot be part of public lessons (i.e. neither part of lessons in a public school, nor part of teaching in the framework of the public service of a licensed private school). For the Court, teaching of religion *in* as well as *by* public schools would be intolerable.

As a consequence of the Courts' initial standpoint a dilemma regarding the criterion for review turned up: whether the principle of separation should be interpreted in the light of the right to religious freedom or whether the right to religious freedom is the main criterion for review (which ought to be interpreted in the light of the principle of separation).²⁶ Since the constitutional right to religious freedom is one of few most hierarchically protected rights and unconditionally protected constitutional values (it may in no case be abolished and it can only be limited under very strict conditions),²⁷ there should not have been any doubt that it cannot be outranked by the principle of separation. Thus, the Court's above-mentioned conclusion could not be deduced from the principle of separation alone. However, as the main criterion for judicial review of the general prohibition of denominational activities in public kindergartens and schools served the principle of separation.²⁸

In reviewing the provision prohibiting the denominational activities in public kindergartens and schools the Court did refer to the right to religious freedom, but failed to make a consistent test of proportionality, which includes a careful and profound balancing between the positive and the negative aspect of the right to religious freedom. In the Courts' argumentation strict interpretation of the principle of separation prevailed, which pushed aside a full-scale balancing of both constitutionally protected aspects of the right to religious freedom:

“According to Art. 41.2 of the Constitution, citizens have the right not to declare their religious beliefs and to require that the State prevent any forced confrontation of the individual with any kind of religious belief. A democratic State (Art. 1 of the Constitution) is, on the basis of the separation of the State and the Church (Art. 7 of the Constitution), obliged in providing public services and in public institutions to ensure its neutrality and prevent one religion or philosophical belief from prevailing over another, since no one has the right to require that the State support them in the professing of their religion. To reach this goal it is constitutionally admissible that the State takes such statutory measures as are necessary to protect the negative aspect of freedom of religion and thereby realize the obligation of neutrality. ... Furthermore, the interference with the positive aspect of freedom of religion cannot be considered inappropriate as thereby the forced confrontation of non-religious persons or persons of other denominations with a religion they do not belong to can be prevented. This interference is also proportionate, in the narrow sense of the word, in so far as it relates to the prohibition of denominational activities in public kindergartens and schools. These are namely, public (State) institutions financed by the State and are as such the symbols which represent the State externally and which make the individual aware of it. Therefore, it is legitimate that the principle of the separation of the State and religious communities and thereby the neutrality of the State be in this context extremely

²⁵ Art. 7 of the Constitution.

²⁶ Orehar Ivanc, M. (2000), p. 48.

²⁷ Art. 16. of the Constitution.

²⁸ Judge Tresten opposed to the selected mode of review (Para. 1 Art. 7 of the Constitution) insofar as it referred to the premises of public kindergartens and schools. In his opinion, in the case of licensed kindergartens and schools, the freedom of the founders of these schools to profess the religion should also have been considered as a necessary criterion for review.

consistently and strictly implemented. Considering the fact that a public kindergarten or a public school do not represent the State only in carrying out their educational and upbringing activities (public services) but also as public premises, the principled prohibition of denominational activities does not constitute an inadmissible disproportionality between the positive aspect of the freedom of religion and the rights of parents to raise their children in accordance with their religious persuasion on one hand and the negative aspect of freedom of religion on the other hand.”

However, in reviewing the general prohibition of denominational activities in licensed kindergartens and schools which take place outside the scope of the execution of a valid public programme financed from State funds, the Court relied on the right to religious freedom as the main criterion for review. In order to determine a proper balance between the negative and the positive aspect of religious freedom the Court now carried out the test of proportionality more accurately. According to the Constitution, human rights and fundamental freedoms are limited only by the rights of others and in such cases as determined by the Constitution.²⁹ The Court reviewed whether the interference, as enacted by the Education Act, with the positive aspect of the freedom of religion (conscience) of an individual and the right of parents is admissible to ensure the protection of the constitutional rights of others. The Court stressed that:

“in reviewing proportionality in the narrow sense we must weigh in a concrete case the protection of the negative aspect of the freedom of religion (or freedom of conscience) of non-believers or the followers of other religions on one hand against the weight of the consequences ensuing from an interference with the positive aspect of freedom of religion and the rights of parents determined in Art. 41.3 of the Constitution on the other. There is no such proportionality if we generally prohibit any denominational activity in a licensed kindergarten and school. By such prohibition the legislature respected only the negative freedom of religion, although its protection, despite the establishment of certain positive religious freedoms and the rights of parents to provide their children a religious upbringing, could as well be achieved by a milder measure.”

For the Court, teaching of religion *in* licensed schools as a matter of principle is tolerable. However, teaching of religion *by* licensed schools is only being tolerable in the case it is not performed in the scope of public service.

Public sphere, premises, service and financing vs. Religion

Although the doctrines used by the Court in order to support its argumentation are not sufficiently elaborated, one can conclude that in the Court’s opinion the doctrine of state neutrality rules out the presence of religion in the public sphere. The socialist Constitution (1974) prohibited the activity of Churches in public sphere. A new Constitution (1991), by introducing the principle of democracy and the right to religious freedom departs from the old totalitarian views on religion. Freedom of religion is not only ensured in private life, but also in public life. This means that religion and other convictions are part of public life or society. Thus, the religious moment is relevant and legitimate especially in the fields of public media, education, culture and social affairs.³⁰

The Court’s argumentation is not only unconvincing, but also inconsistent in terms of logic and comparative legal doctrine. The meaning of the term “public” (as already indicated in the above cited Court’s arguments on the meaning of the principle of state-church separation) turned out to be a crucial point of review. However, it remained unclear what really is entitled

²⁹ Art. 15 of the Constitution.

³⁰ Orehar Ivanc, M., p. 447.

to legal protection: the premises of public schools, the public service as such, the public financing or the whole public sphere. The separate opinion of Justice Testen mentioned above also reveals other problems with the Court's argumentation. Testen claims that the criterion of review (the legitimate goal) that justifies State restriction of denominational activities on the premises of schools and kindergartens, insofar as also referring to the premises of public kindergartens and schools, might only be the negative aspect of religious freedom, enshrined in the Para. 2 Art. 41 of the Constitution. He rightly stressed that "if only the rights of parents and children determined in Para. 1 and 3 Art. 41 of the Constitution on one hand and the rights of other users of public school services determined in Para. 2 Art. 41 of the Constitution, on the other hand, are weighed against each other; the results of such weighing should be the same for public schools and licensed schools." In Testen's opinion the decision gives no convincing reasons why it is constitutionally admissible that denominational activities on the premises of public schools are in principle not permitted at all, while in private schools and licensed schools such activities cannot be prohibited. Namely, in the case of public kindergartens and schools the rights of parents and children are equally interfered with as in the case of licensed schools. Whereas, in the case of licensed schools, it is constitutionally feasible to ensure the exercising of the negative aspect of the right to religious freedom by a milder measure (providing that persons with different beliefs are not forced to involuntarily encounter the expressions of religious beliefs), there are no reasons why the same would not also be feasible in the case of public schools.

From a comparative perspective, does the constitutional principle of separation between state and church in some other countries of the European Union *per definition* prohibit the religious education in public schools? I consider this is not the case. For instance, in Portugal teaching of religion in public school is allowed on a voluntary basis.³¹ A principle of separation was introduced also in Hungary, where it is interpreted in the light of neutrality and benevolent separation. Thus, churches have the right to provide religious education in public schools at the request of students or their parents.³² Even in France, which has secular public education, *Läicité* takes different forms (e.g. elementary schools must leave clear one day to enable parents to arrange for religious education outside the school and the existence of chaplaincies at level of secondary schools) and the three *départements* of the east of France still enable religious education in public schools as part of a general curriculum.³³ Šturm believes that the church-state balance has still been influenced by strict neutrality that limits church-state interaction: "such an approach of negative neutrality does not accord with modern views of religious freedom, which envision greater church-state cooperation, protection of positive religious freedom, and the state intervention in public religious activities when necessary to protect public order."³⁴

The most problematic issue about the particular decision is that the Court did not provide for any kind of protection of positive aspects of religious freedom in public schools, except in an extremely rare situation, when denominational activities cannot be carried out in a local

³¹ See in detail about the relevant jurisprudence of the Portugal Constitutional Court: Canas, V. (2005), p. 454.

³² Schanda, B. (2005), p. 329.

³³ Basdevant-Gaudemet, B. (2005), p. 171.

³⁴ Šturm, L. (2004), p. 642.

community, due to the fact that there are no other appropriate premises.³⁵ Nor did the Court take into account the general state of affairs in the field of education, especially almost total absence of private elementary schools (at the time there were no religious elementary schools, established by the churches or other religious communities). Consequently, the right to free education and the religious freedom is not guaranteed. The Court supported the introduction of archaic model of negative *Läicité* in education and consequently decided in favour of an ultra-strict model of separation between state and religious communities. Neither the Legislator's way of regulating religious education in public schools, nor the decision of the Court are comparable with the constitutional and legislative solutions of other countries of the European Union.³⁶ It can also be argued that the Legislator overlooked the need to somehow remedy the injustices, done by the indoctrination in the system of public education in the past.³⁷

However, in its recent decision No. U-I-92/07-23 on the Religious Freedom Act the Court referred to the decision on the Education Act and acknowledged that the negative aspect of religious freedom cannot outweigh the positive one, which indicates that the Court changed its perspective (par. 86).

IV. OPTING OUT OF SCHOOL OBLIGATIONS FOR RELIGIOUS REASONS

The Legislator's decision to opt out religion from the area of public education has important consequences concerning the possibility for opting out of school obligations for religious reasons.

- ***Religious Holidays: Possibility of and Conditions for Taking off the Relevant Days***

According to the State Holidays Act major Christian holidays are not working days. Non-Christian pupils may use the right to be absent from school for five days without giving any kind of justification (Art. 53 of the Primary School Act). The headmaster may even consent to a longer absence. This decision is within his discretion.

- ***Opting out of Religious Instruction or Instruction about Religions***

Since there is no religious instruction in public schools and instruction about religions is a facultative subject, the problem of opting out does not arise.

- ***Opting out of Physical Education (e.g. Coeducational Swimming Instruction for Muslim Girls) and opting out of Biology (e.g. Due to Believing in Creationism)***

The question of opting out of Physical Education or out of Biology, which are obligatory subjects (Art 16 of the Primary School Act), has not yet arisen. The only reason for opting out of compulsory subjects is poor health (Art. 52).

- ***Religiously Motivated Home-schooling***

The Primary School Act provides for Home-schooling (Arts. 1, 5 and Chapter VII/ 88-92) and has no special provisions that would regulate its religious motivation. The provisions of the

³⁵ The only exception, introduced by the Education Act, shows that the public school premises are not untouchable for religion. Para. 5 Art. 72. of the Education Act.

³⁶ For comparative analysis see: Robbers, G. (2005).

³⁷ See more Ivanc, 2007.

Education Act concerning the “Autonomy of School Premises” cannot apply to home-schooling. The risk of interference with the right of parents to determine their children’s upbringing as to freedom of conscience in the area of homeschooling is extremely low, but in practice there is hardly any case of home-schooling that is directly or indirectly religiously motivated.

V. CONCLUSION

The system of private or “free” education in Slovenia is – 20 years after the change to a democratic system – still in its initial development phase. Since the Education Act, under the pretext of the “Autonomy of School Premises”, ousts religion from the field of public education, the constitutional right of parents to determine their children's upbringing in the area of freedom of conscience in most cases remains void.

In regard to public schools the legislator decided for a (too) strict regulation of religious issues, taking into consideration only the negative aspect of religious freedom and ignoring the positive one. Thus, the school legislation does not regulate issues such as opting out of school obligations for religious reasons. However, there is a certain free field for discretion (e.g. the headmaster's decisions) that in concrete cases enables solutions that go in favour of religious opt-outs.

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