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The freedom of religion of children

ABSTRACT: The Convention on the Rights of the Child recognises the right of the child to freedom of thought, conscience and religion. In the wording of the Convention, parents provide direction in exercising this right. Other human rights instruments lay more emphasis on parental rights. It is the natural right of parents to strive to pass on their own convictions and traditions to their children. There are good reasons for the neutral state to keep out from religious disputes as well as from the religious life of families. State involvement should be reserved for extreme cases, but it may be inevitable when family relations break down. Prudence is needed to promote peace in the family and society instead of raising internal and religious tensions.

KEYWORDS: religious freedom, parental rights, religious education, custody, rights of children, freedom of conscience.

1. Freedom of religion in UN documents

The most important human rights conventions prioritise protection of the freedom of religion. However, these are naturally regulatory frameworks given meaning by the national contexts in which they are applied. Although it is not binding, the Universal Declaration of Human Rights is the first “law” that enshrines human rights in a charter according to the principle of universality and which is considered to have the greatest impact. According to Article 18:

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 teaching, practice, worship and observance.

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The Universal Declaration states that “the family is the natural and fundamental group unit”⁵⁵² and acknowledges that “Parents have a prior right to choose the kind of education that shall be given to their children.”⁵⁵³ According to Article 18 of the International Covenant on Civil and Political Rights, promulgated in Hungary with Law-Decree No. 8 of 1976:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Of the international laws enacted under the aegis of the UN, the “Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief”, passed with resolution No 36/55 by the UN General Assembly on 25 November 1981, should also be mentioned, which, although it is not binding, still serves as a beacon. This Declaration affirms the previously declared norms that guarantee freedom of religion and urges states to take effective action to prevent and eliminate negative discrimination based on religion or belief. The Declaration affords special protection to the rights of parents in raising their children according to their beliefs.

The Convention on the Rights of the Child adopted in New York on 20 November 1989, promulgated in Hungary with Act No. LXIV of 1991,

⁵⁵² Art. 16(3) of the Universal Declaration of Human Rights.

⁵⁵³ Art. 26(3) of the Universal Declaration of Human Rights.

declares the right of the child to freedom of thought and religion and also acknowledges that parents have the right to provide direction in a manner consistent with the evolving capacities of the child in Article 14⁵⁵⁴:

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

International human rights conventions contain fundamentally similar provisions on the freedom of religion, although the Convention on the Rights of the Child and the other documents lay differing degrees of emphasis on protecting the integrity of the beliefs of families. The different wording mirrors a different perspective that can be seen as a contradiction. The Convention on the Rights of the Child would provide children with the right to make independent decisions regarding religion, depending on age. A number of people have pointed out the contradiction between these two approaches.⁵⁵⁵

Both the Covenant and the Convention make a fundamental distinction between the freedom of religion and the freedom of religious observance: while the former is considered an absolute right, the latter may be restricted for certain reasons.

2. The freedom of religion in the European Convention on Human Rights

Under Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms, promulgated in Hungary with Act No. XXXI of 1993, which is especially important for the binding adjudication of individual complaints:

⁵⁵⁴ Lux, 2018.

⁵⁵⁵ Schweitzer 1994.

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.

Article 14 of the Convention provides for the prohibition of discrimination:

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.

For the freedom of religion, it is important to note that Article 2 of Protocol 1 expressly acknowledges the right of parents to provide education in conformity with their religious convictions:

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.

In addition to the historical role of the freedom of religion, the freedom of thought, conscience, and religion form an inseparable and prominent fundamental right that, according to the Convention, is one of the pillars of a “democratic society”. Moreover, religion is a fundamental element of the cultural identities of nations. As Giovanni Bonello, a former Maltese member of the Court, expressed in his concurring opinion to the judgment in *Lausti v. Italy*:

A court of human rights cannot allow itself to suffer from historical Alzheimer's. It has no right to disregard the cultural continuum of a nation's flow through time, nor to ignore what, over the centuries, has served to mould and define the profile of a people. (...) A European court should not be called upon to bankrupt centuries of European tradition.⁵⁵⁶

Until the 1990s, the Court did not formulate any substantive jurisprudence regarding freedom of religion, possibly because democratic states generally tend to respect this right and because the relationship between the State and religious communities has developed in accordance with the widely differing historical traditions in various nations, requiring international fora to apply a wide range of considerations in both regulation and practice. In certain States Parties, the Court determined it legitimate to uphold the position of the state religion,⁵⁵⁷ while in others it protected the secular nature of the constitutional order⁵⁵⁸. Case-law has increased in quantity drastically in recent decades. The cases shed light on certain well-defined, controversial topics: how far can the State go in protecting any particular (majority) religion or the secular nature of the State if such results in a disadvantage to minority needs? How can the peaceful coexistence between the faithful of different religions with culturally different traditions be guaranteed, and how must the state respect the independence of religious communities?⁵⁵⁹

As regards the freedom of religion of children/minors/school-age children, the controversial issues are around the protection of specific clothing required by religious doctrine for both teachers and students in the educational institutions of various countries. In the case of a teacher fired from a state-run school in Geneva, with reference to the fact that the school is secular, the Swiss court accepted the reasoning that for the children, especially younger children, the teacher is a representative of the State, and the measure was necessary to protect the rights and freedoms of the children

⁵⁵⁶ *Lautsi v. Italy* App. No. 30814/06, 18 March 2011.

⁵⁵⁷ *Darby v. Sweden* App. No. 11581/85, 23 October 1990, see.: commission report 45.

⁵⁵⁸ *Leyla Sahin v. Turkey* App. No. 44774/98, 10 November 2005.

⁵⁵⁹ Schanda, 2021; Grabenwarter, 2014, Art. 9, 224-250.; Koltay, 2015; Martínez-Torrón - Navarro-Vals, 2004; Szajbely 2018; Temperman – Gunn – Evans 2019; Vermulen 2018; Ventura, 2019.

in light of their impressionability.⁵⁶⁰ The Court also rejected the complaint filed by a teacher at Istanbul University.⁵⁶¹ The question arises as to whether emphasising the young age – and thus the impressionability – of the students in one case weakens the reasoning regarding the headscarf of the university professor: in the case of the Turkish teacher, the court accepted the protection of the peculiar secular nature of the Turkish state instead of the grounds of religious pluralism. The Court accepted the application of the restrictive rules by referring to the protection of the “the rights and freedoms of others” in the case of both the university students⁵⁶² and the students participating in compulsory education: the protection of students’ bodily integrity in physical education classes was found to be a suitable reason for the restriction,⁵⁶³ while in a broader sense the secular nature of the State and public education may also give rise to the imposition of restrictions.⁵⁶⁴ The State may also rightfully protect children from peer pressure by restricting the wearing of headscarves.⁵⁶⁵ It should be noted that the practice of the court in accepting existent restrictions in all cases is based on the broad power of discretion of the states; it does not in any way follow from the judgments that the absence of the restriction would be worrisome.

States are given a wide power of discretion in connection with the organisation of public education, as the objective of public education is to transfer knowledge in an objective, critical, and pluralist way; however, an exemption may not be requested from compulsory public education even for religious reasons.⁵⁶⁶ Schools may not have the objective or purpose of indoctrinating children or undermining family education. Although the basis is respect for parental rights, these rights may also be restricted, i.e., although it is not permitted to turn children against their parents, parents may not require that the children not be subjected to any impacts contrary to their beliefs. Granting exemption to children from sexual education has not

⁵⁶⁰ *Dahlab v. Switzerland* App. No. 42393/98, 15 February 2001.

⁵⁶¹ *Kurtumulus v. Turkey* App. No. 65500/01, 24 January 2006.

⁵⁶² *Leyla Şahin v. Turkey* App. No. 44774/98, 10 November 2005.

⁵⁶³ *Dogru v. France* App. No. 27058/05, 4 December 2008.; *Kervanci v. France* App. No. 31645/04, 4 December 2008.

⁵⁶⁴ *Aktas v. France* App. No. 43563/08, 30 June 2009; *Bayrak v. France* App. No. 14308/08, 30 June 2009.; *Gamaleddyn v. France* App. No. 18527/08, 30 June 2009; *Ghazal v. France* App. No. 29134/08, 30 June 2009; *Jasvir Singh v. France* App. No. 25483/08, 30 June 2009; *Ranjit Singh v. France* App. No. 27561/08, 30 June 2009.

⁵⁶⁵ *Köse and Others v. Turkey* App. No. 37616/02, 7 December 2010.

⁵⁶⁶ *Folgerø and Others v. Norway* App. No. 15472/02, 14 February 2006.

received protection.⁵⁶⁷ Exemption may also not be requested for compulsory co-educational swimming classes, as this would lead to the exclusion of immigrant children by the State. Moreover, participation also promotes integration in addition to teaching the child to swim.⁵⁶⁸

Freedom of religion is not affected by generally compulsory, neutral requirements. Just as no-one is exempt from the rules of the road for religious reasons, citizens also do not have the right to refuse the use of a tax number on religious grounds.⁵⁶⁹ Religious norms do not grant exemption from the obligation to observe state law. Accordingly, a sexual act with a girl younger than 16 is a crime even if the perpetrator and the victim are married under Islamic law.⁵⁷⁰ The application of Seventh-day Adventist parents to obtain an exemption for their children from having to attend school on Saturday was also not approved.⁵⁷¹

Refusing a blood transfusion may be a free expression of a person's autonomy (Article 8) and freedom of religion. The principle, though it may seem unreasonable to others and the medical community, may not be an impediment to dissolving or banning the operations of a religious community. Adult persons obviously have to be provided with the opportunity of making truly free decisions, and courts must be able to overrule the decisions made by parents in respect of the minor members of the group in the interest of the children.⁵⁷²

3. The rights of the child vs. parental rights?

As an independent right, the freedom of thought, religion, and conscience is due to all natural persons regardless of citizenship and any restrictions to personal freedom. In respect of children, certain approaches, such as the Convention on the Rights of the Child, imply that the fundamental rights of a child's freedom of religion and parental rights may compete: according to the Convention, instead of selecting the education to be given to the child, the parent provides "direction to the child in the exercise of his or her right

⁵⁶⁷ *A.R. et L.R. v. Switzerland* App. No. 22338/15, 19 January 2018. Art. 40, 49.

⁵⁶⁸ *Osmanoğlu et Kocabaş v. Switzerland* App. No. 29086/12, 10 January 2017.

⁵⁶⁹ *Skugar and Others v. Russia*, App. No. 40010/04, 3 December 2009.

⁵⁷⁰ *Khan v. the United Kingdom* App. No. 35394/97, 4 October 2000.

⁵⁷¹ *Martins Casimiro and Cerveira Ferreira v. Luxembourg* App. No. 44888/98, 27 April 1999.

⁵⁷² *Jehovah's Witnesses of Moscow and Others v. Russia* App. No. 302/02, 18 August 2010. Art. 131-144.

in a manner consistent with the evolving capacities of the child.” The Holy See underlines in its reservation to the Convention the “primary and inalienable rights of parents” i.a. with regard to religious rights.⁵⁷³

The Fundamental Law (the Constitution) provides special protection to parents in determining the religious education their children receive. However, a parent’s religious conviction may not be a primary reason for keeping their child out of public education: Article XVI paragraph 3 of the Fundamental Law specifically states that the obligation of taking care of minor children extends to providing schooling. Exemption from specific subjects (biology, co-educated physical education, swimming lessons) raises special questions. Although Hungarian case law has not yet been faced with these issues, the Educational Authority has allowed the application of special schedules (previously, notaries had allowed home-schooling), which is debatable insofar as it is based only on the parents’ religious needs.

Children and students have the right to participate in religious education (religion and ethics, or optional religious studies).⁵⁷⁴ The parent decides on participation.⁵⁷⁵ There are no legislative provisions regarding any possible disputes between the parents or between a parent and a child. General principles can be used to settle either of these potential conflicts. The parents have to come to an agreement between themselves regarding issues resulting from their worldview. In no situation does the State take a position on religious issues: the legal regulation of the denomination of a child to a couple of different Christian denominations is now history even if the practice remains in many families. Like other, sensitive issues regarding education, the parental decision governs any possible disputes between the parent and the child. Hungarian law does not apply “Religionsmündigkeit”, whereby a young person over 14 is considered “mature” and may, in most Austrian and German states, freely opt out from compulsory denominational religious education or convert to another faith. (Parents may make all decisions regarding religious affairs until the child is 10 years old; between the ages of 10 and 12, the parents must take their child’s opinion into account, but the child may only leave the given religion with the consent of both parents. When the child is between 12 and 14, the parents may decide to leave a religious community against the child’s will, and after reaching

⁵⁷³ United Nations, 2023; Benyusz, 2021.

⁵⁷⁴ Art. 46(3) of the Act No. CXC of 2011.

⁵⁷⁵ Art. 182 of the Ministerial (EMMI) Decree No. 20 of 2012.

the age of 14, the child may make independent decisions, including leaving school-based religious education.⁵⁷⁶⁾

4. Religious issues in child custody disputes

Although membership in a church may not be taken into consideration in child custody disputes, the court may assess its consequences. Custody may be impacted if one parent “resolutely and forcefully” involves the child in practicing religion despite the objections of the other parent and this, along with other circumstances, has a negative impact on the child’s mental state.⁵⁷⁷

Differences in worldviews may not be evaluated to the advantage or detriment of either parent when determining custody. In principle, a distinction based on religious differences between parents is, therefore, not acceptable. [...] Of course, the issue is entirely different if the parent’s educational principles and behaviour are anti-communal or are contrary to the child’s fundamental interests, in which case this has to be evaluated for the purposes of custody concerning its suitability for educating and the care of the child and ensuring healthy moral development.⁵⁷⁸ The worldviews of the parents and the doctrines and principles of their religion are not part of the custody lawsuit and may not be subjected to judicial discretion.⁵⁷⁹

Neither the guardian authority nor the court may make decisions in absence of an agreement between parents exercising joint custody in issues of conscience and freedom of religion.

⁵⁷⁶ *Gesetz über die religiöse Kindererziehung; 15. Juli 1921 (RGBI S. 939)*

Available at: https://www.oesterreich.gv.at/themen/leben_in_oesterreich/kirchenein__austritt_und_religionen/Seite.820012.html (Accessed: 15 December 2022).

⁵⁷⁷ Curia decision No. BH1994.543.

⁵⁷⁸ Curia decision No. BH 1998.132. It has to be noted, that the Supreme Court also referred to the *Hoffmann v. Austria* (June 23, 1993) case in its reasoning.

⁵⁷⁹ Curia decision No. BH 2001.479.

5. Issues of religion in child subsidiary protection

By law, the subsidiary protection of the child shall take into consideration the child's freedom of conscience and religion as well as their national, cultural, and ethnic origins.⁵⁸⁰ Children taken into temporary or permanent foster care are especially entitled to freely select, express, and practice their convictions regarding religion and conscience in line with their age, state of health, development, and other needs, and to participate in religious education accordingly.⁵⁸¹ When determining the custody of the child, the guardian authority shall take into consideration the child's "religious and cultural identity". The law decrees that the child's religious identity and not religious convictions have to be considered, as a kindergarten child, for example, does not yet have convictions. However, even a young child may have an identity. In this respect, the parents' decision is governing, for example to have the child christened in a certain denomination. However, identity may not be considered only a formal membership in a church, in the absence of which the religions of forebears may also prove governing. Children taken into foster care decide to participate in religious education independently,⁵⁸² where the foster parent merely supports the child's participation.⁵⁸³

6. Conclusions

The instruments of law are only of limited use for settling the internal relations of families. The strength of religious convictions and religious traditions also forces the law to back down. Although the State may take action against the decisions of the parents (for example, against the threat of female genital mutilation on religious grounds) to protect the rights of the child, the general rule is to protect the religious integrity of the family. It is the natural right of parents to strive to pass on their own convictions and traditions to their children. There is no single regulation or measure regarding how and when older children must be provided a say, or the right to make independent decisions, in these issues. In this respect, the internal relations and the millennia-old religious norms of the family as the "natural

⁵⁸⁰ Art. 7(1) of the Act No. XXXI of 1997.

⁵⁸¹ Art. 9(1) point (d) of the Act No. XXXI of 1997.

⁵⁸² Art. 9(1) point (d) of the Act No. XXXI of 1997.

⁵⁸³ Art. 55(1) point (c) of the Act No. XXXI of 1997.

community” enjoy primacy. It is recommended that today’s legal system of rules for governing state and man proceed with prudence: it must promote peace in the family and society, not internal tension.

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