



High level seminar on Freedom of religion in Europe: achievements and perspectives
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Rights of families against the State as regards the education of children

Your Excellencies,
Mr. President of the European Court,
Ladies and Gentlemen,

Freedom of religion and education is a vast subject; I will try to go straight to the essential to clarify the current issues, with an historical perspective.

Education and *religion* are tightly linked, as the Church has been the teacher of Europe. Hundreds of thousands of members of the clergy have dedicated their lives to teaching and instruction, and they continue nowadays. In Europe, *teaching* stems from *religion*. Knowledge was preserved and cultivated within monasteries during the Middle-Ages, and the classic heritage was transmitted thanks to the religious tradition in the Renaissance period. The great minds of modernity: Erasmus, Descartes, Pascal, Spinoza or Kant are the heirs of the religious faith, culture and tradition. In this tradition, knowledge can spread under all its dimensions.

The secularisation of teaching is a recent and incomplete phenomenon¹. It is only with the emergence of **the atheistic and rationalist school of thought**, that *education* and *religion* were presented as incompatible. The pretention of rationalism to explain everything negated the epistemological legitimacy of religions.

Contemporary Europe inherited this conflict, which intensified with the fight of secular school against religious teaching, as evidenced by the dramas of the first half of the XXth century, marked by the prohibition and expulsion of teaching religious congregations by the French Republic in 1901 and the prohibition of religious institutions by the Soviet and Nazi regimes. The first half of the XXth century was marked by a will of the State to have a stranglehold on the youth through schools, to impose their ideology.

¹ It would be a historical mistake, and an injustice, to pretend that a radical opposition between *education* and *religion* exists. In the European tradition, there is a difference between teaching religious; but not an incompatibility, for the knowledge on the world, on *creation*, for it pertains to knowledge on the creator, while distinguishing the methods of knowledge. Religious knowledge is not of the same nature as secular knowledge, but they are recognized as being complementary.

At the end of the Second World War, European States managed to overcome this conflict, which was internal to the European culture, in accepting to guarantee freedom of conscience and religion and to respect the rights of parents concerning the religious education of their children².

Against a statist and totalitarian system which imposes itself from the government to the people, “top down”, the writers of the Universal declaration of human rights, of the European convention and of its 1st Protocol have sought the balance point in the relations between child, family, communities, society and the state.³ This was realised in a cultural context, marked, on the one hand by a positive vision of family, of intermediate bodies⁴ and of religions, and on the other hand on a negative vision of State, statism and (atheist) ideologies.

The solution of 1948 and 1950 relies on the organic and natural comprehension of society according to the mode of *subsidiarity*. The aim was to rebuild the society from the base, “bottom-up”, basing it on persons and families.

Family is then recognised as the *fundamental and natural unit of society*⁵, so naturally the Universal Declaration declares that “*parents have a prior right to choose the kind of education that shall be given to their children*”⁶. This priority is the expression of the precedence and superiority of the rights of parents on those of society; it is exercised against the State and all other social groups. The role of the State is subsidiary; it must not absorb or substitute itself to the families, but on the contrary recognize and help them in accomplishing their own responsibilities, and, supplement the failings of parents when children are deprived of proper teaching.

This is the spirit that animated the writers of the European Convention and of its 1st Protocol, when they recognized the right to education in the respect of the rights of parents regarding their religious and philosophical convictions.⁷

The preparatory works of the Convention and of its 1st Protocol clearly show that the first aim of their authors was less to proclaim a right to education than to guarantee the prior right of parents against the State. The rights of parents are then very often called a “*natural*”, “*elementary*”, “*fundamental*”, “*innate*” or “*priority*” right. This right which was initially considered to be the 3rd paragraph of article 12 of the initial project of the Convention was not entitled “*right to education*” but the “*prior right of parents to choose the kind of education to be given to their children*”. It was one of the “*family liberties*”, with “*the right to marry and to found a family*” and the right to “*freedom from arbitrary interference with the family*”.⁸ As

² Indeed, this conflict calmed down during the second half of the XXth century around a *Christian-democrat* consensus, one of the most remarkable fruits of which was the Counsel of Europe.

³ Within a subsidiary society, the **balance point** in the relations between child, family, communities, society and the state is a **point of harmony**. The more realised this vital harmony is, the less the power of the State is necessary.

⁴ Hence the taste for social rights.

⁵ European Social Charter of 1961. Article 16 § 3 of the Universal Declaration of Human Rights of 1948; Article 23 §§ 1 and 2 of the 1966 International Covenant on Civil and Political Rights, Article 10 § 1 of the International Covenant on Economic, Social and Cultural Rights, 1966, Preamble to the Convention on the Rights of the Child, 1989 ; Article 16 of the 1996 European Social Charter (revised); Article 33 of the Charter of Fundamental Rights of the European Union of 1989; Article 44 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 1990.

⁶ Art. 26.3 DUDH,

⁷ Art. 2. of the 1st protocol:

Right to education

No one shall be denied the right to education. In exercising its functions in the field of education and teaching, the State shall respect the right of parents to provide such education and instruction in accordance with their religious and philosophical convictions.

⁸ As very clear in the report of the Committee on Legal and Administrative Questions

underlined by numerous drafters of the convention, it was aimed at protecting families “*against the danger of nationalization, absorption, monopolization, requisitioning of young people by the State*”.⁹

In its report of December 1951, the Committee on Legal and Administrative Questions of the Assembly¹⁰ insisted on the fact that “*the rights to which parents can and should be entitled, (...) extend not only to the education but also to the teaching given to their children*”.¹¹ The Rapporteur of this Committee precises that this text must hence guarantee “*the fundamental rights of all parents to have their children brought up and taught in accordance with the dictates of their consciences, whatever these may be, and it is not for the State to judge*”.

Based on these natural and liberal principles, the Court developed the right to instruction, including for ethnic and religious and linguistic minorities, underlying the importance, *inter alia*, of pluralism and tolerance.

The situation nowadays

Between 1950 and today, the context has deeply changed. The society of 1950 was mostly homogenous; it is not the case anymore; we saw the burst of the institution of the family, the drop of Christian religious practice and the correlative rise of individualism. In an individualist society,¹² subsidiarity is not possible anymore.

Nowadays, the Western society has a largely negative view of religions and a largely destructured experience of families. Yet, within the majority population, minority and immigrated populations seem exempted from such trend and keep constituting alive communities, but distinctly; they do not integrate the postmodern “liquid society” described by Zygmunt Bauman.

The disaggregation of the “subsidiary society” indeed strengthens the State which then appears as the ultimate factor of cohesion. At the same time, traditional communities, while becoming a minority, are more isolated but also more visible, like lumps in the “*liquid society*” of individual relativism. They face increasing hostility.

What is the answer?

When the social cohesion is weakened, school becomes a major political issue again. What is at stake for the State is not only to support the cohesion of society but more than that, to struggle against its *disaggregation*. Once again this is a “*top-down*” social process, consisting in imposing integration, notably through forced modernization, which implies secularisation.

In some of its judgments, the jurisprudence of the European Court took that path by approving the reinforcement of the power of the State against religious expressions within teaching institutions. The Court hence admits that the role of the State is not limited anymore to ensure about the quality of the teaching and the respect of the health of children, but that it can reach

⁹ *Preparatory works*, p. 195.

¹⁰ Report of Committee on Legal and Administrative Questions of the Assembly on the communication of the Committee of Ministers, 4 December 1951, P. H. Teitgen, Rapporteur. T. P. pp 163 – 167.

¹¹ *Preparatory works*, p. 163.

¹² The main characteristic of individualism is to exclude from the personal identity anything that the subject has not wanted, not chosen himself, to access a higher independence mistaken for freedom. Individualism destroys natural, cultural and religious belonging. In doing so, individualism destroys what people have in common, what constitutes their life in society.

to the expressions of religious convictions and even to the contents of moral convictions of pupils and students. It was first seen in the acceptance of the prohibition of wearing religious symbols within teaching institutions.

It was even more spectacular in the recent *Osmanoğlu and Kocabaş v. Switzerland* case of 10th of January 2017, in which it poses the principle, which will have far reaching consequences, that “*the interest of the children in a full education enabling a successful social integration according to local habits and customs takes precedence over the wish of the parents to see their daughters exempted from the mixed swimming lessons*”¹³ in accordance with their religious convictions. The Court believes that violating the rights of the parents aims at, “*protecting foreign pupils from any phenomenon of social exclusion*” (§ 64), namely protecting the children from their parents, because they are foreigners.

This judgment confirms the logic of the *Konrad v. Germany* case of 2006,¹⁴ in which the Court had validated the prohibition of home-schooling in the name of “*integration of minorities in the society*” and of the “*general interest of society to avoid the rising of parallel societies*”.

As regards moral teaching, the phenomenon is the same. To my knowledge, the Court has ruled in favour of the State in every case filed by parents complaining about the content of sex-education¹⁵ and non-confessional moral classes.¹⁶

There is a contradiction here with the education rights guaranteed to historical minorities, such as Romani, as well as with those of families who put their children in private schools reserved to pupils of a specific religion.¹⁷

To conclude

Social circumstances can justify a reinforcement of the action of the State to support the cohesion of society. But one must be aware that this reinforcement leads to statism and to the risk of violating the rights of families.

As noted by Juris Rudevskis, an excellent jurist of this house, between statism and totalitarianism, there is but a difference of degree,¹⁸ while the difference between a totalitarian state and a subsidiary state is one of *nature*. Liberal philosophers, such as Friedrich von Hayek or Chantal Delsol, think that subsidiarity is the guarantee of a sane liberalism. This liberalism is based on the *trust* in the person and the distrust towards the State, like the system of protection of human rights. The opposite situation, of trust in the State and distrust towards part of the population, is pernicious. It is unfortunately topical.

¹³ Non official translation.

¹⁴ *Konrad v. Germany*, no. 35504/03, 11th September 2006.

¹⁵ *Jiménez Alonso and Jiménez Merino v. Spain*, n° 51188/99, decision of the 25th May 2000; *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, no. 5095/71, 5920/72, 5926/72, judgment of the 7th of December 1976, § 54; *Dojan and others v. Germany*, n° 319/08, decision of the 13th September 2011.

¹⁶ *Sluijs v. Belgium*, n° 17568/90, decision of the 9 September 1992; *Appel-Irrgang v. Germany*, n° 30814/06 decision of the 6th October 2009 ;

¹⁷ Can the demand of “social integration” justify a restriction of the freedom of “sectarian” religious education, or its prohibition?

¹⁸ “The difference between a totalitarian State and a subsidiary State is a difference of *nature*, while the difference between an interventionist welfare State and a totalitarian State is but of *degree* or *intensity*”. RUDEVSKIS, *Juris Réflexions sur la subsidiarité, l'étatisme et la jurisprudence de la Cour européenne des droits de l'homme / Juris Rudevskis*. – In: *Cohérence et impact de la jurisprudence de la Cour européenne des droits de l'homme : liber amicorum Vincent Berger / [édité par Leif Berg ... [et al.]].* - Oisterwijk : Wolf Legal Publishers (WLP), 2013. - p. 349-367

There is a limit not to pass for a society to remain liberal. As you will have understood, I respectfully believe that the aforementioned judgments have already dangerously got close to this limit, in favour of a uniform conception of culture.

I believe that social cohesion and peace can be obtained not by force but in respecting the natural laws of human nature, in keeping a model based on subsidiarity; which does not prevent from strengthening requirements as regards social values.

To this regard, I believe it is essential to respect the natural rights of parents and communities to create denominational schools, to pass on to their children moral values and the sense of their belonging to a community.

I also believe it is fundamental to ensure, in the State schooling system, the respect of the epistemological legitimacy of religion, namely the fact that science does not answer the question of God.

I will conclude with a lesson coming straight from the Middle-Ages, while society was deeply religious. Questioned on the possibility to remove a child from his Jewish parents, for the best interest of the child to be baptised and integrated into the society, St Thomas Aquinas firmly opposed it in the name of the priority nature of the natural rights of the parents, thus explaining that public freedoms essentially consist in guarantying the natural laws of society.

I thank you for your attention.