

## ■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

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### **Parental Rights and religious freedom in education considering the case-law of the ECtHR**

The parents' right to have their children educated in accordance with their religious and philosophical convictions is laid down in the second sentence of Article 2 of Protocol No. 1 of the European Convention on Human Rights (ECHR), which reads:

*"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 parents' right is in effect not an absolute right for parents to have their children educated in conformity with their own beliefs, but a right to have their own religious and philosophical convictions respected by the State.<sup>1</sup> The following article shall give an overview on several problems arising under the aspect of Article 2 of Protocol No. 1 ECHR by means of the case-law of the European Court of Human Rights (ECtHR).

#### **I. PARENTAL RIGHTS WITH REGARDS TO THE CONTENT OF TEACHING**

The first group of cases consists of problems concerning the content of teaching, as for example teaching religious or philosophical instruction or indeed sex education as well. Generally Article 2 of Protocol No. 1 does not prevent the State from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind.<sup>2</sup> The second sentence of this guarantee implies that the State must take care that information or knowledge included in the curriculum of the educational system is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions.<sup>3</sup>

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1 Reid, A Practitioner's Guide to the European Convention on Human Rights<sup>3</sup> (2008), IIB-093.

2 ECtHR 29.6.2007 (GC), *Folgerø* ./ NOR, N° 15472/02, para. 84(g).

3 ECtHR 29.6.2007 (GC), *Folgerø* ./ NOR, N° 15472/02, para. 84(h).

### a. Religious instruction

Up to now the ECtHR has had to deal with the problem of religious instruction in two main cases. The first case *Folgerø vs. Norway* concerned a school subject ("Christianity, Religion and Philosophy"), which was newly established instead of the hitherto confessional religious education in the Christian Faith. The subject was supposed to give knowledge and insight but not to be a tool for religious preaching. Unlike with the former confessional religious education, exemptions were now to be limited only to parts of the subject, especially topics of a confessional character and participation in rituals.<sup>4</sup> The applicants, all members of the Norwegian Humanist Association, complained that the refusal of the competent domestic authorities to grant children a full exemption from the "Christianity, Religion and Philosophy" subject violated the parents' rights under the Convention. The children's compulsory attendance at religious instruction unjustifiably interfered with their parents' right under Article 2 of Protocol No. 1, second sentence, to ensure such education and teaching in conformity with their own religious and philosophical convictions.<sup>5</sup> The question determined by the Court was whether the respondent State had taken care that information and knowledge for the subject was conveyed in an objective, critical and pluralistic manner or whether it had pursued an aim of indoctrination not respecting the applicant parents' religious and philosophical convictions and thereby had transgressed the limit implied by Article 2 of Protocol No. 1.<sup>6</sup>

The Court stated that only the fact that knowledge about Christianity represented a greater part of the Curriculum for primary and lower secondary schools could not itself be viewed as a departure from the principles of pluralism and objectivity amounting to indoctrination. In view of the place occupied by Christianity in the national history and tradition of the respondent State, this had to be regarded as falling within the State's margin of appreciation.<sup>7</sup> However the Court assumed that participation in "religious activities" (including prayers, psalms, the learning of religious texts by heart and the participation in plays of a religious nature) would be capable of affecting pupils' minds in a manner giving rise to an issue under Article 2 of Protocol No. 1.<sup>8</sup> Therefore the questions aroused whether the imbalance could be said to have been brought to a level acceptable under Article 2 of Protocol No. 1 by the possibility for pupils to request partial exemption.<sup>9</sup> Since the partial exemption arrangement presumed that pupils should be granted exemptions only from those parts of the teaching incompatible with their own or parents' convictions and beliefs, the parents would have to have been adequately informed of the details of the lessons plans.<sup>10</sup> Furthermore, for a number of religious activities it had been proposed

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4 See for the facts: ECtHR 29.6.2007 (GC), *Folgerø ./. NOR*, N° 15472/02, para. 15.

5 See for the complaints: ECtHR 29.6.2007 (GC), *Folgerø ./. NOR*, N° 15472/02, para. 51.

6 ECtHR 29.6.2007 (GC), *Folgerø ./. NOR*, N° 15472/02, para. 85.

7 ECtHR 29.6.2007 (GC), *Folgerø ./. NOR*, N° 15472/02, para. 89.

8 ECtHR 29.6.2007 (GC), *Folgerø ./. NOR*, N° 15472/02, para. 94.

9 ECtHR 29.6.2007 (GC), *Folgerø ./. NOR*, N° 15472/02, para. 96.

10 ECtHR 29.6.2007 (GC), *Folgerø ./. NOR*, N° 15472/02, para. 97.

that observation by attendance could suitably replace involvement through participation<sup>11</sup>, so that even partial exemption had not been granted in each case. Accordingly, there had been a violation of Article 2 of Protocol No.1 because of the refusal to grant the applicant parents full exemption from the "Christianity, Religion and Philosophy" subject.<sup>12</sup>

The second case *Zengin vs. Turkey* concerned confessional religious instruction ("religious culture and ethics classes"), which was compulsory in primary and secondary schools. Only pupils of Turkish nationality who belonged to the Christian or Jewish religion were entitled to exemption. The applicants, adherents of Alevism, alleged that the classes in religious culture and ethics were not being conducted in an objective, critical or pluralistic manner and the syllabus, which was being taught entirely from a religious perspective and which was praising the Sunni interpretation of the Islamic faith and tradition, together with textbooks describing the traditional rites of Sunni Islam, clearly indicated the lack of objectivity.<sup>13</sup> Again the Court did not see a departure from the principles of pluralism and objectivity which would amount to indoctrination in giving greater priority to knowledge of Islam than to that of other religions and philosophies<sup>14</sup>. But it considered the exemption procedure not as an appropriate method to provide sufficient protection to those parents who could legitimately consider that the subject taught were likely to give rise in their children to a conflict of allegiance between the school and their own values.<sup>15</sup>

### b. Sex education

The case of *Kjeldsen vs. Denmark* was decided by the Court in 1976 and is the basis case concerning the content of teaching. The parents maintained that integrated, and hence compulsory, sex education as introduced into State schools was contrary to the beliefs they held as Christian parents and constituted a violation of Article 2 of Protocol No. 1.<sup>16</sup> The Government pleaded that the second sentence of Article 2 of Protocol No. 1 implied solely the right for parents to have their children exempted from classes offering "religious instruction of a denominational character". The Court however considered that Article 2 of Protocol No. 1, 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 instructions and other subjects.<sup>17</sup> Concerning the content of sex education the Court stated that the public authorities wished to enable pupils, "to take care of themselves and show consideration for others in that respect" when the time comes, "not to land themselves or others in difficulties solely on account

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11 ECtHR 29.6.2007 (GC), *Folgerø* ./ NOR, N° 15472/02, para. 99.

12 ECtHR 29.6.2007 (GC), *Folgerø* ./ NOR, N° 15472/02, para. 102.

13 ECtHR 9.10.2007, *Zengin* ./ TUR, N° 1448/04, para. 36.

14 ECtHR 9.10.2007, *Zengin* ./ TUR, N° 1448/04, para. 63.

15 ECtHR 9.10.2007, *Zengin* ./ TUR, N° 1448/04, para. 76.

16 ECtHR 7.12.1976, *Kjeldsen* ./ DEN, N° 5095/71, para. 44.

17 ECtHR 7.12.1976, *Kjeldsen* ./ DEN, N° 5095/71, para. 51.

of lack of knowledge". It did not make a point of exalting sex or inciting pupils to indulge precociously in practices that are dangerous for their stability, health or future or that many parents consider reprehensible. Further, it did not affect the right of parents to enlighten and advise their children, to exercise natural parental functions as educators with regard to their children, or to guide their children on a path in line with the parents' own religious or philosophical convictions. The Court consequently came to the conclusion that the compulsory sex education in no way offended the applicants' religious and philosophical convictions to the extent forbidden by the second sentence of Article 2 of Protocol No. 1.<sup>18</sup>

## II. PARENTAL RIGHTS WITH REGARD TO THE INTERNAL SCHOOL ADMINISTRATION

As a second group, problems regarding the school administration (e.g. disciplinary measures) shall be discussed. The State must respect the religious and philosophical convictions of parents "in the exercise of each and every function they undertake in the sphere of education and teaching"<sup>19</sup>, including the internal administration of schools.

### a. Disciplinary Measures

In the case *Campbell and Cosans vs. The United Kingdom* the ECtHR had to deal with the question of school discipline maintained by corporal punishment over the parents' objections. The Court estimated the parents' objections as "philosophical convictions", since their views were related to a weighty and substantial aspect of human life and behaviour, namely the integrity of the person.<sup>20</sup> The Court found a breach of Article 2 of Protocol No. 1, second sentence, given that "a system of exemption for individual pupils in a particular school would necessarily be incompatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure".<sup>21</sup> Although the judgement dealt with the difficult question defining "philosophical convictions" it must be read in the light of handling the problem of corporal punishment in the UK in the 1980s and be considered as a decision in an individual case.

The suspension from school as a disciplinary measure might be compatible with Article 2 of Protocol No. 1, second sentence, if the penalty of suspension cannot be regarded as an exclusively educational measure, that may have some psychological impact on the pupil on whom it is imposed, and is only of limited duration, thus not requiring the exclusion of the pupil from the school premises.<sup>22</sup> The applicants in the *Valsamis vs. Greece* case alleged a violation of Article 2 of

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18 ECtHR 7.12.1976, *Kjeldsen ./. DEN*, N° 5095/71, para. 54.

19 ECtHR 25.2.1982, *Campbell and Cosans ./. GBR*, N° 7511/76, para. 33.

20 ECtHR 25.2.1982, *Campbell and Cosans ./. GBR*, N° 7511/76, para. 36.

21 ECtHR 25.2.1982, *Campbell and Cosans ./. GBR*, N° 7511/76, para. 37.

22 ECtHR 18.12.1996, *Valsamis ./. GRE*, N° 21787/93, para. 32.

Protocol No. 1 because of the suspension of their daughter for one day due to of non-attendance at a school parade. As argued above, the Court did not share their view. Nevertheless, this judgment also has to be regarded as a decision in an individual case, since the reasons given by the Court do not seem convincing nowadays.

Up to date the ECtHR has not had to deal with pupils wearing headscarves in schools with regard to Article 2 of Protocol No. 1, second sentence, but to Article 9 of the Convention. Unlike with Article 2 of Protocol No. 1, second sentence, which includes only the parents' right, Article 9 contains the children's right of respect for their own convictions and beliefs. Nevertheless, the Court found no violation of Article 9 in the expulsion from school of two girls in France wearing headscarves and refusing to take them off during physical education and sports classes.<sup>23</sup> Consequently, a possible application of parents on the same matter might neither constitute a violation of Article 2 of Protocol No. 1, second sentence.

### b. Symbols in classrooms

Up to now the ECtHR has had to deal with the question of crucifixes in classrooms with regard to Article 2 of Protocol No. 1 only twice.<sup>24</sup> In the first case *Bulski vs. Poland* the Court only gave general reasons for the inadmissibility but did not refer directly to this aspect of the alleged violation of the presence of the crucifix in the classroom.<sup>25</sup> It is not clear if the lack of reasons is a consequence of the insufficient allegations of the applicant or if the Court did not see an interference with the parents' right. The only possible conclusion is that the Court did not see an apparent violation of rights under the Convention in the presence of a crucifix in classrooms, otherwise this aspect would have been examined more thoroughly by the Court.

Contrary to this decision, the Court found a violation of Article 2 of Protocol No. 1 taken jointly with Article 9 of the Convention in the presence of the crucifix in the case *Lautsi vs. Italy*, because according to the Court "the compulsory display of a symbol of a given confession restricted the right of parents to educate their children in conformity with their convictions and the right of children to believe or not to believe".<sup>26</sup> However, the judgement does not seem convincing – especially concerning the dogmatic aspect. The Court does not distinguish between the rights of the parents (Article 2 of Protocol No. 1) and the rights of the children (Article 9 of the Convention), but holds that there has been a violation of Article 2 of Protocol No. 1 "taken jointly" with Article 9 of the Convention. It will have to be awaited if this decision becomes final as Italy announced to request the case to be referred to the Grand Chamber. If the case raises a serious question of interpretation or application or a serious issue of

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23 ECtHR 4.12.2008, *Dogru* ./ FRA, N° 27058/05, para 76; ECtHR, 4.12.2008, *Kervanci* ./ FRA, N° 31645/04, para. 76.

24 The second case ECtHR, 3.11.2009, *Lautsi* ./ ITA, N° 30814/06 was published in November 2009 and could not be taken into account fully in the prime edition of this article.

25 ECtHR 30.11.2004 (dec.), *Bulski* ./ POL, N° 46254/99.

26 ECtHR, 3.11.2009, *Lautsi* ./ ITA, N° 30814/06, para. 57f.

general importance the referral request is to be granted.<sup>27</sup> Thereafter the Grand Chamber would render its decision in a new judgement.

### III. PARENTAL RIGHTS WITH REGARD TO THE SCHOOL SYSTEM IN GENERAL

As a last group of cases, problems concerning the school system in general shall be discussed. The right to education in Article 2 Protocol No. 1, first sentence, commits the State to establish a school system<sup>28</sup>, as "no one shall be denied the right to education". A compulsory system of education is not contradictory to the obligation of Article 2 of Protocol No. 1<sup>29</sup>, even though it is limited by the rights of the children to education and their parents' right to respect for their convictions and beliefs.<sup>30</sup> However, the setting and planning of the curriculum fall in principle within the competence of the Contracting States.<sup>31</sup> The Court stated that the right of education calls "by its very nature for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals"<sup>32</sup>; therefore, a broad margin of appreciation for the State can be assumed.<sup>33</sup> Nevertheless this margin of appreciation is limited by the parents' rights to respect their convictions and beliefs.

#### a. Specific types of schools

Since the parents' right – as mentioned above – is not an absolute right, but is limited as a right to respect their convictions and beliefs, parents cannot demand that their children be taught in a specific way, as for example demanding that disabled children be taught in the normal school system and not be placed in special schools. The European Commission of Human Rights (ECtHR) decided in the case *Graeme vs. The United Kingdom* that the right of the child to effective education prevailed over the parents' view and declared the application as ill-founded.<sup>34</sup> Also, the obligation of Article 2 Protocol No. 1, second sentence, does not require of the State that it respect parents' linguistic preferences in the sphere of education or teaching<sup>35</sup>, given that these cannot be regarded as a "religious" or "philosophical" conviction or belief. However, in its more recent judicature the Court found a breach of Article 2 of Protocol No. 1, second sentence, in the case *Cyprus vs. Turkey*, since there had been no secondary

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27 *Reid*, I-017.

28 *Grabenwarter*, Europäische Menschenrechtskonvention<sup>4</sup> (2009), § 22 para. 71.

29 ECoHR 6.3.1984, *Family H* ./ UK, N° 10233/83; also see *Reid*, IIB-094.

30 *Vermeulen*, in: van Dijk/van Hoof, Theory and Practice of the European Convention on Human Rights<sup>4</sup> (2006), p. 901.

31 ECtHR 7.12.1976, *Kjeldsen* ./ DEN, N° 5095/71, para. 53.

32 ECtHR 23.7.1968, *Belgian Linguistics* case ./ BEL, N° 1474/62, p. 28 para. 5.

33 Cf. *Grabenwarter*, § 22 para. 71.

34 ECoHR 5.2.1990, *Graeme* ./ UK, N° 13387/88.

35 ECtHR 23.7.1968, *Belgian Linguistics* case ./ BEL, N° 1474/62, p. 29 para. 6.

education through the medium of the Greek language in northern Cyprus.<sup>36</sup> The Court did not qualify the convictions of the parents' as "religious" or "philosophical", but stated that the provision of secondary education in the south of Cyprus in keeping with the linguistic tradition did not suffice to fulfil the obligation laid down in Article 2 of Protocol No. 1.<sup>37</sup> Whether a rejection of the constant judicature can be followed from this, or whether this decision only requires to maintain once established schools, has to be awaited. However, the case has to be seen in the light of the Turkish military operations in northern Cyprus and the continuing division of the territory of Cyprus as well.<sup>38</sup>

### b. Private schools and home schooling

Article 2 of Protocol No. 1, second sentence, aims at safeguarding pluralism in education, which is essential for the preservation of the democratic society.<sup>39</sup> This pluralism in education includes the right to start and run a private school, which is part of the parents' right to respect their convictions and beliefs as decided by the Commission.<sup>40</sup>

The right to teach their children at home is not included in the parents' right to respect for their convictions and beliefs. In the case *Konrad vs. Germany* the Court accepted the exclusion of home schooling, as this was to ensure integration into and first experiences of society for children. It stated that the applicant parents were free to educate their children after school and at weekends, so that their parents' right to education in conformity with their convictions was not restricted in a disproportionate manner.<sup>41</sup>

## IV. CONCLUSION

In all three groups of cases the ECtHR examined whether the respondent States took the utmost care to respect the parents' religious and philosophical convictions and beliefs in the exercise of each and every function they undertook in the sphere of education and teaching. Indoctrination in any case is the limit which leads to a breach of Article 2 of Protocol No. 1, second sentence.

Concerning the content of teaching the ECtHR generally examined an alleged violation of Article 2 Protocol No. 1 in two steps. Firstly, whether information or knowledge is conveyed in an objective, critical and pluralistic manner is examined. If this is not possible, as for example with confessional or denominational religious instruction, the ECtHR secondly examines if this imbalance can be brought to a level acceptable under Article 2 of Protocol No. 1 through the

36 ECtHR 10.5.2001, CYP ./ TUR, N° 25781/94, para. 277, 280.

37 ECtHR 10.5.2001, CYP ./ TUR, N° 25781/94, para. 278.

38 ECtHR 10.5.2001, CYP ./ TUR, N° 25781/94, para. 13.

39 ECtHR 29.6.2007 (GC), *Folgerø* ./ NOR, N° 15472/02, para. 84 lit. b.

40 ECoHR 6.3.1987, *Jordebo* ./ SWE, N° 11533/85.

41 ECtHR 11.9.2006 (dec.), *Konrad* ./ GER, N° 35504/03.

possibility to request exemption. In case even the exemption procedure cannot be considered in accordance with the parents' right of respect for their convictions – as in the *Folgerø* case – there is a violation of Article 2 Protocol No. 1, second sentence. In case the information or knowledge is conveyed in an objective, critical and pluralistic manner, there is no violation and the second step in the examination can be omitted (e.g. *Kjeldsen*).

With regard to the internal school administration no clear pattern of the examination of the ECtHR is observable. This is the case, on the one hand because the decisions of the Court have to be seen as decisions in individual cases (e.g. *Campbell and Cosans* and *Valsamis*) and on the other hand because the Court gave only general reasons for the inadmissibility (e.g. *Bulski*).

Regarding the school system in general, the parents' right is closely linked to the enjoyment and the exercise of the right to education<sup>42</sup>, as the State is obliged to set up a school system. In doing so the State has to respect the parents' right which means more than "acknowledge" or "take into account"<sup>43</sup>, but includes a positive obligation. Nevertheless, a margin of appreciation remains for the State as long as a pluralistic education is ensured. Consequently, the parents' right and the margin of appreciation of the State are limited by one another. On the one hand the State is not required to provide for special facilities to accommodate the parents' particular convictions; nor is the State obliged to set up and support schools serving such beliefs.<sup>44</sup> On the other hand, the State has to organise the public school system in that way that parents can send their children to state schools primarily<sup>45</sup> rather than to private schools.

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42 Cf. ECtHR 29.6.2007 (GC), *Folgerø* ./ . NOR, N° 15472/02, para. 84 lit. e.

43 ECtHR 29.6.2007 (GC), *Folgerø* ./ . NOR, N° 15472/02, para. 84 lit. c.

44 *Vermeulen*, p. 905.

45 *Grabenwarter*, § 22 para. 72.