



# WRITTEN OBSERVATIONS

Submitted to the European Court of Human Rights

in the case

***WUNDERLICH V. GERMANY***  
**(n°18925/15)**

**(translated from French)**

**Grégor Puppinck**  
**Director**

9 December 2016

## Summary

The most important thing is to reaffirm the principle, both liberal and of natural law, according to which family takes precedence on State, particularly as regards education and teaching. If the Court had to rule on the basis of the opposite principle, it would thus join the ranks of statisms and totalitarisms.

- Parents are entitled full respect of their freedom of education by the State. The right for parents is not used with regard to children, but against the State. With regard to children, the parents have a duty which legally takes the form of a freedom. As for children, they have a right to education from their parents and then from society.
- The Convention protects the right to found a family (Art. 12), the integrity of family life against the arbitrary interference of the State (Art. 8) and parental rights as regards education and teaching (art. 2 of the 1<sup>st</sup> protocol). The writers of the Convention wanted to protect these freedoms from the control of the State.
- Article 2 of the 1<sup>st</sup> Protocol does not explicitly recognize the right for parents to ensure themselves the education and teaching of their children, but it seems obvious –especially as regards education– within the abilities of parents. The text does not explicitly recognize the right of parents to home-school their children, nor does it explicitly recognises their right to found private schools. It has to do with the fact that the right in question guarantees a general freedom to parents and imposes to the State the negative obligation to respect this freedom. Article 2 of the 1<sup>st</sup> Protocol does not define the maximum limits to the freedom of parents, but the minimum limits that the State must respect: the respect of the convictions of the parents when the children are instructed in public schools. It would be absurd to wonder whether Article 2 of the 1<sup>st</sup> Protocol prescribes a positive obligation for the State to authorise home-schooling or private schools, for it essentially contains the negative obligation not to oppose to them, for the freedom of education of the parents is a fundamental right, prior to that of the State. Even more, this right obliges the State to respect the convictions of parents when it assumes functions in education and teaching.
- The limit to the right of parents, as well as to that of the State, consists in the right of the child not to be deprived of teaching.
- Hence, *in the present case*, it is possible to conclude to the violation of the Convention with no necessity to affirm that the States have the unconditioned obligation to allow home-schooling. One needs only consider that Germany had no sufficient motive in the present case, in regard to the superior interest of the children, and especially in regard to their right to teaching, to remove the children from the parents' custody; this measure being obviously disproportionate.

\*

The application introduced by the petitioners contains a good presentation of the current the Court's case law; henceforth, it is not useful to renew this presentation in these observations. To stay on the level of general principles, and in the interest of justice, our observations aim at putting things into perspective on the matter, to better understand what is at stake, particularly through the preparatory work of the Convention.

\*

\*

## 1. Plato or Aristotle

This case questions an old opposition between two conceptions of relations existing between the family and the city, conceptions that were already expressed by Plato and Aristotle. It is useful to remind them to show the Court, if it were needed, the depth of issue of the current case.

For Plato, the family unity, or *oikos*, through the affective and material links it generates, is a cause of division, of inequality and of conflicts within society,<sup>1</sup> and it would be anti-political. In his ideal city, this social, familial and economic unity ought to be destroyed to reinforce the unification of the city. Hence, among the guardians of the City, there needs be “*that these women shall all be common to all the men, and that none shall cohabit with any privately; and that the children shall be common, and that no parent shall know its own offspring nor any child its parent.*”<sup>2</sup> For Plato, the guardians should form a *unique* family, making the rivalry between *oikoi* impossible, the unity of the guardians conditioning that of the whole city. In his view, children are common to the society, their education is assured by society for it is a liberation from opinions and families.

Aristotle clearly opposes the collectivism of Plato. Several chapters of his *Politics* deal with the education of the youth, of which he claims “*That the legislator must, therefore, make the education of the young his object above all would be disputed by no one*”. For the Stagirite, family is not an association of individuals, but an order where different and complementary elements are organised, it is constituted not only by biological and affective connections, but also by a common heritage; it is also an economic entity, a place of work and sharing; it is in itself a small society. Family is also the basic unit of society: several families make a village, and several villages make a State. Aristotle is in favour of a public and collective education: “*And inasmuch as the end for the whole state is one, it is manifest that education also must necessarily be one and the same for all and that the superintendence of this must be public, and not on private lines, in the way in which at present each man superintends the education of his own children, teaching them privately, and whatever special branch of knowledge he thinks fit. But matters of public interest ought to be under public supervision; at the same time we ought not to think that any of the citizens belongs to himself, but that all belong to the state, for each is a part of the state, and it is natural for the superintendence of the several parts to have regard to the superintendence of the whole.*”<sup>3</sup>

## 2. The idealistic and potentially totalitarian conception of connections between family and society.

While both Plato and Aristotle make the State prevail on the person, the former is radically different from the latter in that he wants to change or abolish family to create an ideal society: he submits family reality to a political project; it is a potentially totalitarian project. On the contrary, Aristotle tries to observe the natural reality of the family and of the city and to deduce the fair relationship between them.

In a very schematic way, these two approaches are antagonists, idealistic for Plato, and realistic for Aristotle. The idealistic approach, which submits families to a project of society,

---

<sup>1</sup> HELMER, Étienne, « Le remodelage politique de l'*oikos* dans la *République* de la famille au modèle familial, de l'économie domestique à l'économie politique », *Plato 11* (2011), Online: March 2012, URL: <http://gramata.univ-paris1.fr/Plato/article98.html>, last check 7 December 2016.

<sup>2</sup> *Republic*, V, 457c10-d3.

<sup>3</sup> *Politics*, 1337a.

of State or of nation, has bred the philosophy of the Enlightenment, and the nationalists and then totalitarian regimes of the XIX<sup>th</sup> and XX<sup>th</sup> centuries.

School and State education has always played a central instrumental role in the setting of the ideologies and political programs. Hence, in the beginning of the XX<sup>th</sup> century in France, after the prohibition and the expulsion of Catholic teaching institutions, history school books explicitly aimed at making children “good republicans”. The cult of the republic and of the nation, equally in France and in Germany, had a large share of the responsibilities in the massacres of both world wars. Nazi Germany and fascist Italy both used school to condition youth. Thus, Nazi Germany forbade catholic schools,<sup>4</sup> while Mussolini wanted to submit them to his ideology. In fascist schools, “*pupils are educated in the way wanted by the Party, which controls, as well, the leisure activities of the whole population through its dopolavoro organisations*”.<sup>5</sup> The same thing happened in the soviet regimes.

Still nowadays, in Europe, important political personalities believe that the role of school is first to give citizens to the State. The recent French Ministry of National Education thus wrote in 2008:

*“School must operate this miracle of fathering through which the child, stripped off all his pre-republican links [namely, familial, cultural, religious, ethnic, etc...] will rise to become citizen, an autonomous subject. It is through this new birth, a transubstantiation which happens in and through school, this new Church with its new clergy, its new liturgy, its new Tablets of Law. The republican and lay society has no other choice than to teach herself (Quinet), to be a perpetual renewal of the Republic in every republican, a continuous birth of every citizen in every child, a pacific but constant revolution”.*<sup>6</sup>

According to this approach, families are for the State an obstacle to the appropriation of the child, an obstacle that the public schooling must allow to circumvent.

### 3. Realistic, organic and subsidiary comprehension of society

On the contrary, the realistic tradition refuses to apply an ideological project to reality, but is based on the respect of natural and social realities. According to this tradition, which is also that of natural right (while idealists are often positivists), society is organically organized. The main points of this organization can be shown as follows:

Persons, families, civil society and State are distinct realities. The respect by the State of the components of civil society is a condition of the social **pluralism**, which contributes to the common good and to democracy.

Society is at the **service** of people and subsidiaries societies which constitute it. The State is not the author but the servant of civil society, that is to say of the people and groups that make it up, for the existence of the State derives from the civil society. The people is not made for the State but the State is made from society and for its service.

The State is hence at the service of **families**, which are the first natural societies, the fundamental units of society. Families exist independently of the State. At the heart of family life, one finds the transmission of material and immaterial heritage: a filiation, a tradition, a culture, values, an education, etc. Families are a natural society, a community alive and dynamic through generations, they contribute to the welfare of society in a unique and irreplaceable way. Without them, there wouldn't be society. Families have their own and

---

<sup>4</sup> Marc-André Charguéraud, *Les Papes, Hitler et la Shoah, 1932-1945*, Labor et fides, 2002, pp. 62-63.

<sup>5</sup> Encyclopédie Larousse, article « Fascisme », <http://www.larousse.fr/encyclopedie/divers/fascisme/51294>

<sup>6</sup> Vincent Peillon, *La Révolution n'est pas terminée*, Le Seuil, 2008, p. 17.

original rights, that is to say, not granted by the State, in the same way as human rights, which are prior to the State because they exist by the nature of man itself.

The respect of families by the State is realized mainly through the principle of **subsidiarity**, under which society and the State must not remove from the family the tasks that it can accomplish alone or freely associated to other families. The State must not absorb or substitute itself to families but on the contrary it must recognize and support them in accomplishing their own responsibilities. It must act for the welfare of families which themselves contribute to the common good. The State helps the common good by serving the families. The first and essential specificity of families is to bear **children**; this birthing is not only biological but also cultural.

Because the parents gave birth to their children, they have the original right and duty, that is to say the responsibility, to educate them. This responsibility is natural *stricto sensu*, for issued of birth (*natus*), it is not given by the State (but by the author of life) and is inalienable. The education of children –which implies between others teaching– is thus under the responsibility of the family, society being able to help and support the family in the accomplishment of its duty. In return for this duty, children have the right to receive protection and education from those who took the responsibility to bear them.

Indeed the parents are the **first educators** of their children but they cannot meet all their needs as they grow. To assume fully this responsibility, they must obtain the collaboration and the help of other families and components of society, in particular schooling, religious, cultural, musical, sport association, *i.e.* subsidiary “societies” etc.

Parents are thus led to **delegate** a part of the education and teaching of their children to other educators, but it is only a delegation of the *exercise*, and not a transfer of the educative *responsibility*, which is inalienable. Because it is a delegation, the parents must be able to choose the educators (or at least the latter should not be imposed absolutely to the former) and have them respect their will as regards the education and teaching given to their children.

Because of its subsidiary role, society can **relieve** the deficiencies of parents when they are obvious, for the good of children, but this faculty of society is limited in respect for the rights of the parents. Thus, for example, during the Western Middle-ages, while society was deeply religious, St Thomas Aquinas thought it was illegitimate to remove a child from his Jewish parents, for even the interest of the child to be baptized and raised in the “true religion” did not prevail on the respect of the natural rights of his parents.

#### **4. The choice after the War of the subsidiary society**

##### a. Through the Universal Declaration of Human Rights

It is this subsidiary understanding of the organization of society which was reaffirmed after the Second World War, by making the **person** –as a naturally sociable being– the subject and aim of the political and legal order. It appears in the wording of the Universal Declaration of Human Rights, which then inspired the European Convention.

The Universal Declaration recognises that the human being is not an abstract and isolated “individual” but a social being. The Declaration thus underlines that only in the “community” that the “*the free and full development of his personality is possible*” (art. 29). The family, as a fundamental cell of society, is the first community; society must not interfere with its fulfilment, but allowing it to lead “*an existence worthy of human dignity*” (art. 23.3) and reach a “*well-being*” (art. 25.1).

International law and numerous national constitutions have recognised this in asserting that family is a “*fundamental unit of society*”<sup>7</sup>, and also “*the natural and fundamental group unit of society*”.<sup>8</sup>

As was solemnly stated in several international instruments, family is protected against “*arbitrary interference*” by the State (art. 12) and is recognized as a “*fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children*”.<sup>9</sup> The protection not only regards the couple but the family, which “*is entitled to protection by society and the State*”<sup>10</sup> “*while it is responsible for the care and education of dependent children*”.<sup>11</sup>

This intertwining integration between couples, families and society is a result of the fact that couples found families, which constitute society and insure its continuity. The recognition given to the couple by society through marriage is a result of its contribution to the common good through the foundation of a family. To give an appropriate framework to the bearing and educating of children is the first social aim of marriage. Family rights are hence natural rights of social nature. This realistic and subsidiary understanding of society, which differs from an idealistic and individualistic conception, was regularly reaffirmed since 1948, particularly by the Council of Human Rights in 2015.<sup>12</sup>

As for the rights of parents as regards education, the Universal Declaration recognizes that “*parents have a prior right to choose the kind of education that shall be given to their children*” (art. 26.3 UDHR, our emphasis). This priority is the expression of the precedence and superiority of the rights of parents of those of society; it is exercised against the State and all other social groups (including religious and political groups).

A decade later, with the UNESCO Convention against Discrimination in Education (1960), the States committed to “*respect the liberty of parents and, where applicable, of legal guardians, firstly to choose for their children institutions other than those maintained by the public authorities but conforming to such minimum educational standards as may be laid down or approved by the competent authorities and, secondly, to ensure in a manner consistent with the procedures followed in the State for the application of its legislation, the religious and moral education of the children in conformity with their own convictions (...)*” (art 5. b. and c.).

---

<sup>7</sup> European Social Charter, 1961.

<sup>8</sup> Article 16 § 3 of the Universal Declaration of Human Rights of 1948; article 23 §§ 1 and 2 of the International Covenant on Civil and Political Rights of 1966, article 10 § 1 of the International Covenant on Economic, Social and Cultural Rights, Preamble to the Convention on the Rights of the Child of 1989; article 16 of the European Social Charter (revised) of 1996; 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.

<sup>9</sup> Preamble to the Convention on the Rights of the Child.

<sup>10</sup> Article 16 § 3 of the Universal Declaration of Human Rights; article 23 § 1 of the International Covenant on Civil and Political Rights.

<sup>11</sup> Article 10 § 1 of the International Covenant on Economic, Social and Cultural Rights.

<sup>12</sup> ONU, United Nations Human Rights Council, Resolution on the “Protection of the family”, 1<sup>er</sup> July 2015, A/HRC/29/L.25

## b. Through the European Convention and the First Protocol to the Convention

On the ruins of Western Europe destroyed by nationalism in 1914 and totalitarianism in 1939, and against the Soviet Empire, in 1948 the aim was to restore the natural order to fund liberal democracy. Human Rights precisely consist in putting the human person back as the center and aim of society. The person, protected by Human Rights is not an isolated individual, it is not the abstract citizen, that is to say the political subject, but the person in his human and social reality and dimensions, in his relations, his culture and surroundings. Human Rights, like the liberal system, are based on the trust in the person and the distrust towards the State; they aim at protecting people from the interference of the State.

Yet, the first protection of people is their families, societies of which they are naturally part. The recent historical experience showed that to submit people to the State, they must first be reduced into individuals, and hence family unit and such subsidiary societies must first be destroyed. Family life hence clearly deserves protection, not only for the sake of its own virtues, but also for it constitutes the most powerful natural shield against the excessive control of the State on society and people. It is brilliantly shown in the *travaux préparatoires* of the Convention and the first Protocol. Hence, during the talk on the future article 2 of the 1<sup>st</sup> Protocol, several members said as much. For example, the Irish MEP Mr Sweetman underlined the importance of recognition of the person and the family as a natural defense against statism and totalitarianism:

*“The fundamental difference between a democratic and a totalitarian regime is that we believe that the State exists for the individual, while they believe that the individual exists for the State.*

*If you accept that principle, then you must also accept the principle that when the young generation is growing up it must be nurtured, primarily looked after, primarily kept, and its primary education must be selected by the body which is nearest to the individual rather than by the State.”<sup>13</sup>*

The preparatory works of the Convention and of the 1<sup>st</sup> Protocol to the Convention clearly show that the first aim of the authors of the Convention was not to consecrate a “right to instruction”, but to guarantee the prior right of parents against the State. Hence, the right of parents was the 3<sup>rd</sup> paragraph of article 12 of the initial project of the Convention. The right which was initially planned was entitled not “right to education” but “*the prior right of parents to choose the kind of education to be given to their children*”. As shown in the report of the Committee on Legal and Administrative Questions, this right is one of the aspects of “*family rights*”, with “*the right to marry and to found a family*” and the right to “*freedom from arbitrary interference with the family*”. Hence the right of parents as regards the education of their children is a component of family rights and must be understood in conjunction with the right to marry and to found a family and the right to respect for family life. Incidentally, “*to found a family*” cannot be reduced to the sole bearing of children but also implies the transmission of a material and immaterial heritage, namely education and teaching. As regards the immunity of the family, Mr Lavery, Irish MP underlined that “*the begetting of children is surely not the ‘founding’ of a family, and something more is to be protected if family life is to continue*”.<sup>14</sup> The Committee on Legal Questions also stated that “*it considered that the father of a family cannot be an independent citizen, cannot feel free within his own*

---

<sup>13</sup> *Preparatory works*, p 20.

<sup>14</sup> *Sous-comité chargé de procéder à une étude préalable*, février 1950, *Preparatory works*, p. 50.

country, if he is menaced in his own home and if, every day, the State steals from him his soul, or the conscience of his children”.<sup>15</sup>

As with the other Human Rights, particularly parental rights, the rights of parents are *natural rights*. In the preparatory works, the rights of parents are very often called by authors of all political tendencies, a “*natural*”, “*elementary*”, “*fundamental*”, “*innate*” or “*priority*” right; it protects the freedom of parents against the State but neither institutes this freedom in itself nor concedes it. The freedom/responsibility of parents naturally exists. Human Rights recognize and protect it but do not create it. As French MP Mr Pernot said:

*“When we request, on behalf of the family, the rights of parents to ensure that their children are brought up in accordance with their opinions or religious convictions, we are not asking a favour. We are expressing a natural right. We desire that the father and mother of a family may be able to mould the souls of their children in accordance with their own convictions, for there is nothing dearer to a father than the souls of his children.”*<sup>16</sup>

## **5. Respect of family life, including the duties of parents, is a condition of a liberal society**

The authors of the Convention were conscious of the fact that the recognition of the family rights and duties is a condition to oppose and prevent collectivism; considering that the German, Italian and Soviet schools were all public schools and “educated” generations of children in accordance with the official ideology of the regime, and often against the convictions of their parents. The status of public or state school is hence in no way a guarantee of political and ideological neutrality, quite the opposite, experience shows that families are generally less politicized than the State, and hence constitute a natural obstacle to totalitarianism.

For Pierre-Henri Teitgen, Rapporteur of the Committee on Legal Questions, “*it is essential, for our Protocol to protect the right of parents in the field of education and teaching against the danger of nationalization, absorption, monopolization, requisitioning of young people by the State –irrespective of whether they have religious convictions or merely the philosophical convictions of traditional humanism*”.<sup>17</sup> For Sir Maxwell-Fyfe, the recognition of this right “*is to meet (...) a terrible aspect of totalitarianism*” which leads to make it “*impossible for their parents to bring them [their children] up in their own religion and philosophic beliefs*”.<sup>18</sup>

The first draft of the report of the Committee of experts to the Committee of Ministers underlines that “*the totalitarian regimes had a tendency (...) to have a detrimental effect on the education of children by depriving them of the direct influence of their parents*”.<sup>19</sup> As for the Committee of Experts on Human Rights, in its report to the Committee of Ministers, it underlined that “*the totalitarian regimes (...) sought systematically to expose the children to their ideological propaganda, by depriving them of the rightful influence of their parents.*”<sup>20</sup>

---

<sup>15</sup> Pierre-Henri Teitgen, *Preparatory works*, p.6.

<sup>16</sup> *Preparatory works*, p. 185.

<sup>17</sup> *Preparatory works*, p. 195.

<sup>18</sup> Session of the Assembly 25<sup>th</sup> August 1950.

<sup>19</sup> *Preparatory works*, p. 52.

<sup>20</sup> *Preparatory works*, p. 53.



## 6. Final writing of article 2 of the 1<sup>st</sup> Protocol

One must note that, at the beginning, the object of this provision was not to guarantee the right to teaching, but the respect of the fundamental right of parents as regards the education and teaching of their children. The insertion of a reference to the right to teaching, at the top of the article, was made subsequently, as a complement and a counterweight to the right of parents, as a means to implicitly show that the latter cannot be exercised at the expense of the child's right to be educated. This right to teaching was worded in a negative way not to impose on States a general positive obligation in this regard.<sup>21</sup> The authors also had the care of not to force themselves to allow parents to teach their children political convictions opposed to the values of the Council of Europe.<sup>22</sup>

In its report of 4<sup>th</sup> December 1951, the Committee on Legal and Administrative Questions of the Assembly<sup>23</sup> insists on the fact that “*the rights to which parents can and should be entitled, as the Assembly declared on 25<sup>th</sup> August 1950 by 97 votes to 0 with 15 abstentions, and by 111 votes out of 111 on the text as a whole, extend not only to the education but also to the teaching given to their children*”.<sup>24</sup> The Rapporteur Mr Teitgen clarified: “*it is in our view impossible, in a text as important as this, to limit the rights of parents merely to education in the sense of upbringing*”.<sup>25</sup> The 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*”.<sup>26</sup> It is also underlined by the Secretary General in his letter of 24<sup>th</sup> October 1951 to the Foreign Ministers of the Member States.<sup>27</sup>

In the intention of the drafters, this right relates separately on the *education* and on the *teaching* of children. The obligation of the State is hence not limited to proposing an optional religious lesson course in public schools, but, much more than that, for it is both education and teaching, when given by the State, that must respect the convictions of the parents. As underlined by Mr Rolin, MP, author of a version of what will become article 2 of the 1<sup>st</sup> Protocol to the Convention: “*full respect for religious and philosophical beliefs can only be ensured if not only religious instruction is guaranteed, but all instruction is permeated with a religious spirit: it is this which distinguishes denominational instruction from State instruction*”.<sup>28</sup>

The main mode for the State to respect this right is to respect the freedom of parents not to put their children in state schools. As mentioned by Mr Modinos, on behalf of the Secretary General of the Council of Europe,<sup>29</sup> the obligation to give every child an education and teaching compatible with the religious and philosophical beliefs of their parents does not weigh on the State, but what weights on it is the *negative* obligation to respect the “right” of parents to ensure this education independently from to State education<sup>30</sup>

---

<sup>21</sup> Note of the Secretary General, *Preparatory works*, pp. 152 and 153.

<sup>22</sup> *Ib.*

<sup>23</sup> 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.

<sup>24</sup> *Preparatory works*, p. 163.

<sup>25</sup> *Preparatory works*, p. 167.

<sup>26</sup> *Preparatory works*, p. 169.

<sup>27</sup> *Preparatory works*, p. 157.

<sup>28</sup> *Preparatory works*, p. 91.

<sup>29</sup> Note of 3<sup>rd</sup> December 1951

<sup>30</sup> *Preparatory works*, p. 199.

What is to underline is that article 2 of the 1<sup>st</sup> Protocol to the Convention contains, essentially, a negative obligation for the State: that not to violate the freedom of parents to educate and teach their children according to their convictions.<sup>31</sup> The “right of parents” consists in the negative obligation for the State to respect their freedom to exercise their natural and primary responsibility towards their children.

It is logical that a disposition establishing a negative obligation (on the State) to respect a (individual) freedom not define limits to this freedom, but only the possibility of the State to limit this freedom. What is more surprising is the absence of motives to justify the restrictions which can be imposed by the State to the freedom of parents, contrary to the freedoms guaranteed by articles 8 to 11 of the Convention. One can deduce from this that the educational freedom and right of parents enjoys a higher degree of protection. The only limit to the right of parents that can be deduced from article 2 of the 1<sup>st</sup> Protocol to the Convention is implicit: it is the respect for the right of the child not to be deprived of teaching.

What applies as well is the general limit of article 17 of the Convention related to the abuse of rights, as was reminded during the *travaux préparatoires*. The Court also introduced another limit to the parent’s right in giving a judgement on the existence of a “conviction” depending on its quality given the values of the Convention.

## **7. Implicit freedom to insure teaching of one’s children outside the State structures**

When the Convention was written, the practice of home-schooling and preceptorship was widespread, as it is still nowadays in European countries and the United States. This practice was almost not mentioned explicitly during the Preparatory works. The writers deeply wanted to guarantee the freedom for parents to escape State schooling and, for that, to found private schools. At no moment is there a mention of socialising virtues of collective teaching, except to denounce its abusive use by totalitarian regimes. The fear was hence not on “*the emergence of parallel societies based on separate philosophical convictions*”<sup>32</sup> but much more, on the contrary, on that of a uniformed society by the State, not respecting minorities and families.

The only material limit recognised as regards the freedom of parents to escape the public education system was regarding finances. It is clear that governments, while recognising the educational freedom of parents, did not engage to fund the exercise of that freedom in the private framework.

Hence, it is not in the formal logic of the text to explicitly guarantee the right of parents to teach their children at home. Some did not understand its cause and regretted it. Thus the French MP Guy Mollet thought that the wording was “*far from satisfactory*” for it did not explain whether it guaranteed the right for parents to “*ensure, if necessary at their own expense, that their children receive instruction and education in accordance with the parents’ religious and philosophical beliefs*”.<sup>33</sup> Similarly, the Irish Minister of Foreign Affairs declared, while signing the Protocol, that “*in the view of the Irish government, article 2 of the Protocol is not sufficiently explicit in ensuring to parents the right to provide education for*

---

<sup>31</sup> The extent of this right is firmly reminded by the Assembly to the Committee of Ministers for the British representative wanted, on the contrary, reduce to the minimum its extent while writing that governments “take into account” the “freedom” of the parents.

<sup>32</sup> *Konrad and others v. Germany*, n° 35504/03, 11.09.2006

<sup>33</sup> *Preparatory works*, p. 91.

*their children in their homes or in schools of the parents' own choice, whether or not such schools are private schools or are schools recognised or established by the State*".<sup>34</sup>

Finally, keeping in mind that article 2 of the 1<sup>st</sup> Protocol guarantees the exercise of a freedom, one must underline that the question is not to know whether the Convention and the 1<sup>st</sup> Protocol to the Convention constrain the State in a positive obligation to allow home-schooling, but to know whether and under which conditions these texts permit the State to forbid parents from exercising this freedom. Indeed, to allow home-schooling is not a positive action but an abstention from the State in front of the fundamental freedom of the parents. In numerous European States, preceptorship is practised without being explicitly authorised, for it is a freedom, a natural right of parents, the proper exercise of which is controlled by the State only for the welfare of the child.

Hence, when parents decide to home-school their children whether themselves or with a preceptor, they should not ask for a schooling "dispensation", but simply inform the administration of their choice and accept regular controls. To speak of a dispensation implies to consider that the prior responsibility comes to the State. The role of the State is first to ensure that children are not deprived of teaching, particularly when it is given in private. When the State itself also ensures teaching, it does it by delegation of the parents, and must hence respect their convictions; it respects them in providing a teaching objective and free of any indoctrination.; but the problem is that the State is itself the judge of the objectivity of the teaching and of the neutrality of the doctrines that it often chooses to impose. When the State becomes an ideologue and uses school to instil children with social theories and political doctrines, then it is the conscience of responsible parents which constitutes the last obstacle of the swamping of society by the State, and hence is the true guarantor of the superior welfare of children.

Liberalism stands on trust towards people and distrust towards State; totalitarianism stands on the opposite choice.

\* \* \*

### **Quotes from the *Travaux préparatoires***

#### **Consultative Assembly of the Council of Europe, session of 7<sup>th</sup> and 8<sup>th</sup> December 1951**

Intervention of Mr Schmal, MP of the Netherlands:

*"The respect of the individual is the basis of the Western conception of the State and of society. That is why I venture to ask whether it is not natural and elementary that it should be the parents, first and foremost, who are responsible for the education of the children that they have brought into the world. If this is so, they must be given full freedom to carry out this sacred duty, which they cannot neglect with impunity! That is the very least that we ask.*

*If the State, in one form or another, has the monopoly of primary education, this right of the parents, to which I have just refereed, is in danger (...) Moreover, it should be clearly understood that this requirement in no way implies that it is the duty of the State to subsidise independent schools.*

*As for the fundamental right of the parents, all things considered, one point only is important: to make it possible for parents to refuse the compulsory education offered by the State if it is contrary to their conscience. It is no use saying that in any particular country where the State*

---

<sup>34</sup> *Preparatory works*, p. 209.

*school is compulsory, some provision, relatively modest, is made for religious instruction. I know that, Mr President, but such a thing is merely the minimum concession that could be made by a rationalist age. Practising Christians, whatever their creed, are anxious to provide their children with an education imbued with the Christian faith. In the school, "Christianity", in the words of Alexandre Vinet, "the eternal seed of liberty, should act like the leaven of the Gospel", leavening the whole lump" (p. 172).*

Intervention of Mrs Weber, German MP:

*"After having reminded how the III<sup>d</sup> Reich had impose its ideology to children and families, Mrs Weber recognised that, indeed, "the State has its rights in the schools", "but this principal right, in accordance with religious and philosophic convictions, is the right of the parents. It is a natural, innate right, like the right to live. It is also a duty to God who sent children to the parents and made them responsible for their education and upbringing. The State can never exempt them from that duty." (p.178)*

Intervention of Mrs Rehling, German MP:

*"At the baptism of their children, Christian parents give a solemn undertaking to do their best to bring them up in the Christian faith. By this understanding the method and the aim of education are fixed. It is my religious conviction as a Christian mother that I am responsible for my children, and that no Minister of State can assume this responsibility in my place."*

*"The rights of parents concerning the upbringing and education of their children are of a fundamental nature, whereas those of the State are subsidiary. (...) [I]f we wish strenuously to oppose everything that smacks of collectivism, as we have said here more than once, we must foster and increase individual responsibility. Furthermore, one of the most urgent tasks of this Assembly is to contend against totalitarianism. I shall venture to say that, though totalitarianism obviously exists under dictatorial Governments, it may also develop in democracies. We should offer the strongest possible opposition to any such development." (p. 184)*

Intervention of Mr Pernot, French MP:

*"As a father, I should like to repeat (...) that when we request, on behalf of the family, the rights of parents to ensure that their children are brought up in accordance with their opinions or religious convictions, we are not asking a favour. We are expressing a natural right. We desire that the father and mother of a family may be able to mould the souls of their children in accordance with their own convictions, for there is nothing dearer to a father than the souls of his children" (p. 185).*

Intervention of Professor Boggiano Pico, Italian MP:

*"The right to give education, moral and intellectual training to a child, as has been said here, rests with none other than its father. This is a matter of natural right. As a modest jurist and professor of Law, I can assure you that this is indeed, a natural right, which no one but an autocrat can dispute. I will add that neither the State nor the Church, be it the Catholic Church or any other –I can affirm this as a Catholic and a believer– has the right to come between a father and his children in the matter of education, that is to say, of moral guidance, the training and formation of their conscience" (p. 189).*

## **Preparatory works of the Universal Declaration of Human Rights**

During the Thirty-Seventh Meeting of the Commission on Human Rights, during the Consideration of the Reports of the Working Groups on the Declaration (Document

E/CN.4/57), the Commission discussed the article of the Declaration related to the protection of family.

Dr. Malik proposed the following substitute text for the second sentence of Article 15A:

*“The family deriving from marriage is the natural and fundamental group unit of society. It is endowed by the Creator with inalienable rights antecedent to all positive law and as such shall be protected by the State and Society.”<sup>35</sup>*

This proposal has been adopted by 15 votes.

Dr. Malik “pointed out that the word “family” was mentioned for the first and only time in the Declaration. He maintained that society was not composed of individuals, but of groups, of which the family was the first and most important unit; in the family circle the fundamental human freedoms and rights were originally nurtured. It therefore deserved greater prominence, he thought, than that given to it in the original text. Regarding the second sentence of his amendment, he said that he had used the word “Creator” because he believed that the family did not create itself. That word might give rise to objections, but he would very much like to have it [12] retained. He also contended that the family was endowed with inalienable rights, rights which had not been conferred upon it by the caprice of man, and he cited the use of the phrase “endowed by nature” in Article 1 as a precedent for the wording.”

---

<sup>35</sup> Preparatory works, p. 1283