Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

How Inclusive Do Religious Schools Need to Be to Respect Individual Rights to Freedom of Religion?

Question(s) at stake:

Whether the enrolment of a child from an agnostic family in a state-funded Catholic school infringes on the right of parents to give their children a moral and religious education in accordance with their own convictions.

Outcome of the ruling:

The Court annulled the original administrative decision and ordered the provincial education authority to ensure the child's admission to a public school, considering the exceptional circumstances and the parents' right to ensure that their children receive religious and moral instruction in accordance with their own convictions.

Topic(s):

- Education

Keywords:

- Freedom of thought, conscience and religion
- Right of parents to ensure the religious and moral education of their children
- State neutrality
- State-funded schools
- Best interests of the child

Tag(s):

- Positive and negative religious freedom
- Indoctrination
- Educational ethos

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Country:

Spain

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Date:

17 February 2017

Jurisdiction / Court / Chamber:

High Court of Justice Aragón, Contentious Administration Chamber

Remedy / Procedural stage:

Appeal

Previous stages:

No information found

Subsequent stages:

No information found

Branches / Areas of law:

Administrative law

Facts:

The appellants applied for their child’s enrolment in two public primary schools, with CEIP (Public School) San Juan de la Peña as their first choice and CEIP Monte Oroel as their second. However, the School Board at CEIP San Juan de la Peña rejected the application due to a lack of available spaces. Similarly, no spaces were available at the second-choice school. As a result, the child was allocated to Escuelas Pías de Jaca, a state-funded Catholic school, which was the only institution with available spots. The parents exhausted the administrative procedures before reaching the contentious administrative stage, arguing that as an agnostic family with an unbaptized child, they had the right to a non-denominational education, which they believed could not be provided by a Catholic school.

Ruling:

The appellants claimed a conflict of interests between the protection of religious freedom and the best interest of the child, as determined by his parents and the maintenance of a certain number of pupils in each classroom (Articles 10.1, 27, 16.1, and 39 of the Spanish Constitution, Article 154 of the Spanish Civil Code, Article 4 of Law 8/1985 of 3 July on the Right to Education, and Article 4 of Law 8/2012 of 19 July on Religious Freedom).

The appellants seek recognition of their child’s right to receive a comprehensive, non-religious education in Jaca, aligned with the development of his personality (Article 10 Spanish Constitution) and free from any religious influence. They therefore requested that the Directorate of the Provincial Service of Huesca, within the Department of Education, Culture, and Sport of the Government of Aragon, facilitate the proper enrolment of their son by adjusting the number of students permissible per class at San Juan de la Peña Public School to accommodate him. However, the administration argued that increasing the number of students per class to accommodate parental preferences for religious or moral education is impossible, citing the Supreme Court’s 30 March 2012

ruling, which prohibits such adjustments. Additionally, the administration maintains that there is no unmet need for schooling, as vacancies exist in schools participating in the public admission process, including the semi-public school Colegio de Escuelas Pías in Jaca.

The Court acknowledges the right included in Article 27.3 of the Spanish Constitution, which states that the public authorities guarantee the right of parents to ensure that their children receive religious and moral instruction in accordance with their own convictions, and considers the regional regulations governing the admission of students to public schools (Article 9 of Decree 32/2007 of 13 March of the Government of Aragon, which regulates the admission of pupils to public and subsidized private schools in the second cycle of preschool education, primary education, special education, compulsory secondary education, baccalaureate, and vocational training in the Autonomous Community of Aragon). The Court reasons that it is not feasible to argue that the education provided in a Catholic school can be detached from the parents' choice, even in the hypothetical scenario where no explicit religious instruction is offered. The school's religious ethos and character are inherently present in all its activities, including those at the early stages of education (e.g., symbols, school activities), making it impossible to reconcile the parents' wishes with what would constitute a suitable education for their child.

Therefore, this particular situation does not necessitate an increase in student enrolment; instead, it requires the Provincial Directorate, under the oversight of the Director General, to implement appropriate measures to ensure that students receive an education that aligns with their parents' beliefs. Consequently, the Court addressed the conflict between the requirement to maintain a specific student-to-classroom ratio and the parents' right to have their children be educated in accordance with their own convictions by prioritizing the fundamental rights of the parents in this specific instance. In light of the Court's interpretation, the appellants' child should be admitted to a non-religious public school.

Main quotations on cultural or religious diversity:

“Como bien se dice en el recurso de apelación, nuestra jurisprudencia constitucional se ha ocupado de la derivación de este derecho, que conlleva no obligar a nadie a la realización de un determinado culto religioso cuando esas no son sus creencias. Es lo que se denomina el ámbito externo de protección de ese derecho.”

“As the appeal rightly states, our constitutional jurisprudence has dealt with the derivation of this right, which entails not forcing anyone to perform a particular religious practice when it does not reflect their beliefs.This is what is called the external sphere of protection of this right.” (legal reasoning 1, para. 3)

“Por tanto el derecho que se actúa no es sólo el derecho a recibir una educación moral y religiosa concreta, sino de elección del Centro docente. Y como hemos dicho, este derecho nos parece de menor entidad que el de recibir una determinada educación, aunque puedan estar claramente relacionados. En el caso del Tribunal Supremo, no admitir la elección de centro docente no vulnera ese derecho pues la educación religiosa se va a dar en el Centro Público, aunque no con la intensidad y el ideario concreto que los padres solicitan. En este caso permitir la educación en un centro religioso del hijo de los actores, es directamente contrario e incompatible con su derecho a la educación moral y religiosa acorde con sus convicciones.”

“Therefore, the right in question is not only the right to receive a specific moral and religious education, but also the right to choose a school. And as we have said, this right seems to us to be of lesser importance than the right to receive a specific education, although they may be clearly related. In the case of the Supreme Court, not admitting the choice of school does not infringe this right, as religious education will be provided in the public school, although not with the intensity and the specific ideology that the parents request. In this case, allowing the child of the plaintiffs to be educated in a religious centre is directly contrary to and incompatible with their right to a moral and religious education in accordance with their convictions.” (legal reasoning 3, para. 5)

Main legal texts quoted in the decision:

Domestic law:

- Articles 10, 16, 27, 39 Spanish Constitution
- Article 2 Organic Law 7/1980 of 5 July 1980 on Religious Freedom
- Article 4 Organic Law 8/1985 of 3 July 1985 regulating the Right to Education.
- Article 157 Organic Law 2/2006 of 3 May 2006 on Education
- Articles 4, 6, 12 Organic Law 3/2020 of 29 December 2020 amending Organic Law 2/2006 of 3 May 2006 on Education
- Article 12 of Law 30/1992 of 26 November 1992 on the Legal Regime of Public Administrations and Common Administrative Procedure
- Article 9 Royal Decree 32/2007 of 13 March 2007 regulating the schooling of students in public and subsidized private schools in the second cycle of preschool education, primary education, special education, compulsory secondary education, baccalaureate, and vocational training in the Autonomous Community of Aragon
- Royal Decree 1537/2003 of 5 December regulating the minimum requirements for centres providing general education
- Article 139 Law 29/1998 of 13 July 1998 regulating the Contentious Administrative Jurisdiction
- Articles 154, 162 of the Civil Code

**International Human Rights Law **

- Articles 18, 26 Universal Declaration of Human Rights
- Article 13 International Covenant on Economic, Social, and Cultural Rights
- Articles 3, 12 Convention on the Rights of the Child

Cases cited in the decision:

None

Commentary

How Inclusive Do Religious Schools Need to Be to Respect Individual Rights to Freedom of Religion?

In the Spanish legal system, the right of parents to ensure that their children receive an education in accordance with their own beliefs is based on Articles 16.1, 27, and 2 of the Constitution, which guarantee the right to freedom of religion in both its individual and collective dimensions and broadens the protection of this freedom by granting immunity from coercion (Souto Galván 2011: 246). Article 27, which reflects international standards, grants parents the right to choose the moral and religious education of their child, but the Court did not mention Article 2 of Protocol 1 of the European Convention of Human Rights (ECHR). As regards the possession of this right, it is clear from the case law of the ECtHR that this right, while belonging to the parents, is part of the duty to ensure the upbringing and education of their children. From the outset, the ECtHR has stated that Article 2 does not permit a distinction to be drawn between religious instruction and other subjects. It requires the state to respect the religious and philosophical beliefs of parents in the public education system. States are not prevented from disseminating, through teaching or education, information or knowledge of a direct or indirect religious or philosophical nature, but they are required to disseminate the information or knowledge included in the curriculum in an objective, critical, and pluralistic manner (Souto Galván 2011: 255). Consequently, the state is prohibited from pursuing an indoctrination objective that could be considered incompatible with the religious and philosophical convictions of parents. This right is precisely formulated to either reinforce or limit the state's educational activities, with the aim of achieving the full realization of the right to education. It safeguards the pluralism of education that is essential for a "democratic society" (Souto Galván 2011: 257). The right to education, freedom of religion, the right to respect for private and family life, and the general spirit of the ECHR aim to protect and promote the values of a democratic society and prohibit the state from indoctrinating in the field of education. It also imposes a limit on parents who, as guarantors of their children's right to education and freedom of belief, must allow their children to receive the information and teaching necessary not only to attain a certain level of knowledge but also to achieve the goal of education, the development of their personality, and their personal autonomy.

In the Spanish understanding of the right to education, there is a clear obligation on the part of the state to ensure that every child has access to education. This obligation entails certain logistical and administrative challenges, as this case illustrates, such as ensuring that class sizes remain within certain legal limits and that available resources are used efficiently. When it comes to the protection of fundamental rights, administrative rules must be applied with flexibility. The Court has already stated that the protection of the right of parents to provide religious and moral education in accordance with their own beliefs should take precedence over any administrative restriction. The Court emphasized that the protection of constitutional freedoms (Article 27) must take precedence over rigid adherence to procedural norms such as class quotas. Accommodation is an exception to the existing legal or administrative framework and therefore requires the state to perform a balancing act of proportionality.

In the present case, the Aragonese regulations have a significant impact on the possibility to open additional places for children in public schools. Article 9 of Decree 32/2007 of 13 March 2007 of the Government of Aragon provides, in paragraph 5, that the directors of the provincial services must determine, before the admission procedure, the maximum number of pupils per classroom for each level of education. Furthermore, paragraph 6 states that this procedure is not necessary if the number of pupils exceeds the limit due to the presence of repeaters or “duly justified exceptional circumstances”, which do not affect the general situation in other schools in the area. In this case, there are 9 pupils who requested to have a place at the CEIP San Juan de la Peña and 3 at the CEIP Monte Oroel, as reported by both the Town Council and the Aragonese Public Administration. A possible solution would be to invoke Article 9.6 of Decree 32/2007, which classifies this situation as an “exceptional and duly justified case”, thus allowing an increase in the number of pupils in a public school in Jaca without having to follow the procedure for increasing the number of classrooms laid down in Article 9.5 of the same decree. However, as the Court noted, this situation does not require an increase in the classroom ratio, but rather that the Provincial Directorate provides reasonable accommodation and therefore takes

the necessary measures to ensure the proper education of the child and to inform the Director General accordingly. The above situation must also be seen in the light of the system of parental authority and in particular Article 154(2) of the Spanish Civil Code, which expressly includes the duty to raise children and to provide them with an integral education, a duty which includes everything necessary for the development of the child's talents and qualities to enable him or her to develop under the best possible conditions in the future (Gaspar Lera 2010: 338).

In addition, the second paragraph of Article 162 of the Civil Code excludes from the legal representation of the parents those acts relating to the rights of personality. The development of the personality as well as participation and freedom of religion are fundamental rights for the development of the child as a human being participating in a democratic society (Gaspar Lera 2010: 341). Therefore, decisions relating to the child's personality, such as which beliefs to profess or which educational establishment to attend, should take precedence over the parents' preferences. Moreover, a clear distinction must be made between the right to choose an educational institution and the right to direct a child's moral and religious education. While the choice of a particular institution may be subject to administrative restrictions, the right of parents to ensure that their child is not exposed to religious influences incompatible with their beliefs is of a higher order. This protection goes beyond the mere act of choosing a school and touches on the fundamental freedom of parents to ensure the moral development of their child.

A major concern for many agnostic families is the rationale for including subsidized religious schools in the list of state schools offered as an option to children. One of the functions of private and state-subsidized schools is to fill gaps in the public education system, particularly where there is a shortage of space and classrooms, and to act as a complementary network to the public system. Currently, if children are not accepted into their first-choice public school, they are assigned to other schools, which may include religious schools, to guarantee their right to education. The system takes into account families' second and

subsequent preferences, and if these schools are also full, the proximity of the family's home, the placement of the child's siblings or the parents' place of work are taken into account. Families who are dissatisfied with their school allocation may withdraw and choose another school outside the initial application period. However, they can only choose from schools with available places, which may require them to travel a considerable distance or result in them being placed in a school that is at odds with the educational values they wish to instil in their children. In their appeal, the appellants proposed three possible solutions to the conflict, all of which were rejected by the Court of First Instance. The first proposal was to open a new classroom in a public school in Jaca, but this was rejected as it would require additional budgetary and infrastructure resources. The second proposal was to remove religious symbols from the religious school, but this was considered incompatible with the educational ethos of the school. The third option was to reinterpret the regulations in light of the relevant constitutional rights, which would require adjusting the maximum number of pupils per classroom according to the specific needs of the school.

In its ruling of 2 December 2010 (STC 133/2010), the Constitutional Court clarified that Article 27 of the Spanish Constitution guarantees parents the right to choose the type of education they want for their children. However, this constitutional right is limited to the freedom to choose an educational institution and the freedom for children to be educated according to their parents' beliefs. The challenge arises when allocating places to students who have not secured admission to their first- or second-choice school. This is particularly problematic for state-subsidized religious schools, which provide religious education at a lower cost than private institutions while expanding the number of schools available. However, agnostic families have the right to ensure that their children are not subjected to religious education. The tension between maintaining class ratios and upholding parents' rights to non-religious education must be addressed on a case-by-case basis. In this case, the constitutional right must prevail over administrative rules which could prevent the creation of additional places in public schools, since the public authorities must guarantee the right of parents to

ensure that their children receive religious and moral instruction in accordance with their own convictions. From the Court's point of view, the mere fact of being in a Catholic school would indirectly contradict the parents' decision, even if specific religious education was not being provided as a subject. The ideology and the character of the school naturally influence the activities that are carried out in the school, as well as the religious symbols that may be present and the festivities that may be celebrated. It is therefore impossible to reconcile this with the wishes of the parents for an appropriate education for their child.

The best interests of the child and the child's freedom of expression

One can argue about the extent to which inclusive religious schools need to respect individual rights to religious freedom. When integration is on the table, parental authority and the right of parents to educate their children according to their own beliefs must be taken into account. However, the best interests of the child, even once he or she has reached what is considered to be maturity, must prevail, as the best interests of the child are the ultimate aim of child protection. In this sense, the right to education itself is conceived as a right that corresponds to a responsibility that is closely linked to the enjoyment and exercise of the right to education of minors. The problem of determining who has the right to choose the moral, religious, or philosophical education of children, which corresponds to those who exercise parental authority over minors, lies precisely in the fact that these same minors are holders of the right to freedom of belief (Lundy 2012: 396). If a particular child wishes to manifest his or her religious beliefs in a way that his or her parents disapprove of, or vice versa, international or national human rights law ultimately protects children over the wishes of their parents. Article 3 of the Convention on the Rights of the Child (CRC) states that in all actions concerning children, whether taken by administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. In addition, Article 12(1) of the CRC states that "all States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child".

These provisions should not be undermined, and each case and court decision should be subject to scrutiny and balancing, not only to assess whether the best interests of the child are being considered but also to analyze whether the child is mature enough to decide for himself or herself on his or her religious and moral education. Parents educate their children to become independent human beings with principles and religious morals that follow their beliefs, but children, when they reach maturity, may well disagree with their parents' decisions. This would result in a conflict of rights and interests, but their personal development and autonomy to believe and disagree with their own upbringing cannot be neglected.

Literature related to the main issue(s) at stake:

General legal literature on the topic that may not be directly connected with the case:

- Evans, Carolyn. 2008. "Religious Education in Public Schools: An International Human Rights Perspective". *Human Rights Law Review* 8: 449–473.
- Gaspar Lera, Silvia. 2010. "El derecho de los padres a que sus hijos reciban una formación religiosa y moral de acuerdo con sus propias convicciones: patria potestad y autonomía del menor". *Derecho privado y Constitución* 24: 333–340.
- Louden, Lois M.R. 2004. "The Conscience Clause in Religious Education and Collective Worship: Conscientious Objection or Curriculum Choice?" *British Journal of Religious Education* 26: 273–284.
- Lundy, Laura. 2012. "Children's Rights and Educational Policy in Europe: The Implementation of the United Nations Convention on the Rights of the Child". *Oxford Review of Education* 4: 393–411.
- Souto Galván, Beatriz. 2011. "El derecho de los padres a educar sus hijos conforme a sus propias convicciones en la jurisprudencia del Tribunal Europeo de Derechos Humanos". *Revista Europea de Derechos*

Fundamentales 17: 245–268.

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