Religion, Law and Education: Tensions and Perspectives

Jan de Groof, Georgia du Plessis and Maria Smirnova (Eds.)

This book provides an encompassing analysis of the position of religion in education in several countries across the globe. It first analyses the wider issues and complexities surrounding the position of freedom of religion or belief in education systems and the need to respect, protect and promote the religious or (non-religious) beliefs of all those involved and participating in education. Various specific themes are constantly at the foreground, namely: the religious distinctiveness of private schools, the protection of religious and belief diversity in education, the protection of parental rights and religious freedoms, the protection of children’s rights and religious freedoms and managing the dissemination of religious knowledge in public schools. Secondly, this book provides important case studies explaining the various approaches pertaining to the reconciliation of law and state, religion and education and secularism and diversity that exist in the world. A more encyclopedic approach is followed and provides insights, through the country case studies, into the contemporary issues surrounding religious and non-religious schools in these selected jurisdictions.
Religion, Law and Education:

Tensions and Perspectives

Edited

by

Jan de Groof, Georgia du Plessis

and

Maria Smirnova
Religion, Law and Education: Tensions and Perspectives

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Preface

From 18 to 21 November 2015 the Congregation for Catholic Education celebrated the fiftieth anniversary of the Second Vatican Council’s Declaration *Gravissimum Educationis* and the twenty-fifth anniversary of the Apostolic Constitution *Ex Corde Ecclesiae*. As part of these celebrations, the Congregation aimed to re-energise the Catholic Church’s commitment to education by means of a World Congress entitled ‘Educating Today and Tomorrow: A Renewing Passion’. The main aim of the Congress was to rethink the role of Catholic schools and universities that act in the name of the Universal Church. The Congress urged more than 5,000 participants (in Vatican City) to step up efforts to *promote dialogue* in times of spiritual poverty, self-referential exclusiveness, harmful spread of ideological viewpoints, and the lowering of the general level of culture.¹

In line with the aims of the Congress, and under its hospitable auspices, the *European Association for Education Law and Policy (ELA)* held a special conference. The *ELA* sessions within the larger Congress focussed mainly on the reconsideration of the role that religion plays in education in general. The main concern of this legal panel was the way in which the rights of the religious² and non-religious³ are accommodated in both secular (non-religious) and religious schools and universities around the world. Thus, the *ELA* sessions encompassed both the study of religion in education in general (not only Catholic education), and the transformation of approaches to religious rights in education across various sectors of society. The focus of this book, although originating from the Congregation of Catholic Education, is not limited to the protection of Catholic education or religious freedom, but provides an all-encompassing analysis of the position of religion in education across the globe. This volume deals, first, with the wider issues and complexities surrounding the position of freedom of religion or belief in education systems and the need to respect, protect and promote the religious and (non-religious) beliefs of all those involved and participating in education. Various specific themes are constantly at the foreground, namely: the religious distinctiveness of private schools, the protection of religious and belief diversity in education, the protection of parental rights and religious freedoms,

² For purposes of this book, the ‘religious’ means all persons adhering to a formally recognised faith or religion.
³ For purposes of this book, the ‘non-religious’ means all persons adhering to or having faith in any other ideology or belief not necessarily accounted for in any formally recognised religion. These can include, for example, atheism and humanism (amongst many others).
the protection of children’s rights and religious freedoms and managing the dissemination of religious knowledge in public schools. Second, this volume provides important case studies explaining the various approaches pertaining to the reconciliation of law and state, religion and education and secularism and diversity that exist in the world. A more encyclopedic approach is followed and provides insights, through the country case studies, into the contemporary issues surrounding religious and non-religious schools in these selected jurisdictions.

The first three chapters of this volume elaborate on general aspects concerning the right to religious freedom or belief in education. In his opening essay, Charles Glenn addresses the importance of religious distinctiveness in schools and the importance of faith-based schools in general. He attempts to provide a balanced answer to very controversial questions: Are those who hold strongly to religious convictions and practices unfit for full and free participation in a pluralistic society? How can a particular school culture help young people to resist the great downward suck of a consumer society? And do faith-based schools actually live up to that promise? Blossoming religious distinctiveness can be regarded as a product of the positive appreciation of freedom of school choice in domestic law and practice. On the other hand, Zdenko Kodelja argues that, even if religious distinctiveness is important, the International Covenant on Economic, Social and Cultural Rights (ICESCR) cannot be interpreted as placing an obligation on states to fund private schools. She regards the important correlation between religious freedom and the free choice of schools through a philosophical lens. Methodologically, this correlation is presented as a comparison between definitions of the right to choose private schools in the Dignitatis Humanae and the International Covenant on Economic, Social and Cultural Rights. José Luis Martínez López-Muñiz gives a rather contrary view when he offers a general reflection on his many years of experience concerning religious education and secularism within the context of private and public schools. He concludes that the ‘generalisation of knowledge on religion in a manner that respects the convictions of everyone would be a good contribution to a pluralistic peaceful life in society’. According to him, free choice of religious and non-religious schools is a principal way to ensure ‘the religious and moral education of children in conformity with the convictions of parents’.

After an analysis of the different viewpoints regarding religion and school choice, a comparative country study commences. These studies, within their respective countries, elaborate further on the tensions mentioned in the first three chapters. The first country to be discussed is the United States of America. Fr. Sean Sheridan addresses several legal challenges that Catholic schools in the United States have faced, and are continuing to face, as they strive to fulfil their mission or desire to remain true to their mission (and religious distinctiveness) while existing within a civil society. The chapter addresses the legal challenges that arise
from the Catholic school as an employer — including challenges pertaining to employee benefits which could be contrary to the teachings of the Catholic church, ‘same sex marriage’ and the Affordable Care Act. Moving on from school education to higher education, John Garvey challenges a widespread conviction in the United States of America that education at a religious educational institution is ‘less free’ than education at a public (or non-religious private) one. On the contrary – he claims – faith and free inquiry are not mutually exclusive concepts. In fact, ‘faith has an indispensable role in search for truth.’

This volume slowly turns to Europe when Melissa Moschella and Marta Ponikowska start with an insightful analysis of parental rights in education from a European and US comparative perspective. The rights of parents to educate their children in accordance with their own religious or ideological perspectives and the supporting (or conflicting) interests of the state represent some of the biggest challenges and issues pertaining to the role of religion in education. Drawing from two court cases, the authors evaluate parental rights in education from the perspective of natural law, defending the thesis that the rights of parents to educate their children are primary and original, whereas the role of the state in education is secondary and subsidiary to that of parents.

Fully focusing on Europe, John Panaretos, former Deputy Minister of Education (Higher Education, Research and Innovation) in Greece, provides an interesting glimpse into the work done during his period as Deputy Minister. He shows how Greece used education to narrow social inequalities that exist regarding Muslim minority groups, improving the status of the Muslim minority in Greece and its relations with the Christian majority. In Hungary the relations between the state and the church in relation to education are also challenging. Balázs Gerencsér takes on a very practical approach to explore the meaning and content of the two fundamental rights (freedom of religion and freedom of education). He studies the content of a decentralised, contractual-based regulation of these human rights and their relation with two external means: a bilateral agreement between Hungary and the Holy See and the decisions of the Hungarian Constitutional Court. Going more West in Europe, the contribution by Jaap Dronkers is published posthumously. Islamic Primary Schools in the Netherlands was first published in the Journal of School Choice and reprinted, with permission, in this volume. Dronkers discusses the fact that Islamic primary schools were founded in the Netherlands in the last twenty years of the 20th century under the ‘right to freedom of education’. Dronkers provides some background information about the Dutch system of religious schools and the history of Dutch Islamic schools. He addresses contradictions pertaining to the quality of education in Islamic schools, attitudes and values of pupils and parents in Islamic schools, administrative problems in establishing and running Islamic schools and negative relations between Islam and educational performance in modern societies.
In order to provide a constructive end to the comparative analysis on the USA and EU, William Jeynes provides six recommendations to the European Union on maintaining the religious distinctiveness of Christian schools in Europe. He draws from his experiences in the USA and provides vital expertise on this issue.

Maria Smirnova investigates religious rights as an element of school choice in Russia. Religious rights are regarded as a manifestation of accessibility, acceptability and adaptability in school education. An explanation of the constitutional and legislative framework of school choice is followed by several cases related to various aspects of religious freedom in education: appearance of pupils, ideological neutrality of secular education and the right to set up private religious schools. Continuing the Russian case, Vitaly Matveev and Artemy Rozhkov analyse the relationship between different religions and public schools. Their chapter examines current Russian legislation and the implementation mechanisms of religious rights in Russian schools. They primarily focus on the teaching of basic religious culture in public schools, the wearing of religious symbols and clothing and how the teaching of religion is arranged on public school premises.

Turning west, Merlin Kiviorg, Jüri Ginter and Ene-Silvia Sarv explore freedom of religion and belief in education in Estonia. They highlight the fact that Estonia does not yet have substantial problems regarding freedom of religion or belief in education but that the European refugee and migration crisis has contributed to the public debate over religious freedom. Most prominently, the chapter concerns the wearing of religious or cultural symbols, such as headscarves or burkas, and accommodating specific religious needs. The authors argue that Estonia may not be ready for new challenges regarding freedom of religion in education, and explore some of these difficulties in much detail.

A geographical shift is made across the ocean towards the South American continent. Nina Ranieri, Angela Limongi, Danilo Rossi, Elisa Lucena, Meire Cristina Souza, and Michel K. Lutaif have produced an impressive comparative study of religion in education across Latin America. They argue that the establishment of nation states in Latin America cannot be dissociated from the influence of the Catholic Church, especially when it comes to education. The secularisation of states in Latin America was not a linear process. In fact, it was marked with ‘contradictions, retrocessions and breakthroughs’. This chapter presents an overview of the legal provisions related to religious education in Brazil, Argentina, Chile, Mexico, Venezuela and Uruguay. Next, Rubens Beçak and Luis Felipe Cirino continue the analysis of Latin America by focussing specifically on home schooling in Brazil. They stress the idea that the Brazilian legal system sets forth no provisions with respect to home schooling and that this legal vacuum
 Preface 

... gives rise to serious controversy.

Turning the focus to Africa, Johan Beckmann provides for an introduction to religion and education within South Africa. He argues that, because South Africa comes from a past of racial and religious discrimination, it can provide for a fresh and unique perspective on how to deal with religious diversity in education. This perspective provides for a conceptual framework, other than secularism and separationist approaches, from which debate can flow. In light of the unique perspectives offered by South African law and case law, Georgia du Plessis investigates the current position of the dissemination of religious knowledge in South African public schools and consequently argues for an even more inclusive approach. She argues that such an inclusive approach is more in line with the notions of equality, human dignity and freedom.

The role of Catholic schools in Australia concludes this global overview. Sally Varnham rounds off this volume with a comprehensive analysis of the philosophy which drives education for human rights and social justice in independent Catholic schools in Australia.

Finally, Jan de Groof provides a few concluding remarks emphasising the general importance of the right to religious freedom in education and how this can be translated into public schools by way of (1) parental rights and (2) the right to school choice. He warns against the usurpation of education by the state and advocates for an approach in line with ‘active pluralism’, requiring that the state takes an active approach in realising the right to school choice pertaining to ideological and religious preferences.

Jan de Groof, Georgia du Plessis and Maria Smirnova (editors)
Chapter 8

State and Church – Education in Hungary (The Content of a Human Right and the Role of External Instruments)

Balázs Szabolcs Gerencsér*

I. Introduction

‘Go then, and make disciples of all the nations...’ (Mt. 28:19) This sentence is essential when talking about the educational mission of the Christian Church, which is almost as old as the Church itself. In addition to teaching the concepts of faith, secular knowledge has been taught by the Church for a long time. The issues of education and faith were thus closely linked for centuries. Today’s secular world requires state and church to be separated, so that they can be introduced to each other again and find their connection points.

Below a medium-sized Central European country is examined in order to show that the meaning and content of the two fundamental rights, freedom of religion and freedom of education, are not dependent on legislative activities only. In fact, external institutions and instruments may also have an effect on freedom of religion. Moreover, these tools may be a form of control over the legislative power as well. The content of a decentralised, contractual-based regulation of these human rights is studied and their relation with two external means are: a bilateral agreement and the decisions of the Constitutional Court.

If the Basic Law of Hungary (2012) is compared to the country reports and monitoring reports of the various international human rights organisations, it is clear that freedom of religion and belief is recognised in Hungary. Another finding is closely connected to the previous one, namely the state operates separately from the church. If we look beyond the constitutional norms, similar findings can be made. As discussed below, churches have the right to contribute to public services such as education. Moreover, such contributions by churches may even have public support.

II. International and Domestic Background

Various constitutional aspects must be taken into account when examining the

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relationship between church and state in education law. One of the issues is the separation of state and church, one of the basic values of the contemporary democratic structures. Another focal point is the right to education, which, as a human right, is declared by the most significant international treaties and even referred to in the social teaching of the Church. Among the multilateral treaties especially great importance is attached to the European Convention on Human Rights, the International Covenant on Economic, Social and Cultural Rights.

1 Rome 1950. Most important are Articles 9 (European Convention on Human Rights) and 6 (First Additional Protocol). Article 9 of the European Convention of Human Rights states: ‘1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.’ Article 2 of the First Additional Protocol to the Convention (Paris, 1952) states: ‘No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.’

2 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with Article 27. Article 13 states: ‘1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace. 2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: (a) Primary education shall be compulsory and available free to all; (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education; (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education; (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved. 3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the
and Convention on the Rights of the Child.³

Hungary is a secular state, meaning that 'the State should remain neutral in matters concerning ideology; there should be no official ideology, be it religious

religious and moral education of their children in conformity with their own convictions. 4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.'

³ Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with Article 49. For purposes of this chapter, Articles 28 and 29 find most application. Article 28 states: ‘1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all; (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; (c) Make higher education accessible to all on the basis of capacity by every appropriate means; (d) Make educational and vocational information and guidance available and accessible to all children; (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates. 2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention. 3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.' Article 29 states: ‘1. States Parties agree that the education of the child shall be directed to: (a) The development of the child’s personality, talents and mental and physical abilities to their fullest potential; (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations; (c) The development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own; (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; (e) The development of respect for the natural environment. 2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph I of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.'

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or secular’. Nevertheless, since its very early days, the history of Hungary has been closely linked to the multilingualism and the relationship of people of different religions and cultures.

During and after the Middle Ages education was provided typically by the Church. Later, Queen Maria Theresa (1740-1780) introduced public education (*Ratio Educationis*, 1777). Since then, the state has been continuously and increasingly taking over the function of education until World War II. After 1948 the communist dictatorship nationalised all church schools. All services had been declared to be provided only by the state. Until 1989, when the dictatorship has collapsed, no church school could exist, nor could religious education even occur. The atheist state explicitly discriminated against the Church and all of its members. It can be argued that this unlawful situation was the reason why the fall of the dictatorship brought a significant change in this area particularly.

After the 1989 change of the political system, the Hungarian parliament amended the 1949 Constitution. In effect, it finally gave real content to the human rights and democratised the entire organisation of the state. As an important milestone of the reform process, the state recognised (in the 1990s) that it cannot perform all public services on its own. It became necessary for the state to involve external actors, particularly the churches and civil society organisations. Of course, the process was not easy because nationalised properties had to be transformed towards the performance of the actual public tasks. This process of transformation was accompanied by long diplomatic and political discussions and legislative change. Importantly, during this period of transition, the Constitutional Court played a significant role in balancing educational rights and the Church-school relationship, as is demonstrated below.

In 1989 the Constitution was amended due to the change of political system. However, major provisions of the right to education were carried forward from the previous text with a slight clarification. Adoption of the act on freedom of religion in 1990 added a real democratic value to the transformation of church-


5 See the first Act of Peace of Denominations in 1568.


8 Schanda, B. (2015), 84.

9 Horváth, E. (2009), ‘The right to education’ [A művelődéshez való jog], in: Jakab, A (ed), *Commentary on the Hungarian Constitution* [Az alkotmány kommentárja] 2nd ed, Budapest, Századvég, 2595. From this amendment the Constitution defined itself as ‘provisional’ and declared its regulations until Hungary’s new constitution comes into force. This latter became the new Basic Law in April 2011.

10 Act IV of 1990 on the freedom of belief and religion and the churches.
state relations by recognising their autonomy and right to property.\textsuperscript{11}

III. Constitutional Regulations and their Interpretation by the Constitutional Court

Article XI of the Hungarian Basic Law states, that ‘every Hungarian citizen shall have the right to education.’ Paragraph 2 states:

‘Hungary shall ensure this right by providing general access to public culture, free and compulsory primary schooling, free and universally available secondary education, and higher education available for every person on the basis of his or her ability, and, furthermore, through the financial support for students in training, as defined by statute.’

As noted by Ádány et al., ‘a novelty regarding the right to education is granting that secondary education shall be free of charge. This was only mentioned earlier in the Act on [National] Public Education, although it was obvious and self-evident as a condition of the fulfilment of compulsory education.’\textsuperscript{12}

Undoubtedly, the right to education is first and foremost a subjective right related to equal access; moreover, it guarantees free access to compulsory education, as well as quality and availability of learning. It presupposes the right to have the freedom to choose a school, as well as the freedom to choose a religiously committed school.\textsuperscript{13}

In an earlier decision the Hungarian Constitutional Court stated that ‘the state cannot deny the legal possibility to establish either religiously committed or atheist schools; the appropriate legal regulation should be adopted. The state is not obliged to set up non-neutral schools.’\textsuperscript{14} This means that the ideologically neutral school is the main rule of the state education system, while religiously committed schools are but exceptions.\textsuperscript{15}

Later, in relation to the state’s obligations regarding the right to education, the


\textsuperscript{13} Decision of the Constitutional Court No. 22/1997.

\textsuperscript{14} Decision of the Constitutional Court No. 4/1993.

\textsuperscript{15} Schanda, B. (2013), \textit{‘Church Law of the State’} [Állami egyházjog], Szent István Társulat, p. 104.
Constitutional Court concluded that ‘the right to study, however, does not mean that the state should guarantee access to all schools at all levels and within all ideologies for everyone. States’ obligations relating to the operation of the educational institution network in this context mean that the state as maintainer of public institutions shall not discriminate anyone.’\(^\text{16}\) In the same decision, the Court found that ‘securing a human right by the state is achieved when the state provides the legal conditions for establishing religiously committed educational institutions and it allows these institutions to undertake state or local government functions.’

At the same time, the Constitutional Court emphasised the subjective and the institutional side of the right to education: ‘the State has a constitutional obligation while the parents and students have a fundamental right to free education.’\(^\text{17}\) Public education is therefore a responsibility of the state, which shall be provided not only by the state. ‘Outsourcing’ of public services is possible within appropriate legal guarantees and specific agreements.\(^\text{18}\) Under these conditions, non-state schools are eligible for state aid to an extent corresponding to the public services they provide. The limit of this obligation is determined by the Constitutional Court, according to which the ‘state is obliged only to establish and maintain non-ideologically-committed schools. We cannot determine that the state should provide free education for everyone in any school of their choice.’\(^\text{19}\)

Summing up the Constitutional Court’s practice, it may be concluded that the right to education cannot be enforced without state guarantees. Moreover, the state is entitled to involve non-state actors, including churches, with the obligation to support them if they contribute to public services.

**IV. International Legal Framework: Agreement between Hungary and the Holy See**

Hungary obtained freedom to settle its relationship with religious denominations in 1989. This situation was similar in the most Central, Eastern, and South-

\(^{16}\) Decision of the Constitutional Court No.18/1994.

\(^{17}\) Decision of the Constitutional Court No. 22/1997.

\(^{18}\) The concept ‘outsourcing’ is different in this sense as it is used by the New Public Management theories. See for example Frivaldszky, J. (2012), ‘On the Actual Context of Good Governance and formation of Good Public Policy’ [A jó kormányzás és a helyes közpolitika formálásának aktuális összefüggéseiről], in: Szigeti, Sz. – Frivaldszky, J. (eds): *On Good Governance* [A jó kormányzásról], JTMR Faludi Ferenc Akadémia, Budapest, Hungary, 51-106.

\(^{19}\) Decision of the Constitutional Court No. 22/1997.
Eastern European countries in the early 1990s. This post-communist period affected both the countries’ internal and international relations. Regarding domestic law, new or revised constitutions and legislative acts added new content to the freedom of religion. The law thus reflected the transformed state-church relationships. In Hungary, this reflection was expressed for the first time by the Act IV of 1990 on the freedom of religion and the churches.

Concerning international law, a number of Central and Eastern European countries signed a convention with the Holy See which functioned as a general framework for settlement of their relations. Among the countries liberated from the communist dictatorship, the first such agreement has been elaborated with Hungary on 9 February 1990. The second agreement, in 1984, was in relation to the military chaplaincy. The third agreement was signed in 1997 specifically on the promotion of educational functions in Church-run institutions.

Among the three treaties the 1997 agreement is particularly important as it ‘does not refrain from regulating in-depth, sometimes even technical matters instead of being attached only to theoretical items. The most important element of this agreement is perhaps the declaration of financing of public service activities on equal basis with public bodies (Part I, Article 1). The agreement declared that the financial support received by the church for contributing to public services such as kindergartens, primary, and secondary schools, dormitories, was declared to be of the same level as allocated to the similar institutions operated by the state or the municipality (Part I, Article 2). Apart from educational matters, the agreement deals with recognition and protection of cultural heritage (Part I, Article 4), settlement of church property (Part II, Appendix 2), as well as support concerning taxation policy (Part II, Article 4).

After multiple Joint Committee sessions and a three-year-long preparatory work the agreement was renewed and comprehensively amended in 2013. This amendment updated the legal status of religious education, support of higher

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21 Published in the National Gazette 1990/35.
22 Published in the National Gazette 1994/19.
23 This Agreement was ratified by the Act LXX of 1999.
25 Schanda refers to three Joint Committees and an ‘expert opinion’, which were designed to dispute resolution. See Schanda (2014b), pp. 8-10. It may be noticed that between 2002 and 2010, Hungary had a centre-to-left government, which did not favour ecclesiastical institutions at all.
26 Ratified by the Act CCIX of 2013.
education, and other fields.

The agreement guaranteed an essential assistance in relation to the development of Church-run education. In Hungary the relationship between the state and religious institutions could not have been developed without the decisions of the Constitutional Court and international treaties. The Hungarian public educational system relies on two main principles with regards to state-Church relationship: individual agreements accompanied by strict control or accreditation and funding arrangements based on the principle of equality.

Although this study mainly concerns the issue of public school education, it is important to note that the 2013 amendment to the Agreement brought significant changes to the system of higher education as well. Thus, a closer connection has been established between the church-run higher education institutions and the new system of state subsidies which had been changed significantly during the course of educational reforms of 2011-2013.

V. Legal Regulation of the Right to Education in Church-Run Institutes

Having reviewed the essential constitutional and international regulations, the main rules of domestic law establishing substantive rights and state obligations towards church-run-schools in public education, on the one hand, and religious education in public schools, on the other, are now examined.

A. Guaranteeing Individual Rights as an Essential Element of Human Rights

As cited above, according to Article XI of the Hungarian Basic Law ‘every Hungarian citizen shall have the right to formal and non-formal education.’ According to the Basic Law of Hungary, the rights and obligations of pupils are regulated in detail in the act on public education. This regulation is in line with the 1989 Convention on the Rights of the Child, and subsequent Hungarian regulation, the 1997 Child Protection Act.

Paragraph 2 of Article XVI of the Hungarian Basic Law establishes the right of the parents to choose any form of education they would like to provide for their children. Parents are thus free to choose either church-run schools or secular public schools. Similarly, the child has a right to choose whether to participate in religious education in public institutions. These constitutional rules are highlighted in Act CXC of 2011 on National Public Education which emphasises

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27 Ratified by the Act LXIV of 1991.
that children have the right to ‘use pre-school, school and hall of residence service at church or private institutions and receive religious and ethics education and instruction organized by a church [registered as a] legal person in state and municipal educational institutions’. 29 The act thus ensures both sides of the substantive right to education: schools run by church can be chosen and, on the other hand, optional religious education in public schools can also be chosen by the students.

In the recent years due to the educational reform and the revision of the agreement the issue of religious education in public schools has been clarified. By today,

[r]eligious instruction in public schools is delivered by ecclesiastical entities, not by the school. The instruction is not a part of the school curriculum, the teacher of religion is not a member of the school staff, grades are not given in school reports only participation is registered. Churches decide freely on the content of the religion classes as well as on their supervision. Teachers of religion are in church employment; however, the State provides funding for the churches to pay the teachers. The school has only to provide an appropriate time for religious classes as well as teaching facilities. Churches are free to expound their beliefs during the religious classes: they do not have to restrict themselves to providing neutral education, merely giving information about religion, as do the public schools otherwise. Religious education is not part of the public school’s task; it is a form of introduction into the life and doctrines of a given religious community at the request of students and parents. 30

In order to ensure the implementation of the legal framework outlined above, the protection of education-related rights of children in Hungary is carried out by a complex system of institutions:

- the rights of the pupils are protected by the ombudsman; 31
- children’s rights are represented by the so-called ‘children’s rights advocate’ established by the 1997 Child Protection Act, as well as a special ‘alarm-bell-network’;
- protection of the safety of the students is a responsibility of the police;
- psychological control is performed by the school psychologist;
- compulsory education is controlled by the County Government Office.

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29 Art. 46 Para. (3) Point (e) of the Act on National Public Education No. CXC of 2011.
B. Obligations of the State: from Theory to Practice

The right to education and freedom of religion are, therefore, not only individual rights, but also imply a corresponding obligation of the state. Obviously, the state performs public educational functions or services primarily through its own institutional system. However, what happens if the state does not have enough capacity, but there are external organisations that are willing and able to provide at least the same level of services?

The answer begins with the restraint exercised by the state. There is a realisation that involvement of religious, civil, or other non-state actors into public services under reasonable conditions can be justified. Even so, the need to guarantee quality of a public duty implies that non-state providers of public services have to meet stringent requirements.

The government carries out its educational duties through a centralised network of authorities. The Office of Education is a central administrative body under the direct control of the ministry responsible for education, currently the Ministry of Human Resources. This authority ensures adequate functioning of the national education system, while at the local level County Government Offices are in charge. In Hungary, the Government Offices of Budapest and the Counties function as the government’s public administration bodies of territorial jurisdiction.

Since 2012, when the Act on National Public Education became law, only the state can establish public schools in Hungary; previously, the municipalities and county self-governments were able to do so as well. The maintainer is a central administrative body; however, in some cases local governments may assume specific responsibilities from the government (except establishing).

The Act on National Public Education contains a list of eligible public persons and authorities that can establish and operate public education institutions (Article 2 para 3). These are:

- the state,
- self-governments of nationalities (minorities),
- churches,\(^{33}\)
- religious NGOs,

\(^{32}\) This model established a high-level centralisation that is under reconstruction in 2016 as it did not fulfil entirely the expectations.

\(^{33}\) According to this regulation Schanda highlights that ‘church schools are classed as neither public nor private’ Schanda (2015a), p. 97.
• other organisations or persons on the condition they procured the right for conducting such activities as established by statutory provisions. Local governments may also establish and operate pre-schools.

Any educational institution can be created only when the County Government Office issues a license and registers the school. This is done in order to control the quality of the educational activity. With this license, the authority confirms that institutions meet the requirements of both infrastructure and educational content.

According to a ministerial decree, before issuing a license the authority examines ‘whether the available or obtainable personal, material resources, labour protection, fire protection, public health, and financial conditions meet the requirements established for a continuous, long-term, safe, healthy and professional education.’

The requirement of equality applies to both state and non-state institutions. These, therefore, must be the same criteria in performing educational public duties. In addition, the principle of equality prevails among non-state institutions too. For example, a 100 year-old church school would have to meet the same criteria as a newly established private school and vice versa. The quality of educational activities is regularly monitored by the County Government Office, at least once every two years.

Importantly, non-state schools performing a public function have specified financial assurances. Separation of church and state ‘does not mean a ban on public funding.’ Since education is a public duty, the state’s annual budget is the main source of ensuring its operation. In addition, the founders and operators must add extra support for funding, additional services, or more staff. These sources may be supplemented by special fees for specific services which fall under a separate legal regulation.

Normally, the budget ensures funding for public education activities of institutions not operated by the state on a condition that the institution undertakes activities in compliance with its operating license. Essentially, the principle of equality is declared in the provision of public services by both the state and the church.

34 Decree No. 20/2012 of the Minister of Human Resources.
36 See Art. 88 Para. (3) of the Act on National Public Education of 2011.
37 Art. 5 Para. (1) of Act CXXIV of 1997 on the financial conditions of churches’ religious and public activities.
Until 2013 the budget was based on per capita funding with some additional support for every church-run institution. After the reformation of the educational system, the yearly budget is now based on the average salary, complemented with additional support. The calculation of the average salary per capita is based on a complex algorithm taking into account the type of institution, the number of students, the number of supported employees and their annual income.

A church obtains the right to additional support if its schools provide education of compulsory level and type. For receiving the support, though, an individual legal instrument must be drafted in addition to the abovementioned license. The founder or the operator of the school usually signs a contract with the Minister in each case setting out a wish of the founder to provide public educational services. This contract is a typical agreement between the founder and the Ministry under which individual schools, boarding schools, foster homes or other institutions can be established.

The other type of individual legal instrument can be used if there is already a framework agreement between the church and the Ministry. Such a framework agreement is usually mentioned at the moment when an educational institution is created. In this case, if a church entered a framework agreement with the government covering, inter alia, the implementation of public education functions, then it shall assume responsibilities to assist in the implementation of state and local government functions and to carry out remedial tasks to help students catch up with educational standards. Such undertaking is formalised by a unilateral declaration sent to the County Government Office or to the local government when a pre-school is being established. On the basis of the unilateral declaration, in this case the County Government Office registers the institution maintained by the church and includes it in the public education development plan.38

Regarding the Catholic Church, there is no need to establish a contract or agreement with the state; the Catholic Church is entitled to make a unilateral declaration on the basis of the abovementioned agreement. The right to make such a unilateral declaration belongs to the organisational unit of the Church invested with legal personality according to the internal rules of that church. If, therefore, a Church school is to participate in the public function of provision of education, the access to education shall be free, just like in state schools.

VI. Conclusion: External Instruments are to complete the Content of the Human Rights

38 See Art. 32. Para. (2) of the Act on National Public Education of 2011.
Separation of state and church does not in any way preclude the possibility of co-operation between the state and the churches in Hungary. 39 This is particularly relevant in such public services where the church has long and significant experience and infrastructure. Within this co-operation the interests of both parties are important: the church receives support from the Ministry, while the state ensures that outsourced public functions are well-controlled.

For the purposes of legal certainty, both the constitutional basis and international legal background are required. However, clear rules set up in positive legal regulation are always exposed to the variability of daily political decisions. According to the rules regarding church-run schools, it is clear that control mechanisms of the state should not intervene in the church’s internal affairs. Instead, they should focus only on educational activity. 40 Lawfulness is granted when the conditions are laid down in law because the state has to consider (or at least tolerate) internal structural peculiarities of the churches to some extent.

Schools founded by churches and other non-governmental organisations have a special position in the Hungarian public administration system. The state, on the one hand, guarantees free exercise of religion and free functioning of the church, while the church fulfils the conditions laid down by the state. The performance of public services could only be outsourced, i.e. provided by non-state actors, on the same conditions if the state provides financial support. Notably, free market does not determine the cost of such a public service. In Hungary, non-governmental participation in the exercise of public services typically relies on a contractual legal basis. A similar approach can be found in health services, as well other public utility services. The contract includes, on the one hand, the content and criteria of the particular public service, and on the other regulates subsidisation in the form of such matters as budgetary payments, and grants.

In cases where the state entrusts the church with selected state responsibilities, the state usually expects the provision of the same conditions of the same quality to all students; therefore, it can also specify conditions for budgetary support. However, a church-run educational institution has a particular right to undertake its religious commitment openly which the state must respect. So, the only remaining task of the legislature besides defining the mandatory standards is the

40 We can find an indirect hint on this in the judgments of the European Court of Human Rights. See: Schanda, B-Csiziné Schlosser, A (2009), ‘New developments in the practice of the European Court of Human Rights regarding religious freedom’ [Újabb fejlemények az Európai Emberi Jogi Bíróság vallásszabadsággal kapcsolatos gyakorlatában], Iustum Aequum Salutare, 2009/2, pp. 80-81.
estabishment of *lex specialis* rules. For example, such rules are determined to guarantee the quality of education.

Overall, it is clear that the balance in the exercise of religious and education rights requires a combination of legal instruments, including internationally recognised human rights, the constitutional framework, bilateral international agreements, and the Constitutional Court’s interpretation of these documents.
Religion, Law and Education: Tensions and Perspectives

Jan de Groof, Georgia du Plessis and Maria Smirnova (Eds.)

This book provides an encompassing analysis of the position of religion in education in several countries across the globe. It first analyses the wider issues and complexities surrounding the position of freedom of religion or belief in education systems and the need to respect, protect and promote the religious or (non-religious) beliefs of all those involved and participating in education. Various specific themes are constantly at the forefront, namely: the religious distinctiveness of private schools, the protection of religious and belief diversity in education, the protection of parental rights and religious freedoms, the protection of children’s rights and religious freedoms and managing the dissemination of religious knowledge in public schools. Secondly, this book provides important case studies explaining the various approaches pertaining to the reconciliation of law and state, religion and education and secularism and diversity that exist in the world. A more encyclopedic approach is followed and provides insights, through the country case studies, into the contemporary issues surrounding religious and non-religious schools in these selected jurisdictions.