SCHOOL CHOICE AS A HUMAN RIGHT

School choice is usually understood as the freedom or liberty (authoritative permission) to choose a school between public and private schools on the one hand, and among different kinds of private or public schools on the other. However, when this freedom of choice is defined as a human right, it is conceived as a right of parents to choose private schools.1 Although it is not explicitly mentioned, it seems that this right follows from, or is at least closely connected with, their right to educate their children in accordance with their own religious or philosophical convictions. In this paper – which is written from a philosophy of education perspective – I am going to discuss the school choice as a human right in this context, that is, as the right of parents to choose religious private schools because of religious reasons.2 However, this does not mean either that they choose them only for this reason or that the right to choose private schools can be reduced only to this reason.

The right of parents to choose religious private schools

The right of parents to choose for their children private schools, or more precisely, schools other than those established or maintained by the public authorities, is recognised as a human right in two important international documents: firstly, in the International Covenant on Economic, Social and Cultural Rights,3 and secondly, in the Convention Against Discrimination in Education.4 In both documents, this right of parents is defined as a right to liberty of choice. That is to say, it is defined as liberty of parents to choose private schools. This right is correlative to the duty of the State to refrain from imposing on them the obligation to send their children to public schools. Defined in such a way, the discussed right is understood as freedom from the State monopoly in education. Therefore, this right of

1 The possibility of choosing among public schools is not mentioned in the international documents on human rights which guarantee parents’ right to choose private schools. This means that these documents neither permit nor forbid such possibility of choice.
2 This is the rewritten and extended part of the paper (Religion, human rights, and education in the international context) which I presented as an invited scholar at Louisiana State University in 2013.
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” (International Covenant on Economic, Social and Cultural Rights, UN 1966, art. 13.3).
4 “It is essential to respect the liberty of parents and, where applicable, of legal guardians, … to choose for their children institutions other than those maintained by the public authorities (Convention Against Discrimination in Education, UNESCO 1960, art. 5. 1.b).
parents, as well as other individual human rights, requires the State to limit its power. All States that have ratified the mentioned international documents on human rights have voluntarily accepted this limitation of their sovereign power in relation to their citizens. However, this was not sufficient for protecting the discussed parents’ right. The former Yugoslavia, for instance, ratified among other international documents on human rights also the *Convention Against Discrimination in Education* in 1964 and the *International Covenant on Economic, Social and Cultural Rights* in 1971. But despite this, all private schools except seminaries and faculties of theology were legally prohibited on its territory not only before, but also after the ratification. In Slovenia, for example, private schools were abolished after the Second World War, when the Republic of Slovenia became a constitutive part of Yugoslavia, and they have been permitted again since 1991, when Slovenia became an independent state. In this case it is totally clear that the State respected neither the liberty of parents to choose for their children private schools, nor the right of individuals and bodies to establish and direct private schools. If we take into consideration two additional facts – firstly, that parents were legally obligated to send their children to public schools, and secondly, that the education in these public schools was, or at least would have to be, based on Marxist ideology – then we can conclude that the State violated also another recognised parents’ right, the right “to ensure religious and moral education of their children in conformity with their own convictions.”

However, although the previously mentioned international documents on human rights guarantee the right of parents to choose private schools, this does not mean that parents’ liberty of choice is unlimited. On the contrary, it is restricted. On the one hand, parents have freedom in their choice of schools only in relation to the State, but not necessarily also in relation to the religious communities or churches to which they belong. Parents belonging to the Catholic Church, for instance, have a duty to send their children to Catholic schools.

---

6 The States have themselves limited their internal sovereignty (M. Rendel, *Whose Human Rights?*, Trentham Books, Oakhill 1997, p. 23). Internal sovereignty is subordinate to international law, which is a product of consensualism, but limits the arbitrary exercise of power. Nothing can be imposed on those who govern without their consent. National sovereignty is in this way safeguarded. (M. Bettati, “The International Community and Limitations of Sovereignty”, pp. 91, 100-101).
8 *The International Covenant on Economic, Social and Cultural Rights*, 13. 3.
wherever this is possible. On the other hand, parents are permitted to choose only those private schools “which conform to such minimum educational standards as may be laid down or approved by the State” or “by the public authorities”. Therefore, the State is not only obliged to permit parents’ liberty of choice, but also to limit it. This limitation seems to be justified and also necessary, at least from the traditional liberal point of view, if the reason for which the State uses its power against the free will of parents is to prevent harm to their children and to protect fundamental children’s rights. Controversies about the liberty of parents to choose private schools begin when the question arises of how far it is legitimate to restrict it.

If these restrictions go too far, then parents’ right to liberty of school choice might be violated. If restrictions of parents’ liberty of school choice do not go far enough, then children’s rights are violated. When parents choose private schools in accordance with their own religious or philosophical convictions, they usually choose private religious schools. Some negative consequences of the insufficient restriction of this parents’ right by the determination of minimal educational standards for schools, which parents can choose, are described in Dwyer’s analyses of schooling in some private religious schools in United States. He stresses that State’s regulation of them is not sufficient to ensure that the content of instruction and the treatment of children in these schools would be consistent with the best interest of the child. Educational practices in some fundamentalist Protestant and Catholic schools are, in his opinion, “damaging to children” because of “imposing excessive restriction of children’s basic liberties”, suffocating their intellectual development, inculcating dogmatic and intolerant attitudes and modes of thought, as well as causing emotional harm.

If this is true, then it is clear that minimal educational standards, which the State, in accordance with the human rights documents, is not only permitted but also required to impose on private schools, are not always sufficient for protecting children from the harmful

---

9 “Parents are to send their children to those schools, which will provide for their Catholic education. If they cannot do this, they are bound to ensure the proper Catholic education of their children outside the school” (Codex Iuris Canonici, Can. 798).
11 *Convention Against Discrimination in Education*, art. 5. 1.b
12 For example, the right of Amish parents to choose their own schools, which “teach only enough reading to make a lifetime of Bible study possible, only enough arithmetic to permit the keeping of budget books records of simple commercial transactions. Four or five years of this, plus exercise in sociality, devotional instruction, inculcation of traditional virtues, and on-the-job training in simple crafts of field, shop, or kitchen are all that is required” (J. Feinberg, *Freedom and Fulfilment*, Princeton University Press, Princeton 1994, pp. 81–82).
consequences of their parents’ school choices. On the other hand, according to Adam Swift, parents’ choice of a religious private school can be harmful for other children as well, if parents choose for their own children an expensive elite religious or non-religious private school. For, “parents who buy their children an education that gives them competitive advantage are worsening the prospects of other people’s children, using their money in a way that gives those others a less than fair start in life”. Since “equality of opportunity is a crucial part of social justice, and it implies that children’s chances of success should not depend on their parent’s money”, Swift logically arrives at the conclusion that “parents’ freedom must be constrained by a framework of justice, by the duties we have not to harm others.”

These are some reasons why some authors doubt that parents have a moral right to choose private schools. Yet, they do not deny that parents have this right as an internationally recognized legal right. The crucial question here is whether this parents’ right is negative or positive. If it is interpreted as a negative, then the State must only protect parents’ liberty of choice. But if it is interpreted as a positive right, then the State has not only the duty of guaranteeing this parental right as a human and legal right, but also of providing public subsidies for ensuring the concrete conditions for its exercise. The Catholic Church claims that it should be interpreted as a positive right, while the European Court of Human Rights has decided that at least the First Protocol to the European Convention on Human Rights – which states that no person shall be denied the right to education in conformity with their own religious and philosophical convictions – “imposes no obligation upon the State to establish at its own expense or to subsidise education of any particular type or at any particular level: no parent or group of parents could insist on the establishment of a new school of a particular type, or a State subsidy for an existing school, providing an education consonant with a

---

14 At least such as they are applied in the USA where the “church schools must satisfy certain minimal curricular standards if they are to be accredited by the state” (J. Feinberg, Freedom and Fulfilment, p. 84).
16 Ibid., p. 13.
17 “Parents who have the primary and inalienable right and duty to educate their children must enjoy true liberty in their choice of schools. Consequently, the public power, which has the obligation to protect and defend the rights of citizens, must see to it, in its concern for distributive justice, that public subsidies are paid out in such a way that parents are truly free to choose according to their conscience the schools they want for their children” (Gravissimum educationis, 1965, 6. 1). The European Parliament has also interpreted this parental right to choose a school for their children as a positive right. Consequently, in its opinion, the State has the obligation “to provide the necessary facilities for state or private schools” (Resolution on Freedom of Education in the European Community, 1984, I, 7.4), and is, therefore, “required to provide the financial means whereby this right can be exercised in practice, and to make the necessary public grants to enable schools to carry out their tasks and fulfil their duties under the same conditions as in corresponding State establishments, without discrimination as regards administration, parents, pupils or staff” (ibid., I, 9.1).
particular cultural or religious or denominational tradition, or with any particular academic specialisation”. However, this does not mean that the State is forbidden to subsidise private schools. The Protocol namely leaves intact the freedom of States to subsidise them or refrain from doing so. Therefore, we can conclude that in the last instance it is up to the State to decide whether the parents’ right to choose for their children private schools will be treated as positive or negative.

**Conclusion**

School choice is a topic which can be seen and interpreted from different points of view. In this paper, it was discussed as a human right. As a human right, it is a right of parents to choose private schools. This right to liberty of choice (which is, in fact, a form of substituted judgment, or an act in which the judgment of one person is imposed on, and on behalf of, another person who is found to be unable to judge competently and decide some matter for herself) is guaranteed by some international documents on human rights and connected with another right, the right of parents to educate their children in accordance with their religious or philosophical convictions. This is the main reason why parents have – if there are not such schools – the right to establish them. But this does not mean, says the European Court of Human Rights, that the State has an obligation to establish at its own expense, or to subsidise, private schools which provide an education consonant with a particular religious tradition.

---

19 *Digest of Strasbourg Case* 1985, p. 791.
20 In Slovenia, for instance, private primary and general secondary schools which implement public programs “have the right to public funds to the extent of 85% of the funds that the State or local community designate for salaries and material costs per student in public schools, if they comply with the conditions determined by the education laws. For more about private schools in Slovenia see in: Z. Kodelja, M. Šimenc, Slovenia, in: C. L. Glenn, J. De Groof (eds.), *Balancing freedom, autonomy and accountability in education*, Wolf Legal, WLP, cop., Nijmegen 2012, pp. 465-477.