

# **The child as a subject of rights, the rights of parents, possible conflicts in a religious context**

*Jean Zermatten<sup>1, 2</sup>*

## **Context**

The following opinion is in response to a request for a position on new Guidelines issued by the Government of Japan (Minister of Health, Labor and Welfare) in autumn 2022<sup>3</sup>, highlighting how religious doctrine could constitute one or more forms of child abuse based on an interpretation of the Child Abuse Prevention Act. The Guidelines presented in the form of «*Q&A on Responses to Child Abuse Related to Religious Beliefs*» focus on the connection between religious belief and child abuse.

The aim here is not to make a critical assessment of each of these questions and answers but rather to give an objective reading of children's rights, to recall the founding principles of the Convention on the Rights of the Child, particularly from the point of view of the evolution of children's capacities, and to address possible conflicts between children's rights and parents' rights, particularly about freedom of thought, conscience and religion and the autonomous exercise (or not) thereof. I'll end with a conclusion on what the children's rights approach underpins, particularly in relation to the issues at hand.

The following opinions are given in my personal capacity. Therefore, they should not be construed as the expression of any public or private organization or academic bodies I belong to or have directed.

## **I. Introduction**

The UN Convention on the Rights of the Child<sup>4</sup> of November 20, 1989 (hereinafter referred to as the CRC or the Convention), has radically altered the legislative landscape of every State that has ratified it (to date, 196 States, except one, have ratified this treaty, including Japan in 1994), hence the fact that the Convention is universal in scope so that the same definitions, principles and provisions apply throughout the world.

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<sup>1</sup> International expert in children's rights.

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<sup>3</sup> Child Announcement 1227 No.1, December 27, 2022, to Prefectural governors, mayors of municipalities, from Director of Child and Family Policy Bureau, Ministry of Health, Labour and Welfare.

<sup>4</sup> Convention on the Rights of the Child, 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. [www.ohchr.org/sites/default/files/crc.pdf](http://www.ohchr.org/sites/default/files/crc.pdf)

As in other countries and legal cultures, Japan's ratification of this binding treaty marked the beginning of a shift in the authorities' perception of children from a paternalistic approach to recognition of their status as subjects of rights. Of course, the child remains a beneficiary of benefits due to his or her dependence (education, health, food, culture, leisure, sports, etc.) and/or a recipient of protective measures due to his or her vulnerability (against all forms of exploitation, manipulation, violence, sexual, physical, or mental abuse, abandonment or neglect, etc.). Adherence to the Convention has transformed the child from a small adult into a person in his or her own right. This new person is not the property of his parents, his community, still less of the State; moreover, he holds rights that he will gradually be able to exercise autonomously or by representation (which will not necessarily be exercised by his parent(s)). In short, the child has gone from being an object to being a child, a subject of rights.

The legal issues arising from this change in status are manifold, both procedural and substantive. While the risk of conflicts between children's rights and those of their parents is becoming increasingly frequent, it seems difficult to rely on dogmas to give a stereotyped answer, as their resolution depends on many factors.

I'll return to a specific situation later, referring more specifically to religious freedom. However, before analyzing this situation, I'd like to remind you what the rights of children and parents are, according to the Convention.

## **II. Rights at stake**

### **1. Children's rights**

#### **1.1 UN Convention on the Rights of the Child**

The child's status as a *subject of rights* is not expressed as such in the Convention. Still, it derives from its four general principles<sup>5</sup> and other provisions such as Articles 5 (evolving capacities), 13 (right to freedom of expression), 14 (right to freedom of thought, conscience and religion), 15 (right to freedom of association and peaceful assembly), 16 (right to privacy) and 17 (right to information and protection from harmful information).

For the remainder of this opinion, I shall confine myself to the significance of the two "flagship" Articles that embody this new status of the child: Article 3 par. 1 CRC (the right of the child to have his or her best interests taken into account in any decision affecting him or her) and Article 12 CRC (the right of the child to express his or her views and have them given due weight). These two Articles are complementary. They combine and complement each other and must be read in conjunction with Article 5 CRC (evolving capacities), which is the instrument for measuring the child's autonomy in exercising his or her rights.

##### *1.1.1 The child's right to have his or her best interests considered.*

Article 3.1 of the Convention states:

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<sup>5</sup> The best interests of the child, non-discrimination, child participation and the right to life, survival and development (art. 2, 3 par. 1, 6 and 12 CRC).

*"I In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

The concept of the child's best interests has been criticized as an empty shell, an umbrella concept, a magic formula, conceptual vagueness and so on. Moreover, it has regularly been confused with the child's good or well-being<sup>6</sup> and sometimes even with the child's happiness.

I won't enter into this ideological debate, but I would remind you that Article 3.1 CRC speaks of the 'best interests of the child' and deals with a child's right: the right of every child whose case is at stake to have his or her personal situation examined individually (or collectively if it concerns a group of children) and to know that all possible solutions to the problem at hand will be examined, to choose the one that will best promote his or her harmonious development (Article 6 CRC), particularly when different interests are at stake. The decision-maker called upon to determine the best interests of the child concerned must follow three concrete steps:

- Assessment of the child's personal situation,
- The search for all possible solutions to the question posed,
- Choosing the most favorable measure or solution.

As far as I'm concerned, these three stages make the best interests of the child a right to individualization, case-by-case, or even "made-to-measure" care.

Therefore, Article 3.1 creates a direct obligation for States to ensure that interventions carried out by judicial, administrative, or social authorities (not to mention political authorities), integrates these three stages into the decision-making process, and explains how the best interests have been assessed, what solution has been chosen and why. The right to have one's best interests considered can be invoked before a court or any other body and should be directly applicable (self-executing)<sup>7</sup>.

Like all rights, the right to have one's best interests considered is not an absolute right that systematically takes precedence over all other interests. Once assessed and determined, the child's best interests may compete with other rights (e.g. parental interests). It will then be up to the decision-maker to balance and decide on a case-by-case basis, as indicated by the Committee on the Rights of the Child: "... *authorities and decision-makers will have to analyze and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best.*"<sup>8</sup>

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<sup>6</sup> The well-being of the child is defined by the Committee on the Rights of the Child as an ideal to be achieved: "The notion of the well-being of the child, in the broadest sense, encompasses the satisfaction of his or her material, physical, educational and emotional needs, as well as his or her needs for affection and security." (General Comment No. 14 of the Committee on the Rights of the Child, 16 CRC/C/GC 14, 2013).

<sup>7</sup> Ruggiero, R. (2022). Article 3: The Best Interest of the Child. In Z. Vaghri, J. Zermatten, G. Lansdown and R. Ruggiero (Ed.), *Monitoring State Compliance with the UN Convention on the Rights of the Child* (p. 21- 29). Cham: Springer.

<sup>8</sup> General Comment 14, para. 39 CRC/C/GC 14, 2013.

Thus, Article 3.1 CRC expresses that the Convention places the child at the core of all decisions made in his or her regard and that this is neither abstract, vague, nor entirely conceptual. It is a recognition of the major importance of the child in our society.

### *1.1.2 The child's right to be heard.*

Article 12 of the Convention on the Rights of the Child states:

*"1 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.*

*2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."*

Art. 12 CRC establishes the child's participation or the position of the child actor. This article is comprehensive in scope, and even includes a political dimension. I will limit myself to a brief explanation of the meaning and scope of this norm.

Art. 12 of the CRC enshrines a twofold right of the child:

- to express its opinion on any matter of interest to it, and
- to have this opinion taken seriously, given its age and degree of maturity.

This is a subjective right granted to the child, allowing him or her to ask to be heard. The effect of this right is to create an obligation for States to recognize it and ensure its application in its twofold scope: procedural (gathering the hearing of the child) and material (assessing the value of the child's opinion and taking it into consideration). This obligation is sufficiently concrete to entail direct application (e.g. in Switzerland).

This Article grants a right to the child, not an obligation: the child can choose not to exercise it. Decision-makers must respect this choice and avoid using pressure or coercion to get the child to express his or her opinion against his or her will.

Article 12 CRC does not set any age limit for the enjoyment of this right. The spirit of the Convention implies that the child is presumed to be capable of forming his or her own views (presumption of capacity) and that it is not for children to demonstrate that they are capable of expressing themselves. In this context, the burden of proof of the child's incapacity to discern rests on the shoulders of the decision-maker.

The expression "*capable of discernment*" in Article 12.1 CRC has often been the subject of debate, with some people wishing to apply the strict criteria of discernment (the intellectual faculty to appreciate the scope of the act and the faculty to determine freely to this act) to Article 12. In the case of such an interpretation, the child's right would be severely limited, to such an extent that the Committee on the Rights of the Child, in its General Comment No. 12, settled this question clearly, stating that "*it is not necessary that the child has comprehensive knowledge of all aspects of the matter affecting her or him, but that she or he has sufficient understanding to be capable of appropriately forming her or his own views on the matter*"<sup>9</sup> .

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<sup>9</sup> General Comment n° 12, para. 21 CRC/C/GC/12.

Children's right to express their opinion depends not only on their ability to express an opinion, but, above all, on their ability to form an opinion, mature or otherwise. In some cases, children will need the help of others to form an opinion.

In addition, Article 5 CRC gives children the right to adult guidance and direction in exercising their rights under the Convention, including Article 12 CRC.

Thus, the child's right to be heard does not only apply to the emblematic cases of divorce and separation, where children are the first to be affected by judges' decisions. Indeed, the child has the right to express his or her opinion in all kinds of other decisions, as soon as they have a direct or indirect impact on him or her (education, health, protection, religion, leisure, sports, etc.). But also, and perhaps above all, in the context of ordinary family relationships, where it is felt that the opportunity for the child to express his or her point of view regularly can help foster personal development, family relationships and facilitate the socialization of children.

We'll see later the possibility of exercising one's right to freedom of thought, conscience, and religion.

### *1.1.3 The close relationship between Article 12 and Article 3.1 CRC*

From the explanation of these two articles, the child must be heard to determine the child's best interests, but who is better placed to assess the child's personal situation and find the most favorable solution than the child himself/herself, the first person affected by the decision? To determine the value of the child's voice, we must examine his/her personal circumstances, the 1st step in determining his/her best interests.

These two Articles and rights are complementary and function as a duo in decision-making. Article 3.1 gives effect to Article 12, which offers an indispensable instrument for determining the solution to promote the child's development. Above all, considering these two provisions as interdependent ensures the child's right to influence his or her own best interests and, therefore, the decision to be made, which means his or her current existence and future.

But beware: despite the interdependence of the two articles, they should not be confused: in many situations, the child's right to be heard is a crucial element of the judicial or administrative process, but the child's voice will not be decisive in relation to other interests or may even be contrary to the child's own interests. We also need to consider situations where the child's subjective wishes do not correspond to his or her best interests

### *1.1.4 Children's evolving capacities*

Art. 5 CRC, which in my opinion should have been considered a fifth general principle, prescribes that:

*"States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."*

This provision deals with the relationship between parents and children (rights and duties) and the necessary guidance that parents (in the broadest sense) must provide to children so that the latter can exercise their rights.

While the Convention reaffirms the principle of respect for autonomy and the primacy of the rearing role of parents in relation to their children, Article 5 CRC stipulates that the rights and responsibilities of parents must be directed towards realizing their children's rights while respecting their developing capacities. Therefore, this provision goes beyond a literal reading of the Convention, establishing the principle of the progressive development of the child's capacities (*evolving capacities*)<sup>10</sup> : it describes a growing curve of the child's autonomy. In other words, the older they grow, the more their capacities develop, to the point where they can progressively enjoy their rights until they become autonomous in exercising them.

In assessing a child's capacity to exercise his or her rights, the two criteria cited in Article 12 CRC come into play: age and maturity. Age alone (an objective element) cannot determine a child's capacity. Therefore, the criterion of maturity (ability to form an opinion on one's own) must provide the necessary complement to assess whether the child can exercise his or her rights, partially or totally, or whether he or she needs to be represented to do so. The criteria to be taken into account in judging the child's degree of maturity are based on his or her degree of physical, affective, cognitive and social development.

We might even add here that Article 5 provides a better understanding of Article 12, which transfers the exercise of their rights to children (and justifies the absence of a universal age limit in the CRC) by recognizing that children can acquire sufficient maturity at a very young age.

**In short, the child's voice, best interests, age, maturity, and evolving capacities are the attributes of the child's new status as a subject of rights.** This implies that, for every child living in particular circumstances or experiencing difficulties and at a time when decisions must be taken in his or her regard, every decision-maker must concretely:

- Proceed with the hearing,
- Evaluate the impact of his words,
- Determine your personal situation (family, school, health, relationships, vulnerability, etc.) and
- Choose the measure that best serves his/her interests while balancing these against other interests at stake and inform him/her of the action taken in response to his request.

This complex and, where possible, multidisciplinary approach requires a case-by-case process that considers each child's uniqueness and the fact that his or her development must be at the heart of all concerns.

## **2. Parents' rights**

### **2.1 UN Convention on the Rights of the Child**

#### *2.1.1 General*

The Convention does not explicitly define the rights of parents, but it does refer in several provisions to their rights and responsibilities; in fact, rather than setting out rights, it acts through indirect references to the position of parents, from the point of view of "the child's individual right to..." and not from the point of view of the rights of his or her progenitors.

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<sup>10</sup> GERISON LANSDOWN (2005). The Evolving Capacities of the Child, *Innocenti Insights*, n° 11.

Despite this, there is no doubt that the child is not a person disconnected from his or her environment, a creature "out of ground", but that he or she does belong to a family, a community and a group of people who make up the State, which is a party to the Convention.

This failure to explicitly define parents' rights has led several States (and opponents of the CRC) to express concern that, by recognizing the child as an autonomous subject of rights, parents' rights would be stripped of much of their scope and significantly weakened.

A reading of the Convention reveals that the rights and *duties* of parents are mentioned in numerous articles, in particular, the provision of appropriate care and the guarantee of protection for children. In addition, the CRC devotes several articles to parents (or their substitutes) as indispensable actors in realizing children's rights<sup>11</sup>.

### 2.1.2 *Specific provisions dealing with parents and their role.*

First, let's quote the Preamble to the Convention, which is explicit on this subject:

*"The State parties [...] Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,*

*Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding"*<sup>12</sup>

This reference to the family, seen as the fundamental pillar of society and providing the natural environment for the growth and well-being of its members, underlines the necessary conditions (family environment, atmosphere of happiness, love and understanding) to ensure the realization of children's rights and their harmonious development (objective of Article 6 CRC). Therefore, the presence and role of parents are essential to this basic unit.

We might also mention an interesting consideration by the Committee on the Rights of the Child, at the very beginning of its work, in its activity report for 1994: "[...] *The family is an indispensable agent for raising awareness of human rights, preserving these rights and ensuring respect for human values [...]. We need to examine ways of ensuring a balance between parental authority and the realization of children's rights, particularly the right to freedom of expression.*"<sup>13</sup>

Two important articles. Firstly, Article 5 CRC (*supra*), which we have read from the perspective of children's evolving capacities. This norm is also a provision that deals with respect for the rights and duties of parents and their responsibility to guide and advise their children. Parental rights are therefore geared towards the realization of children's rights and the development of their capacities. What we can add is that the parent-child relationship is at the heart of Article 5 CRC and, in my view, the wording of this provision challenges traditional models of parenthood, historically formulated in terms of property, where the child is an asset (owned by

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<sup>11</sup> Ruggiero, R., Volonakis, D., and Hanson, K. (2017). The inclusion of 'third parties': The status of parenthood in the Convention on the Rights of the Child. In E. Brems, W. Vandenhoele and E. Desmet (dir.), *Children's Rights Law in the Global Human Rights Landscape: Isolation, Inspiration, Integration?* (p. 72-75). London, United Kingdom: Routledge.

<sup>12</sup> CRC Preamble.

<sup>13</sup> Committee on the Rights of the Child, Report on the fifth session (January 10-28, 1994), 58, CRC/C/24, March 8, 1994.

the parents) and not yet a person, and therefore has no say in the matter. Article 5 CRC, international legislators are proposing a conception of parenthood based on respect for children's progressive capacities, on parent-child collaboration and thus on mutual trust. Parents are no longer considered as holders of exclusive rights over their child, but as holders of duties towards their child, respecting the enjoyment and exercise of their rights as children as set out in the CRC.

Secondly, Article 18 CRC, which deals with parental responsibilities (and not parental rights), establishes the equal responsibility of the child's parents for the upbringing and development of the child. This norm complements Article 5 CRC by directly conferring on parents the primary responsibility for the upbringing and development of the child, emphasizing that parental decisions must always be made with the child's best interests in mind. This provision must also be read in conjunction with Article 27.2 CRC, which confers on parents the responsibility of ensuring "the conditions of life necessary for the child's development". In my view, Article 18 CRC does not prioritize the rights of parents' rights over children's rights, but instead asserts the primacy of "parents and other primary caregivers" over the State, not over the child. In so doing, the CRC bestows an obligation on States to respect the role of parents by refraining from arbitrary interference in exercising parental responsibility.

Within this framework, parents enjoy a certain discretionary power as holders of rights limited on the one hand by the child's evolving capacity – as the child gets more matures, parental rights will automatically be restricted or reshaped in their content and scope (art. 5 CRC) – and on the other, by the requirement to respect the child's right to have his or her best interests considered as a primary consideration in any decision affecting him or her<sup>14</sup>.

Respect for the family and the role of parents is also reflected in the following provisions:

- Article 7 CRC: children's right to know and be cared for by their parents.
- Article 8 CRC: preservation of identity, including the right to family relations.
- Article 9 CRC: children must not be separated from their parents unless necessary; children and their parents must not be separated without due process. In addition, this norm protects the child's right to maintain personal relations with both parents, unless his or her best interests indicate otherwise, and imposes an obligation on States to keep parents and children informed of any State action (judicial or administrative) likely to impinge on this right. Article 9 par. 4 CRC states that when a parent or child is separated from his or her family because of state action (detention, imprisonment or exile), the State must provide information on their whereabouts and ensure that this does not have negative consequences for those concerned.
- Article 10 CRC: if a child or his or her parents apply to enter or leave a state for family reunification, States parties must deal with such applications positively, humanely and expeditiously. In addition, when a child lives in a State other than that of his or her parents, States must provide the opportunity to maintain contact. The issue of family reunification is central and raises several questions in the field of migration.
- Article 11 CRC: obligation to set up mechanisms to protect children against illegal abduction from their country of origin and to recover them.
- Articles 20, 21 and 25, circumstances in which families are unable or unwilling to care for their children: children's right to alternative care and appropriate, high-quality temporary or permanent alternative care.

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<sup>14</sup> Ruggiero, R. (2022). Article 18: Rights Concerning Parental Responsibility. In Z. Vaghri, J. Zermatten, G. Lansdown and R. Ruggiero (Ed.), *Monitoring State Compliance with the UN Convention on the Rights of the Child* (p. 153-162). Cham: Springer.

### 2.1.3 Summary

In conclusion, although respectful of the family and its importance in children's lives, the Convention raises the question of the family, which has long been considered a private institution enjoying total autonomy as far as children are concerned. Indeed, the CRC confers on the State a key role in respecting, protecting, and realizing children's rights within the family. This is quite logical, since the Convention binds States, not individuals, in terms of what they must respect, protect and implement in terms of children's rights. Thus, the State must support, encourage and take all measures favorable to families (and parents).

Therefore, the parents' role is not seen as one of sacred authority but rather as a link in the net of protection and services that the State owes to the child. Although the CRC often relies on parents (notably in Articles 5 and 18) to enable the realization of rights, the State should do everything in its power to ensure an environment conducive to the harmonious development of its children and, thus, to protect and strengthen the family unit, the fact remains that the State no longer necessarily recognizes the traditional role assigned to parents before the advent of the CRC.

The CRC goes even further, asserting that children must be recognized as holders of individual rights and, therefore, that there is not always a coincidence of interests between children and their parents, but that there can be partial or total divergence when it's not a question of crass violations of children's rights by their parents! This obliges States parties to the Convention to take measures to protect or even remove children to ensure their safety and adopt legislative measures (both substantive and procedural) to guarantee the exercise of their rights when they conflict or do not coincide with those of their parents.

## 3. Selected conflict

### 3.1 The child's decision-making power vs. that of his or her parents in the context of the right to freedom of thought, conscience, and religion

This opinion expresses a legal and not a multidisciplinary point of view on the general question of the child's position regarding religion, notably in the apprehension of his autonomy as a subject of rights, without ignoring the evident freedom recognized to parents to provide their children with religious education.

#### 3.1.1 *The right under Article 14 CRC*

Religion is undoubtedly a complex and controversial phenomenon, from a cultural point of view, but also from the point of view of respect for children's autonomy. In the following lines, I will only discuss the right to religious freedom, without dealing with freedom of thought and conscience. The Convention, in its article 14, defines it as a civil, subjective and absolute right enshrined in numerous international instruments (first of all Article 14 CRC, but also Article 9 and Article 2 of Protocol no. 1 ECHR of 4.11.1950, Articles 18 and 27 ICCPR, Article 13.3 CDESCR...).

Thus, international law proclaims the child's right to religious freedom, after a long debate between the recognition of an individual right of the child and the protection of the parents'

right to the religious education of their offspring. Nevertheless, the subject goes beyond the legal question and becomes even more difficult if we tackle the aspects linked to sociology, philosophy, psychology, and ethics. Moreover, this freedom involves several actors: the child, the parents, the religious communities and the State.

### 3.1.2 Nature of the right

It is important to note that this right is *family-related* in nature, given the impact of religious beliefs on the construction of a child's identity. It is a given that when a child is born, he or she does not have the necessary maturity to make a religious choice, and it is quite natural for the child to develop within the religious and cultural milieu of his or her parents. Indeed, this was the view of international law before the adoption of the CRC. Therefore, concerning religion, parents are seen as shapers of the child's visions and identity. Their participation in the construction of the child's religious personality is essential.

Until the adoption of the CRC, international law ignored the direct legal challenge between the child's right and that of his or her parents regarding the right to practice religion. Since then, there have been two approaches: one as *family-related* for immature children who still passively assimilate religious elements, and the other "*individualistic*", for children who can form their own opinions. The Convention modifies this right's familial nature in favor of the individualistic approach, accepting it as soon as the child is capable of religious self-definition. So, while freedom of religion in principle grants parents the right to give their children a religious upbringing that conforms to their own convictions, international law since 1989 has also provided that children may choose their religion and adopt the religious practices that suit them when they are able to do so. Thus, for example, children have the right to object to being forced to participate in their parents' religious practices, as they also enjoy freedom of religion.

During the debate, many fears were expressed that recognizing the child's right to religious freedom would weaken parents' responsibility to socialize the child<sup>15</sup>. While some fears may be justified, it should be said that Article 14 also empowers children and their parents to defend themselves against any undue interference by the State in the area of religious convictions, particularly about families belonging to minority religious groups, e.g. by combining the effects of Articles 30 and 14 CRC<sup>16</sup>.

### 3.1.2 Relationship between children's rights and parents' rights in religious matters

To go further in the relationship between children's rights and parents' rights, we need to link Article 14 CRC to Article 18.4 ICCPR, which provides that the States parties "... *Undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*". For my part, I read Article 14.2 CRC and Article 18.4 ICCPR as a kind of continuum. They are not mutually exclusive but complementary. We could also speak of the rights of children and

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<sup>15</sup> This has led several States to express reservations about this article, notably the Islamic States.

<sup>16</sup> Article 30 CRC "In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language."

parents being in a relationship of principal right to accessory right, as Eva Brems does in her commentary on Article 14, based on the preparatory work for the CRC<sup>17</sup>.

Furthermore, I note that the parents' freedom to provide their children with religious education is not abolished by Article 14 CRC since parents can still guide their children in their steps towards progressive autonomy (evolving capacities of Article 5 CRC). In addition, the CRC assumes that parents have their children's best interests at heart and that children benefit from growing up and developing in their family's environment. While this principle is upheld in most cases, it does not rule out situations of conflict of interest, or even abuse and mistreatment of children by parents.

### *3.1.4. The child's progressive autonomy as the key to the problem*

Can the child's right to religious freedom be combined with the parents' right to religious education? In my opinion, it is Article 5 described above (evolving capacities) that is the key to this alleged opposition. In the field we're interested in, religion, the child, depending on his or her degree of development, may determine himself or herself either positively: to receive and practise a religious education at home or outside, to take part in the community's religious events, to wear religious symbols, to manifest his or her faith...; or negatively: to refuse to have a particular religion imposed on him or her, to renounce taking part in ceremonies, not to wear religious symbols.... The complexity lies in assessing the child's capacity to form his or her own opinion, since, depending on his or her state of development, the child will be able to make an autonomous decision. Informing the child (and children in general) about religious matters therefore takes on its full meaning here, and this information should be wide-ranging and, if necessary, go beyond that provided by parents.

At what age is the child autonomous? In matters of religious freedom, as with the child's hearing, the legislator of the Convention did not set any age limit, assuming that even very young children could form a valid opinion. Some countries have set a religious age of majority<sup>18</sup>; but this idea is hardly appropriate if we refer to the previously mentioned principles of the capable child. Indeed, the Committee on the Rights of the Child, in its General Comment No. 12, imposes the following consideration as a rule for States: "*The more the child himself or herself knows, has experienced and understands, the more the parent, legal guardian or other persons legally responsible for the child have to transform direction and guidance into reminders and advice and later to an exchange on an equal footing. This transformation will not take place at a fixed point in a child's development but will steadily increase as the child is encouraged to contribute his or her views.*"<sup>19</sup>

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<sup>17</sup> E. Brems, in her commentary on Article 14, defines the parental right outlined in Article 14(2) as an 'accessory to the child's right, rather than an autonomous right on an equal footing'. Quoted in Ruggiero, R., Volonakis, D. et Hanson, K. (2017). The inclusion of 'third parties': The status of parenthood in the Convention on the Rights of the Child. In E. Brems, W. Vandenhoe and E. Desmet (dir.), *Children's Rights Law in the Global Human Rights Landscape: Isolation, Inspiration, Integration?* (p. 75-78). London, United Kingdom: Routledge.

<sup>18</sup> E.g. Switzerland, Article 303.3 CC: "*A child who has reached the age of 16 has the right to choose his or her own religion.* The Committee on the Rights of the Child has criticized the 16-year age limit as being too high since a child could validly determine his or her choice of religion well before the age of 16.

<sup>19</sup> General Comment No. 12 (2009), The right of the child to be heard, CRC/C/GC/12 para. 84.

Finally, let's end with a clarification provided by the Committee on the Rights of the Child in its General Comment No. 20<sup>20</sup>, which not only asks States parties to withdraw their reservation to Article 14 CRC, but above all States "*...it is the child who exercises the right to freedom of religion, not the parent, and the parental role necessarily diminishes as the child acquires an increasingly active role in exercising choice throughout adolescence. Freedom of religion should be respected in schools and other institutions, including with regard to choice over attendance in religious instruction classes, and discrimination on the grounds of religious beliefs should be prohibited*".

About the child's capacity to form his or her own opinion, we therefore return to the issues discussed earlier, such as the child's right to be heard and the child's right to have his or her best interests considered as a primary consideration, consent or capacity to discern.

## **4. Relationship between the Guidelines and the child as subject of rights**

### *4.1. General overview*

Through examples, I have dealt with the thorny issue that can arise when the rights of the child and the rights and responsibilities of the parents compete in religious matters. There are a multitude of other possibilities for conflicting rights. The scope of the Japanese guidelines dictates this choice, and what has been written above shows that in such situations, the answer is not easy, nor is it self-evident as if it could come out of a mold or cookie-cutter.

In this case, the *New Guidelines* issued by the Government of Japan (Minister of Health, Labor and Welfare), in autumn 2022, it is important to understand that they only provide a list of possible cases that constitute child abuse within the meaning of the "Child Abuse Prevention Act", the specific law<sup>21</sup> in relation to religious beliefs, with the aim, arguably, of better addressing the issues and providing the appropriate responses that the existing protection system should provide.

### *4.2 First question: why do these guidelines focus only on religious beliefs?*

The guidelines title is "Q&A on Responses to Child Abuse Related to Religious Beliefs, etc.". This is fairly self-explanatory; however, the *etc...* would suggest that this document also covers other situations unrelated to religious beliefs, such as play, sport, cultural activities... or school. However, this is not the case, and the document focuses exclusively on religious beliefs, as its title indicates.

And yet, reading the long list of questions and answers, it's obvious that almost all the situations described could apply to situations that have no relation to religious beliefs and that can arise in any family context at any socio-cultural level of society and in any activity involving children, parents, and responsible caregivers.

If I take a random example, the case of corporal punishment (Q&A 2-1, 2-2, 2-3), it is very clear that corporal punishment must be considered in all the activities described above and not

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<sup>20</sup> General comment No. 20 (2016) on the implementation of the rights of the child during adolescence, CRC/C/GC/20, 016, para. 43.

<sup>21</sup> Child Abuse Prevention and Treatment Act (Act No. 82 of May 24, 2000).

only in relation to religious beliefs, whether it is delivered in the form of physical punishment or psychological pressure; it is moreover prohibited by international legislation (CRC) and more or less satisfactorily, by Japanese law<sup>22</sup>. Therefore, if protection authorities at the highest level want to combat corporal punishment, they should do so either by means of a general guideline covering all situations/activities involving children or by issuing guidelines for each type of activity. However, restricting this to the religious sphere is problematic.

#### *4.3 Second question : a possible discrimination*

The fact of limiting the "*Questions & Answers*" document to children who profess a religious belief and have parents who have provided them with a religious education could constitute discrimination against this group of children, but also against their parents.

International law is aware of the issue of discrimination, and all human rights treaties have a specific provision devoted to this question: art. 2 par. 1 of the International Covenant on Civil and Political Rights (ICCPR) and art. 2 par. 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) are obvious examples. So, in principle, children are covered by the provisions of these two treaties; yet their special position and the fact of their dependence has opened the question of whether children are sufficiently protected by these general provisions against the actions or omissions of the State, their parents, or persons in charge of their protection. Moreover, their special status as children of ... means that they are often discriminated against because of their parents' special position (foreigners, unemployed, members of a minority, prisoners, etc.).

It was for this reason that the international community decided in 1989 to legislate specifically on discrimination against children, by enshrining article 2 of the CRC, a very important article which the Committee on the Rights of the Child has established as a general principle<sup>23</sup> and which reads as follows:

*1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.*

*2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.*

This provision, although similar to the major texts cited above, is indeed very specific. In fact, art. 2 par. 1 protects children in their capacity as children, i.e. with all their characteristics as

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<sup>22</sup> "The Committee notes that corporal punishment in schools is prohibited by law. However, it is seriously concerned that ... (b) Corporal punishment in the home and in alternative care settings is not fully prohibited by law; (c) The Civil Code and the Child Abuse Prevention Act, particularly, allow the use of appropriate discipline and are unclear as to the permissibility of corporal punishment" CRC/C/JPN/CO/4-5, 2019, para. 25).

<sup>23</sup> Lansdown. G. (2022). Article 2: The Right to Non-discrimination. In Z. Vaghri, J. Zermatten, G. Lansdown and R. Ruggiero (Ed.), *Monitoring State Compliance with the UN Convention on the Rights of the Child* (p. 11- 19). Cham: Springer.

human beings different from other human beings; but it also protects them, via par. 2, against discrimination linked to their parents or "legal guardians, or family members". In fact, children are often doubly discriminated against because they are children, and because they belong to a family or group of persons that is itself discriminated against.

Consequently, in the case under consideration, the question is whether the Guidelines issued by the Japanese state authority, which target only situations linked to religious belief, could constitute a case of discrimination. To do this, we need to consider three factors:

- That the guidelines imposed on children categorized by them are different in comparison to those imposed on other children or groups of children who may be victims of abuse,
- That the treatment imposed by the guidelines involves a disadvantage for the child or group of children concerned,
- That the treatment imposed by these directives is disproportionate to the objective pursued.

From the in English-language information available to me in the case of these Guidelines presented in the form of "*Q&A on Responses to Child Abuse Related to Religious Beliefs*", it is quite clear that the group of children targeted is that of children who manifest a religious belief and who have been educated in a religion, and for whom the government intends to determine whether the actions of their parents meet the conditions for application of the Child Abuse Prevention Act. Compared with other groups of children engaged in other activities, there is no application of these guidelines, so the comparison is unfavorable to the children concerned. Furthermore, this application of the guidelines could constitute a disadvantage for these children when they are stigmatized by the use of the above-mentioned questionnaire. Lastly, the State's action seems disproportionate, as it does not respond, as far as I know, to any eminent danger to children of religious belief, and there is nothing to demonstrate, on the contrary, that this group of children is particularly at risk.

Consequently, the State, which by ratifying the Convention should respect, protect and fulfil the right to non-discrimination, could be implicated as perpetrator in a situation of double discrimination:

- that which affects children in the target category in their capacity as children, and
- that which affects these same children because they belong to a family characterized by religious beliefs.

#### *4.4 Third question: why so little room for nuance?*

In this questionnaire, I'm surprised by the answers, which seem to come out of an automatic mold and leave little room for nuance. As we saw above, children have rights; this must be recognized, but it's hard to read in the answers the spirit that should prevail in dealing with situations that could constitute child abuse.

It has been shown that the State (in this case, the protection authorities) must:

- Heard the children,
- Establish the personal circumstances of each child, whether perpetrator or victim,

- Determine whether he/she can exercise his/her rights (particularly in religious matters) independently,
- Demonstrate his/her ability to form an opinion,
- Examine all possible solutions to the dispute that has arisen,
- Weigh his/her interests against other interests (public, parents, and religious community's interest).

I have also explained the rights of parents and their limits, particularly in religious matters, and the fact that family interests give way, at certain times, to the child's individual rights. The notion of evolving capacity is not to be found in the answers, either explicitly or between the lines.

Finally, I would have appreciated it if I could have read that the State could not ignore this reality of the child's capacity to become an actor in his or her own rights and not just a spectator of decisions taken by others in his or her regard, such as that of the rights of his or her parents on whom we usually rely for the socialization of children, and finally its contractual responsibility to respect and implement the right expressed in Article 14 CRC, which also means protecting children against all forms of indoctrination.

#### *4.5 Fifth question: an extension of the offence of child abuse?*

This unqualified approach seems to me dangerous, as it could lead to an extension of the offences contained in the Child Abuse and Prevention Act, by introducing new notions such as religious education being harmful, or that certain common religious practices which may constitute an offence or offences.

We are dealing here with criminal law, which does not allow for an extensive interpretation, but rather a strict interpretation of the material conditions that define offences. Limiting a child's right to religious freedom (e.g. to choose a religion, or not), or limiting the freedom of parents to educate their children in a religious belief (to the extent of the child's autonomy), through these Directives should not be possible.

Given my limited knowledge of Japanese legislation and ignorance of the case law of Japanese courts in this area, I will confine myself to mentioning this risk, because it is a very real one, and to drawing attention to this crucial legal issue.

## **5. Conclusion**

Every decision taken concerning children walks a tightrope between the individual case, the nuances, the objective description of the child's personal circumstances, the assessment of needs, all under the pressure of interested or affected parties (parents, communities, the State (through its various administrations)), often themselves in conflictual situations, the sometimes-divergent opinions of experts and the subjectivity of decision-makers.

This is why clear procedural rules, tried-and-tested practices and abundant case law can help those who must decide on the fate of children and promote their harmonious development (Article 6 CRC).

However, it's hard to see how even well-meaning, unvarnished guidelines can achieve this objective and express a "children's rights" spirit or approach.

In my opinion, the adoption of the "*Q&A on Responses to Child Abuse Related to Religious Beliefs*" poses several objective problems. There is a strong likelihood that respect for children's rights and parents' rights will not be guaranteed. I'm thinking in particular of the potentially discriminatory nature and content of the Guidelines, and the danger of extending the criminal notion of child abuse.

What's more, the unqualified prescriptions of the questions and answers are not conducive to taking all precautions into account in a subject and reality as delicate as freedom of religion as defined in major international texts, in particular art. 14 of the Convention on the Rights of the Child.

A handwritten signature in black ink, appearing to read 'Jean Zermatten'. The signature is stylized, with a prominent vertical stroke on the left and a series of loops and curves on the right.

Crans, 26.02.2024

Jean Zermatten