

## **AMICUS CURIAE BRIEF**

### **To the Honorable Justices of the Supreme Court of Justice of the Nation**

... In the case of CSJ 1870/2014/CS1, entitled “**Castillo, Carina Viviana y otros c/Provincia de Salta, Ministerio de Educación de la Prov. de Salta s/amparo**” we present ourselves to Your Excellencies and state:

#### **I. OBJECTIVE**

In the nature of this invocation and in accordance with the arguments detailed throughout this brief, we request to be recognized as “amicus curiae” and summoned to the public hearing.

#### **II. THE ORGANIZATIONS’ INTEREST IN THE RESOLUTION OF THE PRESENT CASE**

The undersigned represent national organizations that come together to work jointly to promote fundamental rights and freedoms comprise the International Network of Civil Liberties Organizations (INCLLO).

CELS is a non-governmental organization that was founded in 1979 to promote and protect human rights and strengthen the democratic system and rule of law in Argentina. The American Civil Liberties Union (ACLU) is a nonprofit, nonpartisan national organization with over 1.5 million members dedicated to defending the principles embodied in the US Constitution and its civil rights laws. For nearly a century, the ACLU has been at the forefront of efforts to preserve religious freedom and equality in the United States. The Canadian Civil Liberties Association (CCLA), founded in 1964, is an independent, national, nongovernmental organization dedicated to the protection and promotion of the civil liberties, human rights and democratic freedoms of all people across Canada. CCLA works in the courts, before legislative committees, in classrooms, and in the streets to protect rights and freedoms.

The Hungarian Civil Liberties Union (HCLU) is a nonprofit, nonpartisan organization that has been active for more than two decades in protecting fundamental rights throughout Hungary. In recent years, the HCLU has successfully litigated for religious freedom before the European Court of Human Rights and campaigned for legal reforms, advocating for religious neutrality and equal treatment in public education. The Human Rights Law Network (HRLN) is a collective of lawyers and social activists dedicated to using the legal system to advance human rights in India and the subcontinent. HRLN works for the rights of marginalized people and to challenge oppression, exploitation and discrimination against any group or individual. The Legal Resources Centre (LRC) is a public interest, non-profit law clinic that was founded in 1979 in South Africa. Since its inception,

the LRC has shown a commitment to working toward a fully democratic society underpinned by respect for the rule of law and constitutional democracy.

Based on the trajectories and experience of each of these organizations, this brief presents arguments regarding the unconstitutionality of Article 49 of the Constitution of the Province of Salta and its statutory regulations. It should be noted that CELS has not received financing or any kind of economic assistance from the State, and that the result of this process does not involve any type of financial benefit either – directly or indirectly.

### **III. THE POINTS TO BE ADDRESSED IN THIS AMICUS CURIAE BRIEF**

In this brief we incorporate arguments relevant to the unconstitutionality of Article 49 of the Constitution of the Province of Salta, which establishes that “Parents and, where appropriate, legal guardians have the right for their children or wards to receive religious education in public school in accordance with their own convictions.” We also sustain, on the basis of the arguments presented, that the laws and regulations derived from this Article<sup>1</sup> (and of course their implementation) are unconstitutional, because they violate the freedom of worship or belief of parents and children and the right to equality and nondiscrimination. This request for unconstitutionality coincides with what the plaintiffs have solicited. Although we will not delve into the matter here, we would like to state that we share the plaintiffs’ position in the sense that the nation’s federal structure cannot serve as a pretext for failing to respect the rights recognized in the National Constitution.

The Prosecuting Attorney before the Supreme Court of the Nation, Víctor Abramovich, after meticulously demonstrating how religious education has been carried out in the public schools of Salta (see point V of his opinion), affirmed that the religious education set forth by local law has not been implemented as a neutral or objective teaching, but instead severely infringes the fundamental constitutional rights of religious and nonreligious minorities. The Prosecuting Attorney sustains that these restrictions are disproportionate and unnecessary, and therefore that religious teachings should be prohibited during regular school hours and removed from the official public school curriculum.

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<sup>1</sup> Provincial Law 7546, Article 8, para. m (“*The principles, purposes and criteria of education in the Province of Salta are: m) Guarantee that ‘parents and, where appropriate, legal guardians have the right for their children or wards to receive religious education in public school in accordance with their own convictions,’ in compliance with Article 49 of the Constitution of the Province of Salta*”), Article 27, para. ñ (“*Objectives of Primary Education in the Province of Salta are: ñ) Provide religious teaching, which forms part of the curriculum and is imparted during school hours, tending to the belief of the parents and legal guardians who decide about the participation of their children or wards. The content and the teacher authorization will require the backing of the respective religious authority*”) and Directive No. 45/09, which requires that parents manifest whether or not they want their children to remain in religion class and, in the affirmative case, that they indicate the beliefs in which they want them to be instructed. (Translations are unofficial)

Furthermore, the restriction on religious education in public schools should be extended beyond regular school hours and to the use of public funds to pay the salaries of those who seek to impart these teachings, based on the arguments that we set forth in this brief. This inasmuch as it is the State's obligation to guarantee the present and future conditions for children and adolescents to exercise their rights – among which is the right to progressive autonomy, a necessary condition for the exercise of other rights such as freedom of worship or belief. This obligation implies that public schools, during or outside regular school hours, be free of religious education and symbolism in order to promote critical thinking skills and the values of a plural, democratic society.

In what follows, then, arguments will be presented that may aid the Court in its resolution of the case. First we will reflect on the importance of keeping the State and religion in separate spheres (separating church and State). Later we will examine how giving preeminence to one religion in particular violates the right to equality and nondiscrimination of those who profess a religion that is not favored or who profess none at all. Emphasis will be placed on the added gravity of the situation when the religion favored by the State constantly advocates against the rights of disadvantaged groups such as women or sexual minorities. Subsequently, the law being challenged will be analyzed in terms of the violation of progressive autonomy and the consequent right of children and adolescents to freedom of worship or belief. To this end, we will examine the duties of the State and of parents to ensure that children and adolescents can effectively exercise their right to freedom of worship or belief. We will conclude that the only way in which the State and parents can ensure that children and adolescents are able to fully exercise their rights is by promoting the necessary conditions for the development of their progressive autonomy. In the case in question, one of these necessary conditions consists of guaranteeing a public school environment that is free from the influence of religion, particularly in a country with an overt majority religion.

### **III.1. THE IMPORTANCE OF THE SEPARATION OF CHURCH AND STATE**

With the advent of democracy as the political regime that would overthrow absolutist monarchies, the close ties between religious and political power came into question, leading to the proposal that, contrary to the past, an autonomous distinction be made between religion and politics.<sup>2</sup> In this regard, it has been argued that no religion should hold effective control over the State, nor should the State adopt or identify with any one religion, since such an identification would necessarily result in the preeminence of the interests and values of the favored religion, thus limiting the State's capacity to

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<sup>2</sup> See Pedro Salazar Ugarte and Pauline Capdevielle (coords.), *Para Entender y Pensar la Laicidad*, Jorge Carpizo Collection, Porrúa, Tomes I, II and III and Roberto J. Blancarte, *El Estado Laico*, Nostra Ediciones, 2012.

comprehend and be receptive to the multiplicity of values and beliefs that coexist in society. To ensure state impartiality in terms of values and recognition of the different moral and ethical worldviews that exist in plural and open societies, the State must have autonomy from religious sectors that seek to impose their particular ethical and moral worldview. The ideal for a secular State is a political project that adheres to religious neutrality in order to protect individuals' freedom of conscience, and this protection can only be provided by adopting the democratic principles that guarantee the same rights to all people, regardless of their beliefs. Secularism does not seek to deny or belittle the idea of God or any religion in particular; rather, its primary objective is to remain neutral in order to protect and guarantee the freedom of all the people under its mandate, because the political legitimacy of a secular State derives from the people's will, from democracy, not from the doctrine of any one religious faith.

In addition to the notion that the State should avoid embodying the ideals of any specific religion, and in light of a social reality in which many religions coexist, another notion has emerged regarding respect for the freedom to choose any of the various existing faiths, or none at all. Here it is also worth mentioning the notion of guaranteeing reciprocal respect among the distinct creeds. To promote this, the State must adopt a neutral position vis-à-vis the multiplicity of religious manifestations. The principle of religious tolerance requires the State to ensure that no church prevail over others. In those cases in which the religiously neutral State is forced to intervene in religious matters, its action must be limited to guaranteeing the freedom of all believers and nonbelievers alike.

### **III. 2. THE RIGHT TO EQUALITY AND NONDISCRIMINATION**

When the particular vision for social and moral order of one religious faith is privileged, which in the case of Argentina is the Catholic faith, other moral and social values that do not align with the parameters of the privileged religion are belittled and treated unequally. Worldviews that are distinct from the privileged one – whether they are religious or not – are often considered inferior in terms of economic and social worth, which impinges on the right to equality and nondiscrimination.

The State must not confer privileged status on any religion. On the contrary, it must adopt a neutral position regarding the plurality of groups that coexist in a democracy. This is because the worldview favored by the State ultimately prevails over minority worldviews, even more so if it is benefitted by State resources, in the form, for example, of wages paid to the teachers or religious authorities who teach religion or the use of public establishments for that purpose (even outside regular school hours). As Justice Hugo Black of the US Supreme Court famously wrote in a case examining the constitutionality of prayer in public schools, “When the power, prestige and financial support of

government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.”<sup>3</sup>

In Argentina, a logic of interaction between the different strata of the State – national, provincial, and municipal – and the different strata of the Catholic Church – episcopate, bishopric, regional pastoral councils, parishes, chapels, etc. – has persisted despite historical fluctuations.<sup>4</sup> The Catholic Church receives differential treatment from the State compared with other religious institutions. There is a political culture with marks of religious identification that traditionally has blocked any initiative proposing a separation of church and State. Notwithstanding, the Constituent Assembly of 1994 clearly expressed its intention to eliminate that religious identification.

The first obstacle we face when affirming the need for separation between political power and religion is Article 2 of the National Constitution, which declares the federal government’s support for the Roman Catholic Apostolic faith. It has been convincingly established that the first members of the Constituent Assembly, after arduous discussion, adopted a model of clear ties to and preference for the Catholic faith, which was further reinforced when the Supreme Court interpreted that the support to be proffered by the State to the Catholic Church is financial in nature. Although the Court denied that this article established a confessional State, in practice it led to the Catholic conquest of the State and its practices. While true that this constitutional provision has had to coexist with one that guarantees freedom of worship or belief (Article 14) and another that establishes the right of foreigners to freely exercise their religion (Article 20), Article 2 and its validation of the State’s favoritism of the Catholic religion has prevailed. This enabled the progressive “confessionalization” of the State through the sanction of an enormous range of laws and practices that confer the Catholic religion with a privileged legal status, sustained by a variety of economic and symbolic resources, such as the payment of salaries to bishops;<sup>5</sup> subsidies for parish priests or bursar vicars in disadvantaged areas<sup>6</sup> and scholarships for seminarians;<sup>7</sup> the elimination of secular criteria in education laws;<sup>8</sup> a prominent role in the system of rating motion pictures;<sup>9</sup> the creation of the National

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<sup>3</sup> Justice Black in *Engel v. Vitale*, 370 U.S. 421 (1962).

<sup>4</sup> See Fortunato Mallimaci (and collaborators), *Atlas de las creencias religiosas en la Argentina*, Editorial Biblos, Buenos Aires, 2013

<sup>5</sup> Law 21.950 and Law 21.540.

<sup>6</sup> Law 22.162.

<sup>7</sup> Law 22.950. In addition, when there is a vacancy at the head of the Archdiocese, Diocese, Prelatures, Eparchies and Exarchates of the Roman Catholic Apostolic Faith the bishopric receives funds Law 22.552. All of these laws were dictated during the last dictatorship and remain in force.

<sup>8</sup> See the National Law of Higher Education 24.521, 1995 and Law 26.206 of National Education, 2006.

<sup>9</sup> Law 23.052 from 1984 abolished the body for cinematographic censorship and designed a system to rate movies. Its regulatory decree 828/84 created an Advisory Committee that includes, among other members: “...d) A member proposed by the Episcopal Team for the Social Communication Media of the Roman Catholic Apostolic Church; e) A member proposed by the Jewish Faith; f) A member proposed by non-

Registry of non-Catholic Faiths;<sup>10</sup> subsidies for religious primary and secondary schools; the presence of the president and other public authorities at Catholic ceremonies such as the *Te Deum* and their transmission by publicly owned media; the presence of religious symbols in the offices of judges, legislators and public servants, in public hospitals, the public television station and even in the new subway stations; the recitation of catechism in public schools outside Argentina's capital city; advantages conferred by the law on audiovisual media (Articles 37 and 93); and the standing attributed to it as a legal entity under public law by the Civil Code (Article 33), among innumerable other types of state support.

It was the will of the Constituent Assembly members to alter this state of affairs during the last constitutional reform, since one of their objectives was to establish a separation between the majority Catholic faith and the State. This intent is evident in the elimination of specific clauses that favored the Catholic religion, as well as the incorporation of a perspective centered on the protection of disadvantaged groups' right to nondiscrimination. Regarding the first point, the Assembly eliminated the constitutional requirement that the president and vice president be Catholic (previously Article 76). Furthermore, it enshrined in the Constitution the agreement reached with the Holy See in 1966 in which the Argentine State relinquished its prerogatives regarding ecclesiastic matters and its capacity to intervene in Church management [for example, by exercising the "Patronato" patronage system, allowing papal bulls, rescripts or council decrees to proceed, Congress's power to authorize the establishment of new religious orders, and eliminated the call to convert "Indians" to Catholicism (formerly Article 67 Section 15)].

At this point it is important to remember that the law that established the Constituent Assembly did not give it the authority to modify the first part of the Constitution referring to the declaration of rights – which is where Article 2 is located. That is why, despite the limit imposed on the reform process that prevented the Assembly from changing this last remaining constitutional provision with a confessional cast, the Assembly clearly intended to terminate the privileges accorded to the majority religion by modifying the provisions in the plexus of the Constitution that gave hierarchy to and benefited that religious faith (in the part it was authorized to reform). Regarding the incorporation of a perspective centered on the protection of disadvantaged groups' right to nondiscrimination, the 1994 reform favored the protection of diverse minority social groups, primarily in Article 75, Sections 17<sup>11</sup>

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Catholic Christian Faiths," granting participation to religions in an area in which they should not be since they rate movies that believers, belonging to those faiths and others excluded by the law, and nonbelievers will see.

<sup>10</sup> Law 21.745, 1978. This law is very restrictive and controlling of faiths other than the Catholic religion.

<sup>11</sup> "To recognize the ethnic and cultural pre-existence of indigenous peoples of Argentina. To guarantee respect for the identity and the right to bilingual and intercultural education; to recognize the legal capacity of their communities, and the community possession and ownership of the lands they traditionally occupy;

and 23,<sup>12</sup> among others. Furthermore, Article 75 Section 22 gave constitutional hierarchy to the principal international human rights instruments that also recognize minority rights in several of their clauses.<sup>13</sup>

Consequently, between the articles incorporated during the last constitutional reform to protect the rights of minorities as well as the clear indication of the intent to circumscribe the influence of the Catholic faith in the public sphere, and the article that privileges the Catholic majority that could not be reformed, it would be appropriate to give primacy to the first two and harmonize constitutional interpretation along the lines of the Constituent Assembly's clear intent to remove Catholic privilege. The removal of this unacceptable privilege would be a first step toward establishing a secular State that respects the freedom of religion, the equal status of all religions, and the equal status of believers and nonbelievers alike. In this context, provisions such as Article 49 of Salta's Constitution, which orders the State to favor the majority religion, incurs blatant unconstitutionality.

There are two main reasons for invalidating any law or regulation that benefits the Catholic religion at the cost of state neutrality in religious matters. In the first place, such favoritism violates the principle of equality among religions, inasmuch as the described system of privileges makes the exercise of freedom of religion more onerous for followers of faiths that do not enjoy the prerogatives and support granted to the Catholic Church. From a conceptual perspective, the freedom of religion requires a relevant measure of state secularity because, if an official religion exists or one church has significant influence over government decisions, it will be more difficult to treat the followers of that religion on equal footing with the followers of faiths that do not enjoy official recognition. Secondly, conspicuous state support for the Catholic Church places the Church's discourse and practices on a privileged plane in comparison with the religions that lack the State's favor.

In this regard, the Supreme Court of the United States has affirmed that school endorsement of religious beliefs expresses subordination to students who are not adherents, sending a message "that

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*and to regulate the granting of other lands adequate and sufficient for human development; none of them shall be sold, transmitted or subject to liens or attachments. To guarantee their participation in issues related to their natural resources and in other interests affecting them. The provinces may jointly exercise these powers.*" Available at: <http://www.biblioteca.jus.gov.ar/argentina-constitution.pdf>

<sup>12</sup> "To legislate and promote positive measures guaranteeing true equal opportunities and treatment, the full benefit and exercise of the rights recognized by this Constitution and by the international treaties on human rights in force, particularly referring to children, women, the aged, and disabled persons. To issue a special and integral social security system to protect children from abandonment, since pregnancy up to the end of elementary education, and to protect the mother during pregnancy and the period of lactation."

<sup>13</sup> Among others, the International Covenant on Civil and Political Rights, Article 27; the International Covenant on Economic, Social and Cultural Rights, Article 2, paragraph 2; the International Convention on the Elimination of All Forms of Racial Discrimination, Article 1; and the Convention on the Rights of the Child, Article 30.

they are outsiders, not full members of the political community, and, an accompanying message to the adherents that they are...favored members of the political community” (*Santa Fe Independent School District v. Doe*, 530 U.S. 290, 309-310 (2000), quoting *Lynch v. Donnelly*, 465 U.S. 669, 688, O’Connor, J., concurring). The Supreme Court of Canada has similarly argued that “[t]he school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate.”<sup>14</sup>

This hierarchical superiority stems both from the economic support provided, which allows a given religion to allocate greater resources to proselytism, and from the “official” status granted to a faith. For these reasons, it is important to invalidate any legal clause that furthers the predominance of Catholicism at the expense of state neutrality in religious matters. Since the return to democracy in 1983, constitutional practice in Argentina has evolved toward greater protections for minority rights, including the 1994 reform that explicitly established such protection, and this obligates the Court to examine and challenge any law or legal provision that privileges a majority religion, especially if its precepts disregard rights recognized by the Constitution.

### **III. 3. THE FREEDOM OF RELIGION OR BELIEF AND THE PROGRESSIVE AUTONOMY OF CHILDREN**

An issue that remains to be analyzed in the case at hand is children’s right to the freedom of religion or belief. The freedom of religion or belief in the case of children represents a right held by a person still in development, and thus their criteria are in the process of being formed. That is why the role of the State and of parents in promoting the development of children is so central. In a ground-breaking work on the subject, Joel Feinberg argues that children have rights that are equal to those of adults, but in the case of children their capacity to choose is in development.<sup>15</sup> Rights are thus attributed to children that require a sophisticated level of autonomy to exercise, a level that children do not attain until they reach the age of majority, so these rights must be protected for them until that point. This means guaranteeing the ability of children to exercise these rights in the future, once they have reached the age of majority. This is not the same as sustaining that children do not possess the right until they reach adulthood. On the contrary, both the State and parents must contribute to the

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<sup>14</sup> *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 at para. 42; see also *Canadian Civil Liberties Association v. Ontario (Minister of Education)* (1990), 65 D.L.R. (4th) 1 (Ont. C.A.) at para. 57: “[s]tate-authorized religious indoctrination amounts to the imposition of majoritarian religious beliefs on minorities . . . teaching students Christian doctrine as if it were the exclusive means through which to develop moral thinking and behaviour amounts to religious coercion in the class-room.”

<sup>15</sup> Feinberg, Joel, “The Child’s Right to an Open Future” in Aiken, William and Lafollette, Hugh (eds.) *Whose Child? Children’s Rights, Parental Authority, and State Power*. Totowa, NJ: Rowman & Littlefield, 1980.



development of children's autonomy so they are able to exercise their rights. The freedom of religion or belief is one of these rights.

Before examining the duties that correspond to the State and to parents with regard to children's right to freedom of religion, it is worth noting that childhood was historically governed by a tutelary model. Under it, children were not considered rights holders, but rather, on the contrary, they were defined in terms of what they lacked, and for this reason were considered to be under the control and protection of the State, the family and society, all of whom were to provide them with guardianship and assistance. This was, for example, the position taken in the Argentine Civil Code until its reform in 2015.

In recent decades, a new understanding of the rights of children has displaced the restrictive guardianship perspective. The 1990 Convention on the Rights of the Child (hereafter the CRC) was the first international instrument that departed from the earlier paradigm, and its adoption brought about profound legal and social transformations in the way adults and institutions interact with minors. The CRC adopted a new conception regarding the legal status of minors. The guardianship approach is replaced by one of comprehensive protection in which the minor is recognized as possessing rights. This paradigm erects as a guiding principle the child's best interest, as the basic premise for the interpretation and application of the full spectrum of laws and regulations. The legal order confers special protection on children given their vulnerable status and the fact that they are in the midst of developing their potentialities. They should exercise their rights in accordance with their age and maturity level. This new legal conception for minors requires reconceiving and, consequently, reducing the emphasis placed on the need for parental direction and guidance, which should be carried out now in terms of accompanying and assisting. The State's role as protector must similarly be reconceived, with the degree of State intervention lessening as the child's autonomy increases.

For illustrative purposes, these changes in the conception of childhood and the role of parents have also been enshrined in several provisions of the Civil and Commercial Code of the Nation. Article 646, for instance, lists among the duties and rights of parents "considering the specific necessities of children according to their psychophysical characteristics, aptitudes and maturity level; respecting the right of children or adolescents to be heard and to participate in their educational process, as well as regarding their most personal rights; and lending guidance and direction to children so that they may effectively exercise their rights." Similarly, Article 639 establishes the principles upon which parental duties are structured: "a) the child's best interest; b) the progressive autonomy of children in accordance with their psychophysical characteristics, aptitudes and development; c) the right of

children to be heard and have their opinion taken into account, according to their age and maturity level.” The same paradigm can be observed in the Law for the Comprehensive Protection of the Rights of Children and Adolescents, No. 26.061, and in Article 5 of the Law on the Right to Gender Identity, in which Congress unanimously determined that children, with the guidance and support of their parents, may make decisions regarding their gender identity based on self-perception.

In what follows, using the concepts described in the previous paragraphs as a frame of reference, the State’s obligation to respect children’s right to freedom of thought, conscience and religion will be analyzed through the lens of Article 14 of the CRC. The scope of the right of parents to inculcate their children with their own religious and moral beliefs will also be examined.

#### *a) State Duties*

From the set of laws and standards previously listed, it can be deduced that children enjoy the right to have the State maximize their opportunities to develop their personal autonomy. The right to freedom of religion or belief is premised on personal autonomy. This means we must conceive of children’s exercise of this right in terms of their restricted yet ever-developing autonomy. When the State abandons its neutrality in favor of a specific religion, it violates children’s future options. This is what occurs when the Province of Salta grants parents the right to have their children receive religious education in public school that is aligned with their own convictions. Taking into account that 91.7% of the province’s inhabitants are Catholic, the granting of this right to parents by Salta’s Constitution is tantamount to establishing Catholic education in the public schools.<sup>16</sup>

It is necessary for the State to protect the present and future rights of new generations by ensuring that they acquire the knowledge and skills necessary to act as full citizens with their own moral independence. The State must ensure that the school environment promotes children’s present and future capacity for progressive autonomy. This is only feasible if the education carried out in public educational establishments is free of any religious influence, especially that of the majority religion. The Committee on the Rights of the Child, in its General Comment Number 1, notes in Section 9 that the main objective of education is “the development of the individual child’s personality, talents and abilities...develop(ing) critical thinking, creative talents and other abilities which give children the tools needed to pursue their options in life.”<sup>17</sup> This is linked with Article 29 of the CRC, which establishes the aim of education as “the development of the child’s personality, talents and mental

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<sup>16</sup> In the northwest of Argentina (which includes the provinces of Jujuy, Salta, Tucumán, Catamarca, La Rioja and Santiago del Estero) 91.7 percent of people are Catholic, 3.7 percent are evangelical Christians, 2.1 percent are Mormons and Jehovah’s Witnesses, 1.8 percent are indifferent to religion and 0.7 percent are believers of other faiths (for example, Jews and Muslims). Mallimaci *ut supra*.

<sup>17</sup> Committee on the Rights of the Child, General Comment No. 1, The Aims of Education, CRC/GC/2001/1

and physical abilities to their fullest potential.” Without a doubt, the best way to attain that objective is by providing an education that reflects the plurality of beliefs in an environment free of influence or pressure from the majority religion.

The members of the 1994 Constituent Assembly tied the importance of education to democracy and equality by establishing in Article 75 Section 19 of the National Constitution that education must be directed at “the promotion of democratic values and equal opportunities and possibilities without any discrimination,” an objective that can only be achieved if no religion is granted preeminence. For its part, the UN Committee on Economic, Social and Cultural Rights has emphasized, in its General Comment Number 13, paragraph 4,<sup>18</sup> the importance of education and diversity, affirming that it should be oriented toward developing a sense of human dignity, should enable all persons to participate effectively in a free society, and should promote understanding among ethnic groups, nations, and racial or religious groups.

The Supreme Court of the United States has also underscored the importance of public schooling as an emblem of democracy and the greatest means of promoting a common destiny, noting that “[i]n no activity of the State is it more vital to keep out divisive forces than in its schools” (*Edwards v. Aguillard*, 482 U.S. 578, 584 (1987), citing *McCullum v. Board of Education*, 333 U.S. 203, 231, opinion by Frankfurter, J.). In this last case, Justice Frankfurter declared that the strict confinement of public schools to secular education was a recognition that democratic societies must educate their children in an atmosphere free from pressures. “Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects...leaving to the individual’s church and home indoctrination in the faith of his choice.” (*McCullum v. Board of Education*, 333 U.S. 203, 216-17 (1948) (Frankfurter, J., concurring)).

In addition, regarding the relevance of education in the life of a person and its connection to democracy, as Carlos Nino expressed it, education “is essential for it to be possible to freely choose one’s life plan and ideals. At the same time, a certain type of education is necessary to carry out a life plan or ideal that is freely chosen. In addition, the education of the population facilitates the adequate functioning of the democratic process, above all when the process is underpinned by the epistemological value.”<sup>19</sup> Similarly, Pedro Salazar Ugarte observes “it is in the domain of education where the connection between secularism and the principle of equality should be the most evident. In

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<sup>18</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 13, The Right to Education (Article 13 of the Covenant) (E/C.12/1999/10)

<sup>19</sup> Nino, Carlos S., *Fundamentos de Derecho Constitucional*, Buenos Aires, Astrea, 1992, p. 239.

a democratic State, all children, without exception, must receive the same intellectual tools to lead dignified and morally autonomous lives. The only way to do this without undermining the beliefs learned at home is by providing a scholastic space that is secular and plural....For this reason, the school has an unavoidable responsibility: offer a level playing field where future citizens interact, creating affective, ethical and intellectual ties that go beyond their differences, that go beyond doctrine and prejudice.”

Furthermore, any measure adopted by the State that concerns children must take into consideration their best interests. In the case under discussion, this requirement is fully met when the State does not impede children from being exposed to their parents’ religious beliefs outside of school hours and public facilities (at home or in churches, temples, clubs, etc.). Regardless, as we will examine in the next section, such exposure does have limits.

#### *b) Parental Duties*

Here we examine the scope of parents’ duties to promote the conditions necessary for their children to develop and exercise their autonomy. This will permit us to analyze the unconstitutionality of the article stipulating that parents have the right to demand that their religious beliefs be taught in public schools.

Article 14 of the CRC, after recognizing children’s right to freedom of religion and thought, stipulates that parents have the right and the duty to guide their children in the exercise of their right to freedom of religion or belief. Such guidance, the Convention continues, should be carried out in accordance with the evolution of children’s decision-making faculties.

In transmitting religious beliefs to their children, parents exercise their own religious rights, not those of the children, given that the exercise of those rights requires a certain level of self-awareness to make free choices in the matter – a level that children, whose capacities are still evolving and whose cognitive skills are different from those of adults, may not yet possess.

This approach has been incorporated into international law. This can be seen in the profound conceptual change regarding the right of parents to determine the moral and religious education of their children. Article 18 of the International Covenant on Civil and Political Rights, reflecting a model now considered obsolete, requires States parties to assume the obligation to respect parents’ freedom of religion by ensuring that their children are able to receive religious and moral education that corresponds to the parents’ convictions, and, although it states that everyone has the right to religious freedom, it says nothing specific about children. This silence was rectified by the CRC, which explicitly establishes children’s religious freedom and the right of parents and legal guardians

to guide children in the exercise of this right. In this latest international instrument, the right of the parents is limited from fully determining the nature of children's religious and moral education to simply *guiding* minors in the *exercise* of their right. The implication is that parents, when providing orientation to their children, have the obligation to respect children's evolving capacities and not base their decisions solely on their religious beliefs. Similarly, the United Nations Special Rapporteur on the freedom of religion or belief Heiner Bielefeldt declared that, in order to encourage children to take an increasingly active role in the exercise of their right to freedom of religion or belief, the guidance they receive should be consistent with their evolving capacities, thereby respecting children as rights holders from a very early age (see the Special Rapporteur's report).<sup>20</sup>

The Covenant on Civil and Political Rights, then, presupposes that adults have religious or moral preferences, while the CRC assumes that children do not possess such preferences yet and must be guided by their parents in the process of obtaining them. As Diana Díaz Montiel argues, "the right to religious freedom of minors requires that religious freedom be developed in accordance with children's evolving capacities, in a manner that is participatory and closely connected to the right to be heard established in Article 12 of the CRC, and to the concept of evolving faculties recognized in Article 5 of this instrument of international human rights law."<sup>21</sup> Accordingly, childhood should not be understood as a period of life that is defined in terms of ideas of dependence or subordination to parents.

Consequently, parents' freedom to choose for their children may be limited in order to protect the rights that children currently possess (such as the right to bodily integrity) or to protect rights that children will only be able to fully exercise in the future, such as their right to exercise full moral autonomy. In the words made famous by Joel Feinberg, members of new generations have the right to "an open future." This does not obligate parents to refrain from making any decision that could impact the lives of their children in some way, but it does obligate them to abstain from making decisions that annul or significantly jeopardize their future moral autonomy.

In a case examining whether sexual education in schools did or did not constitute indoctrination that could be considered disrespectful of parents' religious or philosophical convictions, the European Court of Human Rights favored the importance of children's autonomy in affirming the validity of making such education obligatory. The Court ruled that when a conflict arises between the autonomy

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<sup>20</sup> Report of the Special Rapporteur on freedom of religion or belief, Elimination of all forms of religious intolerance (A/70/286), August 5, 2015.

<sup>21</sup> Diana Díaz Montiel, "El Derecho a la Libertad Religiosa y Niñas, Niños y Adolescentes", Biblioteca Jurídica de la UNAM, 2014, p. 248.

of children and the religious beliefs of their parents, the former should prevail (*Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976).

The position taken by the Constitutional Court of Hungary is especially illustrative. The case examined whether the re-privatization of church property following the fall of the Communist regime created a risk that no more public schools would exist in certain localities, only schools belonging to the Church. This was challenged as a violation of the State's neutrality. The Constitutional Court of that country determined that the freedom of belief gave parents the right to choose education devoid of religious content for their children. It also recognized the right of parents to choose religious education for their children in schools operated by the Church, yet it declared that this right does not correspond to any obligation of the State to maintain religious schools. This holding was based on the court's estimation that the burden of attending a religious school for an atheist was disproportionate in comparison with the burden of attending secular schools for religious parents or students. Of particular significance is the court's consideration that both public and religious schools are required to transmit knowledge in an objective and tolerant manner that respects students' freedom of belief (Decision Number 4/1993, II. 12; a similar opinion was expressed in a subsequent case, Decision Number 18/1994, III. 31).

In a country like Argentina, where over 80% of the population identifies as Catholic (reaching over 90% in some provinces), the failure to maintain state neutrality toward religion, especially in school environments, amounts to a coercive imposition of religion, which violates children's right to an education that promotes the conditions for their future exercise of personal autonomy.

To synthesize the arguments presented, the right to equality and nondiscrimination requires the State to remain neutral and avoid privileging one religion over other beliefs, whether religious or not. Furthermore, the State must ensure that public education constitutes a sphere free of religion, not only because not doing so violates the right to equality and nondiscrimination, but also because the State must take care to provide an education that strengthens children's future autonomy through the teaching of critical thinking skills – which often run counter to accepted dogma, including religious doctrine. It is in schools where convictions based on the centrality of the rule of equality and nondiscrimination are promoted as the path to peaceful, democratic coexistence among citizens through the deep, mutual recognition of others as worthy of the same dignity and a shared destiny. Lastly, it is worth emphasizing that parents' rights and duties consist of guiding children in the exercise of their rights, not imposing their beliefs, and this should be done with consideration for children's maturity level as a gauge for their decision-making capacity.

In light of the arguments presented, we request that the honorable Justices of the Supreme Court declare unconstitutional the challenged laws of the Province of Salta.

#### **IV. PETITION**

In the hope that our contribution might contribute to a just resolution of the case, we request of Your Excellencies:

- 1) that we be deemed Amicus Curiae in this case;
- 2) that the grounds identified in this brief be considered and your resolution be consequent with them;
- 3) that receipt of the accompanying copies be conceded.

With all due consent,

May Justice be done