

O wolność wyznawania religii we współczesnym świecie

Przeciwdziałanie przyczynom dyskryminacji
i pomoc prześladowanym na przykładzie chrześcijan

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Parental Rights in Education in the American Region. Defending a Robust Understanding of the Right in (Mostly) Uncharted Territory

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Introduction

What is the prerogative of parents when it comes to the education of their children? Do they have the right to control the educational content they are given in schools? To what extent? And if so, how is this right to be exercised in the context of modern school systems, which are increasingly pluralistic and diverse in terms of the worldviews of parents and the state's own political commitments. The answer to these and other questions becomes increasingly relevant in a time in which our political communities seem to be more and more divided in terms of the way in which individuals –and perhaps more importantly, each family– view the idea of the good life and the purpose of education for each child.

This chapter examines the issue of parental rights in education from an international human rights perspective, under the universal and American human rights obligations. We have chosen to focus particularly on the American region given the fact that, out of the existing human rights systems that acknowledge the rights of parents in education¹, the Inter American system is the one that presents the least development and treatment of the matter in its jurisprudence, while having arguably the most stringent standard of protection of them all. However, given we have seen increasing political division and tension between parental rights organizations and state authorities over the content of education in schools², it seems likely that the region will have to grapple with this matter sooner rather than later³.

[¹] We note that neither the African Charter on Human and People's Rights, nor the ASEAN Human Rights Declaration acknowledge parental rights in any form whatsoever.

[²] It is possible to observe that within the last five years, parental rights groups have been formed and hundreds of thousands of people have taken to the streets to protest several state initiatives with respect to new proposed contents for the school curriculum dealing with sexuality, gender and other issues under the banner of *don't mess with my kids*. This was the case in Colombia (2016), Peru (2016), Argentina (2018), Uruguay (2017), and the Dominican Republic (2017), among others. For a repository of news clipings on the protests, see <https://www.aciprensa.com/noticias/etiquetas/connishijosnotemetas>.

[³] Indeed, the first salvos have already been fired in this contest. In December of 2017 the Interamerican Commission on Human Rights issued a press release lamenting the move by the Paraguayan Ministry of Education in deciding that its educational material would not use *gender theory and/or ideology*, as a *setback for the rights of women, people with diverse sexual orientations and gender identities, and children to receive an education free of stereotypes that are based on ideas of inferiority or subordination*. Through the press release, the Commission anticipated its view that it considered that Paraguay had put itself in breach of its human rights obligations, considering that in its view, it had the obligation to *modify social and cultural patterns of heteronormative conduct*, the need to *recognize different types of families*, in reference homosexual couplings, and the need to *adopt gender perspective* in education. See, Interamerican Commission on Human Rights, IACHR Regrets Ban on Gender Education in Paraguay, Press Release, December 15, 2017, at: https://www.oas.org/en/iachr/media_center/PReleases/2017/208.asp. There is no pending case with respect to the decision of Paraguay, as of this writing.

It exceeds the scope of this chapter to analyze the full extent of the claims made by the Commission in its press release and the way it delivered them. However, a few comments are in order. It is undeniably the case that States have acquired, through their adherence to the Convention on the Elimination of All Forms of Discrimination Against Women –among others– a duty to combat *prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women* and that this includes the duty to undertake a revision of school programs to eliminate stereotyped conceptions of the role of men and women. See, United Nations, General Assembly, Convention for the Elimination of all Forms of Discrimination Against Women, 1979. However, as is usually the case when it comes to human rights

Our main thesis is that, properly understood, international human rights law requires a great deal of state deference towards parents in terms of having, in general, the final decision making power on the educational contents their children will receive, when those bear on moral or religious issues. As such, and because formal education has been made mandatory⁴, this right will sometimes translate in the need for the state to provide exemptions (so called *opt outs*) or accommodations in those situations where the convictions of parents on these issues come in conflict with the content chosen by the school or the educational system. Through this essay, we hope to convince our readers that existing international human rights law not only makes room for parental rights, but that it imperatively requires states to abide by our interpretation of their scope and content.

In order to support our position, we will first look at the text of the treaties and instruments that bear on the matter, analyzing the words and the context of the relevant norms to outline what the scope and content of the right entails. We will then consider the main objections that are usually raised against our proposed understanding and what it means for the functioning of educational systems in the region. As we mentioned, because other human rights systems have already touched on the issue and set out standards in accordance with their own applicable treaties, we then turn to analyze the jurisprudence of the European Court of Human Rights, in order to distinguish when necessary between the American and European region, and to ascertain what Europe has gotten right, but most importantly, what we think it has gotten wrong. Finally, and before drawing our conclusions, we will examine the only precedent that currently exists within the Inter American system on the issue of parental rights, corresponding to the 1983 Cuba report by the Inter American Commission on Human Rights, which we think provides an adequate starting point to further develop the regional jurisprudence.

In order to facilitate reading, throughout the chapter, and unless otherwise specified, we will refer to *parental rights in education* as a proxy for the conventional right of parents to ensure that their children receive a religious and moral education in accordance with their own convictions.

1. The applicable international law framework

As a matter of written treaty law⁵ – not to mention, of basic justice and common sense –, there is a right of parents to ensure that their children are educated in accordance with their own moral and

treaties, these instruments represent an *overlapping consensus* between different moral, cultural and legal approaches, with many of them being at odds with each other. States focus on achieving practical arrangements, with the determination for their national enforcement left to the States. No political or legal theory has a definitive claim as the *meta principle* by which the treaties should be interpreted and applied. See, T. Henríquez, *La Política y Politización de los Derechos Humanos*, in *Desarrollo Humano y Solidario. Nuevas Ideas para Chile*, D. Schalper ed., Ideapais/Hanns Seidel Stiftung, 2017, at 7. In that sense, the concept of gender itself – which in international law is still linked directly to *the two sexes*, (...), *within the context of society* (article 7.3 of the Rome Statute of the International Criminal Court), does not appear in the CEDAW and is a heavily contested term – may present itself as a useful tool for identifying arbitrary stereotypes and to intellectually separate cultural or legal practices that have no grounding in the sexed body itself. Yet, the idea of gender as a source of oppression, for instance, comes by way of underlying political philosophies or theories that are not inextricably linked. But the commissioners incur in the error of faulting the State for failing to adopt and promote one particularly charged understanding of gender and gender theories and in effect claiming that combating discrimination is impossible to do by other means and content other than those preferred by the Commissioners, without the treaties determining this specific way to fulfill state duties.

[4] Meaning at the very least that children must be formally schooled whether in public or private institutions. The issue of home schooling is not raised substantively in this document and is mentioned in passing. However, it must be noted that at least in principle, home schooling may be compliant with the requirement of mandatory primary education as well, depending on the way it is performed, and the content supplied. To a certain extent, homeschooling could be considered as coming within the right of parents and other bodies to establish educational institutions other than those established by public authorities, subject to their compliance with minimal educational standards approved by the state.

[5] The purpose of this essay is not to analyze nor defend the substantive grounding of parental rights in their children's education. We sidestep the issue given the fact that the right has already been recognized and enshrined in international law. Thus, that the right exist is the premise on which we found our analysis. For an in-depth discussion of the issue which engages with the arguments from both sides of the issue, see M. Moschella *To Whom Do Children Belong? Parental Rights, Civic Education, and Children's Autonomy*, Cambridge University Press, 2016.

religious convictions. This right has been recognized at the regional level in the American Convention on Human Rights (ACHR), which states

Article 12. Freedom of Conscience and Religion (...) 4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

It is also a recognized right in the universal human rights context, receiving acknowledgment and protection through the International Human Rights Covenants and the Universal Declaration of Human Rights:

[Universal Declaration on Human Rights] UDHR) Article 26 (...) 3. Parents have a prior right to choose the kind of education that shall be given to their children.

[International Covenant on Civil and Political Rights] (ICCPR) Article 18 (...) 4. The States Parties to the present Covenant 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.

[International Covenant on Economic, Social and Cultural Rights] (ICESCR) Article 13 (...) 3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

Reasoning from the texts of the applicable treaties, we affirm that a human rights-based approach to the question requires, as a matter of law, a commitment to the most robust and strong understanding of this right as possible. This means favoring those interpretations of the content and scope of the right that would therefore allocate on parents the highest possible control over their children's moral and religious education, in any educational setting. This conclusion is one founded directly in the text of the treaties and the jurisprudence of international bodies laying out the principles that apply to human rights law interpretation and adjudication.

Indeed, through the adoption of these instruments and treaties, the international community acknowledged the existence of this liberty of parents with respect to the state as their original or default position (thus, the *prior* character of the right, as written in the Universal Declaration). It is worth recalling that international human rights instruments were conceived and adopted as instruments for the limitation of the power of the State over the freedom and livelihoods of persons, and not as the grant of rights from States to their subjects. They do not aim to regulate what persons may or may not do, but rather to set out the most stringent limits that no state may ever cross. This fact is fundamental: **educational freedom and parental control over education are not the exception, but the rule**⁶.

In its most basic form, parental rights in education entail that parents are free to educate their children within their own faith tradition, and to transmit to them, through word and deed, their own

[⁶] As a hypothetical, in the absence of any form of regulation over education and specifically a duty to formally educate children, parents would still be bound to do so as a matter of moral duty. Love, understood as the willing of the good of the other, requires parents to educate their children since it is good and necessary for them to be educated. They acquire knowledge and grow into self-sustaining men and women by this long process over which parents have the primary responsibility from birth and onward. Because they want to raise their children into fine men and women, they will educate them in order to be such. And in doing so, they will act upon their convictions on what it means to become a fine man or woman and to lead a good life. The modern state's desire or acquired duty to educate children is common and legitimate, but subject to limits. International human rights treaties set out some of those limits that restrict the state's role in the educational enterprise, not that of parents. It is true, however, that it incidentally creates some regulation on how parents ought to act with regards to education, since it is aimed towards some general objectives that must be met, but without determining how exactly to achieve them.

beliefs or convictions on issues relating to morality and religion. This right is not subject to limitation, as is made clear by the text of articles 18.4 of the ICCPR and 12.4 of the ACHR, both of which enshrine parental rights, without including a clause for their restriction. In fact, limitations to freedom of conscience, thought and religion are **only acceptable as to the manifestation of religion or belief**, provided that they be enacted through legislation, and only when strictly necessary for protecting public safety, morals, order, health or the rights of others, understood in a narrow or restrictive sense⁷. Other aspects of this right are not subject to limitation. The Human Rights Committee acknowledges this in its General Commentary N. 22⁸, asserting that (...) *the freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted*⁹.

Thus, it is undisputed that this right to ensure children are educated in accordance with parental convictions applies without question outside of the schoolhouse gates. But some argue that, beyond this space, parents are powerless, and it is the prerogative of the State to take over and decide on the moral content of the education provided within the school itself. This, however, begs the question: why? Is there any supporting text to back such a distinction between what happens within the boundaries of the school building and what happens outside of it? Can it be the case that the place in which instruction occurs alters the rights that have been recognized for parents? We answer that there is none to be found in the binding legal norms, and thus such a claim lacks legal support and wrongfully disregards the fact that parents possess a right which has been characterized and accepted as not subject to limitations.

Further, the different treatment given by the various treaties and instruments in fact supports the opposite proposition: that parental rights apply everywhere, regardless of the setting. It is true that, in the case of the ICCPR and the ICESCR, they refer to this right as a **liberty** –and liberty rights are generally understood as imposing on the State a negative duty not to interfere, rather than a positive duty to provide a good or, in this case, a service-. However, the ACHR refers to it as a right without additional qualification, and both the UDHR and the ICESCR situate and frame parental rights as part of the right to education. Thus, parental rights are rooted not only in freedom of thought, conscience and religion, but are equally a component of the right to education of each child.

1.1. Parental rights as an integral part of the right to education

As a matter of fact, the Committee on Economic, Social and Cultural Rights (the ESCR Committee) has asserted that the right to education recognized in article 13 of the Covenant –which includes parental rights – *epitomizes the indivisibility and interdependence of all human right*, and it may well be

[7] In application of the *pro-homine* principle, as it has been developed by the Inter American Court of Human Rights, the interpretation of norms for the limitation of rights must be the most restrictive available. See, Inter American Court of Human Rights, Advisory Opinion OC-5/85 with respect to articles 13 and 29 of the American Convention, Series A, N. 5, par. 46; and, United Nations, Human Rights Committee, General Comment N. 22 (article 18), 1993, par. 8.

[8] It must be noted that the interpretations issued by the treaty monitoring bodies such as the Human rights Committee are not legally binding and should not be taken as the authoritative interpretation of treaty obligations. They constitute part of the existing body of soft law in public international law. These legal opinions can be persuasive in accordance with their own merits as to the legal reasoning but should not be given acritical consideration as the definitive or final say on these matters on the mere fact that they have been issued by the Committee. For a discussion on the issue see M. Bódig, *Soft Law, Doctrinal Development*, and the General Comments of the UN Committee on Economic, Social and Cultural Rights, in S. Lagoutte, T. Gammeltoft-Hansen & J. Cerone eds., *Tracing the Roles of Soft Law in Human Rights*, Oxford University Press (2016), 69.

With respect to the role and prerogative of sovereign states as the authentic interpreters of their treaty obligations, the Permanent Court of International Justice set out the principle thusly: (...) *it will suffice, (...) to observe that it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it*. That person or body, under international law, is no other than the state which contracted the obligation. Permanent Court of International Justice, *Question of Jaworzina*, Advisory Opinion, 1923, (ser. B) No. 8, par. 80.

[9] United Nations, Human Rights Committee, op. cit.

said that it is at the same time an economic, social, cultural, civil and political right¹⁰. Accepting that parental rights are part of the right to education carries with it significant consequences, including the fact that they are not ensured merely through a passive attitude of the State not to interfere, but that it actually requires an active approach in terms of guaranteeing that, within the formal education setting, this right is respected as well. Here it is important to emphasize that the states parties to these treaties have also made the determination that at least primary education is **compulsory** and free to all¹¹, meaning that each child must be formally instructed in the primary level of education at least, whether through schools established by public authorities or others¹². It is the general and uncontroversial understanding that the state has a duty to provide, within its means, free primary education for all children under its jurisdiction. In doing so, and because parental rights are an inherent aspect of the right to education, we submit that the state is under an obligation to provide the educational service in a manner that avoids, as much as possible, coming into conflict with the right of parents to ensure their children are educated in accordance with their moral or religious convictions. And, if such conflict is unavoidable, to accept exemptions or accommodations.

The interpretations issued by the Committee on Social, Cultural and Economic Rights, support this conclusion.

First, in keeping with what had been the Human Rights Committee position in its comment on the right to freedom of thought, conscience and religion¹³, the ESCR Committee accepts that states may legitimately decide to provide instruction in a specific religion or belief, as long as they allow for non-discriminatory exemptions or alternatives that accommodate the wishes of parents and guardians who object to such instruction.

Second, that states are permitted to teach ethics if the content is given in a neutral and objective way, respectful of the freedom of conscience¹⁴. By implication, and in the contrary sense, if the ethical teachings are not neutral or not presented in an objective way, and if they do not respect freedom of conscience (which, as has been already established, includes parental rights and is not subject to limitation on its exercise) then state action encroaches illegitimately on parental rights. In the Committee's own words, such state conduct is illegitimate if it does not allow for exemptions or alternatives to accommodate parents or guardians. It is important to note that all applicable treaties refer both to religious **and** moral convictions of parents. They are not identical concepts, yet equal in importance and protection¹⁵. Thus, in light of the Committee's position stating that exemptions or accommodations are required when dealing with religious instruction, and because morality and religion are equally protected and not identical, it stands to reason that the exemptions and accommodations are

[¹⁰] United Nations, Committee on Economic, Social and Cultural Rights, General Comment N. 11, Plans of Action for primary education (art.14), 1999, par. 2.

[¹¹] ICESCR, article 13.2(a).

[¹²] United Nations, Committee on Economic, Social and Cultural Rights, General Comment N. 13, the right to education (art. 13), 1999, par. 9. There the Committee states that the main delivery system for the basic education of children outside the family is primary schooling and that while primary education is not synonymous with basic education, there is a close correspondence between the two.

[¹³] United Nations, Human Rights Committee, op. cit., par. 6

[¹⁴] United Nations, Committee on Economic, Social and Cultural Rights, General Comment N. 13, par. 28. Here we accept the Committee's holding for the sake of argument even if we do not share the conclusion. As we discuss below with respect to the European Court of Human Rights version of the argument, by which the state may legitimately do so if it conveys information in a *pluralistic, objective and neutral manner*, this is plainly wrong since it misdirects its answer in a way that actually avoids dealing with the textual content of the right. This is so because the information conveyed may be defended both as neutral and objective, but still contrary to moral or religious convictions. Objective and neutral are not the opposites to moral or amoral, nor religious or irreligious.

[¹⁵] The word *and* is a coordinating conjunction, used to join two elements of equal grammatical rank and syntactic importance. The use of the conjunction *and* could lead to the conclusion that they are a single legal concept (i.e. religious and moral) but we do not think this is the more appropriate reading. For starters, it would ignore that the ordinary meaning of both words does not make them identical. Even more, it would have the unintended negative effect of excluding from protection parents who hold non-religious moral convictions. We say that they are equal in protection because the law does not make any distinction in this respect, making it unlawful for the interpreter to make a distinction not made in the law.

also required when the school is imparting ethical or moral instruction to which parents object. Put another way, **there is nothing inherent to the text of the treaties that merits the conclusion that exemptions to religious instruction are necessary** –the Committee’s conclusion, as we saw in the preceding paragraph–, **but exemptions to ethical or moral education are not.**

Third, the Committee has taken the position that one of the essential features or characteristics of the right to education is its acceptability¹⁶, meaning that the content of education provided and guaranteed by the state must be culturally acceptable to minorities and indigenous peoples. Specifically, it states that *the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents (...)*¹⁷ (emphasis added). The Committee fails to delve deeper into what it understands as *culture* for purposes of acceptability, but it is apparent that religion and moral tenets are an integral part of the culture of any political community.

The acknowledgement that educational content must be acceptable to parents in appropriate cases points directly to parental rights in education, since their recognition in article 13.3 of the ICESCR is the only section in which treaty law acknowledges that parents have a definite say on the matter of how their children are to be educated, regarding issues that bear moral and religious relevance. In other words, and building upon what the Committee has stated, *appropriate cases* covers at the very least this aspect of educational content¹⁸. The reference is surely not aimed as to whether math, for instance, is acceptable to parents, but rather if the cultural, religious and moral ethos that shapes educational content provided by the school system is. Thus, a state fails to comply with its legal obligations under the treaty if it neglects to ensure that education bearing on moral and religious questions is acceptable to the parents.

In fulfilling their commitment to provide education to all children, the states are under an obligation to ensure that the content of that education is in line with the educational objectives adopted in numeral 1 of article 13¹⁹, and in keeping with the minimal educational standards that may be approved by the state. Thus, the way states discharge their duty is regulated in terms of its content. We submit that, in addition and without prejudice, just as the educational content that the state chooses to convey needs to conform to the objectives laid out –a commitment by the state with the international community–, it must also ensure the instruction given avoids, as much as is possible, contradiction with the religious and moral convictions that the parents served by the school are attempting to instill in their children –a commitment with those on whose service the state exists-. In that sense, **it may well be said that the child’s right to education is not(nor should it be understood necessarily) in opposition to parental rights, but rather that it presupposes it as an inseparable and integral part of the same.**

[16] As per the Committee, the other characteristics are availability, accessibility, and adaptability. See, United Nations, Committee on Economic, Social and Cultural Rights, General Comment N. 13, par. 6.

[17] Id.

[18] The acceptability assessment is by necessity prior to the purveyance of educational content to the students, as a logical matter. If the assessment required prior exposure to all the content in order to decide on its acceptability, it would defeat the purpose of the assessment itself, since the children would have already been exposed to the unacceptable content without their parents knowledge and consent. Otherwise, the requirement of acceptability of content for parents would not be a requirement at all and the choice of becoming exempt would be inexistent in fact.

Some may argue that the acceptability of the content is a judgment reserved primarily for the students and not for their parents, except in extraordinary circumstances. Notwithstanding that this would ignore or diminish the force of the explicitly acknowledged right of parents with respect to moral and religious education, the fact of the matter is that for most of their life in schools, the children ordinarily will lack the ability and capacity to make informed and reasonable judgments on what constitutes acceptable educational content, and this prerogative would still reside in parents. This is actually in agreement with the Convention on the Rights of the Child and the notion of their evolving capacity which, even at its best, is not developed for this purpose before the child reaches adolescence, in the later part of their life before legal adulthood.

[19] [E]ducation shall be directed to the full development of the human personality and the sense of its dignity and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace. ICESCR, article 13.1.

Note also that the acceptability of educational content is not and cannot be defined in terms of what is acceptable to the largest number of people. Human Rights are first and foremost individual, and every single parent or couple of parents must be able to enjoy them in full, or they are not human rights. Their rights cannot (and need not) be sacrificed to the majority's preferences on the matter. The practical problem is, of course, that it is quite difficult to come to an agreement on educational content that is acceptable to all members of the political community in times of increasingly growing diversity of beliefs and convictions on such issues²⁰. One possibility could be to simply do away with all traces of moral or religious teaching in school, with the latter being an easier task than the former. But this will not do. As a normative matter, at least for those states that have become parties to the Covenant on ESC rights, they are bound by their agreement to honor the right to education, the object of which is to direct *the full development of human personality and the sense of its dignity*²¹. Because the human person is a moral and religious being, it is impossible to conceive a form of education that strives for the full development of personality while shunning moral and religious education altogether, or it cannot be understood as fostering full development. Even if this were not legally the case, most if not all political communities acknowledge this in practice and include at least some form of moral education in their own school curriculums.

1.2. Parental rights as a matter of freedom of thought, conscience and religion

Now, recall that in the beginning we mentioned that parental rights are embedded both in the right to freedom of thought, conscience, and religion and in the right to education. Thus far, we have analyzed the scope and content of this right as an integral part of the latter –as acknowledged by the UDHR and ICESCR as well as the general comments made on this last covenant-. We now turn to look at the issue with regards to the former and affirm that our conclusions would equally apply if we looked at the matter exclusively from the perspective of the right to freedom of thought, conscience and religion.

As we mentioned above, parental rights, as any other human right enshrined in law, do not constitute the maximum limits of what the individual right holder may do, but rather they are the limits to what the state can do. As such, in the fulfillment of a legal obligation (if bound by treaty law) or pursuance of its interest in providing a common education for its people, the state is constrained by parental rights, working as the outer limit of state action. In the context of American states that have become parties to the ACHR, the text of the treaty becomes especially relevant. In its official Spanish, Portuguese and French versions, the relevant section states that **parents have the right for their children to receive the moral and religious educations that is in accord with their own convictions**²². The phrasing is

[²⁰] Some states retain cultural and religious homogeneity to the point that this is still possible. Caribbean nations, for instance, are aided in this by the size of their populations and their insular character, among other factors.

[²¹] ICESCR, article 13.1

[²²] The relevant provisions, in these languages, are as follows: *Les parents, et le cas échéant, les tuteurs, ont droit à ce que leurs enfants ou pupilles reçoivent l'éducation religieuse et morale conforme à leurs propres convictions.*; *Os pais, e quando for o caso os tutores, têm direito a que seus filhos ou pupilos recebam a educação religiosa e moral que esteja acorde com suas próprias convicções*; and *Los padres, y en su caso los tutores, tienen derecho a que sus hijos o pupilos reciban la educación religiosa y moral que esté de acuerdo con sus propias convicciones*. The English version of the Convention has a puzzling wording for this very reason. It states that parents have the right to **provide** for the religious or moral education of their children. This is evidently different in meaning to what the Spanish, French and Portuguese versions state, but they are all equally official and authorized versions of the same instrument. See, United Nations, Vienna Convention on the Law of Treaties, article 33.

The *travaux préparatoires* for the ACHR do not shed further light on this matter. The whole of the discussion regarding this provision –which was extremely brief– turned on whether to include it or not. Chile and Uruguay expressed concern early on that the initial proposal did not recognize the right of parents to choose their children's teachers and even worse, did not acknowledge the rights of parents at all. When put up for debate, only two delegations expressed their reticence to including the recognition of this right (Guatemala and Honduras). The Brazilian representative suggested that this was a non-issue in the American context, to which the chairman responded that only totalitarian states refused to acknowledge this right. See, Organization of American States, Specialized Interamerican Conference on Human Rights, Minutes and Documents, 1969, OAS/K/XVI/1.2, at 213–14.

relevant because it conveys the idea that it is not something that the parents have the right to do, but rather that it is something to which they are entitled. Put another way, the right of parents is respected, if and only if, their children receive a moral and religious education that is in accordance with their convictions. And from whom are they to receive this education? Well, in a context in which parents are legally obligated to send their kids to school to receive compulsory primary education the answer is, quite obviously, from the same state that imposes the obligation to send them there.

Accepting for sake of argument that some potential limitations on parental rights could be legitimate (a dubious proposition, if we recall that the Human Rights Committee characterizes them as not subject to limitation on account of the fact that the text of the treaties do not include this right under any limitation provision), it is hard to envision situations in which the state would be in position to make a clear showing of necessity to go against the right of parents as we have conceptualized them. In light of the American Convention, limiting this right would translate into the state flouting its obligation to parents and the latter's correlative right to their children being educated by the state in accordance to their moral and religious convictions. It could only act thus if justified by the necessity (in a strict sense, having no other alternative that is less restrictive) to do so in order to protect public health, morals, security or public order, or the rights of others. Mere state interests or arguments based on the general interest of society over those of parents are not enough –they are not accepted grounds for limitation– and therefore illegitimate.

So, if what we have argued so far is correct, what is it that states must do then?

The starting point would be for them to be willing to acknowledge that there is tension between their interests (and in some aspects, legal duty) to educate on moral and religious tenets, and the individual right of parents to disagree on what the majority may deem as the necessary or best moral education, and educate their children differently.

It also requires that states recognize that this is not a matter of whether to provide gracious concessions at their discretion, but rather the mindful recognition and respect for an individual and fundamental right. Because of this, any public policy position or decision on the matter that ignores or omits consideration of the rights of parents in their children's education is suspect and likely deficient, for it means that the state, willfully or negligently, has failed to properly consider and grapple with the legal demands arising from the right.

Thus, as a primary measure of compliance, states should attempt to find common ground that makes educational content acceptable to all. An overlapping consensus of sorts over educational content should be sought out. This will not always be possible, and even in the best scenarios of high adherence by parents to school curriculums and content, some may still object. While dissident parents should not have a veto power that will impede the school systems from imparting these educational contents if they disagree with the content thereof, they are and ought to be entitled to make use of exemptions or accommodations that secure their right to their children being educated in accordance with their moral and religious convictions, and not those of the majority with which they disagree²³.

As is the case with all rights recognized by international human rights law, it is the duty of the state, through all of its organizations and entities, to take action to effectively promote and protect them, including the establishment of appropriate mechanisms to exercise them –entailing positive duties for the state– and remedies to protect them when infringed upon. This duty does not and need not fall exclusively nor primarily on the courts of law, and legislatures and administrative bodies are equally if not more capable of acting to recognize and secure them. Thus, both the ICCPR and the ACHR flesh

[²³] The number of potential objectors that will make use of exemptions and accommodations is unlikely to become majoritarian for some reasons that seem obvious. If the State attempts to impose educational content that is not supported by most of the population it will lack legitimacy and the majority will most likely assert itself politically to change this. This is likely to be the case under any democratic regime that is not attempting to impose itself by force and with indoctrination objectives.

out this primary duty of each state in terms of the need to adopt *such legislative or other measures*²⁴ as may be necessary to give effect to those rights or freedoms recognized. Thus, while the ultimate decision on whether these measures will be enacted into proper legislation or simply implemented administratively falls on political authorities, the fact of the matter is that all states are in need to adopt them for the full enjoyment and exercise of parental rights.

Up to this point, we have made the legal argument, based on applicable treaty law and the persuasive –but not binding– comments and observations of treaty bodies, for a robust conception of parental rights. One that aims to allow for the broadest possible recognition of parental entitlement to direct the education of their children on matters related to religion and morality. In the following section, we will look at some of the political and legal objections that may be leveled against our proposed conceptualization of parental rights.

2. Common objections to the strong conceptualization of parental rights in education

2.1. The private school objection

Perhaps the most common objection to our proposed understanding of parental rights is what we can call the *private school objection*. It suggests that while it is true that international human rights law recognizes the right/liberty of parents for their children to receive a religious and moral education in accordance with their convictions or to ensure it, the manner in which this right is protected and observed is through the respect of the states for the liberty to establish private educational institutions that the parents may choose for their children to attend²⁵. For the reasons that we set out below, it cannot and should not be understood that the right of parents is safeguarded by the mere fact that the state allows for private education or home schooling as an alternative.

First and foremost, such understanding should be rejected because, unless alternatives to education in state-run schools are entirely free of charge for parents (and this is never the case with homeschooling, which economically speaking always requires the investment of valuable resources on the educational task –such as time– that could be otherwise utilized), it makes the enjoyment of a human right contingent upon the economic means available to individuals or families²⁶, which is unacceptable as a matter of principle. Human Rights are held and enjoyed by persons by the mere fact of their personhood and its enjoyment ought not be contingent upon their economic means²⁷.

[²⁴] ACHR, article 2. Domestic Legal Effects; and ICCPR, article 2.2.

[²⁵] In the European human rights system, see for example the case of *Jimenez and Jimenez Merino v. Spain*, in which the ECHR declared a petition inadmissible. It explicitly highlighted the existence of a wide network of private schools in while parents are free to enroll their children and that the petitioners had not shown the existence of obstacles for doing so. The Court characterizes the attendance of the petitioner's child to a state school as a parental decision, and affirmed that *insofar as the parents opted for the state school, the right to respect their beliefs and ideas...cannot be construed as conferring on them the right to demand different treatment in education*. This seems to be disingenuous to some extent. Regardless of whether this was the case for the Jimenez family, often parents don't have a choice. But the Court did not even think twice about this and premised its conclusion that our understanding of the law is unwarranted on the fact that parents made a free choice to attend that school and must therefore accept the consequences of that choice. However, by the same token, if such choice did not in fact exist, then the argument should fail.

[²⁶] As opposed to the case with respect to the state, in which the progressive attainment and full realization of ESC rights within each jurisdiction is contingent upon available resources at any given time, at least in accordance with treaty law. See, ICESCR, article 2.1

[²⁷] For instance, and with respect to the right to judicial protection and the right to a fair trial, both the European and American system have come to the conclusion that when dealing with civil rights, the state is subject to an obligation not only to abstain from obstructing access to courts, but to create the conditions that allow for equal access to the enjoyment of this right. In the *Airey v. Ireland* case, the Court stated *...fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive and there is ... no room to distinguish between acts and omissions*. See, European Court of Human Rights, *Airey v. Ireland*, Judgment (Merits), 1979, par. 25. For the restatement of American jurisprudence on the issue, see Interamerican Commission on Human Rights, *El acceso a la justicia como garantía de*

Furthermore, in the case of a private school, the possibility of attending is contingent upon the coordination and organization of several individuals and families that decide to band together in order to found or sustain a school on grounds of their shared beliefs. Even if such an establishment was entirely funded by the state, it would still mean that individual parents would be subject to the will of others who, through cooperation, would become necessary for them to exercise their right. But the exercise of human rights cannot be subject to the will of others, even if some **may** be exercised collectively. Thus, the offhanded suggestion of this alternative as a proper way to secure the conventional right of parents is not acceptable.

The suggested alternative additionally involves the establishment of an unlawful discrimination by the state between different groups of parents on different levels. First, it creates a difference in treatment between those whose views align with the ruling majorities who wield the power to decide educational content (or, at most, are indifferent to the matter altogether), and those whose views and convictions differ. If the so-called solution were accepted, the latter would be placed at a material disadvantage in relation to the former, insofar as having to pay out of their pocket (on top of their fulfillment of tax obligations that fund the school system, among other things) to educate their children in accordance with their beliefs, when a simple (and almost always cost free) exemption from those classes or contents would have sufficed²⁸. In turn, such viewpoint discrimination gives way to the establishment of a discrimination based on economic status, since some parents will be able to incur in the expense and thus exercise their right, while others will not. And thus, once more the state will have failed in adopting measures to secure conventional rights for all without discrimination.

Finally, it may also be pointed that while it is certainly the case that exercising their right to educational freedom²⁹ is **one of the ways** in which parents may safeguard their parental rights, it is **not the only way to do so**, and was not intended as such at the time of the adoption of the treaties. As a matter of history of the drafting, we can note that the early draft of the single international covenant on human rights (the precursor to both international covenants) explicitly differentiated between the liberty of parents to choose their children schools other than those established by public authorities, and the injunction on the state to respect the liberty of parents to ensure the religious education of their children *in the exercise of any functions which the State assumes in the field of education*³⁰. After the decision was made to separate the proposal into two covenants, the ICESCR ended up in its current form, with article 13(3) including within the same paragraph the duty of the state to both respect (a) parents liberty to choose schools and (b) the liberty to ensure the moral and religious education

los derechos económicos, sociales y culturales. Estudio de los estándares fijados por el Sistema interamericano de derechos humanos, 2007, OEA/Ser.L/V/II Doc. 4.

[28] Additionally, and as we have emphatically stated in this chapter, we are not defending a view by which the opposite would be true, and that the minority could demand that their convictions be embraced by the school system with exclusion of others. Our position affirms that it is the duty of the state to avoid contradicting parental convictions to the greatest extent possible. This requires serious efforts to build consensus around contents that are commonly acceptable, while leaving room for exemptions or alternatives for those cases at the margins in which objections persist.

[29] By educational freedom, we mean the right enshrined in article 13, sections 3 and 4 of the ICESCR, by which state parties undertake to respect the right of parents to choose schools different than those established by public authorities, as well as the right of individuals and bodies to establish and direct educational institutions. Both rights are but different sides of the same coin. The latter would be pointless as a right if the state were not willing to respect the former, and vice versa.

[30] United Nations, Economic and Social Council, Commission on Human Rights, Report to the Economic and Social Council on the seventh session of the commission, held at the Palais des Nations, Geneva, Thirteenth Session, from 16 April to 19 May 1951, Draft Covenant on International Human Rights, E/1992. Annex. 1, article 28. The original draft did not contemplate moral convictions as well as religious. This was later included in the negotiations to encompass those who do not hold religious faith as the source of their moral convictions. The text of the original proposal for article 28 on the right to education read: (8) *The obligations of States to establish a system of free and compulsory primary education shall not be deemed incompatible with the liberty of parents to choose for their children schools other than those established by the State which conform to minimum standards laid down by the State;*

(9) *In the exercise of any functions which the State assumes in the field of education it shall have respect for the liberty of parents to ensure the religious education of their children in conformity with their own convictions.* (emphasis added).

It was right after this draft was submitted to the UN General Assembly that the decision was made on February of 1952 to split the proposal into the now separate covenants on civil and political, and economic, social and cultural rights.

of their children. The use of the conjunction and reinforces that these are two separate liberties and not just one³¹.

2.2. The objection of permissible private teaching at home

A second common objection is that which suggests that the right of parents is sufficiently protected by the mere fact that they are free to educate their children at home in accordance with their convictions, in parallel to whatever they are being taught in schools³². If this is not forbidden, there is no infringement upon the right in question. To this we may respond that such a reading is unreasonable since it deprives section 4 of article 18 of the ICCPR (or section 4 of article 12 of the ACHR) of any specific content, collapsing it into the general clause of section 1, insofar as everyone (which includes parents) has the right to individually or collectively, in public or in private (which covers the home), manifest his religion or belief in teaching. In other words, if the intent of the adopting parties, as expressed in the text, was in fact to secure the possibility of parents giving their children religious teaching on their own and at home, then there was no need to adopt section 4, since this liberty was already fully protected by the general clause of section 1. Similarly, if the point of parental rights were to protect private teachings in the home, this would have been equally protected, either jointly or separately, by articles 17³³ and 19³⁴ of the ICCPR (or 11³⁵ and 13³⁶ of the ACHR), in terms of the protection of privacy, family and home, as well as the protection of freedom of expression. Put differently, within the scope of these protections, it would have already been the case that parents would have had the chance to educate their children without state interference outside of the formally established schools, which

[³¹] The extent of parental control over the school curriculum was in fact discussed by those involved in the negotiations process. The Secretary General's 1955 Annotation on the Draft International Covenants on Human Rights makes a fine illustration of the decision to reject the possibility of providing individual veto power to parents over the school curriculum. Opt-outs, however, were not discussed nor ruled out. The annotation states that *it was felt impossible to provide that parents should be given the right to determine the curriculum of their children's education (...)*. See, United Nations, General Assembly, Draft International Covenants on Human Rights – Annotation prepared by the Secretary General, A/2929, July 1, 1955, p. 324, par. 45.

Furthermore, the discussions had at the UN General Assembly while finalizing the framing of the article on the right to education shows that opposition was expressed by some to the use of the concept of *right* instead of *liberty* based on the sense that this would require states to pay for whatever type of school parents wished to choose, rather than simply permitting it. The use of *liberty* was ultimately adopted, presumably given that *the majority of the representatives were prepared to recognize such freedom as far as far as 'religious and moral education' was concerned (...), but it was agreed that paragraph 3 should not be understood as imposing upon States Parties the obligation to provide religious education in public schools*. United Nations, General Assembly, Twelfth Session, Report of the third Committee on the Draft International Covenants on Human Rights, Agenda Item 33, A/3764, 1957, par. 46.

Our proposed understanding does not contradict either of the concerns voiced by the States, for it would not require the state to provide, as duty, *a la carte* religious or moral education (even though the State may choose to do so) for any and all parents that so wish, nor would it give individual parents a veto power or control of the general school curriculum.

[³²] The objection is in fact so common, that it has become boilerplate language in many judicial decisions coming out, in our view, unjust European case law. Never as the main argument, but always as an additional reason to reject parental claims in some cases. We think it is specious and amounts to a wicker man. To our knowledge, there has not been any recorded case in which such an attempt by any state has been tried. It would be for the most part unenforceable. Not even the Cuban dictatorship attempted to do as much. And as we argue here, this was not what the treaty drafters had in mind, nor was it necessary to protect under the relevant clauses.

[³³] ICCPR, article 17: 1. *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.* 2. *Everyone has the right to the protection of the law against such interference or attacks.*

[³⁴] ICCPR, article 19:1. *Everyone shall have the right to hold opinions without interference.* 2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. (...)*

[³⁵] ACHR, article 11: "Right to Privacy. 1. *Everyone has the right to have his honor respected and his dignity recognized.* 2. *No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.* 3. *Everyone has the right to the protection of the law against such interference or attacks.*

[³⁶] ACHR, article 13: Freedom of Thought and Expression. 1. *Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice. (...)*

would mean that the express protection of parental rights becomes a useless flourish³⁷. The decision by the states to adopt a specific provision on top of these other protections leads us to reject the merit of this restrictive alternative understanding of the right.

It is a well settled canon of interpretation, applicable to this situation, that the text of the treaty must not be interpreted in such a way that would accept duplication of provisions³⁸ or deprive them of their effect, so as to make them have no consequence³⁹, whenever this is possible. The major risk in minds of the framers of these documents was not primarily that the state would attempt to control what goes on within the house, but rather the misuse of state power for indoctrination in schools. At the time of the rise of the contemporary human rights project, the modern schoolhouse had become prevalent around the world, requiring children to spend most of their waking hours within its walls and under the supervision of the state. Nobody doubted then or now that such situation places the state in an advantaged position when it comes to shaping the mind and will of children, sometimes against their parents. Because that position could and had been abused, negotiating parties specifically aimed to preempt totalitarian attempts by empowering parents, as opposed to the state in the school setting.

2.3. The objection of the overriding children's rights

A third and final objection deals with the rights of children to be educated. The objection would suggest that in some cases, being respectful of the convictions of parents requires denying the child access to instruction, information or education to which he or she is entitled to in accordance with its best interests. Thus, for the right of the child to be respected, he or she must be given some specific instruction or education, even if it goes against the convictions of parents. This is, in our view, wrong.

Recall as part of our discussions that parental rights' framing in international law places them as part of the right to freedom of religion and conscience and/or as part of the right to education. With respect to the former, the right is not subject to limitations. With respect to the latter, **parental rights are an integral part of the right to education of the child**. As we discussed above, just as it is the case that the right to education which the state is obligated to uphold requires that instruction conform, at least, to the general objectives, the proper discharge of its duty requires that the state must be equally respectful of parental rights. In other words, the child has a right to receive an education that is respectful of his or her parent's convictions which they wish to pass on to their child, or his right to education is infringed upon. Holding otherwise reduces parental rights to a lesser status beneath their character as fundamental rights, or simply denies them altogether. And as we have already said, this does not mean that states should allow each parent control over the school curriculum, but at the very least, it requires that the necessary arrangements be made to exempt their children of that part of the instruction that they find contrary to their beliefs, if it comes to that⁴⁰.

[³⁷] It would not only deprive the right of any specific content different from other protections, but it would also open the door for restrictions to its exercise, since all other rights are subject to limitation, unlike parental rights, as per the conclusions of the Human Rights Committee, as we have seen.

[³⁸] B. Garner & A. Scalia, *Reading Law: The Interpretation of Legal Texts*, N. 26. Surplusage Canon, p. 174, Thomson West, 2012.

[³⁹] In international public law, the principle of interpretation suggests that the text should be given its *effet utile*, invoking the maxim of *ut res magis valeat quam pereat*. The treaty ought to be interpreted in a manner that makes all its provisions useful or effectful, being consistent with the object and purpose of the treaty and within the ordinary meaning of the terms used. This principle has found its way to the jurisprudence of the Inter American Court of Human Rights, starting with its advisory opinion on the right to information in consular assistance. For a discussion of its application by the Inter American Court over time, see C.E. Arévalo Narváez, & P.A. Patarroyo Ramírez, *Treaties over Time and Human Rights: A Case Law Analysis of the Inter-American Court of Human Rights*, *Anuario Colombiano de Derecho Internacional* (acdi), 2017, 10, p. 295–331.

[⁴⁰] During the child's first years in which it is undoubtedly the case that they have not acquired enough maturity and self-awareness to make reasoned judgments on what is in their best interest, these decisions will fall exclusively on the parents. As the child grows into adolescence and acquires a higher level of maturity, the decisions on whether to participate in activities or receive information which they find objectionable would be taken jointly by parents and children perhaps. In any event, this is a case by case situation to be resolved as it presents itself.

As to the content of the instruction that will be given to the child, both the ICCPR and the Convention on the Rights of the Child set out the objectives of education with enough generality to allow different pedagogical approaches and educational contents which comply with the objectives.⁴¹ And in making determinations on that content, parental rights must be respected. We should emphasize once more that parents have a right, and not a mere interest, to their children being educated in a manner that is respectful of their convictions. The general objectives of education cannot and should not be interpreted to be opposed to the right itself.

Generally speaking (and this is almost always the case, except for rare exceptions) all parents aim to educate their children in a way that develops their personality to allow them to achieve their full potential, while at the same time teaching them to appreciate their own culture, family, and tradition; to have respect for all persons; and enabling them to participate fully in their societies⁴². Since these objectives do not determine with specificity the actual content of the education to be given to each child, states should make such determinations in a way that avoids as much as possible delving unnecessarily into matters on which conflict is known to exist. They in fact have a duty to do so. Furthermore, there is a core of instruction on which there is unlikely to be any sort of disagreement, and of which children should not be deprived on risk of hindering their capacity for future self-actualization. All human individuals can think critically and acquire knowledge through their own actions, once they have achieved and mastered reading, writing, grammar, logic, and arithmetic. Everything else may be desirable as a matter of policy, but not strictly essential to the point of enabling the individual for future engagement with society and achieving self-sufficiency⁴³.

3. Parental rights in European jurisprudence: what the European Court gets right, and what it gets wrong

Up until this point we have based our analysis and argument on the existing treaty law that applicable to all states adhering to the universal bill of rights, and specifically on the American Convention on Human Rights, applicable to almost two thirds of all the states in the region. But, as we mentioned in the beginning, the interpretation of the scope and content of the right has not been dealt with to

[41] It also interesting to note that while debating the final wording of the right to education in the ICESCR, delegates in the United Nations General Assembly *considered necessary to lay down the objectives of education at the beginning of article 14* [current article 13 – T.H.], *although the view was expressed that paragraph 1, mainly declaratory in character, was out of place in a legal instrument*. United Nations, General Assembly, Twelfth Session, Report of the third Committee..., par. 40.

[42] Which is not the same as accepting as true that there is moral equivalence between all human choices, actions and lifestyles. This in itself is precisely the kind of moral judgment that lies at the heart of any concept of the good life to be lived by human persons; a judgment that is reserved for individuals to make, and for our purposes, one that parents make and convey to their children as part of their education.

How exactly one defines the capacity to participate fully in society is fundamental, yet undefined in treaty law. What enables a person to fully participate and who gets to decide if the threshold is met? We may say that the idea of participation in society encompasses the possibility of taking part in the decision making and general conduction of the affairs of the different communities to which one belongs to. Through our lives we each claim membership to different bodies, starting with our families and the larger political community we are born into. If there once was a time in which the conduction of the affairs of the community was reserved to those with higher knowledge or riches, it is not so today. We live in an age in which we act upon the presumption of radical equality of all individuals in their capacity to participate in the direction of the community, so that everyone may fully participate regardless of their preparation and knowledge, or lack thereof. In any case, the stated object of education is to enable the person for full participation, but it cannot force them into exercising their participation. This is an individual choice to be made by the person, and the state should content itself with the fact that the person is prepared to do so, if she so chooses, and not with the outcome of the person embracing a tradition, worldview or belief system different to that of their parents.

[43] Ultimately, the point is that the child be given the knowledge and skill necessary so that they could, if they so decided, choose a life different from that of his parents. By the same token, we may add, to choose a life different than that which the state may propose as well. See M. Upson Hirschhoff, Parents and the Public-School curriculum: is there a right to have one's child excused from objectionable instruction? , Southern California Law Review, Vol. 50 (1977), p. 933.

date by the bodies that make up the Inter American Human Rights system⁴⁴, with the exception of a sole report by the Commission in 1983. On the other hand, the European Court of Human Rights has had numerous opportunities over time to deal with the issue under the scope of the European Convention on Human Rights Protocol 1, article 2⁴⁵ (ECHR:P1A2). While the way in which the right has been enshrined in that treaty is not the same as that which we have seen so far, it nonetheless shares in some common features and is illustrative of the manner in which the issue has been adjudicated. Because the issue has not received in depth treatment in the American system, and given that the latter recurrently looks towards European jurisprudence in order to decide its own cases, it is worthwhile to analyze this case law to restate the points in which there is agreement with our thesis, as well as the departures from it, and the reasons why we believe this was wrong.

The earliest landmark jurisprudence of the European Court of Human Rights on the issue of parental rights acknowledged, as we do, that **the right of parents is grafted into the right of everyone to education**. The case of *Kjeldsen, Busk Madsen and Pedersen v. Denmark* (1976) involved a challenge by parents to the decision of Denmark to mandate compulsory sex education classes into state primary schools, with all of them claiming that the sex education program, as introduced into state schools, constituted a violation of article 2 of protocol 1. Denmark, for its part, argued that article 1 afforded no more protection than freedom to establish private schools, in which parents could secure that their children be taught in accordance to parental convictions. In deciding, the Court explicitly acknowledged with respect to article 2 that the drafters of the Convention had been acutely aware of *the need to ensure, in State teaching* [that is, in public schools] *respect for parents' religious and philosophical convictions. The second sentence (...) aims in short at safeguarding the possibility of pluralism in education which possibility is essential of the preservation of the "democratic society" as conceived by the Convention. In view of the power of the modern State, it is above all through State teaching that this aim must be realised*⁴⁶. It then advanced the proposition that:

the right set out in the second sentence of Article 2(P1-2) is an adjunct of this fundamental right to education (...) It is in the discharge of a natural duty towards their children –parents being primarily responsible for the 'education and teaching' of their children– that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and exercise of the right to education.

*(...) the second sentence of Article 2 (P1-2) implies on the other hand that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. This is the limit that must not be exceeded.*⁴⁷ (emphasis added).

[⁴⁴] The Inter American Human Rights system is made up the Commission and the Court. The Commission is a treaty body of the Charter of the Organization of American States. The Commission has quasi-jurisdictional powers over all the American states that are members of the OAS, in the performance of its mandate of promoting the observance and defense of human rights. The Commission acts as a gate keeper to the Court in the sense that all individual complaints of human rights violations against those states that have ratified the American Convention on Human Rights and accepted the Court's jurisdiction, have to go through the Commission, which has the final word on whether or not a case should proceed to the Court. In turn, the Court has been given a mandate to hear all cases respecting the interpretation and application of the ACHR, and to decide on whether there have human rights violations by the states.

[⁴⁵] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, article 2: *No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.*

[⁴⁶] European Court of Human Rights, Application No. 5095/71; 5926/72, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, chamber judgment, 1976, par. 50.

[⁴⁷] *Id.*, par. 52–53.

This landmark holding of the Court has been repeated over time. For our purposes, what is important is that the claim of parental rights being an integral part of the right to education is not only supported by the text of treaties (with the ICESCR and ECHR:P1A2 being analogues in this respect) but has been backed by human rights courts as well.

The Court went on to affirm that this right neither prevents the state from imparting information or knowledge of a directly or indirectly religious or philosophical kind, nor does it entitle parents to object to the integration of such teaching and education in the school curriculum. This begs the obvious question of how then parents are to exercise their parental rights. The Court did not immediately give an answer in *Kjeldsen* since, notwithstanding its statements, it concluded that under the circumstances of the case, the state had not infringed upon parental rights⁴⁸. It decided so by stating that it could not glimpse from the law, read in the abstract, an attempt at *indoctrination advocating a specific kind of sexual behavior. It does not make a point of exalting sex or inciting pupils to indulge precociously in practices that are dangerous for their stability, health or future or that many parents consider reprehensible...*⁴⁹. So, while it may not have been the case that the law in abstract incurred in any of the vices that would have consummated the human rights violation (and the Court declined to look into potential abuses in application), it was nonetheless the case that if any of those conditions were met, parental rights would be in need of protection and reparations over the violation.

While we mostly agree with the Court's reasoning which is quite deferential to parents, at least in word, it still needs to be pointed out that, in deciding this way, it introduced a standard that is not part of the treaty: that the limit on state action is that it cannot *pursue an aim of indoctrination* and that the state thus does not run afoul of parental rights if it conveys the controversial educational content in an objective, critical and pluralistic manner.

As to the requirement of an aim of indoctrination, it goes beyond what the plain text of the treaty would require, which is any interference by the state which precludes parents from ensuring that their children's education conforms to their religious and philosophical convictions. Nothing in the text of the treaty appears to justify such a restrictive interpretation. This point was not lost on Judge Alfred Verdross in his dissent, in which he considered, in light of this, that the Court *ought to have restricted itself to ascertaining whether, should there have been any doubt, this complaint tallied or not with the beliefs professed by the applicants*.⁵⁰

The Court's contention that state action is legitimate when it conveys educational content in an objective, critical and pluralistic manner has regrettably become the standard by which the Court judges these cases. We say regrettably because the standard is misplaced and fails to address the concerns and claims of parents in these situations. The core of the protected right is not that parents are entitled to their children receiving from the state objective and pluralistic content. It's that the content conveyed to them in schools **at least** does not come into open conflict (though it need not explicitly support) with the moral and religious education that their parents decide to impart to them. It is generally the case that the specific concern is the rise of contradiction on religious and moral issues taught by the other leading authority in the child's life: the schoolteacher and the rest of the school staff. It is that a situation arises in which there is a conflict in loyalties and authorities between the school and the home, with the child finding herself in a position of feeling obliged to adapt her views in one setting or the other to match what she believes is pleasing or acceptable to either her parents

[48] Crucially, the Court accepted in principle that the issue of sexual education is a prime candidate for the infringement of parental rights, and that the manner in which the instruction is carried out and the legislation applied makes a difference since abuses can occur in practice, and the state has a duty to avoid them. However, it decided that it was called on to review the issue as a general matter of the compatibility of the legislation in abstract, and not as applied to specific cases of alleged abuse. See, *Id.*, par. 54.

[49] *Id.*

[50] *Id.*, Separate Opinion of Judge Alfred Verdross in dissent.

or the school authorities⁵¹. In this sense, it needs to be emphasized that information or content can be conveyed in an objective, critical and pluralistic manner (and what does this even mean? How does one convey something pluralistically?) and still contradict the moral, philosophical or religious convictions of parents. One example out of many possible comes precisely from sexual education. It could be objectively said that humans engage in many forms of sexually significant activity including, for instance, anal intercourse, which many may find pleasurable. The *as a matter of fact statement*, without moral assessment, may by itself be perceived as an embrace of the moral equivalency between this form of conduct and marital coitus, which is known to be a controversial moral issue for many. Furthermore, this also begs the question as to what the necessity or relevancy of a child knowing (in many cases, even before puberty) about the pleasure of anal sex. It could also be the case that parents have no moral qualms about this form of sexual conduct but may consider nonetheless that their child has not come to a state of maturity and personal development that allows him or her to process this information and act according to it in a responsible manner. Because the state is not in position to properly consider the varying degrees of maturity of children within one class (so as to effectively give an individualized instruction), it simply gives the same lesson to all, regardless of whether this may or may not be detrimental to their own development. Parents ought to be able to legitimately assess, in directing the moral development of their child, whether they are prepared to receive these lessons at the time in which the state intends to uniformly provide it.

Be that as it may, the important principle set out by the Court is that the right to education goes hand in hand with parental rights, and that, in its words, at the very least those scenarios in which the state agents are exalting sex, inciting pupils to indulge in practices many parents consider reprehensible, or advocating specific kinds of sexual behavior would all constitute violations of the fundamental right of parents⁵².

Unfortunately, the Court's own position has more bark than bite when its time to protect parental claims against state intrusion and has not been entirely consistent in its application over time. Because the standard is one that does not safeguard the consistency between the moral and religious convictions of parents and the content conveyed by the school –which we believe a proper standard ought to safeguard–, it is no wonder that, for the most part, parental claims are accepted on principle, but fall short in practice. This is especially the case in those situations in which the Court reviews only the abstract legal framework, but refrains from examining whether the application of the framework in practice runs afoul of parental rights.

In **Campbell and Cosans v. United Kingdom** (1982), parents of students enrolled in the Scottish school system complained over the use of corporal punishment in their children's school. The Court accepted as a matter of fact that, for practical and financial reasons, the applicants had no realistic and

[⁵¹] The notion of the conflict of loyalties is one of the difficulties in practice that illustrates the violation of parental rights, in the views of the Human Rights Committee, when dealing with the issue of mandatory religion, philosophy and ethical education in Norway. See, United Nations, Human Rights Committee, v. Norway (Communication No. 1155/2003), CCPR/C/82/D/1155/2003, pars. 3.3, 5.3 and 14.7.

The details of this case are explained below, in reference to Folgerø and others v. Norway case at the European Court of Human Rights, arising out of the same domestic litigation by parents in Norway. At the national level, seven families sued the state over the mandatory course in question. When deciding on how to proceed at the international stage, some decided to sue at the European Court and others to file a complaint with the Human Rights Committee. The fact patterns of both cases are the same but were pursued internationally under two different treaties. The end results were, however, almost identical.

[⁵²] We emphasize this aspect since, even though it has not been the case of European jurisprudence, many examples of sexual education initiatives in the American context indeed involve advocacy for certain sexual behaviors and practices parents may consider reprehensible, taking moral positions with respect to the same. Take for instance the book on 100 hundred questions on adolescent sexuality published by the Municipality of Santiago in 2016 for distribution in its public school (and before the incoming mayor took them out of circulation). In it, and among other aspects, the book embraced masturbation and entirely denied that there could be any sort of moral issue with such conduct; made recommendations for maximizing the pleasure of anal sex; and recommended a casual approach to having sex with friends. See, Municipalidad de Santiago, *100 preguntas sobre sexualidad adolescente*, Santiago de Chile, 2016.

acceptable alternative to sending their children to State schools⁵³. In both cases they framed their claim in terms of a violation to their rights as parents under ECHR:P1A2, as well as violations to their children's rights to education and not to be tortured. Specifically, with respect to the claim of infringement on parental rights, the Court took a hard line in defense of parents and their opposition to corporal punishment as a convictional matter, accepting that the state had indeed infringed upon this right.

In its decision it stated both that the state duty to respect parental convictions *cannot be overridden by the alleged necessity of striking a balance between the conflicting views involved* (referring to those of parents who supported the measure) and that, against the state's argument that it would be impractical to create separate schools with no corporal discipline, it had not been able to establish *that other means of respecting the applicants convictions, such as a system of exemption for individual pupils in a particular school, would necessarily be incompatible with the efficient administration of the school and avoidance of unreasonable public expenditure*⁵⁴. The Court also notes that respect for parental convictions *means more than 'acknowledge' or 'taken into account'; in addition to a primarily undertaking, it implies some positive obligation on the part of the State (...)*⁵⁵. Thus, under the precedent of Campbell and Cosans, parents ought to be entitled to have their children exempt from generally applicable norms of discipline (and presumably, from content) that the state and most parents see fit, but which they personally oppose to as a matter of conviction, even if it had never been applied to their child. And it is the burden of the State to demonstrate that no alternative solution is feasible without incurring in public expenditure or disruption.

It is obviously the case that a practice such as corporal punishment is not subject to assessment of its objectivity, or its pluralistic or critical nature. **It is simply a binary question of whether parents agree with the practice or not with regards to their own convictions applied to the educating their child.** So unlike in Kjeldsen, the Court does not apply (because it cannot apply) the standard of *objective, critical and pluralistic*, but simply assesses if the contradiction between school practice and parental convictions is present.⁵⁶ Because the contradiction exists, parents are entitled to have their children exempt from it, or else their rights are violated, unless the state establishes that no other alternative is possible. This is, in our view, the correct assessment. It could perhaps be said that the precedent of Campbell and Cosans represents the high-water mark of parental rights protections in the context of the European system. But from then on, parental rights have been no match for the erroneous standard of objective, critical and pluralistic content. Further, the issue is not only that the standard is unfounded with respect to the text of the treaty, but also that it is mostly the case that the Court takes the states at their word with respect to the objectivity and pluralistic nature of their content, rather than actually assessing if this is in fact the case, both in principle and in practice.

In the case of **Jimenez and Jimenez Merino v. Spain** (2000)⁵⁷, father and daughter brought suit against Spain over the fact that the state had included compulsory study of contents on sexuality which were contrary to their moral and religious convictions, for which she would not be attending classes on the subject matter. The daughter, supported by her father, followed through with her intention, for which she was flunked in her examinations and forced to repeat the school year. In turn, the European Court rejected the parental rights claims and found the application manifestly ill-founded based on the arguments that (a) the information in the booklets was objective and scientific, and could be

[⁵³] European Court of Human Rights, Application No. 7511/76; 7743/76, Campbell and Cosans v. the United Kingdom, chamber judgment, 1983, par. 8.

[⁵⁴] Id., par. 36.

[⁵⁵] Id., par. 37(a), referring mutatis mutandis to the Marckx judgment of 13 June 1979, Series A No. 31, p. 15, par. 31.

[⁵⁶] With the caveat of the court considering that, in the context of the Convention as a whole, including article 17's prohibition of the 'abuse of rights', philosophical convictions protected are those that *are worthy of respect in a 'democratic society'(...) and are not incompatible with human dignity; in addition, they must not conflict with the fundamental right of the child to education (...)*. Id., par. 36, at 13.

[⁵⁷] European Court of Human Rights, Application No. 51188/99, Jimenez and Jimenez Merino v. Spain, fourth section, decision of inadmissibility, 2000.

construed as being of general interest and not an attempt at indoctrination; (b) that the purveyance of information by the school does not affect the right of parents to enlighten and advise their children in accordance with their convictions at home; and (c) that parents had the right to establish schools and were therefore free to enroll their child within a wide network of private schools to which the parents were free to apply if they did not like the content provided in public schools⁵⁸. The Court did not engage in a review of the actual content of the course, nor on the way in which it was applied in practice. It merely contented itself with noting that the sexual education class in question *was designed to provide pupils with objective and scientific information (...)*⁵⁹. It is also worthy to note that the private school objection was one of the three reasons the Court considered as sufficient to dismiss the case as manifestly ill-founded.

Contrast this, however, with the case of **Folgerø and others v. Norway** (2007)⁶⁰, in which parents that were members of the Norwegian Humanist Association sought relief from the state's compulsory school subject of Christianity, Religion and Philosophy in public schools to which their children attended, since they considered that having their children participate in activities and sit in lessons on said subject violated their parental rights under Protocol 1. This was compounded by the fact that the state only allowed for partial exemptions from those parts of the teaching which parents considered, from their point of view, amounted to the practice of another religion or adherence to another philosophy of life. The exemption only applied, however, if they were able to reasonably argue in what way the objectionable practice amounted to the practice of another religion. Petitioners claimed that this required them to disclose matters of their faith and beliefs coming under protection of their private life and put them at a disadvantage from non-objecting parents who had no need to justify themselves in any way (but the Court failed to decide on this, since it had already found a violation of parental rights). In its decision on the merits the Grand Chamber of the Court did away with the private education objection by simply stating *that, in the instant case, the existence of such a possibility could not dispense the State from its obligation to safeguard pluralism in State schools which are open for everyone*⁶¹. Which is it then? If the existence of private schools is enough to dismiss parental claims in the first case, then it should be so as well in the latter.

Between 2006 and 2011, the Court decided **Konrad v. Germany** (2006)⁶², **Folgerø and others v. Norway**, and **Dojan v. Germany** (2011)⁶³.

In Konrad, parents belonging to a Christian community were attempting to have their children entirely exempt from mandatory attendance to a school that was recognized by the State in order to homeschool them in accordance with the materials and syllabus of a non-recognized school specialized in assisting parents who decided to educate the children at home. This on account of their objection to sex education, the mention of mythical creatures such as witches and dwarfs in fairy tales told to the children during lessons and the general rise of violence in state run schools, of which they wished to protect their children. The state refused to grant such an exemption and the parents claimed that having the children forced to attend school in such circumstances violated their parental rights under article 2 of protocol 1, among others.

In Dojan, the petitioning parents were members of a Christian Evangelical Baptist Church, and their children attended German public schools. They requested that their children be exempt from participating in workshops and classes on sexual education⁶⁴. Some of the petitioners emphasized that

[⁵⁸] Id., par. 1., at 6.

[⁵⁹] Id.

[⁶⁰] European Court of Human Rights, Application No. 15472/02, *Folgerø and others v. Norway*, Grand Chamber judgment, 2007.

[⁶¹] Id., par. 101, noting that Norway subsidized over 85% of the cost of private education.

[⁶²] European Court of Human Rights, Application No. 35504/03, *Konrad v. Germany*, fifth section, decision of inadmissibility, 2006.

[⁶³] European Court of Human Rights, Application No. 319/08, *Dojan v. Germany*, fifth section, decision of inadmissibility, 2011.

[⁶⁴] One of the petitioning couples additionally requested that their children be exempt from taking part of a carnival celebration which they considered was Catholic in nature and was directed by carnal desire and accompanied by immoral and uninhibited behavior.

they did not have an opposition per se to sexual education in schools, but that the specific contents or curriculum that were being used were harmful to the moral development of their children insofar as they represented a liberal or progressive view of sexuality. With the refusal by the school to allow for an exemption, they took de facto action to ensure that their children did not attend on the days in which the classes occurred. The school tried to shift the scheduling of classes without the parents knowing to prevent this and fined the parents for failing to send the children to school. This happened on more than one occasion over more than one year, with the parents refusing to pay the fines, which led to some of them being imprisoned for up to 43 days in order to compel them to pay. Their complaint to the European Court stated that the refusal by domestic authorities to partially exempt their children constituted a disproportionate restriction of their right to educate their children in conformity with their religious convictions, as well as their children's right to receive an education corresponding to their own convictions, which, given their age, had corresponded to those of their parents.

In both German cases, the Court sided with the state, declaring the petitions inadmissible and therefore refusing parental claims to either be able to home school or to be partially exempt from school lessons or activities, based on their parental rights. In the Folgerø case, on the other hand, parents requested a full exemption from school activities involving the course on Christianity, Religion and Philosophy, which the Court decided they were entitled to, and ruled that the refusal by the state to provide it was a violation of parental rights.

In both Konrad and Dojan, the Court accepted that the government's stated interest in their policies of denying homeschooling and exemptions to compulsory sexual education was legitimate. In Konrad, the Court sidestepped the question of whether the educational content was objective, pluralistic and critical by focusing instead on the prior issue of whether homeschooling was allowed within the scope of the Convention. So, the case does not strictly fall under the scrutiny of the court's standard to assess parental rights claims. As a general matter, in deciding Konrad the rationale was that the state had an interest and duty in educating children to become responsible citizens and participate in a democratic and pluralistic society. This required that the children have regular contact with other persons, with this being *the most effective mean* of achieving this aim, and consistent with the *general interest of society in avoiding the emergence of parallel societies based on separate philosophical convictions*⁶⁵, as was stated by the Federal Constitutional Court of Germany and supported by the European Court. Thus, homeschooling is forbidden by the State (if not by the Convention). In Dojan the State contended that this also required compulsory sexual education within the mandatory formal schooling so as to enable students *to develop their own moral views and an independent approach to their own sexuality* (...) [it] *should encourage tolerance between human beings irrespective of their sexual orientation and identity* (...) and to avoid the formation of parallel societies⁶⁶. Because these interests were deemed legitimate, the Court accepted these decisions as within the margin of appreciation for the state and left it at that. In the Dojan case, it did not even bother to consider whether the actual curriculum and content of the sexual education classes indeed presented the issue in a critical, objective and pluralistic manner. It just took the state's word for it⁶⁷ and accepted that this was the case, in contrast to the in-depth examination of the same in Folgerø, on which the result ultimately was based on⁶⁸.

In Folgerø, the Court accepted that the state's asserted interest in mandating the teaching of Christianity, other religions and philosophies together in one course was not in itself contrary to the

[65] European Court of Human Rights, Application No. 35504/03, Konrad v. Germany, par. 1, at 7.

[66] European Court of Human Rights, Application No. 319/08, Dojan v. Germany, par. 2, at 15.

[67] *The Court observes that the sex education classes at issue aimed at, as stated by the Paderborn District Court, the neutral transmission of knowledge (...) in accordance with the underlying legal provisions and the ensuing guidelines and the curriculum.* Id, par. 2, at 14.

[68] European Court of Human Rights, Folgerø and others v. Norway, par. 87–95. The Court began by looking at the description of the course and the way each objective and unit had been worded.

principles of pluralism and objectivity⁶⁹ and that, likewise the German cases, the intent was to foster tolerance and avoid sectarianism, using the course as a mean to such end. Nevertheless, it considered it central to the issue that, on its face, the manner in which the course objectives had been prescribed by the state in the legal framework governing the course (the Court once more declined to look into the actual teaching of the children) evidenced the existence of qualitative and quantitative differences in treatment between evangelical Lutheran Christianity and other religious and philosophical traditions which amounted to a breach of the standards that made religious teaching admissible in schools on account of its *imbalance*. Notably, and in apparent omission of its own case law, the Court did not reach the conclusion that the course content amounted to an attempt at indoctrination⁷⁰ but still found it beyond the pale on account of the lack of full exemptions.

The Court faults the course for its *clear preponderance of Christianity in the composition of the subject*⁷¹. As such, the Court views negatively that students are to receive a *thorough* knowledge of the bible and Christianity in the form of cultural heritage and the Evangelical Lutheran faith, but that thoroughness is not used to describe the level of knowledge expected of other religions and philosophies. It viewed negatively that half the course referred to Christianity whereas the other half referred to all other covered religions and philosophies. The introductory passages stated that the course intended for students to gain *thorough insight* into Christianity, but only *sound* knowledge of the other world religions and philosophies. Students were to learn *the fundamentals* of Christianity, but only *study the main* features and narratives of other faiths and know about secular orientation and the humanist tradition. One is hard pressed to find the same relevance as the Court majority does to these words, since they would convey practically the same meaning in their ordinary usage. Ultimately, the issue came down to the Court's determination that the perceived disparities went against the standard of *objective, critical and pluralistic content*⁷², yet it did not explain how this judgment came to pass, opting for what appears to us as a *we know it when we see it approach* to the issue in that case⁷³.

Of course, if there was a difference in treatment between Christianity and other religions and philosophies it was the result of the fact that the Christian faith took precedence for Norway, an established Christian nation. As an obvious practical matter schools need to rationalize the time they have (which is limited and scarce and is shared by other subjects), and this means making differences in the allotment of time and depth given to each unit. As the Court has ruled, the determination of the curriculum is a matter of expediency left to the states. In our view, and notwithstanding that the Court did not clarify by which criteria it would assess the breach of the standard (other than noting the obvious: that there is a preponderance of Christian content in the course), there was no breach of the court's standard and the state did in fact make a sufficient effort to balance its history and identity as a Christian nation with an established church, with the acknowledgment of the convictions of other who did not share the same faith⁷⁴. But as we have argued, no amount of objectivity and attention to pluralism can remedy the fact that even then the content may be contrary to the convictions and rights of parents.

[⁶⁹] Id., par. 88.

[⁷⁰] Recall that in its landmark ruling in Kjeldsen, the Court had stated that it was the pursuance of an aim of indoctrination which constituted the limit not to be exceeded. Either the Court thought there was an attempt at indoctrination but chose not to level such a grave charge against Norway, or it failed to observe its own precedent.

[⁷¹] European Court of Human Rights, Folgerø and others v. Norway, par. 91.

[⁷²] (...) *it does not appear that the respondent State took sufficient care that information and knowledge included in the curriculum be conveyed in an objective, critical and pluralistic manner* (...) Id., par 102.

[⁷³] Id., pars. 92–95.

[⁷⁴] This is also the conclusion of the dissenting judges, in the 9–8 split. The dissenters considered that nothing in the convention bars a state like Norway to give at least quantitative preeminence to Christianity given the country's history and identity. And they were satisfied that the standard had not been breached, among other things, because *while Christianity represented a greater part of the curriculum than other world religions and philosophies, it should be emphasised that the latter, covering a wide spectrum of world religions and philosophies, constituted roughly half, or at least a major part of the subject*. Id., joint dissenting opinion, at 51.

Be that as it may, it was the perceived disparity or imbalance between all the studied religions or philosophies by the Court, amounting to a breach of the standard, that raised the question of whether such imbalance was admissible, with only a **partial exemption** available to the students at the request of the parents. Ultimately, the Court considered that the refusal to grant a full exemption from the subject matter gave rise to a violation of article 2 of Protocol No. 1. In other words, the existence of the subject matter as such did not come into question, but the fact that parents could not fully exempt their children from it did.

For what is worth, and in line with what we have argued, we believe that the result in *Folgerø* was correct, but for the wrong reasons. A truly *pro-homine* application of parental rights ought to lead towards a regime of full exemptions in cases in which the school's chosen educational content and practices come in conflict with parental convictions, as perceived from their point of view⁷⁵. The result of *Folgerø* should have been coherently applied to *Dojan*, *Konrad* and others. And it is noteworthy that in those few cases in which parental rights have received protection by the Court, there has been no question of changing the content or practices that the state had decided to impart or apply, but simply of acting in a way that makes the right to exemption real in practice⁷⁶.

A few final comments on the European line of cases.

The Court accepted the legitimacy of the German goal of preventing the formation of a *parallel society*, so that it was proper to deny parents an exemption from state mandated education and activities aimed at the creation of a common culture of the State. However, if this was true for the evangelical Christians in Germany, why was it not equally true with respect to the humanists of Norway. Norwegian authorities likewise claimed the need for participation in its classes as means to achieve social cohesion and toleration, built around a course which presented to students most major religions while retaining a distinct Christian worldview based on their established church and national history. Yet the Court saw fit that the humanists exempt themselves from it, against the stated interest of the state⁷⁷. We can only speculate as to the reason of the double standard, but we think it is undeniable that it exists.

We find it questionable that the Court is so solicitous in curbing claims of parental rights. For starters, and as we have seen, this fundamental right of parents is not subject to restrictions, at least in the views of the Human Rights Committee⁷⁸. Even accepting, in arguendo, that no right is free from all limitations, it is nonetheless the case that it is the burden of the state to provide the compelling reasons for restricting rights. The *Konrad* and *Dojan* cases stand out insofar as the Court unduly defers to the state's claim to the general interest of society or of children, without even questioning

[75] In this sense, the Human Rights Committee gets it right, insofar as deferring to parental perception of the contradiction of their convictions. Dealing with the same issue out of Norway, in the case of *Leirvåg* and others, the Committee analyzed whether the course was given by the State in a *neutral and objective* way, since this is the standard that had been developed by the Committee in its General Comment N. 22. The Committee decided that the State had a duty to provide for full exemptions, since the course was not **perceived by the parents** as being imparted in such a way. Ultimately, it is their judgment which truly matters, since they are the ones whose personal convictions are affronted. See, United Nations, Human Rights Committee, *Leirvåg and others v. Norway*, (Communication No. 1155/2003), 2003, par. 14.3.

[76] For instance, the way in which the Human Rights Committee manages this within its own established frame of analysis is not to demand that the state change the contents of the course of study until they are accepted as neutral and objective by the Committee or the parents, but rather that, in order for the teaching to *be said to meet the requirement of being delivered in a neutral and objective way* it must be the case that *"the system of exemption in fact leads to a situation where the teaching provided to those children and families opting for such exemption will be neutral and objective"*. See, United Nations, Human Rights Committee, *Leirvåg and others...*, par. 14.3. In other words, what is truly inadmissible is that the state teaches content and engages in practices that are not neutral nor objective, and that it does not allow for full exemptions from the same. But if it chooses content or practices that are not neutral nor objective, yet allows for full exemption from the same –so that the rest of the teaching provided to the children and their families from which they did not exempt themselves is neutral and objective– then there is no violation of the rights of parents. This is in fact the result we advocate for.

[77] If the school and school curriculum is a reflection of society at large –as it most likely is, since the majority of society wields political power to decide on the curriculum– then any and all groups seeking to exempt themselves are, to some extent, retreating into a *parallel society* which resists cultural and societal integration around the content of said curriculum. When is this legitimate and when is it not?

[78] It is also the case that article 2 of Protocol 1 to the European Convention on Human Rights does not include a restriction or limitation of rights clause.

if there were less restrictive means of achieving the goal. This is especially clear in Konrad, in which the Court declares, following Germany's admission, that the forced assistance to schools –with the prohibition of homeschooling– is a **more effective mean** of achieving the aim of acquiring social skills and holding opinions different from the majority's. This implicitly admits that the state's goals could have been likewise achieved with full respect for parental rights. Under the necessity element of the proportionality test routinely applied to decide on human rights cases, the parents should have prevailed there. Furthermore, given that the state claims this as an interest to justify the restriction of rights, **it should not be sufficient simply to state the claim, but rather there should be some evidence that this parallel society is indeed forming or may be formed. At best this is a prejudice against parents requesting partial or full exemptions, that unjustly imputes to them the intent of creating a parallel society where no such intent exists.**

Perhaps the most egregious assertion comes out of the Konrad case, in which the Court pays lip service to the notion that parental rights are part of the right of education, only to turn around and then affirm that *respect is only due to convictions on the part of parents which do not conflict with the child's right to education*⁷⁹. What we find unacceptable is that the Court gave no reason for reaching such a conclusion and, most notably, for ignoring that what parents hold is no mere interest but a right in the proper sense. Why is this right immediately sacrificed in favor of one out of many possible understandings of the right to education? For this, there is no answer. The Court reasons in a way which effectively eviscerates parental rights and leaves them as no more than lyrical acclamations. By positing that parental rights can only prevail when they are not in conflict with the right of the child to education, the Court is saying is that the right can only prevail if the majority so decides. This is the case because it adopts a loaded understanding of the right to education which goes beyond the general consensus of the objectives of education and implicitly embraces the views of the majority regarding not only the objectives, but also the specific methods by which to achieve them. We have already advanced our understanding of the right to education which has the distinct advantage of upholding both rights, since parents are in no way denying the right of their child to be educated when they act within the broader goal of raising their children to be self sufficient and able to choose to participate fully in society.

4. The 1983 Cuba Report. The only Inter American precedent on parental rights

As we mentioned from the outset, we will close out this chapter by looking into the jurisprudence of the Inter American Commission on Human Rights on the issue, which while almost inexistent, it is nevertheless illustrative and supportive of our understanding.

In 1983 the Commission adopted its country report on Cuba. Among other things, the Commission faulted Cuba for its *dogmatic rigidity regarding the contents transmitted to students, which turned the school into an additional channel for political indoctrination... depriving parents of their legitimate right to choose the type of education they want for their children*⁸⁰. In the context of the whole report, **the Commission acknowledges that parents may be free to pass on their religious and moral convictions at home, but they are shut out of the school setting through the State's compulsory education scheme**, which embraces a comprehensive worldview of scientific materialism, incompatible with Christian moral teachings. It is this conduct by the state that goes against the right of parents to guarantee the moral education of their children in accordance with their convictions. Importantly, given

[⁷⁹] European Court of Human Rights, Konrad v. Germany, par. 1, at 6. Also, in European Court of Human Rights, Campbell and Cosans v. the United Kingdom, chamber judgment, 1983, par. 36.

[⁸⁰] Inter American Commission on Human Rights, Country Report – Cuba, 1983, conclusions, par. 21.

the communist regime's official embrace of atheism, education is necessarily irreligious. So, unlike the more commonly disputed cases in which the state improperly imposes religious education on the non-religious, here the opposite is true. It was never the case that students were being forced to receive religious education against their will (whether against their atheism or against their differing beliefs) and without the chance of opting out. On the contrary, the violation occurred precisely because the schools were irreligious and because they pushed educational contents which, even if facially neutral towards religion, conflicted with the moral views of parents.

The Commission also pointed out that Cuba had nationalized all schools and made the establishment of private schools impossible, which as we have seen, for some would have solved the issue altogether as long as parents could send their children to those schools in order to ensure they be educated in accordance with their convictions. But what is remarkable is that, instead of simply criticizing the prohibition on establishing independent schools, the Commission further chastised Cuba because there were no other worldviews allowed to inform school content in the existing public schools besides of that promoted by the communist party. In that sense, it made the explicit point of criticizing the Cuban educational system because *the moral and educational instruction is imparted by the state and not by the parents, at least within the schools*, thereby implicitly acknowledging that the wrongness of Cuba's conduct resided equally in its absolute control of the moral instruction in the common school. The Commission treated them as two distinct violations of rights, and not just one, in keeping with what we argued previously⁸¹.

The Commission characterized the relation between the Government and churches as one of ideological competition, in which the state acts so that its Marxist-Leninist worldview prevails over Christian ethics. To that end, it employs its vast resources of education and mass media communications to promote its own doctrine⁸². The Commission concluded that this must end, insofar as it presents a violation of religious freedom, and churches cannot *compete* when they are shut out from accessing both. The whole point of this form of control being to impede parents (and churches) from educating children in their beliefs, since the moral content of Christian ethics bears on the practical conduct of individuals, which may lead to opposition to the governing regime⁸³.

Conclusions

Parental rights in education are fundamental rights. They cannot and should not be brushed away as a mere interest of parents. If we are to take human rights seriously in their power to safeguard all persons against the encroachment of the state and majoritarian rule, the respect of a robust understanding of parental rights is fundamental.

Parental rights do not entail that individual parents have veto power over school curriculums. It does however mean that the state is under a duty to, in the course of providing education to all children under their jurisdiction, adopt what measures may be necessary to ensure that the educational experience does not conflict with the moral and religious convictions of parents, to the greatest extent possible. When this objective is not achieved, even after the best efforts of the state, parents are entitled to have their children exempt from instruction and participation to which they have moral or religious objections. States are duty bound to adopt measures to make this right operational and fail to perform their duties if the matter is left exclusively to be enforced by courts of law.

[⁸¹] Id., chapter XIV, Right to Education. pars. 43–44.

[⁸²] Id., par. 12.

[⁸³] Id., chapter VII. Right to religious freedom and worship.

Parental rights are not properly respected, in accordance with treaty law, merely because parents have the theoretical option of sending their children to private schools or to home school. Nor are they fully respected by claiming that the State allows them the freedom to impart knowledge to their children in the confines of their homes. Both propositions are wrong as a matter of interpretation because they deprive parental rights, as recognized in treaty law, of their specific content and force. Further, parental rights are not enjoyed in opposition to the rights of children to be educated, but rather they are an inseparable part of the right to education which children can claim against the state.

International bodies and courts have readily accepted that parental rights are an integral part of the right to education of children, and that full respect to parental rights will sometimes translate into the necessity to accept exemptions or accommodations. In the specific case of the American region, and for the reasons that we have given in length, a human rights approach to this issue, coherent with the *pro-homine* principle that constitutes the cornerstone of human rights law, requires states to adopt measures to facilitate the full exercise and enjoyment of parental rights. This constitutes one of the goals to which the states of the region should aspire to, in their continuing effort to secure all rights for all peoples.

In an age of increasing polarization between citizens, our proposal for the respect of parental rights could help defuse the growing animosity between different groups of society. Suspicion of parents over the use of the school system for ideological reasons is not unwarranted, and it was precisely the reason why the right was recognized in human rights treaties. On an issue such as this, which goes to the core of what it means to be a parent, it is no wonder that the dispute over who controls what goes on inside schools becomes increasingly heated. And this will continue to be the case, if the schoolhouse is seen as the main channel for indoctrination on moral, religious and political issues, more than a place for learning. We believe that state attempts to avoid coming into conflict with parental convictions, paired with the respect for accommodations and exemptions, would have a salutary effect, by lowering the relative importance of controlling the school system so that it does not become an *all-or-nothing* proposition.

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