

Summer 8-1-2015

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Recommended Citation

Fernando Méndez Powell, *Prohibition of Indoctrination in Education — A Look at the Cse Law of the European Court of Human Rights*, 2015 BYU Educ. & L.J. 597 (2015).

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PROHIBITION OF INDOCTRINATION IN EDUCATION – A LOOK AT THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

I. INTRODUCTION

International human rights law recognizes certain rights for parents relating to the education of their children. The law also recognizes the right for private parties to establish educational institutions independent from those operated by the state as well as the right to “academic freedom” for educators. These parental and educator rights can sometimes conflict with the rights international law recognizes for children, such as their right to education and their right to freedom of thought. Out of the various international human rights law enforcement and monitoring bodies, the European Court of Human Rights is the court that most often finds itself in the position of balancing these different rights against each other.

Throughout its case law, the European Court of Human Rights seems to have adopted “prohibition of indoctrination” as the guiding principle to manage these conflicting rights. As introduced in Part I, this article considers how the principle of prohibition of indoctrination has developed through the case law of the European Court of Human Rights and replaced the traditional understanding of parental rights. Part II examines the educational rights of parents, educators, and children and briefly explains how these rights can conflict. Part III illustrates the development of the principle of indoctrination through the European Court of Human Rights and the justifications for adopting the principle over a more traditional understanding of parental rights. Part IV discusses and analyzes the meaning, scope, and implications of the prohibition of indoctrination as it applies to public schools. Part V questions the different implications of the prohibition of indoctrination for private schools and homeschooling. Part VI concludes.

II. INTERNATIONAL RIGHTS OF PARENTS, CHILDREN, AND EDUCATORS IN RELATION TO EDUCATION.

A. The Rights of Parents

The International Covenant on Civil and Political Rights requires—as a component of the right to freedom of thought, conscience, or religion—state parties 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.”¹ The International Covenant on Economic, Social and Cultural Rights establishes—as part of the right to education—the following:

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.²

In the Inter-American Human Rights Protection System, the American Convention on Human Rights establishes—under freedom of conscience and religion—that, “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 conviction.”³ The San Salvador Protocol—the Inter-American Human Rights Protection System instrument on Economic, Social, and Cultural Rights—establishes that, in conformity with domestic legislation and international education principles, “parents should have the right to select the type of education to be given to their children.”⁴

The European Convention on Human Rights and Fundamental Freedoms is the main instrument of the European Human Rights Protection System. This convention, unlike the International Covenant on Civil and Political Rights and the American Convention on Human Rights, does not make any explicit reference to the parental right to dictate the reli-

¹ International Covenant Civil and Political Rights, art. 18(4), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

² International Covenant on Economic, Social, and Cultural Rights, art. 13(3), Jan. 3, 1976, 993 U.N.T.S. 3 [hereinafter ICESCR].

³ American Convention on Human Rights, art. 12(4), Nov. 22, 1969, 1114 U.N.T.S. 171 [hereinafter ACHR].

⁴ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), Nov. 17, 1988, art. 13(4), 69 O.A.S.T.S. [hereinafter SSP].

gious or moral education of their children within its primary text. However, in its first protocol, the article establishing the right to education states, “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.”⁵

The right to education is normally considered an economic, social, and cultural right. Whether one of these rights is or ought to be enforceable is a matter of constant debate.⁶ The main argument against enforceability is the limited resources available to states.⁷ Being dependent on resources, the argument goes, economic, social, and cultural rights cannot be enforced in the same way as civil and political rights.⁸

The preceding argument presents a simplified view of the issue: Not all rights classified as economic, social, and cultural necessarily depend on resources for their satisfaction. Further, some civil and political rights are resource-dependent.⁹ It falls outside the scope of this article to attempt to sort the complex and highly debated issues of an economic, social and cultural right’s enforceability. However, it should be noted that the aspects of the right to education, which concern parental rights, do not necessarily involve resource investment for their fulfillment. In that way, parental education rights are more similar to the freedom of expression or freedom of association than to the right to adequate housing.

Though the right to education is considered an economic, social, and cultural right, it is recognized in a protocol to the European Convention of Human Rights, a treaty concerning civil and political rights, and enforced by the European Court of Human Rights, an enforcement body for civil and political rights.¹⁰ The right to have the state respect both one’s

⁵ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, art. 2, 213 U.N.T.S. 262 [hereinafter ECHR P1].

⁶ See Mónica Tinta, *Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions*, 29(2) HUM. RTS. Q. 431, 431–33 (2007).

⁷ *Id.*

⁸ See Comm. on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of State Parties’ Obligations, art. 2, ¶ 1, U.N. Doc. E/1991/23 (Dec. 14, 1990) [hereinafter UNCESCR, No. 3].

⁹ For example, political rights require states to invest resources in establishing elections while the right to form trade unions (considered an Economic, Social, and Cultural Right) only requires states to abstain from unduly interfering with their establishment. See Jackbeth Mapulanga-Hulston, *Examining the Justiciability of Economic, Social and Cultural Rights*, 6(4) I. J. HUM. RTS 29, 40–41.

¹⁰ The San Salvador Protocol establishes the right to education as one of only two Economic, Social, and Cultural Rights the Inter-American Court of Human Rights is authorized to enforce. SSP, *supra* note 4, at art. 19(6) (the other being the right to form trade unions). Though also authorized to deal with issues of parental rights in relation to the education of their children by virtue of the

private and family life as recognized in international human rights law also provides some powers to parents. Under this right, parents have a recognized authority to make decisions relating to the well-being of their children,¹¹ and states are required to not interfere unjustifiably in the private family relations between parents and their children.¹² This private family relation includes parents communicating their views and values to their children. However, the specific provisions relating to parental rights in education contained in the European Court of Human Rights Protocol 1; International Covenant on Economic, Social, and Cultural Rights; San Salvador Protocol; and in the freedom of education articles of the International Covenant Civil and Political Rights and the American Convention on Human Right have a legal content of their own. They have implications beyond the right of having the state respect one's private and family life.¹³

The special parental rights in relation to the education of their children grant parents a protection against the risk that the state education system would hinder the parents' efforts to guide their children toward a path which is in accordance with their own moral, religious or philosophical convictions.¹⁴ Historically, the main implication of this right has been an obligation for states that implement sectarian religious classes as part of their official education curriculum to provide alternatives to students whose parents feel such classes are not in conformity with their views.¹⁵ Possible alternatives include exempting children from such classes at the parents' request,¹⁶ providing alternative secular or non-sectarian classes, authorizing private schools to omit such classes from their curriculum,¹⁷ or permitting parents to homeschool.¹⁸

freedom of conscience and religion article of the American Convention on Human Rights, the case law of the Inter-American Court of Human Rights in this area is very scarce. For that reason, this article will focus primarily in the case law of the European Court of Human Rights.

¹¹ See *Glass v. United Kingdom*, 2004-II Eur. Ct. H.R. ¶ 74.

¹² See Case "Relating to Certain Aspects on the Laws on the Use of Languages in Education in Belgium" v. Belgium, 6 ECHR Ser A. 33 ¶ I(B)(7) (1968) [hereinafter *Belgian Linguistic Case*].

¹³ *Id.* ¶ I(A)(3).

¹⁴ *Kjeldsen v. Denmark*, 23 Eur. Ct. H.R. 22, ¶ 53 (1976).

¹⁵ A second implication of this is the right of parents to opt to send their children to private schools, independent of any religious or philosophical objections to the content of public education. See *infra* Part V.A. Parents also have a right to choose, among available public schools, where to send their children. However, this right can be limited by the state under reasonable grounds such as the availability of places. *W. & DM., M. & H.I. v. United Kingdom*, 37 Eur. Comm'n H.R. Dec. & Rep. 96 (1982).

¹⁶ In Western European countries, where the tendency is for education to be primarily state-provided and for religious education to form part of the official curriculum, there has been a strong tradition of allowing class exemptions. This contrasts with the U.S. where there is no tradition of allowing class exemptions in public schools.

¹⁷ See *infra* Part V.A.

It is debatable whether the mere existence of any of the possible alternatives is sufficient to satisfy parental rights. The case law of the European Court of Human Rights seems to indicate that international obligations are met as long as parents are provided with an alternative.¹⁹ But alternatives are not meaningful if they are not really accessible to parents. For example, if private or homeschooling are not viable to parents because of their economic situation, then their parental rights may not be sufficiently protected unless class exemptions or alternative classes are offered in the public education system.²⁰

If the issue was limited to sectarian religious classes, providing exemptions or alternative classes could be considered the minimum requirement for ensuring such classes do not infringe parental rights. However, sectarian religious classes are not the only type of classes that parents may consider an interference with their right to guide children in their own convictions. Mandatory non-sectarian or comparative religious classes, secular ethics or religious classes, and sexual education classes can all be and often are the cause of conflict between states and parents.²¹ Parents may also object not to a whole class, but only to specific content within the class or to something that permeates the whole of the school curriculum. The European Court of Human Rights has recognized that the state's duty to respect parental rights in education does not extend only to the curriculum, but to the whole of the educational process including areas such as extra-curricular activities and discipline.²² As the tendency has shifted toward the secularization of the state—especially in Europe—and sectarian religious classes have begun to disappear from official curriculums, it has become increasingly common for infringement claims of parental rights to refer to matters other than religious classes.²³

Dealing with the whole range of situations which parents can object to based on their internationally recognized educational rights is more complicated than simply not making sectarian classes compulsory or allowing parents to exempt their children from such classes. This is one of the reasons the European Court of Human Rights has shifted focus from class exemptions and other alternatives toward requiring states to comply

¹⁸ See *infra* Part V.B.

¹⁹ *Kjeldsen*, 23 Eur. Ct. H.R. ¶¶ 53–54; *Jimenez v. Spain*, 2000-VI Eur. Ct. H.R. ¶ 1.

²⁰ See *infra* Part V.

²¹ See *infra* Part IV.

²² *Campbell v. United Kingdom*, 48 Eur. Ct. H.R. (ser. A) ¶¶ 33–36 (1982).

²³ As will be shown in this article, most of the complaints before the European Court of Human Rights concerning parental educational rights relate sexual education classes, secular ethics classes or comparative religion classes rather than sectarian religious classes.

with the principle of prohibition of indoctrination as a measure of protection of parental rights.²⁴

Before closing this section, it is necessary to note that the rights so far discussed are rights that are linked with the legal custody of children rather than the biological relation between children and parents. For this reason, parents have no rights in relation to the education of their children if they lose legal custody.²⁵ In the same sense, adoptive parents or other legal guardians would have the same rights in relation to the education of their children as any biological parents with legal custody. Thus, any rights referred throughout this article as parental rights should also be understood as custodians' rights.

B. The Rights of Children

Freedom of thought, conscience, and religion does not give a right to be sheltered from differing views, nor a protection against offensive ideas.²⁶ On the contrary, persons have a right to be exposed to different ideas and form their own views; states have an obligation to generate an environment that is conducive to the free exchange of ideas.²⁷ In this sense, children's freedom of thought, conscience, and religion would not give them a right to oppose the inclusion of any type of information in school curriculum. However, children have the right— independent of those of their parents— not to be compelled to participate in any religious activity they do not desire.²⁸ Thus, if students in public schools were required to participate in activities such as prayers or religious ceremonies, they would have a right to request exemptions or alternatives.²⁹

The freedom of religion and the freedom of expression of children

²⁴ Part III.A discusses how practical concerns have influenced the adoption of the principle of prohibition of indoctrination by the European Human Rights Court.

²⁵ For example, when biological parents adopt away their children or a family court has granted full legal custody someone else, the biological parents lose their parental educational rights. *X v. Federal Republic of Germany*, 26 Eur. Comm'n H.R. CD 33 (1968); *Olsson v. Sweden* (No. 1), App. No. 10465/83, Eur. Commission H.R. (1986) ¶ 182. The European Court of Human Rights has determined that in case of divorces where courts have not fully terminated a parent's custody, both parents can exercise the rights conferred by international human rights law in relation to the education of their children. *Vojnity v. Hungary*, 44 Eur. Ct. H.R. ¶ 37 (2013).

²⁶ See *Appel-Irrgang v. Germany*, 2009-IV Eur. Ct. H.R. 415, 431.

²⁷ See *Bustos v. Chile*, Inter-Am. Ct. H.R. (ser. C) No. 73 (2001) (Roux-Rengifo, C.V, concurring); Paul Sturges, *Limits to Freedom of Expression? Considerations Arising from the Danish Cartoons Affair*, 32 IFLA J. 181, 183 (2006).

²⁸ This is because children's right to freedom of religion under the Convention on the Rights of the Child and other international human rights law instruments is independent from that of their parents.

²⁹ Provided they are deemed to have attained sufficient maturity to make their own decisions on these matters. See *infra* Part IV.A.

can also be affected by rules regarding school uniforms or prohibiting or restricting the display of religious symbols. The requirement to wear uniforms in public schools has been accepted as a justifiable restriction on the freedom of expression by the European Commission of Human Rights.³⁰ However, restricting children from wearing religious symbols at school by bans or because they breach of a uniform or dress code is a highly controversial practice.³¹

As part of the right to privacy (and the general right to health), children have a right to sexual and reproductive health. The fulfillment of this right requires children to receive adequate information about their bodies and sexuality.³² The United Nations Committee on the Rights of the Child has expressed that, “States parties should provide adolescents with access to sexual and reproductive information, including on family planning and contraceptives, the dangers of early pregnancy, the prevention of HIV/AIDS and the prevention and treatment of sexually transmitted diseases”³³ and that, “States parties must ensure children have the ability to acquire the knowledge and skills to protect themselves and others as they begin to express their sexuality.”³⁴ Including this information for children to protect their sexual and reproductive health, as part of the official school curriculum, is one of the most efficient ways states can ensure this information reaches children in fulfillment of their international obligations. However, parents sometimes object to these classes if they feel they interfere with their ability to raise their children in accordance to their moral convictions. Sexual education is one of the main areas where conflicts between the rights of children and parents can arise.³⁵

The right to education is not exclusive to children, nor is it limited to elementary schooling. However, both the San Salvador Protocol and the International Covenant on Economic, Social, and Cultural Rights establish that primary education should be free and compulsory to all.³⁶ While making primary education free and compulsory to all is the required minimum, under the principle of progressive development of economic, social, or cultural rights, the goal is for secondary education to also become

³⁰ *Stevens v. United Kingdom*, 46 Eur. Comm’n H.R. Dec. & Rep. 245 (1986).

³¹ See *infra* Part IV.B.

³² See Comm. on the Rights of the Child, General Comment No. 3: HIV/AIDS and the Rights of the Children, ¶ 4, U.N. Doc. CRC/GC/2003/1 (2003) [hereinafter UNCRC, No. 3]; Comm. on the Rights of the Child, General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child, ¶¶ 26, 28, CRC/GC/2003/4 (2003) [hereinafter UNCRC, No. 4].

³³ UNCRC No. 4, *supra* note 32 ¶ 28.

³⁴ UNCRC No. 3, *supra* note 32 ¶ 16.

³⁵ See *infra* Part IV.

³⁶ SSP, *supra* note 4, at art. 13(3)(a); ICESCR, *supra* note 2, at art. 13(2)(a).

free and compulsory if resources allow.³⁷ The provision relating the right to education in European Court of Human Rights Protocol 1 does not obligate states to make education compulsory.³⁸ But the European Court of Human Rights has considered that the provision “implies the possibility for the State to establish compulsory schooling.”³⁹

The concept of “compulsory education” means that it is a state obligation to ensure that all children receive at least a minimum level of education. Children cannot opt out of their right to receive an education and neither can their parents waive this right on their behalf.⁴⁰ Compulsory does not mean, however, that all children can or should be forced to attend state-controlled schools. The ideal is for alternative private educational institutions to co-exist along the public system.⁴¹ However, the obligation to ensure all children receive an education indicates that states must set the minimum standards any alternative must meet and monitor whether private institutions are complying with the standards.⁴² Whether parents homeschooling their children should also be authorized, as an alternative to compulsory education, is a controversial issue; it is also debated whether homeschooling can satisfy children’s minimum right to education.⁴³

The vulnerability of children also means that their general human rights should sometimes be applied differently than adults.⁴⁴ The Convention on the Rights of the Child also acknowledges that the capacity of children to exercise each of their rights normally evolves as they age.⁴⁵ For this reason, the age and maturity of children is relevant when analyzing issues involving their rights, including potential conflicts with the goals and interests of their parents, educators, or policy makers.⁴⁶

In addition to general human rights, international human rights law provides children with special rights. The International Covenant Civil

³⁷ See Comm. on Economic, Social and Cultural Rights, General Comment No. 13: The Right to Education, art. 13, ¶¶ 51–52, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999) [hereinafter UNCESCR, No. 13].

³⁸ Belgian Linguistic Case, *supra* note 12 ¶ I(B)(3).

³⁹ Konrad v. Germany, 2006-XIII Eur. Ct. H.R. 355, 365.

⁴⁰ Comm. on the Rights of the Child, General Comment No. 11: Plans of Action for Primary Education, art. 14, ¶ 6, U.N. Doc. E/C.12/1999/4 (1999).

⁴¹ See *infra* Part V.A.

⁴² UNCESCR No. 13, *supra* note 37 ¶ 29.

⁴³ See *infra* Part V.B.

⁴⁴ Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/2002, Inter-Am. Ct. H.R. (ser. A) No. 17, ¶ 46. This has also been recognized in U.S. case law. See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

⁴⁵ Convention on the Rights of the Child, art. 12(1), Nov 20, 1989, 1577 UNTS 3 [hereinafter CRC].

⁴⁶ See *infra* Part IV.A.

and Political Rights and the International Covenant on Economic, Social, and Cultural Rights, along with the American Convention on Human Rights and San Salvador Protocol in the Inter-American Human Rights Protection System require state parties to provide children with special protection due to the inherent vulnerability of inexperience.⁴⁷ The Convention on the Rights of a Child also establishes special obligations for states concerning children. Among other provisions, it requires for the children's view—specifically those children who have the capacity to form them—to be taken into account in all matters affecting them⁴⁸ and for the “best interest of the child” to always be the primary consideration.⁴⁹ The obligation to protect the best interest of the child does not only apply to actions taken by the state itself, but also to actions taken by private actors, including private schools.⁵⁰ The Convention on the Rights of the Child acknowledges the role of parents and requires states to respect parental rights.⁵¹ However, sometimes the best interest of the child⁵² requires states to intervene in cases of parental abuse.⁵³ This paper deals with cases where parents have not abused or neglected their children, but where there are legitimate controversies between parents and states regarding the “best interest” of children.⁵⁴

C. The Right to Establish Private Educational Institutions

Both the International Convention on Economic, Social, and Cultural Rights and the San Salvador Protocol recognize the freedom of individual and groups to establish schools independent from those operated by the state.⁵⁵ The right to education provision of European Convention on Human Rights' Protocol 1 does not make express reference to this right but the European Commission on Human Rights found that right to be implicit.⁵⁶ The right to establish a private educational institution does not refer merely to the freedom of expression—i.e., the right to create centers where ideas and information can be freely disseminated. The specific

⁴⁷ ICCPR, *supra* note 1, at art. 24(1); ICESCR, *supra* note 2, at art. 10(3); ACHR, *supra* note 3, at art. 19; SSP, *supra* note 4, at art. 16.

⁴⁸ CRC, *supra* note 45, at art. 12(1).

⁴⁹ *Id.* at art. 3(1).

⁵⁰ *Id.* at art. 14(1).

⁵¹ *Id.* at art. 5.

⁵² *Id.* at art. 18.

⁵³ *Id.* at art 19(1); *see also* Human Rights Comm., General Comment 17: Rights of the Child, art. 24, ¶ 6, U.N. Doc. HRI/GEN/1/Rev.1 (Apr. 7, 1989) [hereinafter UNHRC No. 17].

⁵⁴ *See infra* Part III.

⁵⁵ ICESCR, *supra* note 2, at art. 13(4); SSP, *supra* note 4, at art. 13(5).

⁵⁶ Ingrid Jordebo Found. of Christian Sch. v. Sweden, 51 Eur. Comm'n H.R. Dec. & Rep. 125 (1987).

right to establish private schools includes the right to create centers where attendees may profit from their studies,⁵⁷ and receive official recognition of their studies as legitimate alternatives to public education.⁵⁸ As noted above, the right of individuals to establish private schools is also a right of parents to send their children to alternative schools.

The International Covenant on Economic, Social, and Cultural Rights clarifies that the right to establish private schools is subject to compliance with “minimum standards” set by the state.⁵⁹ The European Court of Human Rights has also recognized that the right to create private schools is not absolute: private schools are subject to regulation.⁶⁰ The state has a duty to ensure all private schools meet a standard adequate to satisfy all children’s right to education.⁶¹ Among other things, private schools may be required to comply with minimum curriculum standards. While curriculum standards are necessary for the protection of children’s right to education, they can conflict with the rights of institutions if they require teaching in a manner not in accordance with the institutions’ convictions.⁶²

D. The Rights of Educators

In addition to children, parents, and private educational institutions, individual teachers and employees of schools—whether public or private—also have personal rights. These rights include the freedom of expression and freedom of religion, and apply even when they perform their functions as educator. International human rights law also recognizes the right to academic freedom, which the United Nations Committee on Economic Social and Cultural Rights has described in the following terms:

Members of the academic community, individually or collectively, are free to pursue, develop and transmit knowledge and ideas, through research, teaching, study, discussion, documentation, production, creation or writing. Academic freedom includes the liberty of individuals to express freely opinions about the institution or system in which they work, to fulfil [sic] their functions without discrimination or fear of repression by the State or any other actor, to participate in professional or

⁵⁷ *Belgian Linguistic Case*, *supra* note 12 ¶ (I)(B)(4).

⁵⁸ *Jordebo*, 51 Eur. Comm’n H.R. Dec. & Rep.

⁵⁹ ICESCR, *supra* note 2, at art. 13(4).

⁶⁰ *Jordebo*, 51 Eur. Comm’n H.R. Dec. & Rep.

⁶¹ UNCESCR, No. 13, *supra* note 37, ¶ 54.

⁶² *See infra* Part V.

representative academic bodies, and to enjoy all the internationally recognized human rights applicable to other individuals in the same jurisdiction.⁶³

Although the right to academic freedom is primarily associated with higher education, the UNCESCR has acknowledged that it may also be relevant for lower levels of education.⁶⁴ However, European Court of Human Rights has found that the right to education, as prescribed by European Convention on Human Rights Protocol 1 does not confer any special rights to teachers.⁶⁵ Teachers' freedom of expression or religion can be restricted for the protection of the rights of children or parents.⁶⁶

III. THE PRINCIPLE OF PROHIBITION OF INDOCTRINATION— DEVELOPMENT AND JUSTIFICATIONS

As noted, the initial concept of parental rights in relation to the education of their children was that of a right to have them exempted from compulsory sectarian religious classes. However, this concept has been replaced with the principle that States have an obligation to conduct public education in an objective and pluralistic manner that does not indoctrinate children into particular worldviews. This prohibition of indoctrination first appeared in European Court of Human Rights case law in 1976 when the court stated the following in *Kjeldsen v. Denmark*:

[T]he 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. That is the limit that must not be exceeded.⁶⁷

In *Kjeldsen*, the European Court of Human Rights deemed that sexual education classes that included information on contraception did not amount to indoctrination because the information was conveyed objectively.⁶⁸ However, the court also noted that private schools that were not required to teach these classes were available and heavily subsidized by

⁶³ UNCESCR, No. 13, *supra* note 37, ¶ 39.

⁶⁴ *Id.* ¶ 38.

⁶⁵ See *Slavic Univ. in Bulg. v. Bulgaria*, No. 60781/00, Eur. Ct. H.R. (2004). See Part IV of the article for a discussion of the implications of the principle of prohibition of indoctrination for teachers and other educators.

⁶⁶ *Id.*

⁶⁷ *Kjeldsen*, 23 Eur. Ct. H.R. ¶ 53 (1976).

⁶⁸ *Id.* at 54.

the state, and that homeschooling was also permitted.⁶⁹ These options allowed alternative solutions for parents that wanted to “disassociate” their children from the sexual education provided in state schools.⁷⁰ This decision left unanswered questions. It was not clear whether the availability of alternatives was independently sufficient to satisfy parental rights in education, or if the objective presentation at state schools was also required. Inversely, it was not clear whether an objective and pluralistic presentation alone would have sufficed absent alternatives.

In 2000, the European Court of Human Rights heard another case concerning parental opposition to sexual education classes. In *Jimenez v. Spain*, the court maintained the same position adopted in *Kjeldsen*, holding that no indoctrination had occurred as the classes were taught objectively and private schools offered adequate alternatives.⁷¹ The court also addressed parents’ freedoms:

Parents are thus free to enrol [sic] their children in private schools providing an education better suited to their faith or opinions. In the instant case, the applicants have not referred to any obstacle preventing the second applicant from attending such a private school. Insofar as the parents opted for a state school, the right to respect their beliefs and ideas as guaranteed by Article 2 of Protocol No. 1 cannot be construed as conferring on them the right to demand different treatment in the education of their daughter in accordance with their own convictions.⁷²

In this pronouncement, the court left the door open to the possibility that allowing exemptions or other special arrangements could be necessary, even if alternative schools complying with parents’ convictions existed. For example, exemptions could be necessary when private school attendance is not feasible for a student due to practical or financial barriers.

Seven years later, the European Court of Human Rights clarified that the presence of private schools, even if state-subsidized, did not exempt the state from its obligation to ensure pluralism in public schools.⁷³ In that same year, the European Court of Human Rights also expressed the following:

[W]here the Contracting States include the study of religion in the subjects on school curricula, *and irrespective of the arrangements for exemption*, pupils’ parents may legitimately expect that the subject will be taught in such a way as to meet the criteria of objectivity and pluralism,

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Jimenez* 2000-VI Eur. Ct. H.R. ¶ 1.

⁷² *Id.*

⁷³ *Folgerø v. Norway*, 2007-III Eur. Ct. H.R. 51 ¶ 101 (2007).

and with respect for their religious or philosophical convictions.⁷⁴(emphasis added)

Thus, the obligation to conduct public education in adherence to the principles of objectivity and pluralism is independent of the alternatives available to parents. The European Court of Human Rights has also determined that parents do not have a right to withdraw children from classes or request special arrangements if the state satisfies the standards of pluralism and objectivity.⁷⁵

Based on the above, it appears that the prohibition of indoctrination has become the main implication of the provision concerning parental rights of the European Convention on Human Rights Protocol 1. It has replaced the traditional parental right to obtain exceptions or special arrangements for their children when parents have religious or philosophical objections to elements of the education provided in the public system.

At first read, the court's position regarding prohibition of indoctrination does not seem to be supported by the actual text of the relevant provision. Requiring states to "respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions"⁷⁶ does not seem to require public education to be objective or pluralistic. The article could be interpreted as allowing education in state schools to be biased toward a particular religious, philosophical, or political view as long as parents consent. Education can also be pluralistic and objective while at odds with parents' convictions. In this sense, the plain text of European Convention on Human Rights Protocol 1 seems to support the classical understanding of the parental right to obtain conviction-based class exemptions or alternative arrangements, rather than prohibit indoctrination. Judge Verdross maintained this view in his separate opinion in *Kjeldsen*:

Article 2 . . . constitutes a special rule derogating from the general principle in Article 10 . . . of the Convention. Article 2 (P1–2). . . gives parents the right to restrict the freedom to impart to their children not yet of age information affecting the development of the latter's consciences.

According to the judgment, it is true, the aforementioned clause of Article 2 . . . prohibits solely education given with the object of indoctrination. However, this clause does not contain any indication justifying a restrictive interpretation of such a kind. On the contrary indeed, it requires the States, in an unqualified manner, to respect parents' religious

⁷⁴ *Zengin v. Turkey*, 46 Eur. Ct. H.R. ¶ 68 (2007) (emphasis added).

⁷⁵ *Appel-Irrgang*, 2009-IV Eur. Ct. H.R. 415, 429.

⁷⁶ ECHR P1, *supra* note 5.

and philosophical convictions; it makes no distinction at all between the different purposes for which the education is provided.⁷⁷

However, there are a variety of different bases which have been employed to justify valuing the prohibition of indoctrination over guaranteeing a parental right to obtain class exemptions or special arrangements for their children on convictional bases.

A. Practical Barriers to Guaranteeing Parents' Rights

The impracticality of providing children with special treatment each time a parent requests, is one of the reasons the European Court of Human Rights has given for adopting the principle of prohibition of indoctrination.⁷⁸ The range of issues parents may object to extends far beyond sectarian religious classes. In this relation, the European Court of Human Rights has expressed:

In particular, the second sentence of Article 2 of the Protocol . . . does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for *otherwise all institutionalised [sic] teaching would run the risk of proving impracticable*. In fact, it seems very difficult for many subjects taught at school not to have, to a greater or lesser extent, some philosophical complexion or implications. The same is true of religious affinities if one remembers the existence of religions forming a very broad dogmatic and moral entity which has or may have answers to every question of a philosophical, cosmological or moral nature.⁷⁹ (emphasis added)

U.S. courts have expressed similar concerns:

If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems.⁸⁰

Schools cannot be expected to accommodate the personal, moral or religious concerns of every parent. Such an obligation would not only contravene the educational mission of the public schools, but also

⁷⁷ Kjeldsen v. Denmark, 23 Eur. Ct. H.R. 28 (1976) (Verdross, A., dissenting). Article 10 referenced in the quote is the article on freedom of expression.

⁷⁸ *Kjeldsen*, 23 Eur. Ct. H.R. ¶ 53.

⁷⁹ *Id.* (emphasis added).

⁸⁰ *Brown v. Hot, Sexy & Safer Prods.*, 68 F.3d 525, 534 (1st Cir. 1995).

would be impossible to satisfy⁸¹

While providing exemptions or alternative arrangements for sectarian religious education classes is relatively simple, addressing the whole range of objections parents may present is much more complicated. Ensuring that public education provided in public schools complies with certain standards of objectivism and pluralism is more practical for states to comply with and for courts to monitor than deciding on a case-by-case basis whether specific exemptions or alternatives suffice. However, practical concerns do not seem independently sufficient to justify negating greater deference to parents' wishes. Even if satisfying parents is sometimes impossible—like when the offending content permeates the curriculum in many classes—that does not justify denying requests that are feasible, like when the offending content is isolated to specific classes.

B. Pluralism in Education is in the Public Interest

Another argument for prohibition of indoctrination is that states, independent of parents' or children's rights, need to ensure pluralism in education because pluralism is in the public interest. The European Court of Human Rights has noted that "pluralism in education . . . is *essential* for the preservation of the democratic society."⁸²

If the cultural diversity of humankind is revered as an important value, then it is undesirable for states to pursue the homogeneity of their population through indoctrination. Thus, prohibiting indoctrination can be justified as a measure to protect diversity. The protection of cultural diversity can also be achieved through the allowance of class exemptions, homeschooling, or private schooling. However, by establishing prohibition of indoctrination as an independent principle the protection of pluralism is not left to the parents' agency. Protecting diversity can justify prohibiting state indoctrination in education. However, protecting diversity cannot justify negating parent's the right to pull their children out of the state curriculum, as this right also contributes to cultural diversity.

C. The Need to Protect Children's Rights

Another argument is that the prohibition of indoctrination is a compromise between the rights of children and parents. A requirement for public education to be objective and pluralistic can protect children's

⁸¹ *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1221.

⁸² *Kjeldsen*, 23 Eur. Ct. H.R. ¶ 50 (emphasis added) (internal quotation marks omitted).

rights to form their own views about religion, politics, morality, or philosophy. The European Court of Human Rights has maintained, “[I]n a democratic society, only pluralism in education can enable pupils to develop a critical mind with regard to religious matters in the context of freedom of thought, conscience and religion.”⁸³ Judge Power of the European Court of Human Rights has expressed that pluralism is essential to satisfy a child’s right to education: “Education would be diminished if children were not exposed to different perspectives on life and, in being so exposed, provided with the opportunity to learn the importance of respect for diversity.”⁸⁴

Although pluralism and objectivity in education is indeed essential to the fulfillment of children’s rights, it cannot be directly inferred from this that ensuring such pluralism and objectivity was the objective pursued by IHRL provision granting parents rights in relation to the education of their children.

The European Court of Human Rights has considered that, in relation to parental rights in education, respect is only “due to convictions on the part of the parents which do not conflict with the child’s right to education”⁸⁵ and that parents do not have right to keep their children ignorant from religious and philosophical views different from their own.⁸⁶ The United Nations Committee on the Rights of the Child has also noted that states have an obligation to provide children with the information necessary to protect their sexual and reproductive health—including information on contraception and family planning—independent of parental consent.⁸⁷

In light of these pronouncements, it seems that children’s rights have more weight than parental rights. This has been noted by Judge Rozakis of the European Court of Human Rights:

In conclusion, it seems to me that, unlike other guarantees of the Convention, in respect of which the case-law of the Convention has increased the purview of protection, including the right to education, the right of parents . . . does not seem realistically to be gaining weight in the balancing exercise of the proportionality test.⁸⁸

Unlike practical concerns or the public interest in diversity, the need to protect children’s rights justifies both requiring states to adhere to plural-

⁸³ *Zengin v. Turkey*, 46 Eur. Ct. H.R. ¶ 69 (2007).

⁸⁴ *Lautsi v. Italy (GC)*, 2011-III Eur. Ct. H. R. 61, 111 (Power, A., concurring).

⁸⁵ *Konrad*, 2006-XIII Eur. Ct. H.R. 355, 364.

⁸⁶ *Folgerø*, 2007-III Eur. Ct. H.R. 51 ¶ 89 (2007).

⁸⁷ UNCRC No. 4, *supra* note 32, ¶ 28.

⁸⁸ *Lautsi (GC)*, 2011-III Eur. Ct. H. R. 61, 100 (Rozakis, C., & Vajić, N., concurring).

ism and objectivity in public education, and negating parental rights to keep children from being exposed to views different from their own. Though pluralism in education was not the original goal of international human rights law provisions relating to parental rights, it is the maximum level of protection that can be afforded to parents while respecting children's own rights—as these rights are currently understood.⁸⁹

The above view is supported by the fact that all of the international human rights law treaties that confer parents a right to direct the upbringing of their children predate the Convention on the Rights of the Child. That convention is the result of a paradigm shift regarding the understanding of children's rights within international human rights law. Where children were previously seen as mere objects to protect, they are now recognized as subjects with rights independent of their parents.⁹⁰ State obligations emanating from international human rights law provisions concerning parental rights need to be reinterpreted in light of this shift. Professor Jeroen Temperman has accurately noted: “With the entry into force of the Convention on the Rights of the Child, the paradigm has arguably shifted from prior and decisive parental rights to an autonomous right children to be free in their choice of religion or belief.”⁹¹ Thus, parental educational rights have primarily become a tool to protect children from state indoctrination rather than a tool to compel states to respect parents' wishes.⁹² Children's rights are now the primary concern.

IV. WHAT CONSTITUTES INDOCTRINATION

Prohibition of indoctrination refers to an obligation of the state to conduct any activities it undertakes in relation to education in adherence to the principles of objectivity and pluralism. Although sectarian religious classes were the main issue at the time the relevant provisions were introduced in international human rights law, indoctrination does not necessarily have to be religious in nature. Though the European Court of Human Rights has not examined cases concerning political indoctrina-

⁸⁹ See *infra* Part V.A. (Parents maintain the right to send their children to private schools, but the principle of prohibition of indoctrination extends even to private education).

⁹⁰ Juridical Condition and Human Rights of the Child, *supra* note 44, ¶ 41 (Cançado Trindade, A.A., concurring).

⁹¹ Jeroen Temperman, *State Neutrality in Public School Education: An Analysis of the Interplay Between the Neutrality Principle, The Right to Adequate Education, Children's Right to Freedom of Religion or Belief, Parental Liberties, and the Position of Teachers*, 32(4) HUM. RTS. Q. 865, 870 (2010).

⁹² See Laura Lundy, *Family Values in the Classroom? Reconciling Parental Wishes and Children's Rights in State Schools*, 19(3) INT'L J.L. POL'Y & FAM. 346, 357 (2005).

tion, the Inter-American Commission on Human Rights has noted that political indoctrination could violate parental rights to direct their child's education.⁹³

Indoctrination does not only refer to deliberate state action taken through the whole of the public education system. For purposes of protecting a society's diversity, it may be sufficient to allow individual schools and teachers to take their own approach, promoting their particular views to students. However, as explained, the goal of the prohibition of indoctrination is also to protect the right of children to form their own consciences and—to the degree children's rights allow—the right of parents to raise their children in accordance with their convictions. Thus, what prohibition of indoctrination requires is not just diversity *from school to school* but pluralism and objectivism *within each school*. This was recognized by the European Court of Human Rights in *Kose v. Turkey*, where the court concluded that the obligation to teach courses on religions in a pluralistic manner extended to all state schools, even if the state had established separate secular and religious schools.⁹⁴ Similarly, the obligation to abstain from indoctrination extends to each individual teacher of the public system⁹⁵ in his or her classroom and limits teachers' freedom of expression and religion.⁹⁶ In this regard, the European Court of Human Rights has expressed the following:

[A]buses can occur as to the manner in which the provisions in force are applied by a given school or teacher and the competent authorities have a duty to take the utmost care to see to it that parents' religious and philosophical convictions are not disregarded at this level by carelessness, lack of judgment or misplaced proselytism.⁹⁷

As already noted, teachers working with children have a right to academic freedom.⁹⁸ However, the need to protect children and parents' rights means their academic freedom is much more limited than that of educators working with adults.

Determining what constitutes indoctrination in specific cases can be a difficult matter. Under international human rights law, states are expected to promote certain views through their education system such as democratic values, respect for human rights, and gender and racial equal-

⁹³ The Situation of Human Rights in Cuba, Inter-Am. Comm'n. H.R., OEA/Ser.L/V/II.61, doc. 29 rev 1 Conclusions, ¶ 22 (1983).

⁹⁴ *Kose v. Turkey*, 2006-II Eur. Ct. H.R. 339, 358.

⁹⁵ See *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 447, 462–63; see also 40 Mothers v. Sweden, 9 Eur. Comm'n H.R. Dec. & Rep. 27, 31 (1977).

⁹⁶ *Id.*

⁹⁷ *Kjeldsen*, 23 Eur. Ct. H.R. ¶ 54 (1976).

⁹⁸ See *supra* Part III.D.

ity.⁹⁹ While all of these can be considered political or philosophical views, directly promoting them in education does not seem to be a prohibited form of indoctrination. This is justified by the fact that opposing views are deemed detrimental to the advancement of human rights.

Views on religion are delicate since what one person may consider objective or pluralistic, another may be perceive as indoctrination of secularism—a philosophical position itself.¹⁰⁰ The European Court of Human Rights has never defined what “objectivity” and “pluralism” mean in relation to the principle of prohibition of indoctrination. However, it has considered that a violation occurs when the purpose of a class or element of the curriculum goes beyond the mere transmission of knowledge to the direct promotion of a particular view.¹⁰¹ The European Court of Human Rights has also given weight to whether students are taught about the importance of tolerating and respecting views distinct from their own and whether they are encouraged to exercise critical thinking as indicators of whether an aim of indoctrination is being pursued.¹⁰²

As noted, implementing sectarian religious classes—aimed at indoctrinating students into a particular religion in public schools—can be indoctrination that is detrimental to parents’ and children’s rights.¹⁰³ However, incorporating the study of history of religion, or basic comparative religion and ethic classes in the public curriculum is acceptable because it enhances children’s freedom of thought, conscience, and religion.¹⁰⁴ International human rights law recognizes a right to change religions, which requires that persons have the opportunity to receive information about different religions and worldviews in order to form their own.¹⁰⁵

Regarding courses on history of religion or other courses that deal with religion in a non-sectarian manner, time limitation prevent exploration of every religious view. Therefore, the European Court of Human Rights has deemed it acceptable for states to prioritize teaching students about religions that have a presence in their country and to devote more time to teaching about religions with historical significance within a

⁹⁹ See, e.g., CRC *supra* note 45, art. 29(1); UNCESCR, No. 13, *supra* note 37, ¶¶ 4–5.

¹⁰⁰ *Lautsi (GC)*, 2011-III Eur. Ct. H. R. 61,110 (Power, A., concurring).

¹⁰¹ *Kjeldsen*, 23 Eur. Ct. H.R. ¶ 54; see also *40 Mothers*, 9 Eur. Comm’n H.R. Dec. & Rep. 27, ¶ 30–31; *Folgerø*, 2007-III Eur. Ct. H.R. 51 ¶ 93 (2007).

¹⁰² *Appel-Irrgang*, 2009-IV Eur. Ct. H.R. 415, 429; see also *Folgerø*, 2007-III Eur. Ct. H.R. 51 ¶ 89.

¹⁰³ *Kjeldsen v. Denmark*, Eur. Comm’n H.R. Dec. & Rep. (1973) [hereinafter *Kjeldsen Comm.*]; see also UNHRC, General Comment No. 22: Freedom of Thought, Conscience or Religion, art. 18, ¶ 6 U.N. Doc. CCPR/C/21/Rev.1/Add.4. (July 30, 1993).

¹⁰⁴ UNHRC, *supra* note 103.

¹⁰⁵ *Id.* ¶ 5; see also *supra* note 28 and text accompanying.

country or about religions followed by the majority of the population.¹⁰⁶ Thus, *Folgero* infers that a majority religion, or even an official state religion, should not be presented as superior to others. In other words, quantitative—not qualitative—differences in the treatment of religions are acceptable.¹⁰⁷ Understanding a religion with a large presence in the surrounding society is useful to children and in their best interest, independent of whether they or their parents share the religion.

The other area that is most commonly a cause of controversy between parents and governments is the issue of whether the mere dissemination of practical information on matters—such as methods of contraception—can carry the implication of the moral acceptability of their use. Judge Verdross has noted this issue:

[I]t seems to me necessary to distinguish between, on the one hand, factual information on human sexuality that comes within the scope of the natural sciences, above all biology, and, on the other hand, information concerning sexual practices, including contraception. This distinction is required, in my view, by the fact that the former is neutral from the standpoint of morality whereas the latter, even if it is communicated to minors in an objective fashion, always affects the development of their consciences.¹⁰⁸

Since information on practical matters such as the specifics of how to use contraception methods is of little worth if it is never intended to be carried into practice, it is reasonable to say that the mere transmission of the information also conveys the message that using such methods may be morally acceptable.¹⁰⁹ In this regard, the majority of the *Kjeldsen* court acknowledged that instructing students on methods of contraception included considerations of the moral order in addition to factual knowledge.¹¹⁰ However, it concluded that transmitting this information to children was acceptable because of the public interest in preventing unwanted pregnancies and sexually transmitted diseases.¹¹¹ The majority concluded that no indoctrination occurred because no particular sexual

¹⁰⁶ *Folgero*, 2007-III Eur. Ct. H.R. 51 ¶ 89; *Zengin v. Turkey*, 46 Eur. Ct. H.R. ¶ 63 (2007).

¹⁰⁷ *See Folgero*, 2007-III Eur. Ct. H.R. ¶ 95.

¹⁰⁸ *Kjeldsen*, 23 Eur. Ct. H.R. (Verdross, A., dissenting).

¹⁰⁹ *See Kjeldsen Comm.*, Eur. Comm'n H.R. Dec. & Rep. 46, ¶ 10 (1973) (Sperduti, G., Ermacora F., Welter F., Busuttill E., Daver, B., Mangan, K., & Custers, J., dissenting) (“Just as the pacifist does not want his child to learn how to fight, so the applicants do not want their children to learn how to ‘take care of themselves,’ in another context. Both the pacifist and the applicants have reason to think that if their children are taught in school to do a particular thing—whether it be to carry arms or to have sexual intercourse—they will think that this is morally permissible.”).

¹¹⁰ *Kjeldsen*, 23 Eur. Ct. H.R. ¶ 54.

¹¹¹ *Id.*

conduct was encouraged.¹¹²

The European Court of Human Rights is correct in its conclusion that imparting practical information alone on contraception does not amount to indoctrination. It is true that providing children with practical information on contraception may expose them to the idea that extra-marital sex and contraception are morally acceptable, ideas that may oppose some parents' convictions.¹¹³ Thus, providing instruction on these matters without possibility of exemption may have violated parents' rights as originally understood.¹¹⁴ However, merely exposing children to ideas opposed by their parents is not sufficient to violate the principle of prohibition of indoctrination, the standard that balances the rights of parents and children with public interest.¹¹⁵ Though providing practical information on contraception may expose children to the notion that contraception is acceptable, it does not force them to believe that it is wrong to think otherwise. In addition to the public interest noted by the European Court of Human Rights, providing children with practical information about contraception is necessary for the protection of their right to sexual and reproductive health.¹¹⁶ Thus, it is clear that the principle of prohibition of indoctrination does not ban practical instruction on contraception methods.

A. Is Age Relevant for Indoctrination?

Information that is conveyed pluralistically and objectively can constitute indoctrination if taught to children at too early ages.¹¹⁷ The concern is that any information taught to children before they have developed a capacity for critical thinking can have a disproportionate effect on forming their consciences.¹¹⁸ Thus, states could be required to relegate the teaching of matters of religion, morality, or philosophy to the later years of the schooling process where children are expected to have attained the required level of maturity to form their own views.

Students' ages should be considered when assessing whether education amounts to indoctrination. Judge Verdross expressed, "[E]ven objective information on sexual activity when given too early at school can vi-

¹¹² *Id.*

¹¹³ Similar to the convictions of the Christian applicants in *Kjeldsen*, 23 Eur. Ct. H.R.

¹¹⁴ That is as a right to keep their children from receiving information contrary to their convictions in schools.

¹¹⁵ See *supra* Part III.

¹¹⁶ See UNCRC No. 4, *supra* note 32 ¶ 30.

¹¹⁷ See Jennifer Adams Emmerson, "Who is in a family?" *Parental Rights and Tolerance—Promoting Curriculum in Early Elementary Education*, 40(4) J.L. & EDUC. 701 (2011).

¹¹⁸ See *Ciftci v. Turkey*, 2004-VI Eur. Ct. H.R. 339, 344–45.

olate the Christian convictions of parents.”¹¹⁹ The majority of the European Court of Human Rights did not give any consideration to the ages of the specific children in question in *Kjeldsen*. The European Court of Human Rights has not yet been required to decide whether there is a specific age under which states should abstain from teaching children about various matters. However, in *Dahlab v. Switzerland* the court concluded that it was acceptable for the state to ban a teacher from wearing religious symbols at schools to protect her young students’ right to freedom of conscience and religion.¹²⁰ The court noted that “the applicant’s pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils.”¹²¹ In *Ciftci v Turkey*, the court concluded that states have a right to regulate the minimum age in which parents can enroll their children in private religious education because of the right of the state to protect children from undue influence.¹²²

In *Dahlab* and *Ciftci*, the European Court of Human Rights only established that states, if they deem it necessary, can restrict the rights of private schools or teachers for the protection of young children, with the age of the children being relevant for the proportionality analysis.¹²³ Whether states also have an obligation not to impart certain information in schools to children under a certain age is a separate matter. However, the same concerns regarding children’s rights apply whether it is a private actor or the State who is disseminating information to children. For this reason, students’ age is an element that should be taken into consideration when assessing whether a particular action undertaken by a State in relation to education amounts to indoctrination.

Imparting information with religious, philosophical, or moral implications to children at too early an age—regardless of the source—can constitute indoctrination.

Disagreements are likely to occur between government authorities and parents regarding the best age to teach children about any particular issue. Appropriate ages will vary from society to society. For this reason, states should be allowed some discretion in determining the level of schooling in which to place content with potential religious, moral, or philosophical implications. But states should be expected to consult with relevant experts and carefully consider the level of maturity, which can

¹¹⁹ *Kjeldsen*, 23 Eur. Ct. H.R. (Verdross, A., dissenting).

¹²⁰ *Dahlab*, 2001-V Eur. Ct. H.R. 447, 463.

¹²¹ *Id.*

¹²² *Ciftci*, 2004-VI Eur. Ct. H.R. 339, 345.

¹²³ *Id.*, *Dahlab*, 2001-V Eur. Ct. H.R. 447, 463.

be expected at each age. Domestic or international courts would have the difficult but unavoidable, task of assessing age-based controversies on a case-by-case basis.

B. Is the Prohibition of Indoctrination Limited to Curriculum Content?

States are not required under international human rights law to remain neutral in matters of religion, morality and philosophy; they are permitted to have an official religion and even provide a degree of official support to it.¹²⁴ However, in the specific field of education, the rights of parents and children may impose upon the states the obligation to guarantee the neutrality of the public education system. Since the whole education process has an impact on children's consciences during their formative stage, it cannot be said that that this neutrality obligation only applies to curriculum content.¹²⁵

Thus, the obligation to respect parents' rights in education "is broad in its extent as it applies not only to the content of education and the manner of its provision but also to the performance of *all the functions* assumed by the State."¹²⁶ Making participation in extracurricular activities such as ceremonies or functions compulsory can amount to indoctrination if they have religious or philosophical implications.¹²⁷ Unlike curriculum content, where the right to receive information justifies restricting parental rights, there is little justification to make participation in activities without informative value compulsory.¹²⁸ Since the European Court of Human Rights has ruled that the obligation to abstain from indoctrination through classes on religion is independent from whether the possibility for exemption is offered,¹²⁹ it would seem to follow that States are also prohibited from making any extracurricular activities—with potential indoctrinating effects—compulsory, even if they offer objecting parents the possibility to get their children exempted. However, the European Court of Human Rights' decisions on this matter seem to indicate that requiring students to participate in activities of a religious nature or with philosophical implications does not violate the prohibition of indoctrination if the possibility of exemption is provided.¹³⁰ However, it should

¹²⁴ See UNHRC, General Comment No. 22, 29 March 2000 ¶¶ 9–10.

¹²⁵ See *Lautsi (GC)*, 2011-III Eur. Ct. H. R. 61 (Malinverni, G., dissenting).

¹²⁶ *Valsamis v. Greece*, 1996-VI Eur. Ct. H.R. ¶ 27 (emphasis added) (internal quotations omitted). In the context of the quote, "all the functions" refers to all functions assumed in relation to education.

¹²⁷ *Folgerø*, 2007-III Eur. Ct. H.R. 51 ¶ 94 (2007).

¹²⁸ See *id.* ¶¶ 99–100.

¹²⁹ See *supra* note 75 and corresponding text

¹³⁰ See *Efstratiou v. Greece*, 1996-VI Eur. Ct. H.R. ¶ 31; *Valsamis v. Greece*, 1996-VI Eur.

be noted that these decisions pre-date *Zengin*, where the position that all classes should adhere to objectivity and pluralism independent of exemptions was expressed.¹³¹

Issues may also arise in relation to voluntary activities or classes, which are organized or supported by the government or individual schools. The European Court of Human Rights has determined that it is not indoctrination if a state offers religious classes, even if of a fully sectarian nature, as long as they are completely voluntary.¹³² For a course or activity to be considered completely voluntary, there cannot be any detrimental consequences to a student's non-participation.¹³³ The European Court of Human Rights, in its decisions relating to voluntary religious classes, did not discuss age implications. However, classes or activities with important religious, philosophical, or moral implications should not be offered in public schools to children under a certain age, even if they are voluntary.¹³⁴

One issue that is frequently a cause for controversy is the distribution of contraceptives in schools. U.S. courts have held that like informative classes, the distribution of condoms or other contraceptives in schools exposes children to the idea that using them may be morally acceptable, but it does not indoctrinate them into believing so.¹³⁵ The United Nations Committee on the Rights of the Child has recognized that children have a right to "free or low cost contraception, condoms and services."¹³⁶ For this reason, the need to guarantee children's rights means parents do not have a right to prevent schools from implementing such distribution programs or to make distribution to their children dependent upon their consent.¹³⁷ Similarly, if health services are offered in schools, children have a right to access them with confidentiality.¹³⁸ Parents sometimes oppose on religious or philosophical bases their children having access to certain services, such as those relating to sexual and mental health. However, the mere availability of these services in schools should not be considered

Ct. H.R. ¶ 30; *Folgero*, 2007-III Eur. Ct. H.R. 51 ¶ 98.

¹³¹ If only by months, as in *Folgero*. See *supra* note 75 and corresponding text

¹³² *Saniewski v. Poland*, Eur. Ct. H.R. (2001); see also *C.J., J.J. and E.J. v. Poland*, Eur. Comm'n of H.R. Dec. & Rep. (1996).

¹³³ See *Grzelak v. Poland*, 7710/02 Eur. Ct. H.R. (2010).

¹³⁴ See *supra* Part IV.

¹³⁵ This conclusion has also been reached in U.S. Case Law. See *Parents United for Better Sch., Inc. v. Sch. Dist. of Pa. Bd. of Educ.*, 148 F.3d 260, 270 (3d Cir. 1998).

¹³⁶ UNCRC, No. 3, *supra* note 32 ¶ 17.

¹³⁷ *Parents United* involved a condom distribution program that did not require prior parental consent, but was constitutional because it allowed opting out. 148 F.3d 260, 270, 277 (3d Cir. 1998).

¹³⁸ UNCRC, No. 4, *supra* note 32 ¶ 33.

indoctrination.

The European Commission on Human Rights concluded in 1986 that imposing a uniform requirement on all students did not violate the European Convention on Human Rights, even if parents objected on philosophical bases.¹³⁹ The requirement to wear a uniform cannot be considered a *per se* form of indoctrination; however, uniforms could be used to pursue indoctrination goals by including symbols with religious, philosophical, or political connotations in the clothing. The European Court of Human Rights has not yet been required to decide on this issue. If prohibition of indoctrination extends to all elements of the public education system, then it follows that states should be prohibited from including symbols that manifest an allegiance to a particular religion or political ideology in school uniforms.

Another issue of controversy occurs when religious symbols are banned or deemed incompatible with school uniforms or dress codes. As noted, the European Court of Human Rights has deemed it compatible with international human rights law to prohibit teachers from wearing religious symbols in schools.¹⁴⁰ Teachers are in a position of power in relation to their students. For this reason, the wearing of religious symbols by them can unduly influence students (especially students of younger ages) and therefore can be considered a form of abusive proselytism.¹⁴¹ Since public school teachers are state agents, the principle of prohibition of indoctrination justifies limiting their rights for the protection of children's and parents' rights.

Banning the display of symbols by students is different as students are not in a situation of hierarchical superiority in relation to each other. The European Court of Human Rights has not yet decided on the compatibility of prohibiting children from displaying religious symbols at schools with international human rights law. However, in the context of higher education, it has considered those bans to be acceptable restrictions on the freedom of religion when necessary for the protection of the rights of others. In this regard, European Court of Human Rights has expressed:

[M]easures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who did not practise [sic] their religion or who belonged to another religion were not considered to constitute interference for the purposes of Article 9 of the Convention. Consequently, it is established that institutions of higher

¹³⁹ Stevens v. United Kingdom, 46 Eur. Comm'n H.R. Dec. & Rep. 245 (1986).

¹⁴⁰ Dahlab v. Switzerland, 2001-V Eur. Ct. H.R. 447, 463.

¹⁴¹ *Id.*

education may regulate the manifestation of the rites and symbols of a religion by imposing restrictions as to the place and manner of such manifestation with the aim of ensuring peaceful co-existence between students of various faiths and thus protecting public order and the beliefs of others.¹⁴²

If a religious denomination is dominant at a particular school, the display of symbols relating to that religion by a majority of the students can be used as a form of peer pressure proselytism. Children can be affected more than adults by these types of displays. If protecting adult students from peer pressure is considered a valid justification for restricting other students' religious rights in higher education institutions, a restriction on wearing religious symbols would seem even more acceptable if implemented in elementary or secondary schools.¹⁴³ Protecting the right of freedom from undue pressure for children or attempts to make them feel alienated can justify a policy prohibiting the display of religious symbols in schools.

The rights of parents should be considered when the issue concerns their children. The display of religious symbols necessitates balancing the rights of parents who may feel that requiring their children to abandon their religious symbols when going to school indoctrinates their children into secularism; with the rights of other parents that may include those who feel their rights are affected if their children are exposed to such symbols.

Evidently, a case of a concerted effort to exercise proselytism by peer pressure or to alienate or make feel uncomfortable students with religious views distinct from the surrounding majority through religious symbols is very extreme case. Thus, banning religious symbols could be justified in certain contexts but it will not always be required. If there is no risk that displaying of religious symbols by students would interfere with other children's rights, then it is not necessary to forbid such displays.¹⁴⁴ States should have a margin of discretion in whether to authorize or prohibit wearing religious symbols in schools.

However, when a restriction is deemed necessary, it can be justified to restrict all symbols, even those that have not raised cause for concern. A neutral rule, even if more restrictive, is preferred over banning specific symbols. Banning some symbols but not others can exacerbate conflicts between students of different religious orientations and disrupt the mis-

¹⁴² Şahin v. Turkey, 2005-XI Eur. Ct. H.R. 173 ¶ 111.

¹⁴³ See *supra* Part IV.A.

¹⁴⁴ See Dogru v. France, Eur. Ct. H.R. ¶ 70 (2008).

sion of the school system.¹⁴⁵

In addition to the wearing of religious symbols by students or staff, the placement of religious symbols in public schools by state authorities has also been the subject of controversy. In *Lautsi v. Italy*, the second section of the European Court of Human Rights held that placing religious symbols in public schools violated the prohibition of indoctrination, noting the following:

The schooling of children is a particularly sensitive area in which the compelling power of the State is imposed on minds which still lack (depending on the child's level of maturity) the critical capacity which would enable them to keep their distance from the message derived from a preference manifested by the State in religious matters.¹⁴⁶

They further noted:

[I]n countries where the great majority of the population owe allegiance to one particular religion the manifestation of the observances and symbols of that religion, without restriction as to place and manner, may constitute pressure on students who do not practise [sic] that religion or those who adhere to another religion.¹⁴⁷

However, that decision was later reversed by the European Court of Human Rights Grand Chamber, which concluded that the mere presence of religious symbols in schools does not amount to indoctrination.¹⁴⁸ The Grand Chamber based its decision on the lack of actual evidence regarding the impact of the symbol's presence on students' minds:

There is no evidence before the Court that the display of a religious symbol on classroom walls may have an influence on pupils and so it cannot reasonably be asserted that it does or does not have an effect on young persons whose convictions are still in the process of being formed.¹⁴⁹

The Grand Chamber also considered that the passive display of religious symbols in schools had to be distinguished from classes or extracurricular activities, which are of an active nature:

[A] crucifix on a wall is an essentially passive symbol and this point is of importance in the Court's view, particularly having regard to the principle of neutrality. It cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious

¹⁴⁵ It can also be considered discriminatory to ban some symbols while allowing others.

¹⁴⁶ *Lautsi v. Italy*, Eur. Ct. H.R. ¶ 48 (2009).

¹⁴⁷ *Id.* ¶ 50.

¹⁴⁸ *Lautsi (GC)*, 2011-III Eur. Ct. H. R. 61.

¹⁴⁹ *Id.* ¶ 66.

activities.¹⁵⁰

The Grand Chamber was correct in noting that no actual evidence had been presented regarding the impact displaying crucifixes in schools could have upon children's minds. However, this does not seem sufficient to ascertain that the prohibition of indoctrination had not been violated. Every experience children are exposed to contributes to forming their consciences, and it is difficult to assess exactly how much of an impact the passive display of religious symbols can have upon children. The precise impact is likely to vary from child to child, with some children not being influenced at all. However, the possibility cannot be denied that the display of symbols can have some influence over at least some children, especially the younger ones. In *Dahlab*, the mere theoretical possibility that a teacher wearing religious symbols could influence her students was deemed sufficient to justify restricting her rights.¹⁵¹ Following this view, if a theoretical risk to children's rights is considered sufficient to restrict a person's freedom of religion, it should also be sufficient to require a state to abstain from a determinate conduct.¹⁵²

While the display of symbols is passive in nature, constant and ubiquitous displays, like those in *Lautsi*, do not necessarily pose a lesser risk of indoctrination than individual classes or events, even if the later are active in nature.¹⁵³ Thus, the original decision of the Second Section was correct in that a constant presence of religious symbols throughout public schools violates the prohibition of indoctrination.

V. WHAT THE PROHIBITION OF INDOCTRINATION MEANS FOR PRIVATE EDUCATION AND HOMESCHOOLING

The need to balance parents' rights against children's rights and public interest has meant less deference to parents' wishes. The prohibition of indoctrination has minimized the traditional right of parents to require public schools to provide exemptions or special arrangements for their children due to philosophical or religious objections. However, the right of parents to opt to send their children to private schools instead of public ones remains protected by international human rights law. However, it is highly debated whether parents also have a right to opt to homeschool

¹⁵⁰ *Id.* ¶ 72.

¹⁵¹ *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 447.

¹⁵² *Lautsi (GC)* 2011-III Eur. Ct. H. R. 61, 116 (Malinverni, G., & Kalaydjieva, Z., dissenting).

¹⁵³ *See id.* ¶ 55.

their children.¹⁵⁴ This Part discusses what the principle of prohibition of indoctrination means for private education and home schooling.

A. What the Prohibition of Indoctrination Means for Private Education

The right to establish private schools remains an essential part of freedom of education under international human rights law. This right is meant as more than a simple commercial liberty to operate centers of instruction as a business enterprise.¹⁵⁵ The right to establish private schools is the right to offer an alternative to compulsory state education and, by extension, the right of parents to have alternative schools to send their children to.¹⁵⁶ The right to establish private schools ensures that education is not a state monopoly. The availability of private schools as an alternative to the public education system offers an additional protection against the threat of state indoctrination, which, as all human rights violations, can occur even if prohibited by international law.

As private entities and not state agents, it is not clear whether private schools are bound by the principle of prohibition of indoctrination. However, it is clear that states have a duty to regulate any schools they authorize as alternatives to public education to ensure the education provided is sufficient to satisfy the students' right to education.¹⁵⁷ The European Court of Human Rights has expressed that the prohibition of indoctrination applies to all functions the state assumes in relation to education, including the regulation of private schools.¹⁵⁸ This means states cannot use any conditions or restrictions they impose upon private schools to pursue an aim of indoctrination. It can also be interpreted to mean that states are required to ensure that the private schools under their supervision abstain from indoctrination.¹⁵⁹

It is clear that states can and must establish an essential curriculum to be followed by private schools in order to protect children's rights. It is

¹⁵⁴ For reference regarding the homeschooling debate in the U.S. context see for example, Chad Olsen, *Constitutionality of Home-Education: How the Supreme Court and American History Endorse Parental Choice*, 2009 BYU EDUC. & L. J. 399 (2009); Gage Raley, *Yoder revisited: why the landmark Amish schooling case could—and should—be overturned*, 97(3) VA. L. REV. 681 (2011).

¹⁵⁵ See *supra* Part II.C.

¹⁵⁶ See *supra* Part II.A.

¹⁵⁷ See *supra* Part II.C.

¹⁵⁸ *Kjeldsen*, 23 Eur. Ct. H.R. ¶ 50 (1976).

¹⁵⁹ This interpretation holds more weight in the cases where states do not only regulate private schools, but directly support them with direct funding or other type of subsidies. Under international human rights law, states can incur international liability by the actions of particulars, which have acted with their support. See *Blake v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 36 (1998) ¶ 76.

not so clear whether private schools can be required to teach content that is contrary to the religious, philosophical, or moral beliefs of their owners or founders. The European Court of Human Rights case law seems to support providing freedom to private schools in relation to the teaching of controversial content. In *Kjeldsen* and *Jimenez*, the court considered the fact that private schools were not required to teach the sexual education classes opposed by parents as a positive element which evidenced that parents' rights were being respected.¹⁶⁰ However, in other areas, such as school discipline, the European Court of Human Rights has considered that states can be subjected to international liability if children's rights are violated by the actions of a private school.¹⁶¹ Four justices elaborated this point in their partly dissenting opinion in *Costello-Roberts v. United Kingdom*:

The State must exercise some measure of control over private schools so as to safeguard the essence of the Convention guarantees. A State can neither shift prison administration to the private sector and thereby make corporal punishment in prisons lawful, nor can it permit the setting up of a system of private schools which are run irrespective of Convention guarantees.¹⁶²

From the perspective of guaranteeing parents' rights and ensuring diversity and pluralism in society, it can be preferable for private schools to teach in accordance with their own convictions. However, if children's rights to receive information necessary to protect their well-being and to form their own views are recognized, then states would have an obligation to ensure that private schools respect those rights and play a role in their fulfillment.

If states require private schools to teach the exact same content taught by public schools, then their value as an alternative to the public system is seriously diminished. However, issues of inequity can also occur if private schools are allowed complete freedom in relation to the teaching of content with religious, moral, or philosophical implications. If a state deems certain information so essential for children that it must be taught to them in public schools, even against parents' wishes, but allows private schools to omit this information from their curriculum, then that state has failed to protect the rights of private schools' students to receive essential information.¹⁶³ If certain curriculum content is deemed

¹⁶⁰ *Kjeldsen*, 23 Eur. Ct. H.R. ¶ 54; *Jimenez v. Spain*, 2000-VI Eur. Ct. H.R. ¶ 1.

¹⁶¹ *Costello-Roberts v. United Kingdom*, 247-C ECHR Ser-A, 27 ¶¶ 27-28 (1993).

¹⁶² *Id.* (Ryssdal, R., Thór Vilhjálmsson, Matscher, F., & Wildhaber, L., dissenting).

¹⁶³ *See supra* Part III.C. Information that is necessary for children to protect their sexual and reproductive health or to form their own views on religious matters can be considered essential.

non-essential for the fulfillment of children's rights, then private schools may be authorized to omit this content. However, if public schools do not allow parents to exempt their children from such non-essential content, a right to keep that information from their children would exist only for parents who can afford to send their children to private schools.¹⁶⁴ Inequities of treatment of this sort can amount to discrimination. For this reason, if certain content is deemed essential for children's rights then states can and should require private schools to teach it, even if parents object under religious or philosophical bases.

The above does not mean that private schools cannot have allegiance or affinity with any particular religious or philosophical worldview. Religious schools have a long tradition in many countries, and they have been proven to be able to provide high standard education. Private schools can provide sectarian religious classes to children over a certain age, as these children could also be educated in religion outside of formal schools.¹⁶⁵ They can also add additional information, or a more detailed explanation of the school's view on a particular issue, to the content included in the official curriculum.¹⁶⁶ Thus, the difference between public and private schools should not be that private schools are allowed to omit elements of the official curriculum, but that they can make additions to that curriculum.

B. What the Prohibition of Indoctrination Means for Homeschooling

Under the traditional understanding of parental rights, allowing parents to homeschool their children was a legitimate alternative. Homeschooling could protect the rights of those parents who objected to the public education curriculum for religious or philosophical reasons. This alternative was especially valuable for parents who could not afford to send their children to private schools or who could not find a private school, which suited their wishes for their children's education. Authorizing homeschooling can also serve as an additional protection against the threat of state indoctrination and advance the public interest of having a diverse society.

However, concern has been expressed that authorizing homeschooling can interfere with children's right to education.¹⁶⁷ Not all parents may

¹⁶⁴ See *Kjeldsen Comm.*, Eur. Comm'n H.R. Dec. & Rep. ¶¶ 5, 8, 12 (Sperduti, G., Ermacora F., Welter F., Busuttill E., Daver, B., Mangan, K., & Custers, J., dissenting).

¹⁶⁵ See *supra*, note 109 and corresponding text.

¹⁶⁶ Provided they do not promote intolerance toward opposing or different views, which would be contrary to the internationally accepted goals of education.

¹⁶⁷ See Courtenay E. Moran, *How to Regulate Homeschooling: Why History Supports the*

be sufficiently versed in all the required subjects in order to satisfy their children's right to a minimum level of education.¹⁶⁸ In comparison to private schools, monitoring whether the education provided by parents is sufficient may be a more complicated and burdensome task for states.

Homeschooling may also deprive children of other benefits associated with school education such as the daily social interaction with other students that can be valuable for their development.¹⁶⁹ The United Nations Committee on the Rights of the Child has noted that the basic skills children have a right to receive go far beyond reading and math:

Basic skills include not only literacy and numeracy but also life skills such as the ability to make well-balanced decisions; to resolve conflicts in a non-violent manner; and to develop a healthy lifestyle, good social relationships and responsibility, critical thinking, creative talents, and other abilities which give children the tools needed to pursue their options in life.¹⁷⁰

The European Court of Human Rights expressed that states are allowed to deny parents the opportunity to homeschool their children if necessary to protect their children's rights.¹⁷¹ The court notes that young children are "unable to foresee the consequences of their parents' decision to opt for home education."¹⁷² However, the court has not decided whether a state fails its obligation to protect children's rights when it authorizes homeschooling. One issue is that the elements of the official curriculum that parents object to and seek to keep their children from through homeschooling may be information that is deemed essential for the fulfillment of children's rights. If receiving certain information is deemed essential to satisfy children's rights, then allowing parents to keep children from this information through homeschooling would mean that the state is failing to protect the rights of those children. If the goal of banning indoctrination is protecting children's right to form their own consciences, then states have an obligation to ensure children have access to views different from those of their parents. Thus, states should not authorize homeschooling for the sole reason that parents object to information their children have the right to receive.¹⁷³

Theory of Parental Choice, 2011(3) U. ILL. LAW REV. 1061 (2011).

¹⁶⁸ See *id.*

¹⁶⁹ See *Konrad*, 2006-XIII Eur. Ct. H.R. 355, 360–61.

¹⁷⁰ Comm. on the Rights of the Child, General Comment No. 1: The Aims of Education, art. 29(1), ¶ 9, U.N. Doc. CRC/GC/2001/1 (2001).

¹⁷¹ *Konrad*, 2006-XIII Eur. Ct. H.R. 355, 364–66.

¹⁷² *Id.* at 365.

¹⁷³ This does not mean that the practice of homeschooling is not acceptable. There are cases when it can be in the best interest of a child to be homeschooled. For example, health issues can

VI. CONCLUSION

Providing the deference to parental wishes implied by the text of the European Convention on Human Rights Protocol 1 and other human rights treaties with similar wording has become incompatible with children's rights as they are now understood. The principle of prohibition of indoctrination adopted by the European Court of Human Rights is an adequate guide for balancing parental and children's rights in education. The line between instruction and indoctrination is not always a clear one; however, the case law of the European Court of Human Rights provides some guidance. The prohibition of indoctrination not only applies to statewide policies, but also to the actions of each individual school and teacher. Controversial content, such as instruction on contraceptive methods or on different worldviews, does not constitute indoctrination if it does not aim to promote a specific view to children. Children's ages should be considered a relevant factor when assessing the risk of indoctrination. States are not exempted from their obligation to protect children's rights in education when parents opt to send their children to private schools or to homeschool them. The prohibition of indoctrination needs to be taken into account in the regulation of private schools and when deciding whether to authorize homeschooling.

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