

Parental Rights

Protecting Parents, Empowering Generations

Dr. Georgia du Plessis



ADF International White Paper

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ADF INTERNATIONAL

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Summary

International human rights law recognises parents as their children's primary caretakers and authorities. Yet, at a time of state-sanctioned ideologies, the natural rights of parents are being denied. The state is increasingly seen as the child's primary caretaker, which violates the international human rights of parents. Parents' ability to nourish their children's spiritual, psychological and physical integrity is threatened.

As a response to such increasing threats to the natural rights of parents, this white paper sets out the legal scope and depth of parental rights in international human rights law. It starts by setting out the legal principles and basic norms that establish the framework of parental rights. The rights and duties of parents as primary educators of their children are described and protected. It is shown that the state does not have a monopoly over children's education, that parents have a right to raise their children in line with their religion or belief and that the child's right to freedom of religion or belief is not a threat to parental rights. In line with this, the 'best interest of the child' is binding upon states, not parents. Parents are presumed to act in the best interest of the child. Finally, parental rights as protected in international human rights law are applied and investigated in light of modern-day practical challenges, such as radical 'comprehensive sexuality education' and the 'gender transitioning' of minors.

About the Author

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Executive Summary

- Parents' right to direct the upbringing and education of their children is not an 'idea' or a 'conservative movement', but rather an inherent and fundamental human right strongly established in binding international human rights law.
- Binding international human rights law recognises the family as the fundamental unit of society (entitled to protection and assistance) and parents as their children's primary caretakers and educators.
- Parental rights pre-exist the state because they flow from the inherent dignity of persons and the family as society's most basic building block.
- The principle of subsidiarity flows from this inherent dignity because it articulates that those smaller forms of social organisations, like the family and parents, are best placed to resolve matters concerning them and their children, not the state.
- Parental rights are also a response to the child's immaturity. Parental rights flow from parental responsibilities owed to the child because of this immaturity. To perform these responsibilities, parents must have certain rights to execute these responsibilities or natural duties.
- The state does not have a monopoly over the education of the child but rather plays a subsidiary and supportive (yet active) role while parents remain the primary educators and caretakers of their children.
- 'Common standards of achievement' for education set out in international human rights treaties are not declarations of state-controlled education but should be read considering their historical purposes – to prevent the atrocities of the type of education systems employed during Nazi Germany.
- The right to education in international human rights law, does not demand that a child's education be primarily provided for by the state under the assumption that it can provide a 'better' education than parents.
- The right of parents to raise their children in line with their religion or belief is not limited to raising and educating children outside of the school gates. It applies everywhere.
- The right of parents to raise their children in line with their own religion or belief includes the freedom to establish schools with a specific religious or belief ethos.

- Parents' freedom to establish schools with different religions or beliefs does not absolve state schools from upholding and respecting plural religions or beliefs.
- Although there is no obligation on the state to establish or fund religion or belief schools, the state must refrain from interfering with the rights of parents to establish such schools.
- Although international law does not oblige states to fund or set up schools with a specific religious or belief ethos, it is argued that this could violate the right to equality and non-discrimination. These rights place a positive obligation on the state. The supportive and subsidiary role of the state is to aid parents in their primary role as educators of their children. This role is not only limited to those parents who wish to raise their children in non-neutral secular state schools (the 'secular' also being a belief). It should also be for parents who wish to educate their children in a school with an ethos other than the secular.
- Furthermore, if there is no obligation on the state to set up and fund a variety of schools with different ethes, then the right of parents to raise their children in line with their own religion or belief will only be for those parents who can afford it which could potentially amount to discrimination.
- Parents' right to raise and educate their children in line with their religion or belief might sometimes conflict with the child's chosen religion or belief. Although the child holds the right to freedom of religion or belief autonomously, the parents still have the right to provide direction in this regard and raise the children in accordance with a specific religion or belief. The right of parents to raise their children following their religion or belief is not diminished by the child's right to freedom of religion or belief.
- The 'evolving capacities of the child' is not a principle that should be used against the rights of parents, and it does not justify government interference in the religious upbringing decision made by parents.
- The same applies to the 'best interest of the child' principle. The principle is one of the most prominent in relevant human rights texts and is elevated to the 'paramount consideration' in matters involving the child.
- At the same time, the principle is undefined and indefinite. This leads to the possibility that it can be used as an empty vessel to introduce various ideological conceptions of what is in the 'best interest of the child' in contradiction with parental rights.
- As it is impossible to define the principle, it is, for purposes of parental rights, important to map how and against whom the principle applies.

- Article 3(1) of the Convention on the Rights of the Child (CRC) states that the best interest of the child principle binds public powers and private social welfare institutions.
- On the contrary, the wording of Articles 18(1) and 3(2) of the CRC shows that the 'best interest of the child' is a guiding but not a binding principle concerning parents.
- Yet, the Committee on the Rights of the Child has interpreted the principle as more expansive than the text of the CRC. It has interpreted it as a 'substantive right', a principle of interpretation and procedural rule. These interpretations are not binding.
- As such, this interpretation causes an expansive application of the principle which binds parents and public powers.
- Such an interpretation contradicts binding international human rights law and will cause extensive and unjustified state scrutiny of the parent-child relationship.
- In line with Articles 18(1) and 3(2) of the CRC, the principle is not legally binding against parents but is a binding procedural rule against the state (at most).
- Claims relating to alleged violations of the child's fundamental human rights should first and foremost be dealt with in the established international human rights law *of that right*.
- As a procedural **rule** binding public powers and private social welfare institutions, the principle of the best interest of the child should be distinct from procedural *rights*. Rights such as the right to be heard (Article 12 of the CRC) are not subsumed into 'the best interest' principle. Article 12 remains a separate right independent of the 'best interest principle' but is strengthened by it. The principle supports and complements the substantive and procedural rights of children.
- Since the 'best interest principle' is a guiding principle of parents, it should not be used as a tool to subject the parent-child relationship to state scrutiny.
- There are various instances where parental rights are currently being undermined. It is especially prominent in state-enforced school curricula, the implementation of radical comprehensive sexuality education, the gender 'transitioning' of children and restrictions on alternative forms of education (such as home education).

1) Introduction

The relationship¹ between parents,² their child(ren),³ and the state is complex, containing intricate, interconnected duties and rights within the law that can sometimes result in an actual or perceived conflict.

Some current interpretations portray the state as the child's primary representative and educator eliminating the parents. An overemphasis on autonomy leads to the child being seen as holding individual rights against the family, which then imposes obligations on the parents and family. From this flows the assumption that any conflicts between parents and children should be settled by and subjected to an external set of standards (human rights) as enforced by an external arbiter (the state). This undermines parental rights which are now constantly exercised under the scrutiny of the state. As stated by Professor Melissa Moschella, this leads to the scenario where 'the state's educational authority is at least equal to, if not superior to, the educational authority of parents'.⁴

Misinterpretations of the 'best interest of the child' principle further reinforce this idea. These abandon the child to their supposed autonomy and eliminate the parent as the primary caretaker and decision-maker concerning the 'best interest of the child'.

This is evident from the mounting legal conflicts affecting parental rights. These legal conflicts include obstacles to parental choices to educate children at home, difficulty in opting out of certain courses in school including 'comprehensive sexuality education' (CSE),⁵ and the negation of parental consent in (medical) decisions affecting a child.

1 Guillermo Andrés Morales Sancho (2023) *Patria potestad y derechos fundamentales del menor de edad*. CEPC: Madrid, 32-33.

2 This paper focuses on matters where the parental status is already established and does not consider legal issues arising from the establishment of parental status.

3 Each reference to 'child' is also a reference to the plural ('children') where applicable. The United Nations Convention on the Rights of the Child (UNCRC) defines a child as below the age of eighteen years (United Nations (UN) General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, <https://www.refworld.org/docid/3ae6b38f0.html> [accessed 1 August 2023], art. 1).

4 Melissa Moschella (2016) *To Whom Do Children Belong? Parental Rights, Civic Education, and Children's Autonomy*. Cambridge University Press, 4.

5 CSE refers to the specific curriculum on sexual education the United Nations (UN) promotes. It is described as a 'rights-based and gender-transformative approach' to sexuality education (United Nations Population Fund (UNFPA), 'Comprehensive sexuality education,' <https://www.unfpa.org/comprehensive-sexuality-education#readmore-expand>) [accessed 15 March 2024]. CSE is discussed in more detail in Part 6 (B).

The existence of parental rights is also being denied. The fundamental human rights of parents are equated to a ‘conservative parental rights movement’ framed as asserting the ‘idea’ that parents have a right to direct the upbringing and education of their child ‘extending to directing schools [and] what they should or should not be able to teach or provide access to’.⁶ This interpretation is legally incorrect. Parents’ right to direct the upbringing and education of children is not an ‘idea’, but rather an inherent and fundamental human right strongly established in binding international human rights law.

The misrepresentation of parental rights as an ‘idea’ and the mounting violations of (and conflicts concerning) parental rights require a legal response outlining and clarifying the scope of parental rights.

Following this introduction of the paper, Part 2 contains an analysis of the international and regional human rights laws and principles that establish the legal framework for parental rights – namely, the family as the fundamental unit of society (entitled to protection and assistance) and parents as their children’s primary caretakers and educators. The basic norms upon which parental rights are based (for example, the principle of subsidiarity) are also discussed.

Since parents are the primary caretakers of their children, Part 3 outlines one of the many parental rights⁷ – albeit an expansive one – namely, the right of parents to educate and raise their child(ren) in line with their religion or belief. Part 3 illustrates that the state should not have a monopoly or predominant role over the child’s upbringing or education. This role forms part of parents’ fundamental human rights and duties. The state has a subsidiary role to play in this regard. This section critiques existing (mis)interpretations of the child’s right to freedom of religion or belief and the ‘evolving capacities of the child’ in relation to parents’ right to raise and educate their child in line with their religion or belief.

6 Kiara Alfonseca & Mary Kekatos, ‘Debate over ‘parental rights’ is the latest fight in the education culture wars’, 14 September 2023, *ABC News*, <https://abcnews.go.com/US/debate-parental-rights-latest-fight-education-culture-wars/story?id=103024033> [accessed 18 March 2024] and Jamelle Bouie, ‘What the Republican Push for ‘Parents’ Rights’ is Really About’, 28 March 2023, *The New York Times*, <https://www.nytimes.com/2023/03/28/opinion/parents-rights-republicans-florida.html> [accessed 18 March 2024].

7 The term ‘parental rights’ includes, for example, the rights of parents to raise and educate their children in line with their religion or belief and parental responsibilities and decisions relating to discipline, education, health, medical procedures, property, nutrition, safety and physical and psychological protection (Commission on European Family Law (2007) *Principles of European Family Law regarding Parental Responsibilities*. Intersentia, principles 3:1 & 3:12).

Another principle that has extensively affected the rights of children and parental rights, is the 'best interest of the child' (Part 4). A textual interpretation of this elevated yet indefinite legal concept⁸ shows that it applies largely against public powers vis-à-vis the child. It will be shown that the legal framework supports an interpretation where it can be presumed that parents act in the best interest of their child and that the 'best interest of the child' principle cannot be interpreted in a manner that violates the fundamental human rights of parents.

In Part 6, specific yet mounting legal challenges to parental rights are discussed and critiqued. For example, haphazard interpretations of the 'best interest of the child,' compulsory 'comprehensive sexuality education' violating the rights of parents to raise their children in line with their religion or belief, and the concealment of children's medical information from parents.

Recommendations for legal actors, civil society organisations and parents to strengthen the protection and promotion of parental rights are set out in Part 7.

8 Chang-fa Lo (2017) 'The Formula Approach for Indefinite Legal Concepts and the Possible Codification.' In: *Treaty Interpretation Under the Vienna Convention on the Law of Treaties*. Springer: Singapore, 269-285.

2) The legal principles and basic norms that establish a framework for parental rights

International and regional principles governing parental rights as embodied in the United Nations (UN), the European Union (EU), Council of Europe (CoE), African Union (AU), and the Inter-American system (IA) reveal the existence and scope of parental rights in international human rights law.⁹ The ‘family as a fundamental unit of society’, the ‘parent as the primary caretaker and authority of the child’ and the principle of subsidiarity, as the legal bulwark of parental rights, are fleshed out.

A. The family is the fundamental unit of society

International law recognises the family as the fundamental unit of society and the parents as the primary caretakers of the child. Article 16(3) of the Universal Declaration of Human Rights (UDHR)¹⁰ declares that the ‘family is *the*¹¹ natural and fundamental group unit of society and is entitled to protection by society and the State’. It is not only the state’s duty to protect and assist the family but also that of society.

This wording is repeated in Article 23(1) of the International Covenant on Civil and Political Rights (ICCPR)¹² and Article 10(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹³. The Preamble of the UN Convention on the Rights of the Child (CRC),¹⁴ confirms that ‘the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community...’. The UN Committee on the Rights of the Child’s General Comment 14 (GC 14)¹⁵ repeats that the family is

9 For a comprehensive explanation of international organisations’ internal workings and engagement opportunities, see Paul Coleman, Meghan Fischer and Elyssa Koren (2019) *The Global Human Rights Landscape*. Kairos Publications: Vienna.

10 UN General Assembly (GA), *Universal Declaration of Human Rights*, 217 A (III), 10 December 1948, <https://www.refworld.org/legal/resolution/unga/1948/en/11563> [accessed 05 March 2024].

11 Emphasis added.

12 UNGA, *International Covenant on Civil and Political Rights*, vol. 999, p. 171, 16 December 1966, <https://www.refworld.org/legal/agreements/unga/1966/en/17703> [accessed 05 March 2024].

13 UNGA, *International Covenant on Economic, Social and Cultural Rights*, UN, Treaty Series, vol. 993, p. 3, 16 December 1966, <https://www.refworld.org/legal/agreements/unga/1966/en/33423> [accessed 05 March 2024].

14 CRC, preamble.

15 UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, CRC /C/GC/14, 29 May 2013, <https://www.refworld.org/legal/general/crc/2013/en/95780> [accessed 05 March 2024], par. 59.

‘the fundamental unit of society and the natural environment for the growth and well-being of its members, particularly children’.

The European Social Charter¹⁶ states that ‘the family as a fundamental unit of society has the right to appropriate social, legal and economic protection to ensure its full development’. Article 16 repeats that the family is ‘a fundamental unit of society’ and states that, with ‘a view to ensuring the necessary conditions for the full development of the family’, Contracting Parties should ‘undertake to promote the economic, legal and social protection of family life’. Article 7 of the Charter of the Fundamental Rights of the European Union (CFEU)¹⁷ protects the ‘right to respect for...private and family life, home and communications’.

The American Convention on Human Rights (ACHR),¹⁸ states in Article 17 that the ‘family is *the* natural and fundamental group unit of society and is entitled to protection by society and the state’.¹⁹ Article 18 of the African Charter on the Rights and Welfare of the Child (ACRWR)²⁰ states that the family ‘shall be the natural unit and basis of society. It shall enjoy the protection and support of the State for its establishment and development’.

The international community (through inter alia, the UDHR, CRC and ACHR) acknowledges and affirms that the family is the natural group unit of society and the ‘natural environment’ for children to grow. Additionally, international human rights texts and the American and African systems confirm that the family is ‘the fundamental group unit’ of society. In a weaker formulation, the European Social Charter describes the family as ‘a fundamental group unit’.

16 CoE, *European Social Charter*, ETS 35, 18 October 1961, <https://www.refworld.org/legal/agreements/coe/1961/en/19363> [accessed 05 March 2024], part I, par. 16.

17 European Union, *Charter of Fundamental Rights of the European Union*, 2012/C 326/02, 26 October 2012, <https://www.refworld.org/legal/agreements/eu/2012/en/13901> [accessed 05 March 2024], art. 7.

18 Organization of American States (OAS), *American Convention on Human Rights, Pact of San Jose, Costa Rica*, 22 November 1969, <https://www.refworld.org/legal/agreements/oas/1969/en/20081> [accessed 05 March 2024].

19 Emphasis added.

20 Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, CAB/LEG/24.9/49 (1990), 11 July 1990, <https://www.refworld.org/legal/agreements/oau/1990/en/13798> [accessed 05 March 2024].

B. The family unit should be preserved and protected

The recognition of the family as the ‘fundamental unit’ of society is bolstered by international and regional laws stating that the family unit should be preserved and protected by society and the state and can only interfere in exceptional instances.

Article 9(1) of the CRC confirms that the child shall not be separated from his or her parents save for exceptional situations and with due process and effective remedies (with examples such as abuse and neglect, indicating the level of seriousness required). Even during such exceptional situations, the child’s right to maintain personal relations with parents shall be respected, except if it is contrary to the best interests of the child.²¹ The UN Committee on the Rights of the Child’s General Comment 14 (GC 14)²² further states that ‘[p]reserving the family unity’ is an important component of the child protection system.

The Committee of Experts on Family Law²³ states that parents may only be deprived of parental responsibilities in exceptional circumstances.²⁴ It should not be a ‘commonplace situation to deprive parents of their responsibilities’. This was confirmed in the case of *Y.C. v. the United Kingdom* where the European Court of Human Rights (ECtHR) stated ‘It is clear...that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, where appropriate, to “rebuild” the family. It is not enough to show that a child could be placed in a more beneficial environment for his upbringing...’²⁵

A similar stance is taken by the Inter-American Court of Human Rights (IACHR). In *Fornerón v. Argentina*,²⁶ the IACHR confirmed the preservation of families by stating that ‘[t]he mutual enjoyment of living together between parents and children is a

21 Article 9(3) of the CRC. Also see, UN General Assembly, *Elimination of all forms of religious intolerance: note by the Secretary General*, Heiner Bielefeldt, A/70/286, 5 August 2015, <https://www.refworld.org/reference/themreport/unga/2015/en/107752> [accessed 19 March 2024].

22 GC 14, par. 60.

23 CoE, Committee of Experts on Family Law (CF-FA), ‘Report on Principles Concerning the Establishment and Legal Consequences of Parentage’, CJ-FA (2006) 23 October 2006, <https://rm.coe.int/16807004c6> [accessed 19 March 2024], par. 70.

24 Such exceptional circumstances may include criminal offences committed by the parent against the child, for instance, sexual or physical abuse, but could also include other circumstances, for example mental illness of the parent, where the physical and moral welfare of the child is in danger (CF-FA, par. 70).

25 Appl. No. 4547/10, 13, March 2012, par. 134. Also, see the case of *Abdi Ibrahim v. Norway*, App. No. 15379/16, 10 December 2021 (Grand Chamber).

26 FRC 2012, par. 45.

fundamental element in family life. In this sense, the child must remain in his or her family nucleus, unless there are compelling reasons, based on the best interests of the child, for choosing to separate him or her from his or her family.’ The IACHR, in an Advisory Opinion on the legal status and human rights of the child,²⁷ confirms these words and adds that ‘separation should be exceptional and preferably temporary...The State...must...safeguard the preponderant role of the family in the protection of the child and provide public assistance to the family by adopting measures to promote family unity.’

Article 18 of the ACRWR²⁸ states that the family shall ‘enjoy the protection and support of the State for its establishment and development’. A mandatory obligation is placed on Member States to recognise, protect and support the natural rights of families.²⁹ Article 29(1) provides for a community-oriented perspective because it states that protecting the family is the duty of society and every individual in society.

Other provisions in international and regional legal instruments strengthen the protection of the family – the most notable being ‘the right to privacy and family life’.

Article 12 of the UDHR, Article 17 of the ICCPR, Article 16 of the CRC and Article 14 of the Convention on the Protection of the Rights of Migrant Workers and Members of their Families,³⁰ state that ‘no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence...’ Therefore, the family sphere and home are identified as a unit that should be specifically protected against unjustified interference by the state.

The case of *Nielsen v. Denmark*³¹ expressly acknowledges that Article 8³² of the European Convention on Human Rights (ECHR)³³ protects family life and parental rights

27 Inter-American Court of Human Rights, Advisory Opinion, legal status & human rights of the child, OC-17/02, 28.8.2002, paras. 77 & 88.

28 ACRWR, art. 18.

29 Read with Articles 19 and 20 of the ACRWR which elaborates on the obligation of the state to support the family and parents.

30 UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, A/RES/45/158, 18 December 1990, <https://www.refworld.org/legal/agreements/unga/1990/en/27627> [accessed 05 March 2024].

31 App. No. 10929/84, 28 November 1988.

32 ‘Right to respect for private and family life.’

33 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, ETS 5, 4 November 1950, <https://www.refworld.org/legal/agreements/coe/1950/en/18688> [accessed 05 March 2024].

by stating that family life ‘...and especially the rights of parents to exercise parental authority over their children, having due regard to their corresponding parental responsibilities is recognized and protected by the Convention, in particular by Article 8.’³⁴ This right is further protected in the American and African legal systems.³⁵

Duties are placed on the state and society to ‘preserve’ (GC 14), protect, and assist the family in performing its duties in society (CRC). In fact, international and all regional legal systems maintain that preserving the family unit is paramount. The state may only interfere in highly exceptional circumstances amounting to cases of clear and proven abuse and neglect. The protection and status of the family as the fundamental unit of society is further strengthened and highlighted by the express protection of the right to privacy and family life in international and regional legal instruments.

As the fundamental unit of society, the family provides the framework within which parents are seen as their children’s primary caretakers and authorities.

C. Parents are the primary authorities and caretakers of their children

The Preamble of the CRC states, ‘that childhood is entitled to special care and assistance...’ and that the ‘child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding...’. This is because of the ‘physical and mental immaturity’ of the child (also mentioned in the Declaration of the Rights of the Child³⁶) and because the child ‘needs special safeguards and care, including appropriate legal protection, before as well as after birth’. The need for children to be taken care of is firmly established in the CRC.

The CRC also identifies who should meet this need and be the primary caretakers of the child – namely, the parents. Article 18 of the CRC outlines that States Parties shall use their ‘best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child’. The parents have the ‘primary responsibility for the upbringing and development of the child’ and the ‘best interests of the child will be their basic concern.’

³⁴ *Nielsen v. Denmark*, par. 61. See *Abdi Ibrahim v. Norway*.

³⁵ Article 18 of the ACHPR, Article 10 of the ACRWC & Article 11 of the ACHR.

³⁶ UNGA, *Declaration of the Rights of the Child*, A/RES/1386(XIV), 20 November 1959, <https://www.refworld.org/legal/resolution/unga/1959/en/17170> [accessed 5 March 2024], preamble.

Under the wording of Article 18(2), states should support parents and other primary caretakers in fulfilling their responsibilities and undertake all the appropriate measures to assist them in accomplishing their child-rearing responsibilities.³⁷

According to Article 18(3), states must intervene when parents cannot fulfil their responsibilities. The state, therefore, has a *subsidiary role* concerning the child, not the primary one. Article 27(2) also gives parents the primary responsibility to secure the living conditions necessary for the child's development within their abilities and financial capacities. Articles 18 and 27 of the CRC align with Article 10 of the ICESCR, which accords the 'widest possible protection and assistance' from states to the family. In contrast, the family 'is responsible for the care and education of dependent children.'

It also flows from this general principle that parents have the primary role and authority in the child's education. As stated in the case of *Kjeldsen, Busk Madsen and Pedersen v. Denmark*,³⁸

[T]he 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.'

Although the state's subsidiary role should not overtake the primary role of the parents, it remains active. According to the CRC, the state must ensure the highest attainable standard of health (Art. 24 of the CRC), social security (Art. 26 of the CRC), standard of living (Art. 27 of the CRC), education (Arts. 28 & 29 of the CRC), and environmental protection (Art. 24(2)) that it is uniquely situated to provide.³⁹ Although the state must be active and engaged in performing these duties, the state must primarily act for society's common good. It would defeat the clear language of these texts, the general

37 The child's development is a wide concept and the responsibility of their parents. Articles 27 & 29 of the CRC elaborate on its content.

38 App. nos. 5095/71; 5920/72; 5926/72, 7 December 1976.

39 Elaine E. Sutherland (2016) 'Article 3 of the United Nations Convention on the Rights of the Child: The Challenges of Vagueness and Priorities.' In: *Implementing Article 3 of the United Nations Convention on the Rights of the Child, Best Interests, Welfare and Well-being*, Elaine E. Sutherland & Lesley-Anne Barnes MacFarlane (eds.). Cambridge University Press, 21-50, 42.

obligations placed on the states by these provisions were used to overcome rights explicitly recognised to parents.⁴⁰

This interpretation is explicitly supported in Article 13(l) of the Maputo Protocol. This Article states that 'both parents bear the primary responsibility for the upbringing and development of children and that this is a social function for which the State and the private sector have *secondary* responsibility'.⁴¹

Professors Rex Ahdar and Ian Leigh state that the international conventions indicate that the family is seen as both an essential and a benign institution.⁴² Outside of negligent and abusive situations, it is and should be the primary authority and decision-maker in the life of the child.⁴³

D. The principle of subsidiarity and basic norms underlying parental rights

One of the norms that further reinforces the principle that parents are their children's primary caretakers is the principle of subsidiarity.⁴⁴

Parents are closest to their children and best placed to deal with the everyday matters affecting them. The principle of subsidiarity respects that parents' relationships with children are close and constant, with parents having countless daily interactions with their children. In the intimacy of home, *parental decision-making* is the rule⁴⁵. The state's role, although active, should be a subsidiary and supportive one directed towards the realisation of the common good. Although the state has an active duty to provide for and realise the right to education, it cannot absorb parental rights in this regard and arrogate to itself tasks which can be effectively undertaken by a group (parents) that is closer to the individual (child).⁴⁶ This usurpation would be contrary to the principle

40 Morales Sancho, *Patria potestad y derechos fundamentales del menor de edad*, 126.

41 African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, African Union, 11 July 2003, <https://www.refworld.org/legal/agreements/au/2003/en/18176> [accessed 05 March 2024]. Article 20 of the ACRWR confirms the parent's primary responsibility towards their children. [Emphasis added].

42 Ahdar & Leigh, *Religious Freedom in the Liberal State*, 202.

43 *Ibid.*, 206.

44 The Charter of Fundamental Rights of the European Union formally extended subsidiarity to human rights by stating in the preamble 'with due regard for...the principle of subsidiarity'. The notion 'has an intellectual history as old as European political thought' (Paolo G. Carozza (2003) 'Subsidiarity as a Structural Principle of International Human Rights Law', *The American Journal of International Law*, Vol. 97, No. 1, 38-79, 40).

45 See Alexandre Moreira, *Parental authority in children's education: rationale and limits*, unpublished paper on file with author.

46 Carozza, 'Subsidiarity as a Structural Principle', 43-44.

of subsidiarity.

Furthermore, children are autonomous beings, but the extension of this autonomy is defined by the boundaries set by parents for each everyday situation.⁴⁷ According to the principle of subsidiarity, parents are best placed to decide on matters concerning their children. The state may only intervene in highly exceptional instances (abuse and neglect) and only to the extent that it is needed (proportionate). The principle of subsidiarity is also found in Articles 3(2) and 5 of the CRC as both expressly refer to the rights and duties of parents that the state must respect and consider when it performs its functions.

Furthermore, subsidiarity is not contractual or utilitarian. It exists because each human being has inherent and inalienable worth or dignity. Thus, the value of the individual human person is morally prior to the state's existence.⁴⁸ The UDHR expressly states in its Preamble that 'the inherent dignity...and inalienable rights of all members of the human family' are the 'foundation of freedom, justice and peace in the world'.

A clear example that human rights, and hence parental rights, pre-exist a state entity can be found in Article 26(3) of the UDHR, which states that parents have a 'prior right' to choose the kind of education given to their children. This also means that parental rights and duties cannot be transferred to the state and the state cannot oblige the parents to transfer such rights.⁴⁹ The state cannot tell a parent: '...we are in charge of his education, and we have experts who know how to do it better than you, so you are absolved of your obligation.'⁵⁰

Respecting the inherent dignity of the human person also requires respecting the integrity of the groups that are directly responsible and contribute to the child's growth and well-being. The freedom of groups (families) and, ultimately, the individual (parents and the child) within and relating to those groups is necessary to respect the inherent dignity of the human person.⁵¹ International law also acknowledges this by affirming

47 See Part 3(C)(ii) regarding the overemphasis on the child's autonomy and its effects on parental rights.

48 Carozza, 'Subsidiarity as a Structural Principle', 42.

49 Melissa Moschella, 'Parental Rights: A Foundational Account', 9 December 2020, *The Heritage Foundation*, <https://www.heritage.org/education/report/parental-rights-foundational-account> [accessed 19 March 2024].

50 *Ibid.*

51 Carozza, 'Subsidiarity as a Structural Principle', 43.

that the family is the natural group unit of society and the 'natural environment' for children to grow in.⁵²

Professor Melissa Moschella⁵³ similarly states that the state and parents have overlapping and concentric spheres of authority but that 'children belong to – i.e. are members of – their families in a direct and immediate way, whereas (until adulthood) they belong to the political community indirectly, through the mediation of their parents'.

Then there is biology. Why is it scandalous when babies are switched at birth? Why does it matter? The biological ties between children and parents have always mattered for legal, psychological, scientific and medical reasons.⁵⁴ This does not mean that an adoptive parent has fewer parental rights or will be 'less of a parent'. It means that it is an undeniable fact that the biological link between parents and children has certain automatic legal, psychological and medical consequences. One of these undeniable consequences is the fact that the biological parents automatically become the primary caretakers of the child. As explained below, the biological connection immediately creates unique duties from the parent to the child.

Further basic norms underlying parental rights come to the fore.

In natural law theory, rights correspond to duties and obligations. Parents have a natural moral duty or obligation to care for the children that they create. Because caring for children requires making decisions on their behalf, even when they disagree, parental authority flows from parental obligations. Parental rights protect that authority, enabling parents to fulfil their obligations in line with their consciences.⁵⁵

Not only do parents have natural rights, but they also have these natural rights because they have a natural moral duty to raise and educate their children. Parental rights flow

⁵² The ECtHR in *Folgerø and Others v. Norway* (App. No. 15472/02, 29 June 2007, Grand Chamber) explicitly refers to the parents as having 'natural duties' and the primary authority over their child's education (par. 84e).

⁵³ Melissa Moschella, *To Whom Do Children Belong?* 5.

⁵⁴ *Ibid.*, 20-21.

⁵⁵ Katy Faust, 'Do Children's Rights Override Parental Rights?' *The Colson Center*, <https://whatwoudyousay.org/do-childrens-rights-override-parental-rights/> [accessed 19 March 2024].

from parental responsibilities owed to the child. To perform these responsibilities, parents must have certain rights (which include authority and decision-making powers on behalf of the child) to execute these responsibilities or natural duties. Therefore, children's and parental rights do not contradict each other; they are two sides of the same coin.⁵⁶

Additionally, parents have parental responsibilities and rights due to the child's immaturity. According to Heiner Bielefeldt, former UN Special Rapporteur on Freedom of Religion or Belief, while the child's status as a rights holder is recognised, the CRC also reflects the awareness that the child needs the supportive environment of the family to realise these rights. Therefore, the CRC articulates several rights protecting the relationship between children and their parents.⁵⁷

Although parental responsibilities and the immaturity of the child form two of the basic norms underlying parental rights, it is important to emphasise that these are not the only reasons for the existence of parental and children's rights. Suppose the child's immaturity and the responsibilities that this draws from parents were the only underlying reasons for parental rights. Why do parents have the right to educate their children in line with their religion or beliefs?⁵⁸ Why can parents choose one religion or belief in which to raise a child and not another? The rights of both parents and children primarily exist due to the inherent dignity that parents and children hold due to their humanity (as also stated by the UDHR). Just as children do not only have rights vis-à-vis parents merely because of immaturity, but also because they are human beings, parents do not have parental rights vis-à-vis their children only because of the child's immaturity. Parents have natural rights and duties because they are human beings with fundamental human rights and are responsible for raising their children.⁵⁹

⁵⁶ *Ibid.*

⁵⁷ Also see, UN Human Rights Council, Heiner Bielefeldt, *Elimination of all forms of religious intolerance: note by the Secretary General*, paras. 20-21.

⁵⁸ See Part 3(B) where this right is discussed.

⁵⁹ This is true for biological and adoptive parents. The adoption of children requires state registration or legal processes but does not mean that 'being a parent' or 'being a family' is created by the state.

E. Conclusion

A textual reading of international and regional human rights laws expressly supports the fact that parents are their children's primary caretakers and authorities. This is bolstered by the fact that the family is seen as the fundamental unit of society and is entitled to special protection and support by the state, protected from arbitrary interference from the state or other individuals or entities, and a natural environment for children to develop. This framework forms the express contours within which numerous expressions of parental rights function.

The basic underlying norm of parental rights can be found in the Preamble of the UDHR when it recognises 'the inherent dignity...and inalienable rights of all members of the human family' as the 'foundation of freedom, justice and peace in the world'. Parental rights pre-exist and are before the state because they flow from the inherent dignity of persons. This can also be seen in Article 26(3) of the UDHR, which refers to parents' 'prior rights'.

The principle of subsidiarity, as also supported by the wording of Articles 3(2) and 5 of the CRC, flows from this inherent dignity because it articulates that those smaller forms of social organisations, like the family and parents, are best placed to solve matters concerning them and their children, and not the state. The state supports the parents as the children's primary caretakers and educators. Parental rights also flow from the natural duties of parents in respect of their children and from the child's immaturity. Yet, the primary reason that the state should respect and recognise parental rights is that they are natural rights flowing from the inherent dignity of parents due to their humanity. Moreover, parental rights are protected by binding international human rights laws.

One essential way parents must exercise their rights and duties is by educating their children – whether in or outside of school. This extensive parental right – the right of parents to raise and educate their children in line with their religion or beliefs – has, despite its fundamental status and explicit protection, seen some significant challenges.

3) Parents as primary educators of their children

Parental rights include the right of parents to educate⁶⁰ and raise their children in line with their religion or belief.⁶¹ Part 3 demonstrates that the state plays a role in supporting parents in the education of the child, while parents remain the primary directors in this regard. Sometimes, a child's wishes concerning religion or belief might conflict with parents' rights to raise and educate their children in line with their religion or belief. Existing (mis)interpretations of the child's right to freedom of religion or belief and the 'evolving capacities of the child' that violate parental rights are critiqued.

A. The state does not have a monopoly over the child's education

General Comment No. 13 (GC 13)⁶² of the Committee on Economic, Social and Cultural Rights, states that education 'is both a human right and an indispensable means of realizing other human rights'.⁶³ It is a means by which adults and children can 'lift themselves out of poverty and obtain the means to participate fully in their communities'.⁶⁴

60 The right of parents to educate and raise their children in line with their convictions includes formal and informal education. General Comment 1 of the UN Committee on the Rights of the Child states that education 'goes far beyond formal schooling to embrace the broad range of life experiences and learning processes...' (UN Committee on the Rights of the Child, *General comment No. 1, Article 29 (1)*, The aims of education, CRC/GC/2001/1, 17 April 2001, <https://www.refworld.org/legal/general/crc/2001/en/39221> [accessed 06 March 2024], par. 2).

61 The right to freedom of religion or belief is not limited to traditional religions. It includes the protection of a broad scope of non-traditional beliefs (such as humanism and atheism) (Article 18(1) of the ICCPR as well as General Comment 22 (GC 22) (UN Human Rights Committee, *CCPR General Comment No. 22: Article 18*, CCPR/C/21/Rev.1/Add.4, 30 July 1993, <https://www.refworld.org/legal/general/hrc/1993/en/13375> [accessed 05 March 2024], par. 2)).

62 UN Economic and Social Council, *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, E/C.12/1999/10, UN Committee on Economic, Social and Cultural Rights (CESCR), 8 December 1999, <https://www.refworld.org/legal/general/cescr/1999/en/37937> [accessed 05 March 2024], par. 1.

63 *Ibid.*

64 *Ibid.* At the CoE, the PACE states that 'the effective enjoyment of the right to education is a necessary precondition to enable every individual to fully develop and carry out his or her role in society...' (PACE, Resolution 1904 (2012) on 'The right to freedom choice in education in Europe', 4 October 2012, <https://pace.coe.int/en/files/19162/html> [accessed 20 March 2024], par. 1).

Article 13(1) of the ICESCR echoes GC 13 by stating that:

The States Parties to the present Covenant recognize the right of everyone to education. They agree that education 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.

Article 28(1) of the CRC also articulates the right to education and Articles 26(1) and (2) of the UDHR repeat Article 13(1) of the ICESCR by stating that:

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

Article 29(1) of the UNCRC (and Art. 26(2) of the UDHR) gives further direction to what a child's education should look like. It must be directed to the

development of the child's personality and mental and physical abilities to their fullest potential; (b) The development of respect for human rights

and fundamental freedoms...; (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, and for civilizations different from his or her own;...(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.

Article 29(2) continues by stating that this cannot be interpreted to interfere with the 'liberty'⁶⁵ of individuals to establish educational institutions while adhering to the minimum standards required of a state and Article 29(1).⁶⁶

Therefore, the right to education is provided for everyone and imbued with prescriptive principles that an education system should pursue (qualitative dimension).⁶⁷ In other words, education should enable children to participate in a free society, promote tolerance, and further UN activities to maintain peace.

No reasonable parent or legal guardian wishes for their child to be a poorly developed and non-functioning adult in society. Notions such as 'preparation for a responsible life' will be uncontentious. However, 'other liberal virtues, such as particular interpretations of 'tolerance'...may offend the religious conscience.'⁶⁸

For example, some countries in Western Europe might interpret 'tolerance' as requiring state schools to teach that gender is a societal and fluid construct and that the biological fact of two sexes should not be taught as this would be 'intolerant' towards those

65 Or 'freedom', although the text of Article 29(2) refers to 'liberty'.

66 At the CoE, the PACE Resolution 1904 (2012) on 'The right to freedom choice in education in Europe' provides for standards to which private (faith-based) schools should adhere, namely: '4.5.1 the content of the curricula and the teaching methods are not based on conceptions or do not advocate attitudes which conflict with the values of the Council of Europe; 4.5.2 no aspect of the school environment violates the rights of children, and in particular their dignity and physical and psychological integrity; 4.5.3 private schools do not encourage... segregation; 4.5.4 pupils are provided with suitable and secure premises; 4.5.5 the quality of teaching complies with the standards applied to public-run schools; 4.5.6 the nurturing of critical thinking and cultural openness are an integral part of any educational project.'

67 Article 29(1) underlines the individual and subjective right to a 'specific quality of education' (GC 1, par. 9).

68 Ahdar & Leigh, *Religious Freedom in the Liberal State*, 247.

identifying as transgender.

Also, this is not only theoretical. The Committee on Economic, Social and Cultural Rights, in its non-binding General Comment 13 (GC 13),⁶⁹ has argued that the objectives to which education should be directed should be expansively defined to include, for example, gender equality.⁷⁰ Several parents of Muslim, Jewish, Christian, atheist and other faiths, will and do object against such an interpretation of the quality dimensions (for example, 'tolerance') of the right to education.

This prompts the following questions: Should the state have a monopoly in creating conditions of human flourishing (qualitative dimensions) through education? Should it be for the state to direct how qualitative dimensions, such as tolerance, are taught? What is the role of parents as primary caretakers and educators of the child? More concretely, is it only for the state to determine that the teaching of tolerance should include teaching gender ideology as a fact? Or can parents set up or insist upon educational institutions or options that teach tolerance towards all human beings without requiring the acceptance of gender ideology?

Historical considerations of Article 26 of the UDHR shed some light on the qualitative direction given in international law (Art. 13(1) of the ICESCR and Art. 26(2) of the UDHR) and its relationship with the rights of parents.

Article 26 of the UDHR is described as a dual right, or a right of mixed character, combining fundamental freedoms and social and economic rights. It epitomises the challenge facing the declaration as a whole – finding a compromise between two ideologies.⁷¹ In 1951, UNESCO's first General Director, Sir Julian Huxley, identified what he believed to be an obvious contradiction between a government monopoly in education (Article 26(1) and (2)) and guaranteeing the rights of parents to choose (Article 26(3)).⁷²

69 General Comments are non-binding but contain authoritative interpretations of a treaty provision and give guidelines for the legislation, policy and practice of states (Fons Coomans (2004) 'Exploring the normative content of the right to education as a human right', *Persona y Derecho*, 50: 61-100, 64, <https://www.corteidh.or.cr/tablas/r27050.pdf> [accessed 20 March 2024]).

70 GC 13, par. 5. Also see GC 1, paras. 9 & 10.

71 James Stanfield (2021) 'Parental choice and the right to education: Revisiting Article 26 of the Universal Declaration of Human Rights', *Background paper prepared for the Global Education Monitoring Report: Non-state actors in education*, 4, https://eprints.ncl.ac.uk/file_store/production/279228/F1C18643-9967-4A5C-A6B0-6889C21D09B9.pdf [accessed 20 March 2024].

72 Commission on Human Rights, Universal Declaration of Human Rights (1948), Drafting History, 3rd Session, 24 May - 18 June 1948 New York, <https://research.un.org/en/undhr/chr/3> [accessed 20 March 2024]. Also see, Stanfield, 'Parental choice and the right to education', 4.

The *travaux préparatoires* of the UDHR state that Article 26 is one of the articles in the UDHR most clearly shaped by the experiences of the Second World War.⁷³ At the Third Session of the Commission on Human Rights, held in New York in June 1948, the Commission was reminded that free and compulsory education had been established in the constitutions of forty countries. Yet, although education was free and compulsory in Nazi Germany,⁷⁴ the content conveyed to students had disastrous results. The inclusion of a paragraph concerning the content and direction of education (Article 26(2)) was motivated primarily by the experience of Germany and other countries where education was free but used to promote intolerance and hatred of others.⁷⁵

Who, then, should decide the nature and direction of education?⁷⁶ It cannot be left to the state to create the content of education as this can be used to counter the rights of parents to educate their children the way they wish. Assurances were given that Articles 26(1) and (2) were not meant to justify the state exercising a monopoly over education. Nor was the article meant to restrict the right of parents to choose the kind of education their children will receive.⁷⁷

It was not the intention for the three parts of Article 26 of the UDHR to be addressed separately or for one part to take priority over the others. Focusing only on the first paragraph will give the government a monopoly in schooling, undermining parents' right to choose different options.⁷⁸ Rather, Articles 26(1) and 26(3) of the UDHR enshrine two complimentary and non-hierarchical rights. Article 26(2) does not enshrine a right but establishes 'common standards of achievement' regarding the quality of education. In this sense, Article 26(2) rather supports and directs what the exercise of Articles 26(1) and (3) should look like (not only a right to education but a right to a certain quality of education).⁷⁹ This does not imply a monopoly over education or the content of education but rather sets common standards of quality. It must, therefore, be at least

73 Stanfield, 'Parental choice and the right to education', 7.

74 It is not just in Nazi Germany or the Soviet Union that children have been aggressively influenced by educational systems in violation of parental rights. When Ingvar Carlsson was education minister in Sweden, he said that 'school is the spearhead of Socialism' and 'pre-school training' is essential 'to eliminate the social heritage' of undesirable parental views. Swedish educational theorists even advocated tax and government employment policies 'to get both parents out of the home, so that children are forced out as well' (John Lott (1999) 'Public Schooling, Indoctrination, and Totalitarianism', *Journal of Political Economy*, Vol. 107, No. S6, S127-S157, S128).

75 Stanfield, 'Parental choice and the right to education'.

76 *Ibid.*, 7-8.

77 *Ibid.*, 9.

78 *Ibid.*, 15.

79 GC 1, par. 9.

theoretically possible that only a minority of schools in any one local area are government schools, while the majority are owned and managed by a variety of non-state providers.⁸⁰

Consequently, the UDHR does not prefer a state-run education system but focuses on the development of the human personality, which should be read in its historical context, considering the Second World War. Article 26(3), by explicitly stating the prior right of parents to choose, imposes important restrictions on the nature and extent of government intervention in education. Although the state should guarantee universal access to education, the primary responsibility for that education rests with parents.⁸¹

With respect to Article 29 of the CRC giving a qualitative direction as to what education should contain, General Comment 1 (GC 1) of the Committee on the Rights of the Child states that children's rights are not detached and isolated values devoid of context but exist within a broader ethical framework partly described in Article 29(1) and the Preamble of the CRC.⁸² Accordingly, Article 29 'underlines the importance of respect for parents' and 'of the need to view rights within their broader ethical, moral, spiritual, cultural or social framework'. It also confirms that children's rights are embedded within the values of local communities⁸³ providing evidence for the consideration that education is not merely an external state-imposed process. Although GC 1, promotes certain qualitative standards, it does not state that these standards can only be achieved by state-imposed education.

The state, as an active (subsidiary) role player supporting parents in exercising their primary responsibility to educate their children, will involve trust in the local knowledge and experience of parents as opposed to 'distant civil servants'.⁸⁴ The role of government must be selfless. It must be 'to guarantee that parents have at their disposal the greatest possible number of educational opportunities of all descriptions and so establishing a regulatory framework that will encourage a variety of different schools to grow and flourish will be of paramount importance'.⁸⁵ At the level of the CoE, this is coined as 'the right to freedom of choice in education' and as 'freedom of conscience'⁸⁶ with the obligation to respect the rights of parents to choose in so far

80 Stanfield, 'Parental choice and the right to education', 10.

81 *Ibid.*, 17-20.

82 GC 1, par. 7.

83 *Ibid.*

84 Stanfield, 'Parental choice and the right to education', 20-21.

85 *Ibid.*, 21.

86 PACE Resolution 1904 (2012) on 'The right to freedom of choice in education in Europe', par. 1.

as it is compatible with the fundamental values of the CoE.⁸⁷ The ECtHR also confirmed the natural duty of parents towards their children as primarily responsible for the education and teaching of their children.⁸⁸

‘The state’s role in education is, after all, primarily one of *assisting* parents in fulfilling *their* educational responsibilities’⁸⁹. Klas Roth confirms this by stating that Article 26 of the UDHR is a ‘common standard of achievement’ and contains a positive statement that those affected by state-governed education should be able to choose education for their children.⁹⁰ In other words, children should be taught ‘tolerance’ as a ‘common standard of achievement’ to, for example, counter hatred. However, this does not mean that parents cannot direct the teaching of ‘tolerance’ to include ‘love your neighbour as yourself’ without necessarily linking it to the acceptance of gender ideology. Although parents’ religious beliefs or convictions cannot result in their children being deprived of education (as the child’s right to education is violated),⁹¹ compulsory education can be attained through alternative forms in line with the education standards set by the state.

As stated above, the right to education is ‘an indispensable means of realising other human rights’ and a means by which adults and children can ‘lift themselves out of poverty and obtain the means to participate fully in their communities’.⁹² Will this power derived from education not be most effective if all stakeholders (parents and civil society) are encouraged and supported by the state to take control over their children’s education and help societies flourish in this manner? This will represent a healthier and more democratic society than disengaged citizens and parents subject to a state monopoly and excessive educational scrutiny.

International human rights law does not demand that a child’s education be primarily provided for by the state under the assumption that it can provide a ‘better’ education than parents. Qualitative directions provided for in international human rights law set

87 *Ibid.*, par. 2. Unfortunately, at the European level, the ECtHR has not always decided in a way that enables choice in education (and hence, parental rights). In the cases *Konrad v. Germany*, App. No. 35504/03, 11 September 2006 (although declared inadmissible) and *Wunderlich v. Germany*, App. No. 18925/15, 10 January 2019, the ECtHR upheld bans on home education.

88 *Folgerø and Others v. Norway*, par. 84(e).

89 Moschella, ‘Parental Rights: A Foundational Account’.

90 Klas Roth (2009) ‘Article 26: A Principles Statement on Education’, *Journal of Human Rights*, Vol. 8, No. 2, 139-149.

91 Ahdar & Leigh, *Religious Freedom in the Liberal State*, 206.

92 GC 13, par. 1.

‘common standards of achievement’ but do not provide for a state monopoly over what these standards of achievement should contain and how they should be taught. Parents remain the primary caretakers and educators of their children and are entitled to the active support of the state. From this, it naturally follows that parents have the right to raise and educate their children in line with their religion or belief.

B. Parents have the right to educate and raise their children in line with their religion or belief

Article 13(3) of the ICESCR⁹³ states that:

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.

The right of parents to raise their children in line with their own religion or belief can also be confirmed in the European, Inter-American and African regional systems. Article 2 of Protocol No. 1 of the ECHR⁹⁴ states that ‘the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions’. In the Inter-American system, Article 12(4) of ACHR grants ‘parents...the right to provide for the religious and moral education of their children in line with their own convictions.’ Regarding the African system, Article 17(1) of the ACHPR recognises the right to education. It is widely accepted that parents exercise that right by choosing the school, religious, and moral education of their children.⁹⁵ Articles 11(4) and 11(5) of ACRWR establish that: ‘States Parties to the present Charter shall respect the rights and duties of parents, and where applicable, of legal guardians to choose for their children’s schools, other than those established by public authorities, which

93 The right in Article 13(3) of the CRC is repeated in Article 18(4) of the ICCPR, Article 12(4) of the Migrant Workers Convention, Article 26(3) of the UDHR and Article 5 of the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (A/RES/36/55, 25 November 1981, <https://www.refworld.org/legal/resolution/unga/1981/en/5952> [accessed 07 March 2024]).

94 CoE, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS 9, 20 March 1952, <https://www.refworld.org/legal/agreements/coe/1952/en/35969> [accessed 08 March 2024].

95 Rachel Murray (2019) *The African Charter on Human and Peoples’ Rights. A Commentary*. Oxford University Press: Oxford, 443.

conform to such minimum standards may be approved by the state, to ensure the religious and moral education of the child in a manner with the evolving capacities of the child.’

These respective Articles provide for two distinct freedoms: (a) parents’ freedom to choose and set up schools and the type of education they want for their children and (b) the freedom to ensure the moral and religious education of their children, inside and outside of formal education.⁹⁶ The conjunction ‘and’ reinforces that there are two separate freedoms and not just one. The right of parents to raise and educate their children in line with their religion or belief is not limited to doing so outside the school gates. This is supported by GC 1 stating that the ‘education’ in the context of Article 29 of the CRC (right to education) ‘goes far beyond formal schooling’.⁹⁷

The right of parents to raise their children in line with their religion or belief is also supported and qualified by other provisions. Article 14 of the CRC (and Article 5) states that states ‘shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child’. Article 5 specifically refers to ‘appropriate direction’.

Article 5(1) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief states that parents have the right to ‘*organize the life within the family* in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up’.⁹⁸ The right of parents to raise their children in line with their religion or belief is therefore relevant to the general upbringing of the child, as well as the formal education⁹⁹ of the child. Article 5(2) of the Declaration states that every child ‘shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents and shall not be compelled to receive teaching on religion or belief against the wishes of his parents...the best interests of the child being the guiding principle’.

96 Tomás Henríquez (2020) ‘Parental Rights in Education in European Jurisprudence: What the European Court Gets Right, and What It Gets Wrong.’ In: *The Battle for Religious Freedom: Jurisprudence and Axiology*, Grzegorz Blicharz, Alejandra Vanney & Piotr Roszak (eds.). IWS, 356.

97 GC 1, par. 2.

98 Emphasis added.

99 ‘Formal education’ in this regard means the fulfilment of the legally prescribed requirements regarding the educational formation of a child – for example, the completion of a certain school curriculum or standard of curriculum.

The right to freedom of religion or belief further supports the rights of parents to educate and raise their children in line with their religion or belief. Article 18 of the UDHR states that: 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.' Article 18 of the ICCPR repeats this but adds a limitation clause.¹⁰⁰ Article 18(4) of the ICCPR states that 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'.

According to Dr. Sylvie Langlaude, at the time of the drafting, the clear intent of Article 18(4) was the protection of parental rights against state intervention and not children's rights against their parents.¹⁰¹ This also aligns with the fact that the state has no monopoly over education and that Articles 26(1) and 26(3) of the UDHR should not be interpreted as competing with one another.¹⁰²

General Comment 22 (GC 22) states that the freedom of parents to ensure the instruction of their children in line with their convictions under Article 18(4) of the ICCPR is related to the guarantees of the freedom to teach a religion or belief as held in Article 18(1).¹⁰³ Therefore, GC 22 outlines that freedom of religion encompasses the freedom to manifest one's own religion or belief in worship, teaching, practice and observance, which includes freedom of choice for parents in education. However, Langlaude¹⁰⁴ argues that this is a mistake and that there is a difference between the freedom to manifest religion in teaching under Article 18(1) and the duty to respect parental wishes under Article 18(4). If seen as part of Article 18(1), Article 18(4) will be subject to limitations in Article 18(3).

100 Article 18(3) states: 'Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.

101 Sylvie Langlaude (2007) *The Right of the Child to Religious Freedom in International Law*. Martinus Nijhoff Publishers: Leiden/Boston, 85.

102 See Part 3(A) where this is discussed.

103 GC 22, par. 6.

104 Langlaude, *The Right of the Child to Religious Freedom*, 86.

Furthermore, this is inconsistent with GC 22 stating that ‘...the liberty of parents and guardians to ensure religious and moral education’ as maintained in Article 18(4) of the ICCPR, ‘cannot be restricted’.¹⁰⁵

In other words, evidence exists in international law to support the fact that the freedom of parents to raise and educate their children in line with their own religion or belief cannot be limited.¹⁰⁶ The same can be found in the Inter-American system. Article 12(4) of the ACHR does not contain a limitation clause either. Nevertheless, Article 18(4) of the ICCPR remains interconnected with and indissoluble from Article 18(4). The right to freedom of religion or belief bolsters the broader right of parents to raise and educate their children in line with their own religion or belief in formal education (schools) and beyond.

Whereas Article 18(4) of the ICCPR recognises parents’ freedom to ensure the religious education of their children in line with their own convictions, Article 26(3) of the UDHR mentions the parents’ ‘prior right’ to choose the kind of education that shall be given to their children. This confirms the text of Article 18(4) and additionally describes it as a right preceding state recognition (it is ‘prior’).

The right of parents to raise their children in line with their convictions is not limited to raising and educating children outside of the school gates. Rather, it includes the informal education the children will receive and ‘applies everywhere’. Nothing in Article 26(3) of the UDHR or other binding legal norms can counter this.¹⁰⁷ On the contrary, the wording of Article 26(3) of the UDHR describing the right as ‘prior’ confirms that parents’ right to educate their child in line with their own religion or belief extends to formal education and life in its entirety.

Parents do not only have the right to (also) formally educate their children in line with their religion or belief, but they also have the freedom to establish schools with a specific religious or belief ethos. Yet, this does not absolve state schools from upholding and respecting plural religions or beliefs. The ECtHR, in the case of *Folgerø and Others*

105 GC 22, par. 8.

106 This is also supported by Langlaude, *The Right of the Child to Religious Freedom*, 86 & Henríquez, ‘Parental Rights in Education’, 348.

107 *Ibid.*, 348-349.

v. Norway,¹⁰⁸ stated that the possibility of private education does not dispense the State from its obligation to safeguard pluralism in state schools.

Article 13(3) of the ICESCR is supported by Article 13(4) of the same treaty in that it provides for the freedom of parents or institutions to establish and direct faith-based schools¹⁰⁹ that conform to minimum educational standards laid down and approved by the state.¹¹⁰ This means that parents or bodies have a right to start and run a faith-based school. It also means that the state's regulatory powers may not make it impossible to establish faith-based schools.¹¹¹

The right of parents to establish faith-based schools is a negative right in that it does not place an obligation on the state to set up and pay for such schools actively. However, the state may not adopt legal and administrative measures impeding the exercise of the rights under Article 2 of Protocol No. 1.¹¹² It must refrain from interfering with the rights of parents to set up and pay for such schools. When the same issue was addressed by the UN Human Rights Committee, the Committee stated that: 'the Covenant does not oblige States parties to fund schools which are established on a religious basis. However, if a State Party chooses to provide public funding to religious schools, it should make this funding available without discrimination.'¹¹³

Although international law does not oblige State Parties to fund faith-based schools,

108 *Folgerø and Others v. Norway*, par. 101. This conflicts with what the Court stated in *Dojan and Others v. Germany* ((dec.), App. Nos. 319/08, 2455/08, 7908/10 et al. 13 September 2011, par. 2) declaring that parents could provide for the religious instruction of their children outside of the state school, thereby dispensing the state from safeguarding parental rights and pluralism in state education.

109 Reference will be made to faith-based schools (hence, schools with a religious or belief ethos) and state schools (schools with a form of secular (not neutral) ethos and usually funded by the state to disseminate the curriculum and ideologies promoted by the state). State schools are also sometimes referred to as 'public schools'. Although faith-based schools are sometimes referred to as 'private schools', they can either be state-funded, privately funded, or both. Secular state schools are usually completely funded by the state but may require some funding or receive some donations from parents, guardians, or alumni.

110 GC 13, par. 29. Article 2(b) of the Convention against Discrimination in Education (1960) confirms this by stating that the establishment and maintenance of separate (religious) educational institutions (or systems), offering education in keeping with the convictions of parents, will not constitute discrimination if the education provided conforms to the standards laid down by the competent authorities and attendance is optional (UNESCO, *Convention Against Discrimination in Education*, 14 December 1960, <https://www.refworld.org/legal/agreements/unesco/1960/en/20674> [accessed 07 March 2024]).

111 *Ingrid Jordebo Foundation of Christian Schools and Ingrid Jordebo v. Sweden*, App. No. 11533/85, 6 March 1987.

112 *Belgian linguistic case*, App. Nos. 1474/62, 1677/62, 1691/62, 1994/63, 2126/64, 23 July 1968, par. 13.

113 *Waldman v. Canada*, Communication, Communication No 694/1996, Human Rights Committee, 5 November 1996, par. 10.6.

it can be argued that the rights of equality and non-discrimination¹¹⁴ place a positive obligation on the state. Ignoring this positive obligation could amount to discrimination based on grounds of religion or belief but also based on socio-economic status. The supportive and subsidiary role of the state is to aid parents in their primary role as educators of their children. This role is not only limited to those parents who wish to raise their children in secular state schools but should also be for parents who wish to raise their children in line with other religions or beliefs or educate them in faith-based schools.

Such discrimination is exacerbated by the fact that a 'neutral' secular school is impossible. A dominant theme of (most forms of) liberal theory influencing parental rights is a strict commitment to perceived 'neutrality'. Under the auspices of neutrality, the right of parents to raise their children in line with their own religion or belief can only be realised to the extent that they can afford faith-based schools or to the extent that home-schooling is legal (and even here challenges exist)¹¹⁵. This is because state schools are often declared 'neutral' and faith-based schools are not. The assumption of neutrality regarding state schools often leads to the decision that only these schools should be funded by the state.¹¹⁶

Liberal secular theories adopted by governments give rise to non-neutral secular *ethea* in schools.¹¹⁷ Education and transfer of knowledge reveal elements of subjectivity and linguistic, political, and cultural contexts.¹¹⁸ As stated by Professor Jorge Barrera Rojas, 'education is not a morally neutral process'.¹¹⁹ This is also clear from the 'quality

114 Article 1 of the UDHR states that all 'human beings are born free and equal in dignity and rights'. Article 2 articulates the principle of non-discrimination by stating that 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour...religion..'

115 See Part 6(D) for a discussion of home education.

116 Ahdar & Leigh, *Religious Freedom in the Liberal State*, 254.

117 Within liberal theories, there are disagreements about the existence of 'neutrality'. See, for example, the disagreement between John Rawls (([1971 a] 1999a) *A Theory of Justice*. Oxford: Oxford University Press) and Joseph Raz ((1986) *The Morality of Freedom*. Oxford: Clarendon Paperbacks, 124-125).

118 See Charles Taylor and his discussions on 'closed world structures' - Charles Taylor (1995) *Philosophical Arguments*. Cambridge, Massachusetts, London, England: Harvard University Press, 14 & Charles Taylor (2007) *A Secular Age*. Cambridge, Massachusetts and London, England: The Belknap Press of Harvard University Press, 143). See Stephen Carter (2000) *God's Name in Vain: The Wrongs and Rights of Religion in Politics*. New York: Basic Books, 152, 160-161 & Stephen Carter (1998) *Civility: Manners, Morals, and the Etiquette of Democracy*. New York: Basic Books, 208.

119 Jorge Barrera-Rojas (2023) 'Educational Adequacy: Balancing the Right to Education, Parents' Rights and Educational Freedoms Under the International Covenant of Economic, Social, and Cultural Rights', *George Washington International Law Review*, Forthcoming, Vol. 55.

dimensions' provided regarding the right to education, in, for example, Article 13(1)¹²⁰ of the ICESCR. In liberal theory, clinging to perceived neutrality is necessary to uphold certain claims of equality and democracy, which are broad and undefined notions filled with non-neutral comprehensive ideologies.¹²¹ Forcing parents, for example, to accept comprehensive sexuality education,¹²² mixed swimming classes between boys and girls,¹²³ or banning home education¹²⁴ claiming that this is necessary for 'social integration', democracy or in the 'best interest of the child', are *not* 'neutral' considerations.

Considering that no school is 'neutral', and that education is not a morally neutral process, the secondary duty of the state to fund schools should not be limited to state schools only. Additionally, the right of parents to educate their children in line with their own convictions does not only apply outside of the school and inside the private home. This right is an integral part of the child's educational rights and is not only fulfilled by the availability of faith-based schools or the legal ability to 'home educate'. State schools should also respect parents and children with plural religions and beliefs.

At the European level, Article 2 of Protocol No. 1 to the ECHR¹²⁵ clearly states that the State shall 'respect' the 'right' of parents to ensure education in conformity with their own religious convictions. This means that parents or institutions may (1) establish independent schools of their own that conform with the minimum requirements of the government and (2) choose a school that provides education in line with their religion or belief (other than those established by the government).¹²⁶

120 See Part 3(A) where these 'quality dimensions' are discussed.

121 Ahdar & Leigh, *Religious Freedom in the Liberal State*, 65.

122 CSE is explained in Part 6(B).

123 See, for example, the case of *Osmanoğlu and Kocabaş v. Switzerland*, App. No. 29086/12, 10 January 2017 discussed in more detail in Part 6(A).

124 See the case of *Wunderlich v. Germany* discussed in Part 6(D).

125 CoE, *Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights - Right to education*, 31 December 2020, <https://www.refworld.org/jurisprudence/caselawcomp/echr/2020/en/123528> [accessed 07 March 2024]. This is repeated in Article 14(3) of the CFEU, the PACE Resolution 1904 on 'The freedom of choice in education', par. 6.2.3; PACE Report on 'Tackling intolerance and discrimination in Europe with a special focus on Christians', 29 January 2015 (8th Sitting), <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21549> [accessed 21 March 2024, par. 6.2.3]; Resolution 1928 (2013) on 'Safeguarding Human Rights in relation to religion or belief and protecting religious communities from violence', 24 April 2013 (14th Sitting), <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19695&lang=en> [accessed 21 March 2024], par. 9.11; and Resolution 2163 on 'The Protection of the Rights of Parents and Children Belonging to Religious Minorities', 27 April 2017 (17th Sitting), <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23719&lang=en> [accessed 21 March 2024], paras. 3 and 5.1.

126 CFEU, art. 10. Article 2 of Protocol No. 1 to the ECHR is strengthened by Article 8 (right to privacy and family life), Article 7 of the CFEU (right to respect for privacy and family life) and the right to freedom of religion or belief as protected in Article 18 of the ICCPR as well as Article 9 of the ECHR.

Like other international law interpretations, ECtHR case law on Article 2 of Protocol No. 1 of the ECHR does not require the state to fund faith-based schools.¹²⁷ The ECtHR has mainly interpreted it as creating a negative obligation on the state. In other words, it does not have to set up and fund such schools but must refrain from interfering with the rights of parents to do so.

The first sentence of Article 2 of Protocol No. 1 undeniably establishes a 'right' that must be 'respected'. The ECtHR stated in *Efstratiou v. Greece* that the word 'respect' means more than merely acknowledging this freedom. In addition to a primarily negative obligation, it also implies some positive obligation (obligation to take action) on the part of the state.¹²⁸ The wording of the Protocol as a 'right' lends itself to be primarily interpreted as a positive obligation. For the same reasons stated before, any other interpretation could amount to discrimination against children and parents based on religion or belief as well as socio-economic status.

Although the ECtHR, in the case of *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, did not allow parents to opt their children out of sexuality education classes, it did state that parents' convictions should be respected throughout the entire state education programme. The Court found that the preparatory documents (*travaux préparatoires*) of Article 2 of Protocol No. 1 require that state teaching should respect parents' religious and philosophical convictions.¹²⁹ Therefore, parental rights are an integral part of the right to education¹³⁰ and compulsory state education should be provided in a manner that avoids coming into conflict with the rights of parents to ensure their children are educated in line with their parents' religion or belief.¹³¹

In the case of *Campbell and Cosans v. the United Kingdom*, the parents objected to the school's use of corporal punishment based on their philosophical convictions. The child was only allowed back to school if the parents accepted the possibility of corporal punishment (thereby acting contrary to their convictions). The Court stated that such a 'condition of access to an educational establishment that conflicts in this way with another right enshrined in Protocol No. 1 cannot be described as reasonable and, in any event, falls outside the State's power of regulation under Article 2...' ¹³²

127 *Osmanoğlu and Kocabaş v. Switzerland*, par. 95 & the *Belgian Linguistic case*, par. 13.

128 *Efstratiou v. Greece*, App. No. 24095/94, 18 December 1996, par. 28.

129 *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, par. 50.

130 Henríquez, 'Parental Rights in Education', 361.

131 *Ibid.*, 350.

132 *Campbell and Cosans v. the United Kingdom*, App. Nos. 7511/76; 7743/76, 25 February 1982, par. 41.

If this argument is applied to comprehensive sexuality education provided contrary to the religion or belief of parents or their children, accepting the attendance of such classes cannot be a 'condition of access' for the child to a specific school.

Irrespective of the mentioned cases, the ECtHR jurisprudence regarding the rights of parents to educate and raise their children in line with their religion or belief is complicated. The Court has, concerning educational matters, given domestic legal systems a wide margin of appreciation. Subject to the principle of subsidiarity, and rightly so, states have the primary responsibility to secure the right to education in their nation.

However, it is also stated in Protocol 15 (amending the ECHR) that the ECtHR has a 'supervisory jurisdiction'.¹³³ Although a wide margin of appreciation exists regarding the right to education, this does not mean that the right of parents to educate their children in line with their religion or belief should not be respected and upheld. It is for the ECtHR to supervise that this parental right is respected and upheld.

For example, in the case of *Osmanoğlu*, the ECtHR uncritically accepted, subject to the margin of appreciation, the notion of 'social integration' as sufficient reason not to accommodate two Muslim girls who wanted to opt out of swimming lessons with boys. The ECtHR failed to respect the rights of the children and parents and did not adhere to a strict proportionality analysis whereby the least restrictive measure was sought when rights were limited.¹³⁴

The right of parents to raise and educate their children in line with their religion or belief is firmly established in international and regional legal systems. Current legal jurisprudence establishes this as a negative obligation on the state. However, the state's subsidiary role in funding and beyond cannot only be reserved for parents who raise their children in line with secular belief systems in state schools with a secular ethos.

A question remains: how should parental rights be interpreted when the right of parents to raise their child in line with their religion or belief does not align with the child's choices regarding his or her exercise of the right to freedom of religion or belief?

133 CoE, *Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms*, Strasbourg, 24.VI.2013, https://www.echr.coe.int/documents/d/echr/protocol_15_eng [accessed 21 March 2024], art. 1.

134 The same applies to cases such as *Leyla Şahin v. Turkey*, App. No. 44774/98, 10 November 2005.

C. The right to freedom of religion or belief and ‘the evolving capacities’ of the child

The child is a holder of rights. The exercise and application of these rights change according to the different stages of the child’s development. The child’s exercise of his or her rights is affected by factors such as the child’s rights vis-à-vis the parents, parental rights and, for example, the child’s age. Most of the time parents’ rights to educate and raise their child in line with their religion or belief will be aligned with the child’s right to freedom of religion or belief. However, tensions may arise, prompting a proper investigation into the appropriate role of the state in such cases. In this regard, the haphazard application and interpretation of the child’s right to freedom of religion or belief and the ‘evolving capacities of the child’ by the Committee on the Rights of the Child pose problems for the rights of parents.

(i) *The child’s right to freedom of religion or belief*

Article 14 of the CRC states that the child has the right to freedom of religion or belief:

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.¹³⁵
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.¹³⁶
3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

The inclusion of Article 14 of the CRC was highly contentious, so much so that disagreement over the scope of the child’s right to religious freedom threatened to

¹³⁵ The child’s right to freedom of religion or belief is strengthened by Article 30 of the CRC stating that children belonging to religious minorities shall not be denied the right, in community with others of the group, to enjoy, profess and practice his or her own religion.

¹³⁶ Article 5 of the CRC repeats the notion of the ‘evolving capacities of the child’. It provides support for Article 14(2) by stating that ‘States Parties shall respect the responsibilities, rights and duties of parents, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the right recognized in the present Convention’.

derail the adoption of the entire Convention. Delegates from the Holy See and various Islamic nations entered reservations to this article to preserve traditional religious childrearing practices.¹³⁷

Article 14(1) of the CRC differs from Article 18(1) of the ICCPR in that it does not include ‘the right...to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching’. Article 18(2) of the ICCPR states that ‘No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice’ and is also not included in Article 14 of the CRC. This was not a mere oversight.

At the time of its drafting, the concern with Article 14 of the CRC was that acknowledging a right for children to choose and change religion may run contrary to parents’ right to raise and educate the child in line with their religion or belief – especially if the child chooses a different religion. As stated by Heiner Bielefeldt, the fear is that this will be ‘opening the floodgates for far-reaching interference by State agencies in the religious socialization of children’.¹³⁸

At the same time, Article 14(1) is nuanced by Article 14(3) stating that the rights and duties of parents to provide direction to the child in his or her exercise of this right are respected in a manner ‘consistent with the evolving capacities of the child’. The CRC aims to manage potential tensions between the child and parental rights. Still, the extent of the right to provide direction in decisions concerning religion or belief varies according to the ‘evolving capacities of the child’.

However, when reading the CRC in its entirety (see the Preamble and Articles 9, 18 and 27 of the CRC), and although the child is seen as a rights holder, there is a constant recognition sought of primary role and authority of parents. Professor Elaine

137 Ahdar & Leigh, *Religious Freedom in the Liberal State*, 216. See Geraldine Van Bueren (1995) *The International Law on the Rights of the Child*. Dordrecht, 155 & Philip Veerman & Caroline Sand, ‘Religion and Children’s Rights’, *The International Journal of Children’s Rights*, Vol. 7, No. 4, 385-393, 385. Also see, Convention on the Rights of the Child (1989), Declarations and Reservations, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en#EndDec [accessed 30 April 2024].

138 UN General Assembly, *Elimination of all forms of religious intolerance: note by the Secretary General*, Heiner Bielefeldt, A/70/286, 5 August 2015, <https://www.refworld.org/reference/themreport/unga/2015/en/107752> [accessed 19 March 2024], par. 27.

Sutherland¹³⁹ states that the drafters' 'awareness of the rich and varied nature of childhood and of child development led them to recognise both the evolving capacities of children and young people and the central role of parents and, where appropriate, the wider family group,¹⁴⁰ in the child's life'.

What, then, is the state's role when parents choose to educate their child in line with a specific religion or belief, but the child's choice of religion or belief does not align with the parent's choice of religion or belief?

The child's right to freedom of religion is primarily a 'right before public powers (not against parents (Article 14(2) CRC)'.¹⁴¹ Sylvie Langlaude agrees by stating that the intention behind Article 18(4) of the ICCPR (rights of parents to raise their children in line with their own convictions) at the time of the drafting was to protect parental rights against state indoctrination. The context is the protection of parental rights against the state and not children's rights against their parents.¹⁴²

According to Heiner Bielefeldt, 'an appropriate reading of the Convention, seen in conjunction with other relevant international standards', cannot sustain an interpretation of the text justifying undue interference by state agencies.¹⁴³ The interests of parents and children in freedom of religion or belief are not necessarily identical but should be interpreted as positively interrelated.¹⁴⁴

Although the child holds the right to freedom of religion or belief, the parents still have the right to provide direction in this regard and raise the children in accordance with a specific religion or belief. The right of parents to raise their children following their religion or belief is not diminished by the child's right to freedom of religion or belief.

139 Elaine Sutherland & Lesley-Anne Barnes Macfarlane (2016) 'Introduction', In: *Implementing Article 3 of the United Nations Convention on the Rights of the Child, Best Interests, Welfare and Well-being*, Elaine Sutherland & Lesley-Anne Barnes MacFarlane (eds.), Cambridge University Press, 3.

140 Article 5 of the CRC states that 'States Parties shall respect...where applicable, the members of the extended family or community as provided for by local custom...'

141 Morales Sancho, *Patria potestad y derechos fundamentales del menor de edad*, 266-271.

142 Langlaude, *The Right of the Child to Religious Freedom*, 85.

143 UN General Assembly, Heiner Bielefeldt, *Elimination of all forms of religious intolerance: note by the Secretary General*, par. 28.

144 *Ibid.*, par. 76.

(ii) *The 'evolving capacities of the child' and an overemphasis on the child's autonomy*

Since parents are the primary actors in guiding the spiritual development of their children, how should this be interpreted in light of the qualification that parents should 'provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child' (Article 14(2))?¹⁴⁵ This prompts a legal consideration of the child's developing autonomy and the appropriate legal response if parental rights contradict the right to freedom of religion or belief of the child.

The Committee on the Rights of the Child has done an insufficient job interpreting the 'evolving capacities of the child'. Sylvie Langlaude, by investigating several reports and the work of the Committee, concluded that it has 'fail[ed] children in relation to their religion'.¹⁴⁶ It has not provided for a consistent and illuminating jurisprudence properly balancing the rights and interests in Article 14. It has interpreted the concept of the evolving capacities of the child 'far too broadly' and haphazardly in terms of age limits while not providing any guidance as to how it should be interpreted and applied.¹⁴⁷ Langlaude argues that the Committee treats the child as 'an autonomous religious believer', detached and disconnected from his or her family and religious community revealing an 'impoverished' conception of religion.¹⁴⁸ She states that:

From the start, there seems to be a presumption that the family is not always in the best interests of the child, and that children are best placed to know what is best for them in religious matters. There is too much focus on the child being able to organize their religion autonomously, and this also means too much intervention within the family.¹⁴⁹

145 The phrase 'evolving capacities of the child' appears twice in the CRC, namely, in Articles 5 and 14(2). However, it appears over 80 times in the General Comments of the CRC Committee (Sheila Varadan (2019) 'The Principle of Evolving Capacities under the UN Convention on the Rights of the Child', In: *The International Journal of Children's Rights*, https://brill.com/view/journals/chil/27/2/article-p306_306.xml?language=en [accessed 21 March 2024]).

146 Ahdar & Leigh, *Religious Freedom in the Liberal State*, 216-217. Sylvie Langlaude (2008) 'Children and Religion under Article 14 UNCRC: A Critical Analysis', *International Journal on Children's Rights*, Vol. 16, 475, 493.

147 Langlaude, *The Right of the Child to Religious Freedom*.

148 Langlaude, 'Children and Religion under Article 14 UNCRC', 498-499.

149 *Ibid.*

This gives the impression that the Committee objects to the idea of the child being a religious believer and that there is something inherently biased and intolerant in religions that the child should not be taught about. This puts religion in a negative light and tends toward excessive intervention in the child's and parents' beliefs.¹⁵⁰ By providing the child with religious autonomy that undermines parental authority, unfamiliar adult decision-makers (judges and social workers) would rule on a matter of great sensitivity – a family's religious beliefs.¹⁵¹

For example, in a statement by the Committee on the Rights of the Child, on Article 5 of the CRC, the Committee emphasises that children have a right to receive 'appropriate' direction and guidance in the exercise of their rights and in accordance with their evolving capacities. This means the parents should adjust their guidance and direction to reflect these 'evolving capacities'.¹⁵² However, the Committee does not give guidance as to what 'appropriate' means and it is left to unfamiliar decision makers (like judges) to decide such standards.

It is further stated that the 'evolving capacities of the child' contribute to protecting the child from 'arbitrary family control'¹⁵³ and should not be seen as 'an excuse for authoritarian practices that restrict children's autonomy and self-expression'.¹⁵⁴ It is also argued by the Committee that 'parents' responsibilities, rights and duties to guide their children is not absolute, but rather, delimited by children's status as rights holders'.¹⁵⁵ Such language wrongly pits parents and their rights against children and their rights.

Prof Sheila Varadan, from her analyses of the General Comments of the CRC Committee, found that the Committee has interpreted the principle much broader than it was initially intended from the comments of the drafting history by the Working Group. This can also be seen in the stated examples. The reports of the Working Group, on the contrary, suggest that the drafters of the CRC sought to 'forge a delicate balance within article 5 of the UNCRC, acknowledging the role of the child's evolving capacities,

¹⁵⁰ *Ibid.*

¹⁵¹ Ahdar & Leigh, *Religious Freedom in the Liberal State*, 220.

¹⁵² UN Human Rights Treaty Bodies, 'Statement of the Committee on the Rights of the Child on article 5 of the Convention on the Rights of the Child', 11 October 2023, <https://www.ohchr.org/sites/default/files/documents/hrbodies/crc/statements/CRC-Article-5-statement.pdf> [accessed 22 March 2024], par. 8.

¹⁵³ UN Human Rights Treaty Bodies, 'Statement of the Committee on the Rights of the Child on article 5 of the Convention on the Rights of the Child', par. 10.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*, par. 7.

while still affirming the importance of parents and guardians in providing direction and guidance to their children'.¹⁵⁶ The Working Group session reports indicate that the 'foremost concern amongst Working Group members was that any explicit recognition of a child's capacities (evolving or otherwise) in exercising their rights would undermine the rights of parents and the sanctity of family'.¹⁵⁷ The historical concerns raised by the Working Group should not give way to the current Committee's interpretation that overly emphasises the child's autonomy.

The overemphasis on autonomy has deeper roots than the Committee on the Rights of the Child. It is symptomatic of the building blocks of dominant liberal theories in modern societies. Liberal theorists maintain a unified stance on autonomy.¹⁵⁸ The overemphasis on autonomy and individualism leads to the family being seen as a mere 'collection of individuals united temporarily for their mutual convenience and armed with rights against one another'.¹⁵⁹

Within such a system, the individual is seen as holding individual rights within and against the family, from which flows the assumption that conflicts between individuals within a family should be settled by and subjected to an external set of standards (human rights) as enforced by an external arbiter (the state). This undermines 'internal standards' of family decision-making.¹⁶⁰ Parental rights vis-à-vis the child become rights that should be constantly exercised under the scrutiny of the state. As stated by Melissa Moschella, most Rawlsian liberal theorists consider parental rights to be highly circumscribed by the educational authority of the state. Therefore, 'the state's educational authority is at least equal to, if not superior to, the educational authority of parents'.¹⁶¹

¹⁵⁶ Varadan, 'The Principle of Evolving Capacities under the UN Convention on the Rights of the Child'.

¹⁵⁷ During the drafting of the CRC, concerns were raised that children were not afforded enough consideration as rights-holders in exercising their right to freedom of religion. To address these concerns, the delegation from Canada proposed a draft text for article 7bis (article 14), introducing the phrase 'evolving capacities of the child' (United Nations Commission on Human Rights, 'Report of the Working Group on a draft convention on the rights of the child', E/CN.4/1984/71., 1984, paras. 15 – 16; Office of the United Nations High Commissioner for Human Rights (2007) *Legislative History of the Convention on the Rights of the Child*. New York/Geneva: United Nations, 455 & United Nations Commission on Human Rights (1988) 'Report of the Working Group on a draft convention on the rights of the child', E/CN.4/1988/28, par. 34).

¹⁵⁸ In the theories of both John Rawls and Joseph Raz, personal autonomy remains paramount. However, for Raz, personal autonomy does not require neutrality but rather 'value pluralism' – the availability of choices of a range of morally acceptable and valuable options (Raz, *The Morality of Freedom*, 155 & 395).

¹⁵⁹ Ahdar & Leigh, *Religious Freedom in the Liberal State*, 208.

¹⁶⁰ *Ibid.*

¹⁶¹ Moschella, *To Whom Do Children Belong?* 4.

Other examples of this type of scrutiny of parents within the UN also exist. For example, the Report of the former Special Rapporteur (Joseph A. Cannataci) on the right to privacy titled 'Artificial intelligence and privacy, and children's privacy'¹⁶² makes bold statements such as: 'As they mature, children desire and require privacy, not only from schools...but also from their parents'.¹⁶³ Other statements include 'Sexual expression... and physical autonomy are part of the interwoven fabric of children's privacy' and this means that adolescents 'need to be able to...safely and privately explore their sexuality as they mature'.¹⁶⁴ It is further stated that such autonomy is infringed by 'Governments... health-care and other professionals, parents and peers'.¹⁶⁵ Concerning the need and so-called 'positive attributes' of CSE and issues concerning the sexuality of children, parental consent is undermined by stating that '[m]any see consent as a fundamental' but 'parental consent may not always be in the best interests of the child or aligned to the child's views'.¹⁶⁶ Such language also assumes that the child is autonomous and that they will know what is in their own best interest or that the state does (and not the parent).

This overemphasis on autonomy and individualism, also by the Committee and Special Rapporteur, is directly at odds with the notion of 'families as communities of love, mutual forbearance, and self-sacrifice'¹⁶⁷ often held by different religions. It is not difficult to see how this creates the catalyst for viewing the state as the grantor and curator of parental rights rather than parental rights pre-existing any state guarantee.

The 'evolving capacities of the child' is not a principle that should be used against the rights of parents and it does not justify government interference in the religious relations between parents and children. Although it is not argued that the autonomy of the child should be disregarded or that children should not be bearers of rights, it is argued that a child's evolving capacities should be steered and curated by parents in accordance with their (the parents') judgment (not that of the state). Parents have the right and duty to do so, which aligns with the CRC, properly understood. In making

162 UN General Assembly, Joseph A. Cannataci, 'Artificial intelligence and privacy, and children's privacy', Report of the Special Rapporteur on the Right to Privacy, A/HRC/46/37, 25 January 2021, <https://documents.un.org/doc/undoc/gen/g21/015/65/pdf/g2101565.pdf?token=wA7aZtPr9t0QWxLLJ7&fe=true> [accessed 11 March 2024].

163 *Ibid.*, par. 83.

164 *Ibid.*, par. 97.

165 *Ibid.*, par. 98.

166 *Ibid.*, par. 120.

167 Ahdar & Leigh, *Religious Freedom in the Liberal State*, 208.

decisions where the claims or wills of children and parents clash, the parent as the primary authority and caretaker should be respected. The child's autonomy should not be treated in an unbalanced manner as if he or she is a disconnected adult. An overemphasis on the child's autonomy in matters concerning the right to freedom of religion or belief, which in turn undermines parental rights, is a misinterpretation of the international legal texts and their *travaux préparatoires*.

D. Conclusion

There is no indication in binding international human rights instruments that the child's education should be provided for by the state, or that the state can provide a better education than the parents. The state does not have a monopoly over the education of children but rather has a subsidiary yet active role to play. This role is an unselfish one aimed towards the common good of society.

The qualitative educational directions provided by international human rights law set 'common standards of achievement' but do not provide for a state monopoly over what these standards of achievement should contain and how they should be taught.

Based on the fact that parents are the primary educators and caretakers of their children, they also have the right to raise and educate their children in line with their own religion or belief. This is confirmed in international human rights law.

It is argued that this right should not only establish a negative obligation on the state. The state arguably should fund and set up non-neutral secular, religious, and other belief schools equally, not just secular state schools. Otherwise, the right of parents to raise their children in line with their religion or belief will only be reserved for those parents who raise their children in line with secular belief systems in state schools with a secular ethos. Furthermore, only parents who can afford it will be able to exercise their right to raise their children in line with their own religion or belief.

It might, however, happen that the right of parents to raise their child in line with their own religion or belief comes into conflict with the choice of religion or belief of a minor child. Historical texts regarding the child's right to freedom of religion or belief in the CRC reveal that it was never intended to diminish the rights of parents and primarily applies against public powers.

The fact that parents' rights to curate the child's right to freedom of religion or belief is nuanced by 'the evolving capacities of the child' does not mean that the child's evolving autonomy should be pitted against the rights of parents as primary educators of the child. The Committee on the Rights of the Child has, unfortunately, interpreted it in such a way that it opens the relationship between parent and child to unjustified state scrutiny. This contradicts binding international human rights instruments and their historical texts and contexts.

Yet, the elephant in the room remains. The CRC and phrases such as 'in accordance with the evolving capacities of the child' acknowledge that a child cannot exercise those rights autonomously. An additional principle to guide actions on behalf of the child is the 'best interest of the child'. Regarding parental rights, the principle of the 'evolving capacities of the child' and the 'best interest of the child' are both relevant.

These principles indicate 'that somebody other than the child concerned can better judge the child's interests than the child herself.'¹⁶⁸ Principles that directly influence the direction of a child's life will most certainly have a fundamental impact on those most involved in providing such direction -- parents and their parental rights.

168 Lina Papadopoulou (2004) 'Children and Religious Freedom: An Enquiry into Children's Capability of Being Holders of Rights and the Nature of Religious Freedom in the Western World', In: *Family Life and Human Rights*, Peter Lødrup & Eva Modvar (eds.). Gyldendal Akademisk: Oslo, 539-540.

4) Establishing the scope of application of the 'best interest of the child' standard

The principle of the 'best interest of the child' has been contentious to say the least, especially in terms of its application, meaning and scope. It is known in all international human rights documents and domestic legal systems and is the most dominant concept in the CRC.¹⁶⁹ The Geneva Declaration of the Rights of the Child pioneered the standard in international human rights law, stating that 'mankind owes to the child the best it has to give.'¹⁷⁰ The principle then reached the 1959 UN Declaration on the Rights of the Child (UNDRC) which states: '...In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.'¹⁷¹ The best interests principle appears within the CRC eight times¹⁷² and is qualified in various ways. In the CRC, depending on the relevant provisions, the child's best interests shall be 'a primary consideration',¹⁷³ of 'paramount consideration',¹⁷⁴ and a State's 'basic concern'.¹⁷⁵ Further, when States enact policies that affect children, they shall be 'necessary'¹⁷⁶ to accommodate the child's best interests and should not be 'contrary' to that task.¹⁷⁷

169 In addition to Article 3, the principle of the best interest of the child is mentioned seven times in the CRC: Articles 9 (separation from parents), 10 (family reunification), 18 (parental responsibilities), 20 (deprivation of family environment and alternative care), 21 (adoption), 37(c) (separation from adults in detention) and 40(2)(b) (children in conflict with the law). The principle can also be found in the Optional Protocol to the Convention on the Sale of Children, child prostitution and child pornography (UN General Assembly, *Optional Protocol to the Convention on the Sale of Children, Child Prostitution and Child Pornography*, A/RES/54/263, 16 March 2001, <https://www.refworld.org/legal/agreements/unga/2001/en/95783> [accessed 22 March 2024], preamble & art. 8) and in the Optional Protocol to the Convention on a Communications Procedure (UN Human Rights Council, *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: resolution / adopted by the Human Rights Council*, A/HRC/RES/17/18, 14 July 2011, <https://www.refworld.org/legal/resolution/unhrc/2011/en/82293> [accessed 22 March 2024], preamble & arts. 2-3). After the CRC, the 'best interest' principle has appeared in, for example, the UN Convention on the Rights of Persons with Disabilities (CRPD), where protection of best interests is secured for disabled children (UN General Assembly, *Convention on the Rights of Persons with Disabilities*, A/RES/61/106, 24 January 2007, <https://www.refworld.org/legal/resolution/unga/2007/en/49751> [accessed 22 March 2024], arts. 7 & 23). The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) also safeguards the interests of children (UNGA, *Convention on the Elimination of All Forms of Discrimination Against Women*, vol. 1249, p. 13, 18 December 1979, <https://www.refworld.org/legal/agreements/unga/1979/en/13757> [accessed 22 March 2024], art. 5).

170 The preamble of the Geneva Declaration of the Rights of the Child adopted on 26th September 1924 (League of Nations, <https://www.humanium.org/en/text-2/> [accessed 22 March 2024]) and the preamble of the Declaration of the Rights of the Child (UN General Assembly, A/RES/1386(XIV), 20 November 1959, <https://www.refworld.org/legal/resolution/unga/1959/en/17170> [accessed 22 March 2024]).

171 UNDRC, art. 3.

172 See articles 3(1), 9(1), 9(3), 18(1), 20(1), 21, 37(c) & 40(2)(b)(iii).

173 CRC, art. 3(1). Emphasis added.

174 *Ibid.*, art. 21.

175 *Ibid.*, art. 18(1).

176 *Ibid.*, art. 9(1).

177 *Ibid.*, art. 9(3).

At the European level, Article 24(2) of the CFEU states that the best interest of the child is the primary consideration in all matters concerning the child whether taken by public or private institutions. Principle 3.3 of the 'Principles of European Family Law Regarding Parental Responsibilities' states that 'in all matters concerning parental responsibilities the best interests of the child should be the primary consideration'.¹⁷⁸ In the African Union, Article 4 of the ACRWC also states that in 'all actions concerning the child...the best interests of the child shall be the primary consideration'.¹⁷⁹

Due to its undeniable presence, the question is not whether it plays a role in adjudicating matters involving the child. Rather, modern conceptions of parental rights evoke questions regarding the definition and threshold of this principle, who determines and should determine the 'best interest of the child', and how this relates to parental rights and duties. More concretely, when parents exercise their rights, do they constantly have to prove that it is in the 'best interest of the child' to take or not take a certain action? For example, do they have to prove to the state or decision-making body that it is in the best interest of the child to be home-educated or in the best interest of the child to be raised in line with a specific religion or belief?

A. The elevated nature and lack of definition of the principle

GC 14¹⁸⁰ and Article 3(1) of the CRC state that the 'best interest of the child' shall be a primary consideration in adjudicating matters concerning the child. In the drafting of Article 3, there was considerable discussion as to whether 'a' or 'the' should be used. In the end, it was recognised that situations would arise where other competing interests would become relevant and that it cannot be the only consideration. However, it should be given considerable weight in decisions affecting the child.¹⁸¹

GC 14¹⁸² and Article 21 of the CRC further qualify this by stating that it is not simply 'a primary consideration' (meaning one of many) but rather that it is 'the paramount consideration' and 'the determining factor when taking decisions on adoption, but also

178 At European level, the CoE Committee of Experts on Family Law also promotes the best interest of the child (Committee of Experts on Family Law (CF-FA), 'Report on Principles Concerning the Establishment and Legal Consequences of Parentage).

179 ACRWC, art. 4.

180 GC 14, paras. 36-37

181 CoE, Commissioner for Human Rights, Thomas Hammarberg, 'The Principle of the Best Interests of the Child – what it means and what it demands from adults', <https://rm.coe.int/16806da95d> [accessed 22 March 2024]; UN Commission on Human Rights (1981) 'Report of the Working Group on a Draft Convention on the Rights of the Child', E/CN.4/L.1575, paras. 22-24.

182 GC 14, par. 38.

on other issues.’ The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) refers to it as ‘the primordial consideration in all cases.’¹⁸³

The principle, therefore, has an elevated nature (carries considerable weight) but is not the only consideration in matters concerning the child.

At the same time, this elevated principle has no clear definition. The principle was agreed upon, but the definition was discussed very little during the drafting of the CRC.¹⁸⁴

According to the Committee on the Rights of the Child, the ‘best interest principle’ is ‘a right, a principle and a rule of procedure’¹⁸⁵ (which is not without controversy as discussed hereafter). The Committee states in GC 14 that the concept is complex and dynamic with continuously evolving issues, and its content must be determined case-by-case.¹⁸⁶ GC 14 provides no further definition or more practical criteria for assessing the ‘best interest of the child’, but rather a framework and guidelines for doing so.¹⁸⁷

As an undefined and indeterminable concept, for purposes of parental rights, it is of great concern *how* ‘the best interest of the child’ is established and *who* determines what it is.

B. Who determines the best interest of the child and what is its scope of application?

The next question regarding this elevated yet undefined principle is who determines the best interest of the child. What is the weight accorded to parental opinions, as primary caretakers of the child and considering parental rights?

183 CEDAW, par. 5.

184 When considering the issues not discussed in the historical drafting of the CRC, what separates issues discussed and issues not discussed is not importance, but rather controversiality. ‘The more controversial an issue, the more it was discussed during the drafting – and the more likely it never found a place in the CRC. In contrast, the more the drafters assumedly agreed on an issue, the less need there was to discuss it, as in the case of best interests.’ (Milka Sormunen (2021) ‘The Best Interest of the Child in Human Rights Practice: an Analysis of Domestic, European and International Jurisprudence’, Doctoral dissertation, Faculty of Law at the University of Helsinki, <https://core.ac.uk/download/pdf/401690694.pdf> [accessed 22 March 2024], 35-37).

185 GC 14, par. 46. Calling the best interest of the child a ‘general principle’ is not without controversy (see Sormunen, ‘The Best Interest of the Child in Human Rights Practice: an Analysis of Domestic, European and International Jurisprudence’, 38-39).

186 GC 14, paras. 1, 2, 11 & 32.

187 *Ibid.*, par. 11.

Answering this question is important as the principle's lack of definition can be an empty vessel within which other concepts can be poured for political purposes.¹⁸⁸

The Committee on the Rights of the Child has recognised that the concept's flexibility opens possibilities for manipulative use¹⁸⁹ in the same manner as interpretations of 'the evolving capacities of the child'. This also opens the door to "capricious decision-making", allowing the decision-maker to impose his or her preferred (non-neutral) values, sometimes disguised as being based on "neutral or scientific data". This can still result in the values of the 'dominant political, cultural or religious group being imposed on those who do not fit the standard pattern, leading to discrimination against those who do not conform'.¹⁹⁰

Such 'capricious decision-making' can also be seen in legal decisions. For example, the ECtHR has determined that the state intervention by the removal of a child is not justified when a child's mother is a 'drug addict'.¹⁹¹ On the contrary, the ECtHR approved state intervention when children were removed from their homes because they were being home-educated.¹⁹²

Agreeing a definition for the 'best interest of the child' has proved impossible. While this is far from ideal, one pragmatic reason it can be managed is to recognize the importance of distinguishing between how it binds parents and how it binds public authorities and welfare institutions dealing with children.

In the drafting of the CRC, the list of bodies obliged by Article 3(1) to take the child's best interest into account was amended several times and the delegates noted the

188 Morales Sancho, *Patria potestad y derechos fundamentales del menor de edad*, 323-324.

189 *Ibid.*, par. 34.

190 Sutherland, 'Article 3 of the United Nations Convention on the Rights of the Child: The Challenges of Vagueness and Priorities', 36-37.

191 *Y.I. v. Russia*, App. No. 68868/14, 25 February 2020. Also see *Kutzner v. Germany* (App. No. 46544/99, 26 February 2002) where intellectual incapacity was not considered a sufficient reason to interfere with parental authority. In the case of *Wallová and Walla v. the Czech Republic* (App. No. 23848/04, 26 October 2006) the lack of proper housing was not considered sufficient to interfere with parental authority. In *A.K. and L. v. Croatia* (App. No. 37956/11, 18 January 2013), mental disability was not enough reason to interfere with parental authority and in *R.M.S. v. Spain* (App. No. 28775/12, 18 June 2013), the financial situation of parents was not a sufficient reason to interfere with parental authority.

192 See *Wunderlich v. Germany*, App. No. 18925/15, 10 January 2019.

difference between public and private bodies.¹⁹³ The ‘imposition of obligations on parents and guardians by an international convention was questioned’ by some and felt by others to provide greater protection.¹⁹⁴ The initial Polish text stated that ‘In all actions concerning children, whether undertaken by their parents, guardians, social or State institutions, and in particular by courts of law and administrative authorities, the best interest of the child shall be the paramount consideration’.¹⁹⁵ The United States then introduced a new paragraph removing the reference to parents and guardians.¹⁹⁶ As a compromise, the proposal of the US delegation was taken as a basis for discussion.¹⁹⁷

As a result, the ‘best interest of the child’ standard applies to the state, public powers and ‘private social welfare institutions’ *only*. Article 3(1) of the CRC means that the state, in its conduct concerning minors, must always conform to the principle and has the burden of proving that it has done so. In fact, except for Article 18(1) of the CRC which refers to parental responsibilities, the other seven references to the ‘best interest of the child’ are addressed to and bind public authorities and private social welfare institutions, not parents.¹⁹⁸

In Europe, Article 24(2) of the CFEU mentions that the best interest of the child is the primary consideration in all matters concerning the child, whether taken by ‘public or private institutions’.¹⁹⁹ At the same time, Article 51 of the CFEU clearly states that the Charter only binds institutions and bodies of the European Union.²⁰⁰ Therefore, Article 24(2) cannot be interpreted as including ‘parents’ within the definition of ‘private institutions’.

193 UN Commission on Human Rights (1981) ‘Report of the Working Group on a Draft Convention on the Rights of the Child’, E/CN.4/L.1575, paras 22-24; United Nations Commission on Human Rights (1988) ‘Report of the Working Group on a draft convention on the rights of the child’, E/CN.4/1988/28, paras 117-126. Also see, Sormunen, ‘The Best Interest of the Child in Human Rights Practice: an Analysis of Domestic, European and International Jurisprudence’, 35.

194 UN Commission on Human Rights, ‘Report of the Working Group on a Draft Convention on the Rights of the Child’, par. 23. Also see, Elaine Sutherland (2016) ‘Article 3 of the United Nations Convention on the Rights of the Child: The Challenges of Vagueness and Priorities’, In: *Implementing Article 3 of the United Nations Convention on the Rights of the Child, Best Interests, Welfare and Well-being*, Elaine Sutherland & Lesley-Anne Barnes MacFarlane (eds.), Cambridge University Press, 21-50. 26.

195 UN Commission on Human Rights (1981) ‘Report of the Working Group on a Draft Convention on the Rights of the Child’, E/CN.4/L.1575, par. 19.

196 *Ibid.*, par. 20.

197 *Ibid.*, par. 22.

198 Morales Sancho, *Patria potestad y derechos fundamentales del menor de edad*, 319-322.

199 Article 4 of the ACRWR includes ‘persons’ within the scope of application of the best interest principle.

200 CFEU, art. 51.

The 'best interest of the child' principle, therefore, binds public powers and private institutions (such as child welfare institutions) and places a burden on proof on them to show that they are acting in the best interests of the child. How should parental rights be viewed considering the 'best interest of the child principle'?

According to Article 18(1) of the CRC the 'best interest of the child' is the 'basic concern' of parents. This principle *guides* parents in exercising their parental rights and responsibilities.²⁰¹ According to Article 3(2) of the CRC, the rights and duties of parents must be considered to ensure child protection and care necessary for the child's well-being. Properly exercising parental rights and responsibilities is essential to realising the child's best interest. In this natural order, parents enable the child's empowerment.

Contrary to Article 3(1), Articles 18(1) and 3(2) do not positively bind parents (as Article 3(1) binds the state) and do not place a burden of proof upon them. Unlike public powers, parents are presumed to conform to and act in the child's best interest without supporting evidence.²⁰² For parents, the best interest of the child is a guiding principle, but not a binding principle. Parents are, therefore, primarily responsible and free to determine what is in the best interest of the child and must be guided by this principle in doing so.

Other aspects of international human rights laws also support such an approach. Article 16 of the CRC states that no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence. This article also protects the parent-child relationship from arbitrary interference from the state and other entities. Furthermore, the family is seen as the fundamental and natural unit of society (as expressly stated in the CRC and Article 23 of the ICCPR), entitled to special protection and support by the state, protected from arbitrary interference from the state or other individuals or entities, and a natural environment for children to grow and develop.²⁰³ This natural environment shielded from arbitrary interference of the state

201 Thomas Hammarberg, 'The Principle of the Best Interests of the Child'.

202 A positive right requires the state to act (Matthias Klatt, 'Positive rights: Who decides? Judicial review in balance', *International Journal of Constitutional Law*, Vol. 13, No 2, 354-382, <https://academic.oup.com/icon/article/13/2/354/735681> [accessed 17 April 2024]).

203 Also see, Adem Arkadas-Thibert & Gerison Lansdown (2022) 'Article 27: The Right to a Standard of Living Adequate for Physical, Mental, Spiritual, Moral, and Social Development', In: *Monitoring State Compliance with the UN Convention on the Rights of the Child: An Analysis of Attributes*, Ziba Vaghri, Jean Zermatten, Gerison Lansdown & Roberta Ruggiero (eds.). Springer, 227-236, 232.

should be acknowledged as the most natural environment to establish the 'best interest of the child'. As stated in US case law, the parents possess what a child lacks in maturity, experience, and capacity for judgment required in life's difficult decisions. The natural bonds of affection lead parents to act in the best interest of the child.²⁰⁴

It is, therefore, natural that parents, as primary caretakers and educators of their children, also have the right and responsibility to establish what is in the best interest of the child on a long-term and day-to-day basis. This should be so without a constant burden of proof and state scrutiny.

Unfortunately, international bodies, in non-binding texts, have incorrectly broadened the application and scope of the 'best interest of the child' principle and Article 3(2) of the CRC in line with current theories overemphasising the autonomy of the child and in a way that places parents under constant state scrutiny.

C. Incorrect application beyond public powers: substantive right and interpretative principle

The Committee on the Rights of the Child, in GC 14, has gradually broadened the interpretation of Article 3(1) of the CRC to include private institutions and parents. This has effectively equated the interpretation of the best interest of the child as determined by the state and the best interest of the child as determined by the parents (even giving the state preference in some instances). This undermines the true purpose of Articles 18(1) and 3(2) of the CRC (respect for the rights of the child and parental rights in public intervention), 4 (obligations assumed by States), 5 (parental guidance to children), 9 (right not to be separated from parents) and 18 CRC (parental responsibilities and State assistance to holders of parental authority).²⁰⁵

The Committee on the Rights of the Child has defined the principle of the 'best interest of the child' as a substantive right in GC 14 (amongst other things).²⁰⁶ When reading Article 3(1) of the CRC ('the best interests of the child shall be a primary consideration') there is no indication that the wording supports the interpretation of the 'best interest

204 *Parham v. J.R.*, 442 U.S. 584 (1979), 602; *Wisconsin v. Yoder*, 406 U.S. 205 (1972), 232.

205 Morales Sancho, *Patria potestad y derechos fundamentales del menor de edad*, 321-322.

206 See Part 4(A).

of the child' as a 'substantive right'.²⁰⁷

Milka Sormunen states that although the Committee has suggested a connection, the relationship between the best interests of the child and the rights of the child, as well as other rights and interests, remains ambiguous and has not been thoroughly studied.²⁰⁸

Besides defining the principle as a 'substantive right', the Committee also defined the principle of the 'best interest of the child' as an interpretative legal principle. However, this is circular as the 'best interest of the child' requires the normative interpretation most favourable to 'the best interests of the child'.

If the definition of what is in the best interest of the child is not known, using it as an interpretive legal principle to maximise the rest of the rights in the CRC will not be possible.²⁰⁹

The Committee's analysis of the 'best interest of the child' principle as a 'substantive right' in GC 14, besides not being supported in Article 3(1), is legally incorrect. As stated by Sormunen, 'taking legal human rights as a starting point and using them as a benchmark does not mean that one should uncritically accept all the views of human rights treaty bodies. The general comments of the CRC Committee and jurisprudence of the ECtHR should be criticised when there is reason to do so instead of treated with an excessive deference.'²¹⁰ Furthermore, the General Comments of the Committee are not binding.²¹¹

The Vienna Convention on the Law of Treaties²¹² enshrines in Article 31(1) that 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

207 Also see Morales Sancho, *Patria potestad y derechos fundamentales del menor de edad*, 322-323. Milka Sormunen agrees that it should be interpreted as a procedural rule and not a substantive right (Milka Sormunen (2020) 'Understanding the Best Interests of the Child as a Procedural Obligation: The Example of the European Court of Human Rights', *Human Rights Law Review*, Vol. 20, No. 4, 745-768). Also see Ursula Kilkelly (2016) 'The Best Interests of the Child: A Gateway to Children's Rights?', in: *Implementing Article 3 of the United Nations Convention on the Rights of the Child Best Interests, Welfare and Well-being*, Elaine E. Sutherland & Lesley-Anne Barnes Macfarlane (eds.). Cambridge University Press.

208 Sormunen, 'The Best Interest of the Child in Human Rights Practice', 22.

209 Morales Sancho, *Patria potestad y derechos fundamentales del menor de edad*, 323.

210 Sormunen, 'The Best Interest of the Child in Human Rights Practice', 55-56.

211 See footnote 69.

212 United Nations, *Vienna Convention on the Law of Treaties*, United Nations, Treaty Series, vol. 1155, p. 331, 23 May 1969, <https://www.refworld.org/legal/agreements/un/1969/en/73676> [accessed 22 March 2024].

Interpreting the principle as a substantive right moves beyond the procedural realm of a principle requiring public powers and private welfare institutions to act in a certain manner, as clearly outlined in the wording of Article 3(1) of the CRC. As a substantive right of the child, and contrary to the wording of Article 3(1), the principle becomes self-enforceable and directly applicable to the state and parents.²¹³

It is not stated that children should not have a say in what is in their best interest or should not have an appropriate degree of autonomy. It is worth noting that in Article 12 of the CRC, the child should be heard in judicial and administrative proceedings affecting the child. Yet, this right does not mean that the child is to determine the outcome of the proceedings. Rather, he or she could participate in the proceedings and be considered in determining what is in his or her best interest, depending on the age and maturity of the child (Art. 13(1)).²¹⁴ However, by elevating the principle to a substantive right, the state and public powers become the arbiters as to whether all other entities (including the parent) are acting in the best interest of the child.

As a result, what is the use of the principle, and can a threshold be established to operationalise it by a third criterion – namely, a ‘principle of procedure’?

D. The legal scope and point of application of the ‘best interest of the child’ principle

The ‘best interest of the child’ remains an important principle due to its prominence in binding international human rights laws and its elevated nature (but not the only consideration) in matters concerning the child. Even so, Article 3(1) of the CRC supports the principle as a rule of procedure (not a right or principle of interpretation) binding the state only.²¹⁵

Firstly, parents remain the primary caretakers and educators of their children. They are the primary determinants of the best interest of the child and are presumed to act in the best interest of the child. This protects parents and children from constant state scrutiny of the parent-child relationship.

213 Paul-Augustin Puscas, ‘The best interests of the child as a material right, as a fundamental interpretive principle and as a rule of procedure’, 6 October 2021, *Juridice*, <https://rlw.juridice.ro/19532/the-best-interests-of-the-child-as-a-material-right-as-a-fundamental-interpretive-principle-and-as-a-rule-of-procedure.html>.

214 Morales Sancho, *Patria potestad y derechos fundamentales del menor de edad*, 325.

215 See for example, Sormunen, ‘Understanding the Best Interests of the Child as a Procedural Obligation’.

Secondly, as it is a procedural rule and not a right, claims relating to alleged violations of the fundamental human rights of the child should be dealt with in the established international human rights laws *of that right* and other rights. For example, where it is argued that a parent has violated the right to freedom of religion or belief of the child, the primary consideration of the matter should be whether that right has been violated and whether such a violation has been proportional,²¹⁶ taking into account all the other rights at play (such as the right of the parent to raise the child in line with their religion or belief). The nature of the proportionality analysis is such that it will consider the relationship between the parent and the child and the fact the child is owed and needs guidance and direction.²¹⁷

If the child's best interest is used when balancing rights, uncertainties arise as to what extent the child's interest should be prioritised over the parents' interest. There are no clear criteria for striking a rights-compliant balance, and this situation risks leading to inconsistent case law (as has already been the case).²¹⁸

Therefore, children's substantive rights should be articulated in terms of their rights not the principle of the 'best interest of the child'. Although the 'best interest of the child' can maximise children's rights, due to conceptual unclarity regarding the concept (also not clarified in GC 14), the principle is operationally unfit for a framework focusing on limiting rights.²¹⁹ If considering best interests means considering relevant rights, it is difficult to see why the best interests provision is needed in the first place.²²⁰

Thirdly, the procedural rule, in accordance with the wording of Article 3(1), binds the state and its organs (legislature, courts of law, administration) as well as private welfare institutions in all its actions towards the child.²²¹ Parents are presumed to act in the child's best interest and do not have to prove this to the state.

As a procedural principle, the procedure that led to an outcome concerning the child is assessed and not the outcome itself.²²² However, this does not mean that rights such

216 See Part 4(D).

217 Sormunen, 'The Best Interest of the Child in Human Rights Practice', 127.

218 Sormunen, 'Understanding the Best Interests of the Child as a Procedural Obligation', 746-747.

219 Sormunen, 'The Best Interest of the Child in Human Rights Practice', 133.

220 Sormunen, 'Understanding the Best Interests of the Child as a Procedural Obligation', 754b.

221 Sutherland, 'Article 3 of the United Nations Convention on the Rights of the Child: The Challenges of Vagueness and Priorities', 33.

222 Sormunen, 'Understanding the Best Interests of the Child as a Procedural Obligation', 754.

as the right to be heard (Article 12 of the CRC) are now subsumed into 'the best interest' principle. Article 12 remains a separate right independent of the 'best interest principle' but is strengthened by it. Therefore, procedural rights held by the child should be separated from the best interest principle which is a 'rule' of procedure and set of procedural criteria supporting and complimenting the substantive and procedural rights of children.

The principle rather asks whether, at every step of the decision-making procedure, the state and its organs acted in the best interest of the child. It is, therefore, not only a principle of application in the court of law but also binds all other state organs in any actions directly or indirectly concerning the child.

The ECtHR, in some of its cases, displayed such a procedural approach. For example, in the case of *Strand Lobben v. Norway*,²²³ the Court stated that the best interest of the child dictates that the child's ties with their family must be maintained, except in cases where the family has proved particularly unfit. Everything must be done to preserve personal relations and, when appropriate, to rebuild the family. It was further outlined that states should put in place practical and effective procedural safeguards for the protection of the best interest of the child and ensure their implementation as found in GC 14.²²⁴ The ECtHR stated that a care order should be regarded as a temporary measure to be discontinued as soon as circumstances permit. It should be consistent with the eventual aim of reuniting the natural parents and their children.²²⁵

In the case of *RMS v. Spain*,²²⁶ the ECtHR also considered the best interest of the child as part of the procedural considerations of the case. It held that the domestic authorities failed to adequately consider substantiation of the reasons given for the removal of the child, did not consider the removal as a temporary measure, and that breaking up of the family must be a measure of last resort.

As a result, existing criminal laws and human rights will determine instances of intervention by the state. When the laws and rights have been applied and balanced, and it is found that the parent's actions have violated the law or the child's rights, every

²²³ *Strand Lobben and Others v. Norway*, App. No. 37283/13, 10 September 2019.

²²⁴ GC 14, paras 85 & 87. See *Strand Lobben v. Norway*, par. 207.

²²⁵ *Strand Lobben v. Norway*, par. 208. The case references the child-friendly procedural safeguards of GC 14 (see par. 136).

²²⁶ App. No. 28775/12, 18 June 2013. Also see *Lazoriva v. Ukraine*, App. No. 6878/14, 17 July 2018.

intervention by the state at that point must be demonstrated as in the child's best interest. In assessing each 'interference,' every action by the state must in the case of the removal of a child from his or her parents, for example, satisfy the following considerations:

- a. Were personal relations with the family preserved?
- b. Was the order of removal a temporary measure to be discontinued as soon as circumstances permit?
- c. Was the removal order done as a last resort?
- d. Was substantial evidence given for the removal?
- e. Was the eventual aim of reuniting the parents and the child pursued?

E. Conclusion

The 'best interest of the child' principle is one of the most prominent in binding international human rights laws and is elevated to the 'paramount consideration' in matters involving the child.

At the same time, the principle is undefined and indefinite. This leads to the possibility that it can be used as an empty vessel to introduce various ideological conceptions of what is in the 'best interest of the child' in contradiction with parental rights. As it is impossible to define the principle, it is, for purposes of parental rights, important to map how and against whom the principle applies.

Article 3(1) of the Convention on the Rights of the Child (CRC) states that the best interest of the child principle binds public powers and private welfare institutions.

On the contrary, the wording of Articles 18(1) and 3(2) of the CRC shows that the 'best interest of the child' is a guiding but not a binding principle concerning parents.

Yet, the Committee on the Rights of the Child has interpreted (in non-binding comments) the principle as more expansive than the binding text in the CRC. It has interpreted it as a 'substantive right', a principle of interpretation and procedural rule.

As such, this causes an expansive interpretation of the principle and applies to parents

and public powers. Such an interpretation contradicts binding international human rights laws and will cause extensive and unjustified state scrutiny of the parent-child relationship.

In line with Articles 18(1) and 3(2) of the CRC, the principle is not legally binding against parents but is a binding procedural rule against the state (at most).

Claims relating to alleged violations of the child's fundamental human rights should first and foremost be dealt with in the established international human rights laws of *that right* and other rights.

As a procedural rule binding public powers and private social welfare institutions, the principle of the best interest of the child should be distinct from procedural rights. Rights such as the right to be heard (Article 12 of the CRC) are not subsumed into principle. Article 12 remains a separate right but is strengthened and complemented by it.

The principle asks whether, at every step of the decision-making procedure, the state and its organs acted in the child's best interest. It is, therefore, not only a principle of application in the court of law but also binds all other state organs and private welfare institutions. In short, it should be the measure of *how* states intervene rather than grounds to justify intervention in the first place.

The principle of the 'best interest of the child' is a guiding principle for parents and should not be used by the state to usurp parental rights and subject the parent-child relationship to constant state scrutiny.

5) Summary of the scope and content of parental rights

Parental rights are not a 'conservative idea' but rather an inherent and fundamental human right strongly established and supported in binding international and regional human rights laws. Parental rights are natural rights existing before law and politics and not granted by national or supranational structures. Parental rights also exist because children have rights and needs from which parental responsibilities emanate. The performance of such responsibilities requires parental rights. Additionally, the biological relationship that exists between parents and children (and not diminishing the relationship between adopted children and their adoptive parents) gives parents a non-fungible duty to care for and raise children from birth to adulthood.

Children's rights are not the only source of parental rights. Parental rights also exist due to the inherent dignity of parents as human beings. The principle of subsidiarity, present in international human rights instruments, confirms this by emphasising that respect for the human dignity of parents and children also requires respecting the integrity of the groups within which they function (the family).

One essential way parents must exercise their rights and fulfil their duties is by educating their children – whether in or outside of a school setting. International human rights law confirms and supports parents' right to raise and educate their children according to their religion or belief. The state does not have a monopoly on the education of children. 'Common standards of achievement' for education set out in international human rights treaties are not declarations of state-controlled education but should be read considering their historical purposes – to prevent the atrocities of the type of education systems employed during Nazi Germany. Parents remain the primary educators of their children, and the state plays a subsidiary yet active role in providing and allowing for alternatives in education.

From this, it follows that parents have the right to raise and educate their children in line with their religion or beliefs, firmly established in international and regional legal systems. Current legal jurisprudence establishes this as a negative obligation on the state to allow parents to set up alternative forms of education at their own cost. In other words, the state does not have to set up alternative forms of education but should refrain from interfering with the rights of parents to do so. However, it has been argued that the state also has positive obligations under international human rights law. The

state's subsidiary role in funding and beyond cannot only be reserved for parents who raise their children in line with secular belief systems in state schools with a secular ethos. Additionally, only parents of a certain socio-economic status will be able to realise their right to educate their children in line with their religion or belief. This could amount to discrimination against and a violation of the rights of parents and children based on the grounds of religion or belief and socio-economic status. The state's subsidiary and supportive role should be applied equally without usurping parental rights.

Even so, parents' right to educate and raise their children in line with their religion or belief will sometimes contradict the wishes, claims and rights of their children. Children's rights are first and foremost held against the state and public powers (positively binding the state and public powers) and only negatively against parents.

This is also true for principles such as 'the evolving capacities of the child' and 'the best interest of the child'. Both principles positively bind the state. Parents are assumed to act in accordance with and to know the best interests of the child and the 'evolving capacities of the child'. Both principles act as guiding principles for parents when exercising their parental rights and responsibilities, but do not bind them positively and do not place them under constant state scrutiny.

When there is a conflict between parents' rights and the rights of their children or a violation of the rights of a child as such, this should be dealt with under international human rights norms and treaties. The principle of the 'best interest of the child' does not somehow subsume this process.

When the laws and rights have been applied and balanced, and it is found that the parents' actions have violated the law or the child's rights, every interference by the state at that point must be justified as in the best interest of the child.

Unwarranted state interventions in parental rights, especially using principles such as the 'evolving capacities of the child' and the 'child's best interests' can be seen as symptomatic of dominant liberal theories' overemphasis on autonomy in general and the child's autonomy specifically. The individual is seen as holding individual rights within and against the family, from which flows the assumption that conflicts between individuals within a family should be settled by and subjected to an external set of standards (human rights) as enforced by an external arbiter (the state).

It is important to apply the established legal principles and basic norms constituting parental rights to prominent current-day challenges to parental rights.

6) Practical challenges to the fundamental human rights of parents

Even though parents are their children's primary caretakers and authority, in practice, they have not been treated as such. Schools, states and even international institutions have challenged and violated parental rights. For example, treaty monitoring bodies within the UN have interpreted international human rights law in ways increasingly removed from its original and legally correct interpretation.

This is due to the increasing overemphasis on the child's autonomy being separate from that of parents, family, and community. The position of the family and parents as the primary caring environment for the child has been steadily eradicated. Parents risk becoming entities of distrust to be reprimanded and monitored by the state. Principles such as the 'best interest of the child' and the 'evolving capacity of the child' are incorrectly defined and applied by the state against parents. This results in a state-child relationship replacing the relationship between the parent and the child.

This has been increasingly clear in areas concerning the curriculum of schools (and 'opt-outs/ins'), sexuality education, challenges to home education and the 'gender transitioning' of children.

A. School curricula and opt-out/in clauses

An understanding of parental rights, which flows from parents being their children's primary caretakers and educators, will require more than the occasional 'accommodation' of parents' wishes concerning their children's education – inside and outside the school. Hence, 'educational freedom and parental control over education are not the exception, but the rule'.²²⁷

Compulsory state education, built on the premise that parents have the primary authority over their children's education, will, in all matters, work towards supporting and complimenting this position. One way of doing so will be for states to 'attempt to

227 Henríquez, 'Parental Rights in Education in European Jurisprudence', 348.

find common ground that makes educational content acceptable to all'. Thus, an 'overlapping consensus...over educational content should be sought out'.²²⁸ The general state prescriptions of what a curriculum should look like must be minimal. Very detailed standards will reduce parental discretion (and school autonomy) on education to almost nothing.²²⁹

In a genuine pursuit of such overlapping consensus, an 'accommodation' using 'opt-outs/ins'²³⁰ will be a last resort to protect parental rights as an integral part of the child's right to education and the parent's right to raise their children in line with their own religion or belief.

Even in cases where state-imposed educational standards are minimised, and there are high levels of agreement on the school curriculum, there can still be parental objections. In such cases, when there has been an attempt in good faith towards achieving the greatest amount of unity regarding a school curriculum, exemptions and 'opt-outs/ins' should be used to provide for those parents who might still object to the curriculum.

Subjects such as religious education (given factually about different religions), religious instruction (given in a confessional manner in one specific religion or belief) and sexuality education generally prove to be the subjects where opt-out/in clauses are requested.

GC 22²³¹ states that factual subjects about religion given 'neutrally and objective' can be compulsory but not confessional religious instruction, 'unless provision is made for non-discriminatory exemptions or alternatives...'. The Report of the former UN Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, confirms this by stating that confessional religious instruction can be allowed, subject to opt-out clauses.²³² Also, the threshold to obtain an opt-out should not be high and not lead to any punitive consequences for the child or influence his or her general performance in school.²³³

228 *Ibid.*, 354.

229 Moreira, *Parental authority in children's education: rationale and limits*. How to balance curriculum freedom and regulation is still an open question, with different solutions adopted by each nation. See Wilmad Kuiper & Jan Berkvens (eds.) (2013) *Balancing curriculum regulation and freedom across Europe*. CIDREE Yearbook, SLO Enschede: The Netherlands.

230 An 'opt-in' is when parents and children may choose whether or not to take a specific curriculum subject. An opt-out is when curriculum subjects are compulsory, but a parent (or child) requests an exemption.

231 GC 22, par. 6.

232 UNGA, Heiner Bielefeldt, Report of the Special Rapporteur on freedom of religion or belief, A/HRC/16/53, 15 December 2010, paras. 47-56.

233 UNHRC, *Elimination of all forms of religious intolerance: note by the Secretary General*, par. 79(h).

However, it is important that, as a starting point, a high level of overlapping consensus is sought as no subject will be completely neutral. The *Toledo Guiding Principles on teaching about religions and beliefs in public schools*²³⁴ highlights that in ‘a strict sense, no course – whether on religion or on any other subject – is absolutely neutral or objective. Rather, there is a spectrum of possibilities. The more religiously doctrinal or philosophically oriented the subject and teaching context, the more possibilities there are for conflict with the rights of parents or guardians...’²³⁵ It is, therefore, essential for the state to seek to impart, in good faith and honesty, a general curriculum with a high level of overlapping consensus.

For those subjects that are more politically oriented, religiously doctrinal or morally/ethically sensitive, for example, confessional religious instruction, opt-out clauses should be allowed. Yet, even if some courses have a higher propensity to require opt-outs/ins, any curriculum course can potentially be infused with content that lies on the more ‘overlapping/agreed’ side of the spectrum and content that is pure opinion or ideology. For example, the course ‘citizenship education’ can inculcate the values and attitudes necessary for good citizenship, like honesty and solidarity. There will probably be a high amount of agreement on these two values. However, should ‘citizenship education’ become a way to transform society according to a specific worldview such ‘overlapping consensus’ will be lacking. In such instances, schools, educators and state agents could be held legally liable as it results in a violation of the rights of parents.

The ECtHR decisions on opt-outs/ins have been haphazard and superficial. In *Konrad v. Germany*²³⁶, parents wanted to home-educate their children on account of their objection to sexuality education, the telling of fairytales containing mythical creatures (such as witches and dwarfs), and the rise of violence in state schools. The Court decided that the goal of social integration was a legitimate aim by the state to prevent home education and, in doing so, did not consider parental rights in Article 2 of Protocol No. 1 of the ECHR. The state’s presumption that its sexual education curriculum was adequately critical, pluralistic, and objective was without a critical assessment of its

234 These *Guiding Principles* have been prepared by the OSCE’s ODIHR ‘Advisory Council on Experts on Freedom of Religion or Belief’. They offer practical guidance and assistance in preparing curricula for teaching about religions and beliefs. They do not propose a specific curriculum or approach (OSCE, *Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools*, <https://www.osce.org/files/f/documents/c/e/29154.pdf> [accessed 22 March 2024]).

235 *Ibid.*, 69.

236 *Konrad v. Germany*, App. No. 35504/03, 11 September 2006.

contents. The Court took the state's word for it. The case was declared inadmissible but failed to consider a proper proportionality analysis of the restriction of parental rights presuming that the aim of 'social integration' was a proportional limitation to the rights of parents. As stated above,²³⁷ the requirement of proportionality in the limitation of human rights requires states to find the least restrictive answer in a conflict. It also requires the grounds of limitation to be strictly interpreted.

In the case of *Osmanoğlu and Kocabaş v Switzerland*²³⁸ the Court refused to grant exemptions to parents who wished for their daughters not to be exposed to mixed swimming lessons with boys during school hours due to their sense of modesty emanating from their Islamic religion. The exemption was denied by the state, based on the argument that they needed to socially integrate into society (as in the case of *Konrad*). The Swiss government argued that the girls needed to learn how to handle the aspect of social life where they would see scantily covered bodies of the opposite sex.²³⁹

Both cases represent instances where specific worldviews are taught on sexuality, and societal participation under the guise of 'social integration'.²⁴⁰ 'Social integration' is inherently non-neutral as it requires transformation and changes into a set of social values sometimes at odds with the values of those required to integrate socially.

On the contrary, the ECtHR, in the case of *Folgerø and Others v. Norway*,²⁴¹ decided that there was a violation of Article 2 of Protocol No. 1 of the ECHR. The parents, who were members of the Norwegian Humanist Association, sought an exemption from the state's compulsory subject called 'Christianity, Religion and Philosophy' in public/state schools. They argued that the compulsory attendance of this course violated their parental rights under Article 2 of Protocol No. 1 of the ECHR.²⁴²

Similarly, in the case of *Hasan and Eylem Zengin v. Turkey*,²⁴³ the ECtHR correctly stated that there was a violation of Article 2 of Protocol No. 1. This was because Islamic education was not pluralistic, objective, and critical and, as a result, the students of the Alevi faith could be exempted.

237 See Part 4(D).

238 *Osmanoğlu and Kocabaş v. Switzerland*, App. No. 29086/12, 10 January 2017.

239 *Ibid.*, par. 77.

240 See the cases *Dojan and Others v. Germany* (dec.), App. Nos. 319/08, 2455/08, 7908/10 et al. 13 September 2011 & *Jiménez Alonso and Jiménez Merino v. Spain* (dec.), App. No. 51188/99, 25 May 2000.

241 *Folgerø and Others v. Norway*, App. No. 15472/02, 29 June 2007 (Grand Chamber).

242 *Ibid.*, par. 101.

243 App. No. 1448/04, 9 October 2007, par. 64.

International and regional legal systems agree that opt-out clauses must be possible. However, the ECtHR has not been consistent in its application of these requirements. The ECtHR was more inclined to assess curriculum and allow for opt-outs in cases of religious education (*Folgerø* and *Hasan*) than in cases where liberal or secular moral values were transferred (*Dojan* and *Osmanoğlu*).

It is also increasingly problematic that controversial non-neutral assumptions concerning sexuality are integrated into entire curriculums. For example, a mathematics book might include an arithmetical problem stating ‘two mothers and their child enter a supermarket to buy 5 cans of food. They put three back on the shelves...how many left?’ The conscious choice to use mathematics as a vehicle for linguistic priming and socialisation is not a new phenomenon and it is reminiscent of the ‘integrated instruction’ proposed during Nazi Germany for the dissemination of ideology in schools.²⁴⁴ This aims to instil in students familiarity, acceptance, and approval of the views and positions of those in power to determine the content of education. This deliberately strays from attempting to achieve, in good faith, educational content with the highest amount of overlapping consensus.

A compulsory state curriculum filled with contested and ideologically infused content is a violation of the rights of parents to be the primary educators of their children and raise them in line with their religion or belief. It is also a monopolisation of the education of children by the state which is contrary to international human rights law.²⁴⁵

B. Comprehensive sexuality education

The pressure on parental rights through implementing CSE has been severe. UN entities have promoted this specific form of sexuality education.²⁴⁶ It is described as a ‘rights-based and gender-transformative approach’ containing specific elements about sexual and reproductive health.²⁴⁷ This form of sexual education has also affected regional human rights systems.

244 Lisa Pine (2010) *Education in Nazi Germany*. Bloomsbury Books, 66.

245 See Part 3(A).

246 The notion ‘sexual education’ refers to all forms of sexual education described whereas CSE refers to the specific curricula on sexual education promoted by the United Nations and other regional human rights systems.

247 United Nations Population Fund (UNFPA), ‘Comprehensive Sexuality Education’, <https://www.unfpa.org/comprehensive-sexuality-education#readmore-expand> [accessed 22 March 2024].

The 'International Technical Guidance of Sexuality Education' (ITGSE) is the first consolidated guideline on CSE at the international level.²⁴⁸ The ITGSE was primarily developed by the World Health Organization (WHO) in partnership with UNESCO,²⁴⁹ UNAIDS,²⁵⁰ UNICEF,²⁵¹ UNFPA²⁵² and UN Women,²⁵³ with inputs from NGOs including the International Planned Parenthood Federation (IPPF)²⁵⁴ and Rutgers²⁵⁵. The ITGSE claims to be an 'evidence-informed approach' but, in the same document, acknowledges the shortcomings of the evidence – namely, that accurately 'assessing the effectiveness of different components is complicated by a lack of reporting' and 'inherent biases affect the publication of studies'.²⁵⁶

The ITGSE promotes diverse sexual practices, sexual orientations, and gender ideology. It states that abstinence education is ineffective.²⁵⁷ It also promotes the idea that 'there are different family structures and concepts of marriage'.²⁵⁸ The ITGSE challenges children as young as nine to 'reflect on social, cultural and religious beliefs that impact on how they view gender roles,' and instruct teachers to explain to children of the same age 'how someone's gender identity may not match their biological sex'.²⁵⁹ Fifteen-year-old children are to be taught to advocate for laws that allegedly support human rights that impact sexual and reproductive health.²⁶⁰ It further encourages children to 'question social and cultural norms that impact sexual behaviour in society'.²⁶¹

This form of CSE has been promoted as a 'right of the child' (in his or her 'best interest') placing an 'obligation' upon states to make CSE compulsory in schools. However, none of the core international human rights instruments adopted at the UN level contain

248 UNESCO (2018) 'International Technical Guidance on Sexuality Education' (ITGSE), <https://www.unfpa.org/sites/default/files/pub-pdf/ITGSE.pdf> [accessed 22 March 2024].

249 United Nations Educational, Scientific and Cultural Organization, <https://www.unesco.org/en>.

250 United Nations Programme on HIV and AIDS, <https://www.unaids.org/en>.

251 United Nations Children's Fund, <https://www.unicef.org/>.

252 United Nations Population Fund, <https://www.unfpa.org/>.

253 United Nations Entity for Gender Equality and the Empowerment of Women, <https://www.unwomen.org/en>.

254 IPPF describes itself as a global healthcare provider and a leading advocate of sexual and reproductive health and rights for all and offers CSE as one of its programmes (IPPF, <https://www.ippf.org/about-us> [accessed 22 March 2024]).

255 Rutgers works on sexual and reproductive health rights and promotes abortion as a 'right' as well as CSE (Rutgers, <https://rutgers.nl/> [accessed on 22 March 2024]).

256 ITGSE, 31. The ITGSE was not the result of intergovernmental negotiation, and it has never enjoyed the endorsement of the member states.

257 *Ibid.*, 29.

258 *Ibid.*, 38 & 43.

259 *Ibid.*, 50.

260 *Ibid.*, 47.

261 *Ibid.*, 48 & 70.

language pointing to a 'right' to CSE. The CRC and ICESCR have codified the 'right to education' and the 'right to the enjoyment of the highest attainable standard of physical and mental health' in international law.²⁶² CEDAW provides that women must 'have access to the information, education and means'²⁶³ but does not require the specific implementation of CSE to achieve this.²⁶⁴

Some UN human rights treaty monitoring bodies (TMBs)²⁶⁵ have incorrectly recommended that states implement CSE as part of their obligations under the respective treaties.²⁶⁶ The Committee on the Rights of the Child states that family planning services should be situated within comprehensive sexual and reproductive health services and should encompass sexuality education.²⁶⁷ Such treaty interpretations of TMBs are not authoritative and fall outside their mandate's scope.

Studies on guidance documents from the Committee, like that done by Sylvie Langlaude,²⁶⁸ show that, rather than providing guidance, making recommendations, and clarifying the reporting duties of state parties, committees like the CRC Committee, have been used to arbitrarily alter the scope of the treaty rights and the corresponding

262 CRC, arts. 24 & 28 and ICESCR, arts. 12-13.

263 *Ibid.*, art. 16(e).

264 There is also the Programme of Action of the International Conference on Population and Development (PoA-ICPD, 5-13 September 1994, https://www.unfpa.org/sites/default/files/pub-pdf/programme_of_action_Web%20ENGLISH.pdf [accessed 22 March 2024]). It outlines the commitments of states regarding reproductive health. It is not binding but is widely regarded as the most relevant and authoritative political document on Population and Development. However, the PoA-ICPD does not create any new international human rights (*Ibid.*, par. 1.15.).

265 These are 'independent experts' committees that monitor the implementation of core international human rights treaties (ICCPR, art. 40).

266 For example, the former Special Rapporteur on the right to education, Vernor Muñoz and the members of the UN Working Group on Discrimination Against Women and Girls (UN General Assembly, Vernor Muñoz, Report of the United Nations Special Rapporteur on the Rights to Education, A/65/162, 23 July 2010, https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UNSR_Sexual_Education_2010.pdf [accessed 22 March 2024]; Working Group on discrimination against women and girls, 'Women's and girls' sexual and reproductive health rights in crisis', A/HRC/47/38, 28 April 2021, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/096/69/PDF/G2109669.pdf?OpenElement> [accessed 22 March 2024]; UN Committee on the Rights of the Child (CRC), *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, CRC/C/GC/20, 6 December 2016, <https://www.refworld.org/legal/general/crc/2016/en/115419> [accessed 22 March 2024]; UN Committee on Economic Social and Cultural Rights, *General comment No. 22 (2016) on the right to sexual and reproductive health*, 2 May 2016, E/C.12/GC/22, <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-22-2016-right-sexual-and> [accessed 22 March 2024]).

267 For example, Committee on the Rights of the Child, *General comment No. 15 right of the child to the enjoyment of the highest attainable standard of health (art. 24)*, CRC/C/GC/15, 17 April 2013, <https://www.refworld.org/legal/general/crc/2013/en/96127> [accessed 22 March 2024] & *General comment No. 3: HIV/AIDS and the Rights of the Child*, CRC/GC/2003/3, 17 March 2003, <https://www.refworld.org/legal/general/crc/2003/en/18233> [accessed 22 March 2024].

268 Langlaude, *The Right of the Child to Religious Freedom in International Law*.

obligations of states parties, in violation of the very same instruments that established them. As treaty bodies began reviewing their rules of procedures, they also arrogated the authority to issue, under the guise of 'general comments', revisionist interpretations of treaty provisions, based on increasingly specific, ideological, and intrusive concluding observations. A 'right' to CSE is promoted. However, no such 'right' can be found in international law and cannot be inferred from an ordinary reading of the text in accordance with the general rules of interpretations contained in the Vienna Convention on the Law of Treaties (as explained above).²⁶⁹

In Europe, Article 6(e) of the Treaty on the Functioning of the European Union (TFEU) confirms that the EU only has the competence to carry out actions to support and supplement member state actions when it concerns education.²⁷⁰ Education, and therefore any kind of sexuality education, falls within the national competence of the states. The EU cannot enforce an EU-wide format of sexual education. Yet, the same form of CSE is promoted in Europe through the WHO *Standards for Sexuality Education in Europe*²⁷¹ and pressure is placed on EU Member States to implement it. For example, The Gender Equality Strategy 2020-2025²⁷² mentions the importance of relevant education in this regard and the European Parliament has reiterated the expectation that all Member States adhere to WHO's Standards for sexuality education in Europe.²⁷³

The EU has also placed pressure on other countries to implement CSE. The Partnership Agreement between the EU and the members of the Organisation of African, Caribbean and Pacific States (OACPS), the EU-OACPS Partnership Agreement,²⁷⁴ is an example of

269 Vienna Convention on the Law of Treaties, art. 31. See Part 4(C).

270 Conference of the Representatives of the Governments of the Member States, *Consolidated version of the Treaty on the Functioning of the European Union*, OJ L. 326/47-326/390; 26.10.2012, European Union, 26 October 2012, <https://www.refworld.org/legal/agreements/eu/2012/en/122600> [accessed 21 March 2024].

271 WHO Regional Office for Europe (2010) 'Standards for Sexuality Education in Europe. A framework for policy makers, educational and health authorities and specialists', <https://www.icmec.org/wp-content/uploads/2016/06/WHOStandards-for-Sexuality-Education-in-Europe.pdf> [accessed 22 March 2024].

272 European Commission (2020) 'A Union of Equality: Gender Equality Strategy 2020–2025', <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0152> [accessed 22 March 2024].

273 European Parliament (2019) 'European Parliament resolution of 14 November 2019 on the criminalisation of sexual education in Poland', https://www.europarl.europa.eu/doceo/document/TA-9-2019-0058_EN.html [accessed 22 March 2024].

274 Implicitly promoting CSE programmes and the mainstreaming of gender equality, the Agreement plans to commit states to coordinate negotiating positions in international fora such as the UN (European Commission, 'Partnership Agreement between the European Union and its Member States, of the one part, and the Members of the Organisation of the African, Caribbean and Pacific States, of the other part' (Samoa Agreement), 19 July 2023, <https://data.consilium.europa.eu/doc/document/ST-8372-2023-REV-1/en/pdf> [accessed 22 March 2024], for example, art. 2, principle 5 & art. 7(1)).

this. It covers many thematic areas including peace and security, sustainable development, migration, and human rights.²⁷⁵ Under the guise of advancing gender equality and women empowerment, the document includes language on ‘sexual and reproductive health and rights’ and the implicit promotion of CSE programs.²⁷⁶ The treaty moves far beyond relevant consensus-based, intergovernmental negotiated agreements at the international level, and threatens to undermine national sovereignty on these critical issues. The EU-OACPS Partnership Agreement Protocol commits states to ‘stress the need for universal access to quality and affordable comprehensive sexual and reproductive health information and education’.²⁷⁷ The Pacific Regional Protocol similarly calls on states to ‘enact policies and design programmes’, including ‘sexual education programmes’.²⁷⁸ All three Protocols of the Agreement refer to the ITGSE as a reference for implementing these provisions.

CSE, and the ideologies and values it transfers, has therefore been a major challenge to parental rights, especially when promoted as a compulsory part of the state school curriculum.

At the level of the Council of Europe, the teaching of sexuality education has been restricted to some extent but also decided haphazardly. In the ECtHR case of *Kjeldsen, Busk Madsen and Pedersen v. Denmark*,²⁷⁹ three couples with children of school age objected to integrated and compulsory sexuality education as introduced in state primary schools in Denmark. All the parents indicated that it was contrary to their beliefs as Christians and constituted a violation of Article 2 of Protocol 1 of the ECHR. Although not finding in favour of the parents, the ECtHR did make it clear that ‘information or knowledge’ should be 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.²⁸⁰

275 Negotiations on the Agreement began in September 2018 and formally concluded on 15 April 2021 (European Commission ‘Post-Cotonou negotiations on new EU/Africa-Caribbean-Pacific Partnership Agreement concluded’, 15 April 2021, https://ec.europa.eu/commission/presscorner/detail/en/IP_21_1552 [accessed 22 March 2024]).

276 EU-OACPS Partnership Agreement, art. 40(6).

277 EU-OACPS Partnership Agreement, Africa Regional Protocol, art. 40.6 & EU-OACPS Partnership Agreement, Caribbean Regional Protocol, art. 48.7.

278 EU-OACPS Partnership Agreement, Pacific Regional Protocol, art. 49.6.

279 App. nos. 5095/71; 5920/72; 5926/72, 7 December 1976, European Court of Human Rights, <https://hudoc.echr.coe.int/fre?i=001-57509>.

280 *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, paras. 50-55.

In the case of *AR and LR v. Switzerland*,²⁸¹ the ECtHR stated that there was no violation of parental rights should a child in kindergarten not be exempted from sexuality education. However, the Court stated that the classes were not systematic and that teachers had to confine themselves to ‘reacting to children’s questions and actions’.

In the case of *Jiménez and Jiménez Merino v. Spain*,²⁸² a father brought a case against Spain because the state school had included compulsory study of contents on sexuality contrary to their moral and religious convictions. Because of this, the father decided that his daughter would not attend classes on the subject matter. The daughter, supported by her father, did not attend the classes in question for which she was failed in her examinations and forced to repeat the school year. Although the ECtHR declared the case inadmissible, it argued that the information in the booklets was objective and scientific and could be construed as being of general interest (and not an attempt at indoctrination). The ECtHR also stated that parents had the right to establish schools and could enrol their children within a wide network of private schools. The Court did not engage in a review of the actual content of the course, nor on how it was applied in practice.

There are several problems with the created standard of interference, namely, ‘indoctrination’ (which is not mentioned in GC 22). Firstly, the ECtHR, in the case of *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, introduced a standard that is not part of the ECHR. The ECHR does not provide any criteria for when parental rights are upheld in the school curriculum. It does not state that parental rights are upheld if controversial educational content is given in an ‘objective, critical and pluralistic manner’. As for the requirement 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’.²⁸³ Nothing in the treaty text justifies the interpretation of ‘any interference’ to be restricted only to cases of ‘indoctrination’.²⁸⁴

The indoctrination standard is not only subjective, but also surreptitiously shifts the burden of proof, and an impossible one, to parents. Parents are presumed to be

281 App. No. 22338/15, 18 January 2018.

282 *Jiménez Alonso and Jiménez Merino v. Spain* (dec.), App. No. 51188/99, 25 May 2000. Also see Henríquez, ‘Parental Rights in Education in European Jurisprudence’, 365.

283 Henríquez, ‘Parental Rights in Education in European Jurisprudence’, 362.

284 *Ibid.*

their children's primary caretakers and educators, acting in their best interests. They do not have to prove this. Instead of enjoying this primary right to educate their children, the newly introduced standard of 'indoctrination' now asks parents to demonstrate the maliciousness of the state's compulsory education mandates. This incorrectly shifts the burden of proof to parents to prove their rights.

Not only is this shift a significant limitation of parental rights, but it is also an insurmountable task. If an entire government has agreed upon a compulsory curriculum as being 'objective' and not leading to indoctrination (based on the values held by that government), the chances are that they will not heed the claims of indoctrination of individual parents, especially if those claims run against the dominant values supported by the state. A good example of this is CSE. For parents of many religions and beliefs, CSE, as proposed in the ITGSE, will not amount to education that is objective, critical, and pluralistic, thus qualifying as indoctrination. However, in several countries, the dominant subjective values supported by the state regarding CSE will not heed the claims of indoctrination made by individual parents.

Also, contrary to the case of *Jiménez*, the possibility for parents to establish private schools does not absolve the state from protecting parental rights and upholding pluralism in schools – also when it concerns CSE.

None of the core international human rights instruments contain language pointing to a 'right' to sexual education. There is also no obligation to provide one specific form of sex education. At the same time, UN human rights treaty monitoring bodies have illegitimately recommended that states implement CSE as part of their obligations under the respective treaties. Yet, such treaty interpretations by treaty monitoring bodies are not authoritative and fall outside their mandate's scope.

Regarding the European legal framework on sexual education, similar pressures to those within the UN framework are present and imposed on EU states, and, by the EU, on other countries. Furthermore, the ECtHR has stated that sexual education cannot be indoctrinating and should be taught in an objective and pluralistic form. However, the threshold of 'indoctrination' is open to interpretation because of its subjective nature and shifts the burden of proof to parents to defend their natural rights as parents against the state.

CSE has infiltrated international, regional, and national legal systems and there is pressure on national governments to implement it and parents and children to accept it. This violates the national sovereignty of states in establishing their education systems in line with their own religious, cultural, and political sensitivities. It is also a direct affront to the rights of parents as primary caretakers and educators of their children. It denies the primary authority of parents to direct the sexual education of their children and to educate the child in line with their own religion or belief. It also demands proof from parents that they are best situated to make decisions on the sexual education of their children. The state, instead of the parents, becomes the main determinant regarding the best interests of the child concerning matters of sexuality. The child is subjected to a one-size-fits-all state-sanctioned scheme of age categories, excluding parental guidance. This amounts to a direct violation of Article 14(2) of the CRC, which states that parents, in accordance with the 'evolving capacities of the child', should 'provide direction to the child'.

The reach of CSE and the role it has played in the formation of gender ideologies should not be underestimated. As is evident from the extensive coverage of 'gender' aspects in the ITGSE, the promotion of CSE includes and exacerbates the parallel promotion of gender ideologies. These ideologies dispute the binary and biological construct of sex as male and female and provide support for the 'gender transitioning' of children, very often in violation of the fundamental rights of parents.

C. 'Gender transitioning' of children and parental rights

Amidst the unprecedented rise in the number of children seeking to undergo 'gender transitioning'²⁸⁵ and the 'increasingly toxic, ideological and polarised public debate'²⁸⁶ on the issue, one of the most egregious violations of parental (and children's) rights is occurring.

Parents are being denied their rights as primary caretakers and educators of their children in cases where children want to undergo (often with the encouragement of state agents and against the wishes of their parents) invasive procedures that will change their physical appearance because their 'experienced gender' does not match

285 Cass Review, 'Independent Review of Gender Identity Services for Children and Young People', 2024, <https://cass.independent-review.uk/home/publications/final-report/> [accessed 23 April 2024], page 22, par. 14.

286 Cass Review, page 20, par. 2.

their biological sex.²⁸⁷

Not only are parents being denied these most fundamental rights, but they are also being deceived and isolated from their children.

In Scotland, for example, legislative proposals were published on 9 January 2024, that would potentially criminalise any actions by parents that are ‘controlling’ (meaning, for example, preventing the child from dressing in clothes of the opposite sex) or ‘pressuring’ a child to ‘act in a particular way’ when it comes to gender identity, causing ‘fear, alarm, and distress’.²⁸⁸

At the level of international law, the Special Rapporteur on the Right to Privacy, in his non-binding Report states that parents can infringe the privacy rights of children through the denial of reproductive sexual information and mandatory parental consent as well as ‘the withholding of specific health services, including trans health-care and reproductive sexual information and services’.²⁸⁹

The medical pathways of ‘gender transitioning’ have included ‘social affirmation’ – changing one’s names and pronouns, ‘legal affirmation’ – changing gender markers on government-issued documents, ‘medical affirmation’ – puberty blockers or cross-sex hormones and ‘surgical affirmation’ (not recommended for prepubertal children) – vaginoplasty, facial surgery, breast augmentation, masculine chest construction and so forth.²⁹⁰ These procedures are, therefore, highly invasive and life-changing and the evidence suggests that one domain of ‘affirmation’ often leads to another.

This model of ‘affirmation’, as described above, has been highly problematic for parental rights and heavily contested. This linear and simplistic ‘affirmation’ model has also been rejected in the Cass Review (the leading and most comprehensive study on the

287 The WHO refers to ‘gender incongruence’ and calls it ‘a marked and persistent incongruence between an individual’s experienced gender and the assigned sex, which often leads to a desire to ‘transition’...through hormonal treatment, surgery or other health care services...’ (WHO, ‘Gender incongruence and transgender health in the ICD’, <https://www.who.int/standards/classifications/frequently-asked-questions/gender-incongruence-and-transgender-health-in-the-icd> [accessed 22 March 2024].

288 Scottish Government, ‘Ending conversion practices in Scotland: consultation’, 9 January 2024, <https://www.gov.scot/publications/ending-conversion-practices-scotland-scottish-government-consultation/pages/9/> [accessed 22 March 2024].

289 Cannataci, ‘Artificial intelligence & privacy, and children’s privacy’, par. 83.

290 American Psychiatric Association, ‘What is Gender Dysphoria?’, <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> [accessed 2 May 2024].

'gender transitioning' of children).²⁹¹ Parents who refuse to follow such an 'affirmation' model when they are confronted by their children who wish to 'transition' to a different gender have faced great pressure and emerging laws like the one promoted in Scotland. In some instances, children started this model of 'affirmation' in order to 'transition' without (or against) the consent or knowledge of their parents, but with the knowledge of the school.²⁹²

Not only is the model simplistic and linear, but the entire notion of 'gender transitioning' is controversial and scientifically (and morally) questionable. The Cass Review highlights the highly *experimental nature* of gender transitioning procedures and the clear potential for harm.²⁹³ The scientific evidence concerning the effects on the physical and mental health of children inherent in procedures seeking to 'transition' children is – at best – underdeveloped and contested.²⁹⁴ It is also fraught with controversy.²⁹⁵ Some studies indicate that the so-called 'benefits' of 'gender-affirming' procedures have deliberately been exaggerated and serious health risks and uncertainties downplayed, in turn creating a false narrative as to the safety, efficiency and need of the procedures for children.²⁹⁶

The National Health Services (NHS)²⁹⁷ in Britain reversed its position and decided to ban the provision of puberty blockers. They would no longer be routinely prescribed to

291 Cass Review, page 30, par. 66.

292 Ari Blaff, 'Who's Carl? When parents are the last to know about their trans kids', 30 April 2024, <https://nationalpost.com/feature/parents-transgender-kids-at-school> [accessed 2 May 2024].

293 The Cass Review, 22.

294 American College of Paediatricians, 'Biological Integrity', <https://biologicalintegrity.org> [accessed 22 March 2024]. Also see James Cantor (2019) 'Transgender and Gender Diverse Children and Adolescents: Fact-Checking of AAP Policy', *Journal of Sex & Marital Therapy*, Vol. 46, No. 4, 307-313 and The Cass Review, 'Independent Review of Gender Identity Services for Children and Young People', 2024, <https://cass.independent-review.uk/home/publications/final-report/> [accessed 23 April 2024].

295 See James Cantor, 'Transgender and Gender Diverse Children and Adolescents', 307-313. Leaked documents of the World Professional Association for Transgender Health (WPATH) – the leading organisation of the gender transition industry in the US – exposed irresponsible actions and a failure to meet basic standards of evidence-based medicine. For example, the WPATH President, Marci Bowers, stated in a meeting that 'acknowledgement that de-transition exists even to a minor extent is considered off limits for many in our community' (Mia Hughes, 'The WPATH Files: Pseudoscientific surgical and hormonal experiments on children, adolescents, and vulnerable adults', https://static1.squarespace.com/static/56a45d683b0be33df885def6/t/65e6d9bea9969715fba29e6f/1709627904275/U_WPATH+Report+and+Files.pdf [accessed on 22 March 2024]).

296 E. Abbruzzese, Stephen B. Levine & Julia W. Mason (2023) 'The Myth of "Reliable Research" in Pediatric Gender Medicine: A critical evaluation of the Dutch Studies—and research that has followed', *Journal of Sex & Marital Therapy*, Vol. 49, No. 6, 673-699, <https://www.tandfonline.com/doi/full/10.1080/0092623X.2022.2150346> [accessed 3 May 2024].

297 NHS, 'Treatment: Gender dysphoria', <https://www.nhs.uk/conditions/gender-dysphoria/treatment/> [accessed 26 March 2024].

children because ‘there is not enough evidence of safety and clinical effectiveness’.²⁹⁸ Both Finland and Sweden made a similar U-turn.²⁹⁹ Specific concerns were raised about the effect of puberty blockers on bone density. Furthermore, concerns include the ability of children to consent to procedures that can potentially result in infertility.³⁰⁰

A parent refusing puberty blockers, cross-sex hormones or surgery for their child does not amount to neglect or abuse and cannot be criminally prosecuted as in the proposed Scottish law. The lack of scientific evidence, level of invasiveness and potential harm at such a vulnerable age justifies parents’ refusal (recalling that it must be *presumed* that parents act in the best interests of their children). It is rather the fact that such a procedure is available that is questionable.

The alienation of parents from their children with regards to consent concerning medical issues related to sexuality, sex or gender, is not supported by any binding international or regional human rights treaty. In fact, quite the opposite. It is a direct violation of the presumption that the parents are acting in the child’s best interest and the natural right of parents as their child’s primary authority and caretakers.

Additionally, children and adolescents (and sometimes especially then³⁰¹) do not have the maturity to provide informed consent for such complicated procedures. This is even more true in light of the fact that these procedures are experimental in nature. A child cannot provide informed consent about a procedure the effects of which are unknown to the scientific and medical worlds.

298 NHS, Treatment: Gender dysphoria.

299 E. Abbruzzese et al. ‘The Myth of “Reliable Research”’.

300 See, for example, SEGM, ‘Current Concerns About Gender-Affirming Therapy in Adolescents’, 18 April 2023, <https://segm.org/current-concerns-gender-affirming-therapy-adolescents>; Stephen B. Levine & E. Abbruzzese (2023) ‘Current Concerns About Gender-Affirming Therapy in Adolescents’, *Current Sexual Health Reports*, Vol. 15, 113–123, <https://link.springer.com/article/10.1007/s11930-023-00358-x> [accessed 22 March 2024]; Riitakerttu Kaltiala, ‘Gender-Affirming Care is Dangerous. I Know Because I Helped Pioneer It’, *The Free Press*, 27 March 2024, <https://www.thefp.com/p/gender-affirming-care-dangerous-finland-doctor> [accessed 27 March 2024]; American College of Paediatricians, ‘Biological Integrity’; James Cantor, ‘Transgender and Gender Diverse Children and Adolescents’, 307-313.

301 This is also acknowledged by the Committee on the Rights of the Child. Separation from the protection of the family, together with inexperience and lack of power can render adolescents vulnerable to violations of their rights (*General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, CRC/C/GC/20, 6 December 2016, <https://www.refworld.org/legal/general/crc/2016/en/115419> [accessed 11 March 2024], par. 19).

For example, in the UK, the Court of Appeal decided in the case of *Bell v. Tavistock*,³⁰² that children under the age of 16 may be competent to provide informed consent for puberty blockers (overturning a decision of the High Court³⁰³ deciding the opposite). It was then that decision which ultimately led to the Cass Review³⁰⁴ highlighting the highly experimental nature of gender ‘medicine’ and its potential for harm.³⁰⁵

What about instances where parents decide that the ‘gender transitioning’ of their child is in the child’s best interest and provide for consent on behalf of the child? It remains the case that parents are the primary determinants of the best interests of the child. However, this does not mean the parental assessment will always override the law. The state and the law play a role in regulating the medical profession. In light of scientific uncertainty and a lack of evidence concerning the adverse effects of cross-sex hormones and invasive surgical procedures, it cannot reasonably and objectively be argued that such procedures are in the child’s best interest. In US law, the limitation of medical interventions ‘gains strength in areas of ‘medical and scientific uncertainty’.³⁰⁶ For example, and as stated above, the NHS in the UK refuses to make puberty blockers available to minors because there is not enough evidence of safety and clinical effectiveness.³⁰⁷ The experimental nature of the procedures, as stated above, also makes it impossible to provide the required ‘informed consent’ – also for parents.

When medication has not been tested on children or, for example, pregnant women, the law and the medical profession will not allow such medication to be prescribed to children or pregnant women. If parents think otherwise, they cannot force a pharmacist to override a doctor’s medical judgment or a legal regulation because they think something is in the child’s best interest. Children cannot drink Ritalin³⁰⁸ or undergo some medical treatment merely because their parents think that it is in their best interest.

302 *Bell v. Tavistock*, [2021] EWCA Civ 1363.

303 *Bell v. Tavistock*, [2020] EWHC 3274.

304 The Cass Review, ‘Independent Review of Gender Identity Services for Children and Young People’, 2024, <https://cass.independent-review.uk/home/publications/final-report/> [accessed 23 April 2024].

305 The Cass Review, 22.

306 *Skrimetti II*, 83 F.4th, 473 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007)).

307 NHS, Treatment: Gender dysphoria.

308 Ritalin is the drug used to treat ADD and ADHD in children (Ritalin, [https://www.drugs.com/ritalin.html#:~:text=What%20is%20Ritalin%3F,\(ADHD\)%2C%20and%20narcolepsy.](https://www.drugs.com/ritalin.html#:~:text=What%20is%20Ritalin%3F,(ADHD)%2C%20and%20narcolepsy.) [accessed 23 April 2024].

D. Home Education

Nothing in binding international and regional human rights treaties prohibits home education. In the EU,³⁰⁹ states have national competence over education and the EU may contribute to developing quality education³¹⁰ but not direct matters to prohibit or require home education in a specific state.

The ECtHR has upheld the laws of states that ban home education. In the case of *Family H. v. the United Kingdom*,³¹¹ the Commission stated that the state may establish compulsory schooling and thereby limit parental rights under Article 2 of Protocol No. 1 of the ECHR by requiring parents to cooperate in assessing their children's educational standards where the parents have chosen to educate their children at home due to dyslexia. Unfortunately, in *Konrad and Others v. Germany*,³¹² the Court found that a complete prohibition of home education did not amount to the state's failure to respect parental rights.

In the case of *Wunderlich v. Germany*,³¹³ authorities forcibly removed the four children from their family home and placed them in a children's home for three weeks.

The cases above lacked analytical rigour and easily deferred to the margin of appreciation without considering and weighing the rights of parents. There was also no proportionality analysis or attempt to find a less restrictive way to achieve state goals other than making home education illegal.³¹⁴ Although national governments have the competence to determine their educational systems, the ECtHR still has a supervisory function³¹⁵ and must robustly protect *all* rights, including the rights of parents. In the case of home education, it has not considered or protected the rights of parents as primary educators and caretakers of their children. On the contrary, in his mission to Germany, the United Nations Special Rapporteur on the Right to Education,³¹⁶ recommended that Germany reinstate and legalise home education.

309 TFEU, art. 6.

310 *Ibid.*, art. 165.

311 *Family H. v. The United Kingdom*, App. No. 10233/83, 6 March 1984.

312 *Konrad v. Germany*, App. No. 35504/03, 11 September 2006.

313 App. No. 18925/15, 10 January 2019.

314 See Part 4(D).

315 As explained in Part 3(B).

316 UN Human Rights Council, Vernor Muñoz Villalobos; 'Report of the Special Rapporteur on the Right to Education, A_HRC_4_29_Add-3', 9 March 2007, <https://digitallibrary.un.org/record/595224?ln=en#record-files-collapse-header> [accessed 22 March 2024], par. 93(d).

The state does not have a monopoly over education but supports parents in their primary role as educators and caretakers. This means ample space should be made for diverse and alternative forms of education besides state institutions, such as home education. The option of home education is a further realisation of children's right to education and parents' right to educate their children in line with their religion or belief (although this right is not limited to home or private education).

There are several other scenarios where parental rights are under threat. In all those instances, the basic principles of parental rights as inherent, natural and protected in international and regional human rights instruments apply.

7) Recommendations

Although parental rights are fundamental human rights that pre-exist the state, are inherent to human beings and codified in binding international and regional human rights law, they are under significant pressure. For the various reasons discussed above, parental rights require protection.

Parents, schools, parent-school boards, government entities, politicians, civil society organisations, godparents, families, grandparents, scientists, academics, lawmakers and all other stakeholders concerned about the future of families, parents and children should, insofar as they are able³¹⁷:

In terms of parental rights as such,

1. Support and/or draft laws, policies and actions:
 - That acknowledge the family as society's fundamental and natural unit, enhancing its preservation and protection.
 - That acknowledge parents as the primary authorities and caretakers of their children.
 - That support the presumption that parents know and act in line with the 'evolving capacities of the child' and 'the best interests of the child'.
 - Highlighting that the 'evolving capacities of the child' and the 'best interest of the child' principles positively bind the state *only*.
 - Civil society organisations should engage with the UN and other international or regional bodies to better protect parental rights (for example, the UN Special Procedures, Human Rights Council, General Assembly, WHO and UN agencies). Civil society organisations should also oppose initiatives that oppose or undermine parental rights.

³¹⁷ As mentioned above, for a comprehensive explanation of international organisations' internal workings and engagement opportunities, see Paul Coleman, Meghan Fischer and Elyssa Koren (2019) *The Global Human Rights Landscape*. Kairos Publications: Vienna.

In terms of schools and educational materials,

2. Support and/or draft laws, policies and actions:
 - That protect and enhance the right of parents to raise and educate their children in line with their religion or belief inside and outside of formal school education.
 - Promoting diverse education forms beyond state-provided schools.
 - That provide for and legalise home education and faith-based schools and challenge those that do not. Access to home education should be guaranteed without any unjustifiable restrictions.
 - That promote equal funding for diverse forms of education beyond state-provided schools.
 - That allow for 'opt-out/in' clauses in subjects such as sexual education, religious education and civic education.
3. Join the school boards of their children's educational institutions to effect change towards policies that respect and protect parental rights and parents as primary authorities and caretakers of their children. Parents should direct their children's education by serving in and supporting leadership positions on their local school boards or similar positions.
4. Participate in children's education to provide alternative and diverse forms of education beyond state-provided schools.
5. Challenge laws and policies that only provide state funding for state schools.
6. Sponsor diverse and alternative forms of education beyond state-provided schools for children.
7. Challenge the inclusion of radical sexual education programs, such as CSE, in school curricula.
8. Support and/or draft school curricula and policies free from gender ideologies.

In terms of the overemphasis on the autonomy of the child,

9. Expose and challenge non-neutral liberal ideologies overemphasising the autonomy of children under the pretence of 'neutrality' while undermining the family and parental rights.
10. Support and/or draft laws, policies and actions that do not follow lines espoused by non-neutral liberal ideologies overemphasising the autonomy of the child and the state as the primary caretaker of the child.
11. Expose and challenge treaty monitoring bodies' interpretations of international human rights treaties that are not supported by legal texts and fall outside the scope of their functions – especially concerning the rights of parents and children's rights.

In terms of parental consent,

12. Support and/or draft laws, policies and actions that:
 - Demand complete school transparency towards parents regarding their child's medical, academic or other records. Parents should regularly and proactively request in writing to review their children's records.
 - Demand complete school transparency towards parents regarding medical consent concerning their child.
 - Provide for complete openness regarding the school curriculum and the events children will attend at school as well as external speakers and providers.
 - Holds school officials legally accountable for withholding information from parents concerning their children.
13. Seek to engage in constructive dialogue with schools regarding curricula and document attempts to do so with educational providers.



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ADF International is a faith-based legal advocacy organization that protects fundamental freedoms and promotes the inherent dignity of all people. With headquarters in Vienna, and offices in Brussels, Geneva, London, New York City, and Washington DC, we are at the forefront of defending religious freedom, the sanctity of life, and marriage and family worldwide.

Working on an international level, we have a full-time presence at all the institutions of strategic international importance. We are accredited by the UN Economic and Social Council (ECOSOC), the European Parliament and Commission, and the Organization of American States (OAS). Additionally, we enjoy participatory status with the EU's Agency for Fundamental Rights (FRA) and engage regularly with the Organization for Security and Co-operation in Europe (OSCE). On a national level, we work with local allies to provide training, funding, and legal advocacy.

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