Is Home Education a Human Right?

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In 1988, I was in a delegation to the Soviet Union along with a member of Congress and a parliamentarian from Great Britain. Our object was the promotion of religious liberty. I went by myself to one meeting to talk with a group of Soviet lawyers who were in charge of rewriting their Constitution in the hope of propping up the old system.

I urged this group of lawyers to write explicit provisions into the Soviet Constitution to allow parents to take their children to church and to allow other forms of religious instruction such as Sunday School.

One of the lawyers asked me, “In which international document is there any provision allowing for such parental rights?”

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I have to admit that in 1988, I knew very little about the content of international treaties. Since that time I have obtained an LL.M. in public international law from the University of London. But, at the time I was familiar with the basic ideas of natural law and the rights that are inherent for all men. It was on that basis that I responded to the Soviet lawyers. I said, “The right of all parents to direct the religious instruction and education of their own children in an inherent, God-given right.”

They replied, “You will have to remember that we are communists and do not acknowledge any theory based on God.”

Today, I am going to make the case that international law does indeed protect the right of parents to direct the education of their children—and that the choice to pursue home education is a protected instance of that right. But, I will say upfront, that my instincts were right in 1988.

I would submit that the right of parents to direct the education and upbringing of their children is so inherent that it is not only a God-given right, but it is also a right that the international law community calls *jus cogens*—a level of human rights that is so
fundamental that no state of any description has the legitimate authority to deny or diminish such a right.

I will also demonstrate that this right is fully and explicitly recognized in specific treaty texts so that it is not necessary to resort to the imprecise and somewhat controversial world of *jus cogens* theory in order to establish the legitimacy of the right of parents to choose to educate their own children.

Let me say upfront that I do not intend to argue that parental rights are absolute and that states have no authority whatsoever concerning the education that parents choose for their children. In the United States and in most of the world the issue is not whether parents are free to choose homeschooling. Rather, the legal issues that arise concern the degree to which the state may legitimately impose regulation. But, the issue of degree must be addressed on another occasion. For today, I will assume that some governmental regulation to assure basic academic competency is essential. My simple contention is that, even in this regulatory context, parents have the right to choose home education as a basic choice. In
simple terms my thesis is this: It is a violation of fundamental human rights for any state to ban home education.

It is settled beyond dispute that the Universal Declaration of Human Rights, adopted in 1948 by the unanimous vote of the UN General Assembly arose, “out of the desire to respond forcefully to the evils perpetrated by [National Socialists in] Germany.”\(^2\) The UDHR’s view regarding parents and children is no exception to this rule. Article 26(3) of the UDHR proclaims: “Parents have a prior right to choose the kind of education that shall be given to their children.” Numerous human rights instruments have been drafted in reaction to “the intrusion of the fascist state into the family” with its goal of seeking “to alienate children from their parents for the purpose of political indoctrination.”\(^3\)

It is important for us to focus on the exact wording of this provision of the Universal Declaration. The right of parents to choose education for their children is *prior* to any claim of the state. There are at least two meanings for this priority. The right of


parents to choose the form of education is first in time and it is first in rank.

The altruistic words of the UDHR were distilled into two binding treaties which came into force in 1966. The International Covenant on Civil and Political Rights was favored initially by the Western bloc while the International Covenant on Economic, Social, and Cultural Rights was initially championed by the Soviet bloc. Today, those distinctions are largely gone as the ICCPR has 167 parties and while the ICESCR has 160 parties. For our purposes today, it is important to note that both of these components of the International Bill of Rights contain protections for the right of parents to direct the education of their children.

The ICESCR’s parental rights provision is found in Article 13(3):

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.
Article 18(4) of the ICCPR provides:

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.

There was actually an earlier human rights treaty that recognized the right of parents to make educational choices that differed from those preferred by the state. The 1960 Convention Against Discrimination in Education contains Article 5(b) which provides:

b) It is essential to respect the liberty of parents and, where applicable, of legal guardians, firstly to choose for their children institutions other than those maintained by the public authorities but conforming to such minimum educational standards as may be laid down or approved by the competent authorities and, secondly, to ensure in a manner consistent with the procedures followed in the State for the application of its legislation, the religious and moral education of the children in conformity with their own convictions; and no person or group of persons should be compelled to receive religious instruction inconsistent with his or their convictions;

To the same effect, we find the following language in Article 2 of the European Convention on Human Rights:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to
education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.

These human rights instruments all reflect some important principles. First, parents have the right to choose alternate forms of education. Second, any legislation which impacts these choices needs to be focused on the attainment of minimum academic educational standards. Third, it is absolutely forbidden for the government to enter the zone of morals or religion to override the philosophical views of the parents.

Human rights law recognizes that there are occasions when a nation cannot fully guarantee all of its human rights commitments. For example, in the area of economic, social, and cultural rights (known collectively as positive rights); the general idea is that such rights will be achieved progressively. Positive rights are those things that the government must provide for you or do for you.

International law is a bit more rigid regarding claims that by a state concerning its inability to fulfill its obligations concerning civil and political rights—that is, so-called negative rights. Negative
rights describe zones of liberty that the government may not legitimately invade.

In general, the right of parents to direct the education of their children is a negative right—a zone of freedom—that governments may not invade.

But, even with negative rights, there is recognition that there are occasions where all guaranteed rights simply cannot be protected. Those rights that may be overridden to achieve important interests of the states are called derogable rights. Here are the rules for the derogation of rights contained in the ICCPR:

Article 4(1): In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

This is a very high standard. In order to derogate these protected rights there must be a three-part showing: (1) there must be a public emergency; (2) that emergency must be so grave that it
threatens the life of the nation; and (3) this emergency must be publicly declared. And then, even when the derogation is permitted, it must be a limited derogation following three additional rules: (1) the derogation must be limited to the extent strictly required by the exigencies of the situation; (2) the derogation cannot be inconsistent with other obligations under international law; and (3) there cannot be any discrimination based on race, colour, sex, language, religion, or social origin.

However, even these very constrained forms of derogation have an additional exception that is found in Article 4(2). This section absolutely prohibits the derogation of certain rights even when the life of the nation is threatened by an emergency that has been publicly declared. Rights that are listed in Article 4(2) are considered non-derogable—rights that can never be violated by a state no matter how urgently necessary the government believes it is to do so.

There are seven articles of the ICCPR which contain non-derogable rights. These include Article 6’s protection of the right to life, Article 7’s ban on torture and cruel punishments, Article 8’s
prohibition against slavery, Article 11’s prohibition on using jail
time to collect contractual debts, Article 15’s ban on ex post facto
definition of crimes, and Article 16’s rule requiring the law to always
respect the personhood of every individual.

Human rights lawyers recognize the right to life, the
prohibition of torture and slavery, and the others listed to be at the
very pinnacle of the human rights protections. Any state that
violates these rights—even in times of dire national emergencies—
are considered rogue states outside the bounds of civilized society.

But, there is one additional article that is contained in Article
4(2)’s list of non-derogable rights. Article 18 contains the broad
protection of religious freedom for all persons. Religious liberty is
also a non-derogable right. However, it is Article 18(4) that is of
special interest to us today—and it is also a non-derogable right.
That section protects the rights of parents to choose education for
their children that conforms to their own moral and religious
convictions.

Denying parents the right to choose such education is an act
of a rogue state—and as such it should bear the same level of
shame in international law as states that practice indiscriminate killing, torture, and slavery. States that deny parents the right to control the education of their children are condemned by international human rights law for an invasion of the highest level of protection—the denial of a non-derogable right.

It is frankly hard to understand how some states and some courts have justified—at least in their own minds—the complete derogation of this fundamental human right.

The decision of Germany, Sweden, Romania, and Greece to essentially ban homeschooling was not based upon the failure of any homeschooling family to meet basic academic standards. Rather, in the German instance which has been the most highly litigated, the concern of the government, according to both the court decisions and other official sources was based on the notion that the elimination of homeschooling was necessary to stop the introduction of a “parallel society” into the nation.

*Konrad*, a decision of the German Federal Constitutional Court which upheld the ban on home education, declared that the State has an “educational mandate” to develop “responsible citizens, who
should be able to take part in the democratic processes of a pluralistic society.” Similarly, *Plett*, a decision of the German Court of Civil Appeals which followed and expands the mandate of *Konrad*, praises public education as “important for the development of the children in a pluralistic society.” In *Plett*, the court upheld the legitimacy of removing of children from the custody of parents in order for the government to fulfill its educational mandate. The German Secretary of the Permanent Conference of the State Ministers for Cultural Affairs in official correspondence which explains the government position on the banning of home education, affirms the “legislative value decision” that “learning together in school fosters the learning of social competence” by being able to “practice dealing with those who think differently on a daily basis.”

*Konrad, Plett*, and the German Secretary all affirm and embrace an active “educational mandate,” which requires children to “take part in the democratic processes,” where they “practice dealing with those who think differently on a daily basis.” The state can only achieve this “integration” and “tolerance,” however, if
“religious or philosophical minorities do not isolate themselves and do not close themselves off to dialogue with dissenters and people of other beliefs.” Thus, compliance with this educational mandate justifies “the encroachment into the basic rights” of German homeschoolers, because the state has a “justified” and “rightful” interest in counteracting the development of religiously or philosophically motivated “parallel societies.”

Homeschoolers would contend that the result of home education is not the creation of a parallel society in the way that is feared in this instance. American homeschoolers are fully integrated into society as adults. I have personally trained dozens of homeschoolers who are now practicing lawyers who have gone to top American law schools like Harvard, Yale, Columbia, Georgetown, and many more. They work for National Geographic Television as producers. There are doctors, scientists, bankers, inventors, accountants, and the list could be expanded to cover virtually every profession. And they are loyal citizens with above-average levels of voting and political participation. Alternative education does not lead to bad citizenship.
But, let’s assume for a moment a different idea of what it means to have a parallel society. That is people within the society who simply think differently and believe differently from the majority of the population. That seems to be the actual focus of the critics of home education.

There are important voices in the United States calling for the elimination or curtailment of home education for these very same reasons. Professor of Law at George Washington University, Catherine Ross has written the following astounding statement. You will want to listen carefully.

Many liberal political theorists argue, however, that there are limits to tolerance. In order for the norm of tolerance to survive across generations, society need not and should not tolerate the inculcation of absolutist views that undermine toleration of difference. Respect for difference should not be confused with approval for approaches that would splinter us into countless warring groups. Hence an argument that tolerance for diverse views and values is a foundational principle does not conflict with the notion that the state can and should limit the ability of intolerant homeschoolers to inculcate hostility to difference in their children—at least during the portion of the day they claim to devote to satisfying the compulsory schooling requirement.4

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Martha Albertson Fineman, professor of law at Emory University has called for the elimination of all private schools and home education in order to achieve a measure of philosophical homogeneity. She has written:

[T]he long-term consequences for the child of being home schooled or sent to a private school cannot be overstated. The total absence of regulation over what and how children are taught leaves the child vulnerable to gaining a sub-par or nonexistent education from which they may never recover. Moreover, the risk that parents or private schools unfairly impose hierarchical or oppressive beliefs on their children is magnified by the absence of state oversight or the application of any particular educational standards.5

Fineman continues her assertion with contentions that sound very much like the desire to eliminate parallel societies from the American culture.

The more appropriate suggestion for our current educational dilemma is that public education should be mandatory and universal. Parental expressive interest could supplement but never supplant the public institutions where the basic and fundamental lesson would be taught and experienced by all American children: we must struggle together to define ourselves both as a collective and as individuals.6

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6 Ibid., 237.
We must directly confront these very alarming ideas. These notions should astound everyone who believes in freedom and human rights, not just those who wish to employ their freedom by choosing to homeschool their own children.

Let’s restate the assertions of these American law professors who wish to ban home education and the assertion of Germany, Sweden, Romania, Greece and other government who share this objective.

1. Banning homeschooling is necessary so that small minorities, who wish to teach their children a philosophy that is contrary to the views of the majority, cannot successfully transmit their values to their own children. All true Americans—all true Germans—all true Swedes—must hold similar values.

2. Banning homeschooling will promote tolerance and diversity which are important values for society.

This is dangerous silliness that would not pass a simple examination for logical consistency.
“Diversity will be enhanced if minority philosophies are suppressed and all think like the majority.” Really?

“Tolerance will be enhanced if minority groups who want their children to think differently are not tolerated.” Seriously?

A close examination of the justification for the banning of home education in Germany reveals that these are indeed the reasons for this draconian policy.

Germany may praise tolerance but it does not practice tolerance. Liberal states are expected and commanded to be tolerant of their citizens.

A liberal state, however, necessarily abandons its duty to be tolerant when it seeks to compel “tolerance” or “pluralism” among its citizens through the operation and force of law. A truly “tolerant” state cannot prohibit its citizens from holding beliefs which it views as objectionable, dangerous, or even intolerant, nor can it punish citizens for holding such beliefs. As Justice Holmes of the United States Supreme Court famously stated nearly a hundred
years ago, freedom of thought is not truly “free” unless it also
extends to “the thought that we hate.”

Those who practice intolerance to achieve tolerance will never
succeed. Those who seek to promote diverse viewpoints by
coercively eliminating those who choose to be different will achieve
only homogeneity. The only way a society can be free is for the
government to practice freedom. The only way a society can be
tolerant is for the government to practice toleration. The only way a
society can be truly diverse is to allow minority viewpoints to
flourish.

The existence of a parallel society—that is people who simply
think differently from the majority—within a culture is not a danger
to anyone; rather it is a marker that such society believes and
protects fundamental freedoms and human rights.

Homeschooling may be the context, but the battle is actually
far broader. Will the 21st century witness the advent of coercive
utopianism in the name of toleration and diversity?

A society that refuses to allow homeschooling out of fear that it will create a parallel society is a society that is afraid of all minorities and is ultimately distrustful of freedom itself.

There have been efforts in England to strictly control home education in the past few years. Homeschooling was largely illegal in the United States until about 25 years ago and there are important voices calling to a return to the days of coercion. There is dangerous legislation on this subject that has just been filed in Kenya. The trend away from fundamental freedoms and human rights is not the problem of one or two nations.

All of us who believe in liberty and human rights must look with open eyes and open hearts to every corner of the globe to stand in the gap whenever anyone’s fundamental freedoms or anyone’s non-derogable human rights are challenged.

The right of parents to direct the education of their children is intrinsically important in its own right. But the right to be different from the majority is an even more fundamental right. Both rights are at stake in the battle for homeschooling liberty. And both must
be preserved by any nation that seeks to honor both liberty and human rights.