INTERNATIONAL HUMAN RIGHTS LAW AND THE CHILD'S UPBRINGING: RECONCILING CHILDREN'S RIGHTS, PARENTAL CONTROL RIGHTS AND STATE INTERESTS

by

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ABSTRACT

This thesis investigates whether and how international human rights law (IHRL) reconciles children's rights with parental control rights and state interests in the child's upbringing. To answer these questions, it first originally identifies four normative models on the child's upbringing drawing from moral, legal, and political theory, and then assesses which of these models find reflections in IHRL. In so doing, it offers the most comprehensive account of the IHRL practice concerning the child's upbringing to date, providing an analysis of not only the drafting histories of human rights instruments, but also the general comments and the case law of the human rights systems in Europe, the Americas, Africa and the United Nations.

This thesis shows that IHRL has overtime endorsed more than one normative model. The central argument of the thesis is twofold. First, the Convention on the Rights of the Child has been central to the endorsement of the model combining the liberal conception of children's rights and the fiduciary conception of parental rights. This model assigns multiple functions to the state, endorsing not only a minimal state when intervening into the parent-child relationship but also supportive and prescriptive roles, alongside recognizing autonomy-related and civic interests of the state in education. Second, the thesis indicates that the legal practice, particularly in adjudication, deviates from this model. All IHRL organs are not fully committed to the liberal and fiduciary conceptions as they do not give sufficient weight to the child's substantive rights and the limitations of parental rights.

Keywords: children's rights, parental rights, state intervention, best interests of the child, Convention on the Rights of the Child, European Court of Human Rights, treaty-making.

ÖZET

Bu tez, uluslararası insan hakları hukukunun çocuk hakları, ebeveyn hakları ve devlet menfaatlerini nasıl uzlaştırdığını sorgulamaktadır. Bu soruyu yanıtlamak adına ahlak, hukuk ve siyaset felsefesinde tartışılan dört normatif modeli tespit etmekte ve bu modellerin hangilerinin ve nasıl uluslararası insan hakları hukukuna yansıdığını değerlendirmektedir. Bu tez, çocuğun yetiştirilmesi konusundaki uluslararası insan hakları hukuku uygulamasını ele alan şu ana kadarki en kapsamlı değerlendirmeyi sunmaktadır. Uluslararası insan hakları belgelerinin yapım sürecini ayrıca Avrupa, Amerika, Afrika ve Birleşmiş Milletler insan hakları mekanizmalarının yorumlarını ve içtihadını bir bütün olarak analiz etmektedir.

Tez, temel olarak uluslararası insan hakları hukukunun yalnızca tek bir modeli takip etmediğini göstermektedir. Tezin temel argümanı iki katmanlıdır. İlk olarak bu tez, Çocuk Hakları Sözleşmesi'nin çocuk haklarının liberal anlayışını ve ebeveyn haklarının güven temelli anlayışını bir araya getiren modelin yaygınlaşmasında merkezi bir rolü olduğunu ortaya koymaktadır. Bu model devlete çoklu işlevler yüklemektedir. Çocuk-ebeveyn ilişkisine müdahale konusunda minimal bir devlet anlayışı ile beraber devletin destekleyici ve kural koyucu rollerini ve devletin eğitimdeki özerklik ve vatandaşlıkla ilgili menfaatlerini de onaylamaktadır. İkinci olarak tez, hukuk uygulamasının özellikle yargılama aşamasında bu modelden ayrıldığını göstermektedir. Uluslararası insan hakları organlarının tümünün çocuğun maddi haklarına ve ebeveyn haklarının sınırlarına yeterli önemi göstermemeleri, liberal ve güven temelli anlayışları tam olarak benimsemediklerini ortaya koymaktadır.

Anahtar Kelimeler: çocuk hakları, ebeveyn hakları, devlet müdahalesi, çocuğun üstün yararı, Çocuk Hakları Sözleşmesi, Avrupa İnsan Hakları Mahkemesi, sözleşme yapımı.

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ABBREVIATIONS

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Charter on Human and People's Rights
ACRWC	African Charter on the Rights and Welfare of the Child
Afr.	African
CEDAW	Convention on Elimination of All Forms of Discrimination against Women
Comm.	Committee
CRC	Convention on the Rights of the Child
CWC	Child Welfare Committee
ECHR	European Convention on Human Rights
ECmHR / Eur. Comm'n H.R.	European Commission on Human Rights
Econ.	Economic
ECtHR / Eur. Ct. H.R.	European Court of Human Rights
G.A.	United Nations General Assembly
IACtHR / Inter-Am. Ct. H.R.	Inter-American Court of Human Rights
IAPCW	International Association for the Promotion of Child Welfare
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHRL	International human rights law
OAS	Organization of American States
OAU	Organization of the African Unity
OPCRC-CP	Optional Protocol to the Convention on the Rights of the Child on a communications procedure
Res.	Resolution

Rts.	Rights
SCIU	Save the Children International Union
Sess.	Session
Soc.	Social
T.S.	Treaty Series
UDHR	Universal Declaration of Human Rights
UNICEF	International Children's Emergency Fund

INTRODUCTION

Setting the Scene

M. was fifteen years old when the public prosecutor initiated a criminal proceeding against her father – Mr. Cupiał, for psychological abuse of M by imposing his religious beliefs on her. As an adherent of the Catholic Charismatic Renewal movement, Mr. Cupiał required all family to meet for the evening prayers. He asked children to confess their sins publicly in front of the guests. When he was late at night, he woke M. up to conduct the prayer. He forbade M. to have telephone calls at home and invite her friends in his absence. Despite M.'s testimony in favor of his father, the domestic court decided that Mr. Cupiał's actions exceeded his right to raise his children according to his religious convictions and convicted him.

These are the facts of a pending case before the European Court of Human Rights (ECtHR), where Mr. Cupiał argues that Poland violated his rights.[1] This case – like many other cases of its kind – poses significant theoretical and legal questions on the tripartite relationship between the child, the parent, and the state. Does Mr. Cupiał have an unrestricted right to impart his religious ideals on M., or should his parental practices be limited by M.'s interests or her freedom of religion? What interests does the Polish state have in intervening in the relationship between M. and his father? Does M.'s continuing discomfort qualify as "abuse," or is it an unnecessarily high threshold to protect M.'s rights? What weight should be given to the testimony of M.?

Equally challenging questions on the child's upbringing also arose before international human rights organs when a lesbian mother in Chile was denied custody of her children due to her cohabitation with her female partner[2] or when Muslim parents refused to send their daughter to compulsory swimming classes in Switzerland[3] or when an agricultural

[1] Dariusz Cupiał v. Poland, App. No. 67414/11, Eur. Ct. H.R. [pending]

[2] Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, (Feb. 24, 2012) [hereinafter *Atala Riffo*]

[3] Osmanoğlu and Kocabaş v. Switzerland, App. No. 29086/12, Eur. Ct. H.R. (2017) [hereinafter *Osmanoğlu and Kocabaş*]

worker of Guinean origin was separated from her child in Spain because she failed to feed and clothe the child properly.[4] When international human rights organs examine these cases and interpret and adjudicate on the competing interests, they inevitably make normative choices on which values do (or should) underpin the tripartite relationship between the child, the parent, and the state.[5] The central aim of this thesis is to understand and evaluate these choices.

Of course, one should be mindful that the normative choices of the human rights organs might not be apparent. The central tenets of international human rights law (IHRL) can limit its capacity to address the tripartite relationship. First, IHRL is traditionally perceived as a vertical order where the individuals (right holders) are protected against the actions of states (duty-bearers).[6] Unlike domestic legal systems where parents have responsibilities arising from family or criminal laws, IHRL, as an essentially vertical system, might face resistance to imposing duties on parents. Second, as a corollary of the verticality of IHRL, the dichotomy between the public and private spheres might undermine the ability of IHRL to expand upon the parent-child relationship.[7] Third, the powers of international human rights courts and quasi-judicial bodies are of a subsidiary nature. The ethical or legal dilemmas posed by the tripartite relationship between the child, the parent, and the state can impel the judicial bodies to defer to the national

[4] R.M.S. v. Spain, App. No. 28775/12, Eur. Ct. H.R. (2013) [extracts] [hereinafter *R.M.S.*]

[5] Scholars refer to this function of law as "expressive" function see ALICE MARGARIA, THE CONSTRUCTION OF FATHERHOOD: THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS 2 (2019) ; KATRI LÕHMUS, CARING AUTONOMY : EUROPEAN HUMAN RIGHTS LAW AND THE CHALLENGE OF INDIVIDUALISM 3 (2015).

[6] There have been extensive discussions challenging this vertical order of IHRL, and proposing human rights obligations on transnational companies, armed groups, governmental organizations and individuals. See ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006); PHILIP ALSTON, NON-STATE ACTORS AND HUMAN RIGHTS (2005); Jordan J Paust, *The Other Side of Right: Private Duties under Human Rights Law*, 5 HARV. HUM. RIGHTS J. 51 (1992); Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUMBIA HUMAN RIGHTS LAW REV. 291 (1994).

[7] This public-private distinction has been criticised by feminist theorists. See Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT. LAW 613 (1991).

decision-makers who are "better-placed" to reach a conclusion.[8] These limitations make the task of this thesis more challenging yet also more important.

Taking an IHRL perspective on the child's upbringing is also a timely endeavor. Recently, some scholars have highlighted that children's rights studies are isolated from the broader field of international human rights law[9] and that international children's rights law appears as a "young area" of international human rights law that is regrettably disconnected from the existing fields.[10] This thesis remedies this isolation through rigorous analysis of the drafting histories of international human rights treaties as well as the interpretive and adjudicatory practice of international courts and quasi-judicial bodies with a focus on the child's upbringing.

Normative Theory and the Legal Practice of Children's Rights in Dialogue

The thesis asks whether and how international human rights law reconciles children's rights with parental control rights and state interests in the child's upbringing. First, it examines different normative models for the child's upbringing that are based on competing conceptions of children's rights, parental control rights, and state interests. Second, it aims to see how responsive the IHRL practice – in the legalization, interpretation, and adjudication processes – is to these normative models. More specifically, it employs these models as analytical tools to understand and evaluate the IHRL practice.[11]

Through asking these questions, the thesis takes the dialogue between theory and legal practice seriously. It aims to see in which ways the normative perspectives resonate with

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[8] Paolo G Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT. LAW 38 (2003); GEORGE LETSAS, A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2007).

[9] EVA BREMS, ELLEN DESMET & WOUTER VANDENHOLE, CHILDREN'S RIGHTS LAW IN THE GLOBAL HUMAN RIGHTS LANDSCAPE: ISOLATION, INSPIRATION, INTEGRATION? (2017).

[10] Ursula Kilkelly & Ton Liefaard, *International Children's Rights: Reflections on a Complex, Dynamic, and Relatively Young Area of Law*, *in* INTERNATIONAL HUMAN RIGHTS OF CHILDREN 617, 620 (Ursula Kilkelly & Ton Liefaard eds., 2019).

[11] See a similar method in RORY O'CONNELL, LAW, DEMOCRACY AND THE EUROPEAN COURT OF HUMAN RIGHTS (2020); MARIE-BÉNÉDICTE DEMBOUR, WHO BELIEVES IN HUMAN RIGHTS?: REFLECTIONS ON THE EUROPEAN CONVENTION (2006).

the IHRL practice. In that regard, it is not limited to describing what international human rights law *is* in the field of children's rights or parental rights by organizing the case law or the relevant authoritative legal materials and focusing on the internal coherence between them.[12] Therefore, it differs from the doctrinal studies addressing the issues linked to the child's upbringing.[13]

It is essential to elaborate more on the dialogue between theory and legal practice for international human rights law and children's rights studies. The methodology of this thesis aligns with the view which sees moral rights and legal practice in a mutually constitutive relationship. As noted by Besson, IHRL "can be an object of moral critique and also a resource of moral reform, and all this internally to the legal practice."[14]

With this understanding, this thesis differs from consensus-based, orthodox, and political approaches to international human rights. First, the consensus-based approaches are inspired by John Rawls' political conception of justice, which rests on "an idea of overlapping consensus of reasonable comprehensive doctrines."[15] These approaches suggest that international human rights form an overlapping consensus over diverging moral and philosophical doctrines.[16] This thesis explains diverging normative

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[12] For this description of doctrinal legal research see Martha Minow, *Archetypal legal scholarship: A field guide*, J. LEGAL EDUC. 65, 65 (2013). See a similar description in Christopher McCrudden, *Legal Research and the Social Sciences*, 122 LAW Q. REV. 632, 633 (2006).

[13] See e.g. CARMEN DRAGHICI, THE LEGITIMACY OF FAMILY RIGHTS IN STRASBOURG CASE LAW "LIVING INSTRUMENT" OR EXTINGUISHED SOVEREIGNTY? (2016); Jeroen Temperman, *State Neutrality in Public School Education: An Analysis of the Interplay Between the Neutrality Principle, the Right to Adequate Education, Children's Right to Freedom of Religion or Belief, Parental Liberties, and the Position of Teachers*, 32 HUM. RIGHTS Q. 865 (2010); Jeroen Temperman, *Parental Rights in Relation to Denominational Schooling under the European Convention on Human Rights*, 12 RELIG. HUM. RIGHTS 142 (2017); Carolyn Evans, *Religious education in public schools: An international human rights perspective*, 8 HUM. RIGHTS LAW REV. 449 (2008).

[14] Samantha Besson, *The Law in Human Rights Theory*, 1 J. HUM. RIGHTS / ZEITSCHRIFT FÜR MENSCHENRECHTE 120, 129 (2013).

[15] JOHN RAWLS, POLITICAL LIBERALISM 134 (1996).

[16] ARI KOHEN, IN DEFENSE OF HUMAN RIGHTS: NON-RELIGIOUS GROUNDING IN A PLURALISTIC WORLD (2007); Charles Taylor, *Conditions for an Unforced Consensus on Human Rights*, *in* THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS (Daniel Bell & Joanne R Bauer eds., 1999); JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE (2013).

perspectives on the child's upbringing yet does not claim that IHRL can create such an overlapping consensus over these perspectives.

Second, the orthodox approaches ground international human rights in a moral theory. For instance, James Griffin contends that some rights enshrined in international or regional human rights treaties, such as the right to peace, right to inheritance, and right to protection from attacks on one's honour and reputation as "unacceptable cases" because they cannot be grounded in his moral personhood theory.[17] This thesis does not follow such an approach and does not claim that IHRL should be justified by a single moral theory.

Third, the political approaches contradict the orthodox approaches and suggest that human rights do not need to be grounded in morality. Instead, they aim to build a practice-dependent theory.[18] This thesis diverges from the political approaches as well. It seeks to understand the normative choices in the practice of IHRL but does not aim to form a new normative theory based on that practice.

The dialogue between theory and legal practice is particularly timely for children's rights studies. There is an emerging concern that although the legal regime established by the Convention on the Rights of the Child (CRC) is widely endorsed, children's rights remain under-theorized.[19] For some, this is due to how the CRC is formed as an "incompletely theorized agreement."[20] For others, the low level of theorizing is the outcome of international consensus-building around the CRC and its dominant status in children's rights literature.[21] Of course, this thesis does not aim to provide a theory on children's

[17] JAMES GRIFFIN, ON HUMAN RIGHTS 194-195 (2008).

[18] See e.g. CHARLES BEITZ, THE IDEA OF HUMAN RIGHTS (2009).

[19] Lucinda Ferguson, *Not merely rights for children but children's rights: The theory gap and the assumption of the importance of children's rights*, 21 INT. J. CHILD. RIGHTS 177 (2013); Martha Craven Nussbaum & Rosalind Dixon, *Children's Rights and a Capabilities Approach: The Question of Special Priority*, 97 UNIV. CHICAGO LAW SCH. CHICAGO UNBOUND 549 (2012).

[20] John Tobin, *Justifying Children's Rights*, 20 INT. J. CHILD. RIGHTS 395, 399 (2013).

[21] Didier Reynaert, Maria Bouverne-De Bie & Stijn Vandevelde, *Between 'believers' and 'opponents': Critical discussions on children's rights*, 20 INT. J. CHILD. RIGHTS 155 (2012); Ann Quennerstedt, *Children's Rights Research Moving into the Future - Challenges on the Way Forward*, 21 INT. J. CHILD.

rights. Still, it is hoped that theoretical discussions on the relationship between children's rights, parental control rights, and state interests offer some insights for children's rights studies.

Working Definitions

It is important to clarify some of the concepts used in the thesis. By IHRL "practice," the thesis covers the drafting histories of international human rights declarations and treaties, as well as international human rights organs' interpretive and adjudicatory practice. The latter includes individual applications, general comments/recommendations, and advisory opinions of the three regional human rights systems in Europe, the Americas, and Africa, as well as the United Nations treaty body system. By "upbringing," this thesis refers to the immediate child-rearing and caring practices as opposed to the child's development which implies the long-term process of the child's transition into adulthood.[22]

The term "parental control rights" entails further elaboration. As a broader concept, parental rights have two components: possession rights and control rights. While the first means the claims to form a legal relationship with the child, the second is the claims to power and freedom in child-rearing once that legal relationship is established.[23] The first component of parental rights is also named the "right to become a parent."[24]

The second component – control rights - covers two interrelated entitlements owned by parents: one is to set rules for children and enforce those rules, and the other is to be free from outside intrusion in guiding and shaping the child.[25] Seymour has a useful

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RIGHTS 233 (2013); Matías Cordero Arce, *Maturing Children's Rights Theory: From Children, With Children, Of Children*, 23 INT. J. CHILD. RIGHTS 283 (2018).

[22] Roberta Ruggiero, Diana Volonakis & Karl Hanson, *The inclusion of "third parties": the status of parenthood in the Convention on the Rights of the Child*, *in* CHILDREN'S RIGHTS LAW IN THE GLOBAL HUMAN RIGHTS LANDSCAPE: ISOLATION, INSPIRATION, INTEGRATION? 71, 84 (2017).

[23] James G. Dwyer, *Parental entitlement and corporal punishment*, 73 LAW CONTEMP. PROBL. 189, 194 (2010).

[24] Scott Altman, *Parental Control Rights*, *in* PHILOSOPHICAL FOUNDATIONS OF CHILDREN'S AND FAMILY LAW 209, 209 (Elizabeth Brake & Lucinda Ferguson eds., 2018); Sarah Hannan & Richard Vernon, *Parental Rights: A role-based approach*, 6 THEORY RES. EDUC. 173, 185 (2008).

[25] Altman, *supra* note 24, at 209. Other theorists refer to the same right as "right to rear", see DAVID ARCHARD, CHILDREN, RIGHTS AND CHILDHOOD 96 (1993); MATTHEW CLAYTON, JUSTICE AND

categorization unpacking these entitlements as *powers*, *authorities*, and *recognized interests*. This thesis confines itself to the parents' "powers" to "do things to children or to make decisions affecting them" and their "recognized interests," referring to their special status to be involved in the well-being of the child.[26]

Parental rights also endow parents with certain "authorities" to determine the child's relationship with the outside world and make decisions on her behalf. Parents exercise these when they consent to medical treatment or marriage as the proxy decision-makers of the child. Since these can be invoked in relation to other persons who lack legal capacity, they do not raise a normative question peculiar to the tripartite relationship on the child's upbringing. Additionally, it might involve state interests beyond the child's upbringing, such as the protection of the rights of third parties. Therefore, parental control rights, as understood in this thesis, exclude these authorities.

Research Design

To evaluate whether and in which ways children's rights reconcile with parental control rights and state interests in the making of international human rights law, this study has examined the archival documents indicating the drafting histories of international human rights declarations and treaties.[27] The archival documents are identified through secondary sources,[28] and later the United Nations documents are accessed directly from the Official Document System of the United Nations.

LEGITIMACY IN UPBRINGING 58 (2006), or "right to parent" see Colin Macleod, *Parental Competency and the Right to Parent*, *in* PERMISSIBLE PROGENY? : THE MORALITY OF PROCREATION AND PARENTING 227, 228 (Sarah Hannan, Samantha Brennan, & Richard Vernon eds., 2015).

[26] John Seymour, *An "UnControllable" Child: A Case Study In Children's and Parental Rights*, *in* CHILDREN, RIGHTS AND THE LAW 98, 113 (Philip Alston, Stephen Parker, & John Seymour eds., 1992).

[27] This study examined the archival documents of the following instruments: Universal Declaration of Human Rights, European Convention on Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child. Since the documents of the drafting processes of the African Charter on Human and People's Rights, African Charter on the Rights and Welfare of the Child, the American Convention on Human Rights and the Protocol of San Salvador are not compiled or digitalized, the analysis of these treaties was limited to their final texts and secondary sources.

[28] JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS ORIGINS, DRAFTING, AND INTENT (1999); WILLIAM A SCHABAS, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS THE TRAVAUX

For the interpretive practice, all general comments of the Committee on the Rights of the Child and the African Committee of Experts on the Rights and Welfare of the Child, and the general comments of other UN human rights treaty bodies on children's rights, the right to education and freedom of religion have been reviewed. However, for the adjudicatory practice, given the large body of case law concerning the relationship between the child, the parents, and the state, the research has followed certain screening criteria. The research has focused primarily on the following issues: the child's right to be protected from parental harm, the right to education, and the child's private life against parental control. In selecting cases, the study has benefitted from secondary sources[29] and the IHRL organs' own case-law guides and databases.[30]

PRÉPARATOIRES (2013); MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS : CCPR COMMENTARY (2nd ed. 2005); BEN SAUL, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS : TRAVAUX PRÉPARATOIRES. VOLUME I (2017); BEN SAUL, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS : TRAVAUX PREPARATOIRES. VOLUME II (2017).; Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child: Volume I* (2007), https://www.ohchr.org/Documents/Publications/LegislativeHistorycrc1en.pdf; Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child: Volume II* (2007), https://www.ohchr.org/Documents/Publications/LegislativeHistorycrc2en.pdf.

[29] WILLIAM A SCHABAS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS : A COMMENTARY (2015); CLAIRE FENTON-GLYNN, CHILDREN & THE EUROPEAN COURT OF HUMAN RIGHTS (First ed. 2020); RACHEL MURRAY, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS : A COMMENTARY (2019); LAURENCE BURGORGUE-LARSEN & AMAYA UBEDA DE TORRES, INTER-AMERICAN COURT OF HUMAN RIGHTS: CASE LAW AND COMMENTARY (2011); PAUL M. TAYLOR, A COMMENTARY ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: THE UN HUMAN RIGHTS COMMITTEE'S MONITORING OF ICCPR RIGHTS (2020); BEN SAUL, DAVID KINLEY & JACQUELINE MOWBRAY, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS : COMMENTARY, CASES AND MATERIALS 724 (David Kinley & Jacqueline Mowbray eds., First ed. 2014).

[30] The research benefitted from the following guides: Inter-American Commission on Human Rights, *The Rights of the Child in the Inter-American Human Rights System Second Edition* (2008), http://www.cidh.org/countryrep/infancia2eng/Infancia2Toc.eng.htm. ; European Court of Human Rights, *Fact Sheet - Parental Rights* (2022), https://www.echr.coe.int/documents/fs_parental_eng.pdf. The decisions of the Committee on the Rights of the Child have been accessed through the Jurisprudence database https://juris.ohchr.org/.

In case selection, the definition of parental control rights has served as the primary screening criterion. Since the thesis does not cover parental possession rights, it does not discuss the competing claims on the recognition of social or biological parenthood as in the child's right to know their origins, filiation, surrogacy, and adoption. These issues indeed involve conflicts between the rights of children and the rights of parents, but such conflicts are not about exercising parental control over children. Furthermore, the study excludes parents' role as proxy decision-makers for their children, particularly when they consent to vaccination, medical treatment, and marriage.

Child custody, the right to contact (or visitation), and child abduction cases are mostly excluded. Most of these cases relate to the physical cohabitation of the child and the parent, without a discussion on parents' control rights. The excluded cases involve either a factual assessment of the family environment provided by different parents in terms of material or emotional conditions or a discussion on whether the procedural rights of any parent are respected. These feature a conflict between two parents or others assuming parental responsibility. Nevertheless, some custody and contact cases are normatively significant for this study. For instance, the way a non-custodial parent imparts their religious ideas to the child might be a reason for state authorities to limit or remove that parent's contact rights. Also, parents can be denied the child's custody due to their alleged caring deficiencies based on their sexual orientation or disability. Therefore, these limited number of custody and contact cases that raise significant normative questions are included.

A further remark can be made regarding protecting the child from parental harm. In most child care cases discussed in this study, parents not only complain about the initial decision to take children into public or alternative care but also about the procedural shortcomings of the decision-making process, the state (in)actions to reunite the family, and the contact restrictions imposed on them. Since the latter issues do not necessarily raise questions regarding parental control rights and might involve the child's relationship with alternative caregivers, the study focuses only on how the IHRL organs evaluate the initial decision to intervene in the parent-child relationship.

Structure and the Argument of the Thesis

The thesis builds on three themes explored in separate parts: theory, legalization, and interpretation and adjudication. The first part examines the normative perspectives taken

to the tripartite relationship in legal, moral, and political philosophy. The first chapter divides the concept of children's rights into three conceptions: liberationist, paternalist and liberal conceptions. It examines these conceptions respectively and, in the end, introduces the perspectives refusing the concept of children's rights. The second chapter follows a similar order for parental rights. It identifies three conceptions of parental rights: proprietorial, fiduciary, and relational conceptions and discusses them respectively in different sections. The last section in this chapter presents critiques against the concept of parental rights. The third chapter focuses on the state's roles in the child's upbringing, which are potentially in competition with parental control rights. The first section is on the state's role in protecting the child from harm, and it shows that there are two predominant ideas: the minimal state and the maximal state. The second section concentrates on the state's supplementary roles: supportive and prescriptive. The third section examines the state's role in education and indicates that liberal education can seek autonomy and civic interests. In the end, this part offers four alternative models, each reconciling different conceptions of children's rights, parental rights, and state interests in the child's upbringing.

While the concepts of children's rights and parental rights are highly debated at the normative level, they are both recognized in international law. The second part concentrates on this dual recognition and also follows the order of the child, the parent, and the state. First, it divides the legalization process of children's rights into the following themes: victimhood, dependency, autonomy, and responsibility. Second, it examines the development of parental rights. Third, it focuses on the state's role in the protection and education of the child.

The third part of the thesis discusses the interpretive and adjudicatory practice of the IHRL organs. Unlike the earlier parts, which followed the order of the child, the parent, and the state, this part explores the state's role in the first three chapters. This was a necessary choice since the IHRL organs evaluate whether the state parties fulfill their obligations arising from the respective treaties and pay greater attention to the state's actions or omissions. Therefore, the first three chapters discuss the state's role in protection, the state's supportive and prescriptive roles, and its role in education, respectively. The fourth chapter questions whether the IHRL practice has endorsed the child's autonomy and fiduciary parenthood.

This thesis shows that IHRL has overtime endorsed more than one normative model. The central argument of the thesis is twofold. First, it indicates that the Convention on the Rights of the Child has been central to the endorsement of the model combining the liberal conception of children's rights and the fiduciary conception of parental rights. This model assigns multiple functions to the state. It endorses not only a minimal state when intervening into the parent-child relationship but also supportive and prescriptive roles, alongside recognizing autonomy-related and civic interests of the state in education. Second, the thesis indicates that the legal practice, particularly in adjudication, partly deviates from this model. All IHRL organs are not fully committed to the liberal and fiduciary conceptions as they do not give sufficient weight to the child's substantive rights and the limitations of parental rights.

PART I – THE RELATIONSHIP BETWEEN THE CHILD, THE PARENT, AND THE STATE: NORMATIVE PERSPECTIVES

The thesis focuses on whether children's rights can reconcile with parental control rights and state powers in the child's upbringing. It asks which normative models are employed by the IHRL practice in the search for a reconciliation of different rights and interests in the tripartite relationship between the child, the parent, and the state. Before moving into how children's rights and parental control rights are legalized, interpreted, and adjudicated in the practice of international human rights law, this part examines the normative perspectives taken to this tripartite relationship in legal, moral, and political philosophy. This part demonstrates competing conceptions of children's rights and parental control rights and competing perspectives on the state's role in children's lives. The answer to whether these three are reconcilable depends on which particular conceptions are endorsed.

This part of the thesis is divided into three chapters. The first two chapters explore competing conceptions of children's rights and parental control rights, respectively, while the third chapter investigates the state's interests in the child's upbringing.

1. The Conceptions of Children's Rights

This chapter presents the competing conceptions of children's rights. It suggests that while there is a concept of children's rights, there are varying views about the nature and demands of this concept, and these differences correspond to different conceptions of children's rights.[31] These conceptions of children's rights are the liberationist conception, the paternalist conception, and the liberal conception. This chapter shows that these conceptions of children's rights differ on three issues. The first is the nature of childhood – whether it is a socially constructed phenomenon or a biologically determined stage of development. The second is the scope of children's rights – whether children should also possess autonomy or choice rights in addition to protective or welfare rights. The third is whether adult supervision and guidance over children is desirable. Although the liberationist, paternalist and liberal conceptions diverge on these issues, they share a common concept of children's rights. However, not all philosophers share this concept. The last section of the chapter examines the arguments of the deniers of the concept of children's rights.

1.1. The Liberationist Conception of Children's Rights: Children as Equals

The liberationist conception of children's rights has been inspired by the revolutionary rhetoric of the rights movement of the 1970s.[32] In this conception, children are another group to be liberated from oppression, and they should possess all rights as equal members of society. The justifications for the liberationist conception rest on three central claims: i) childhood is a social construction, ii) the modern childhood has an oppressive nature, and iii) separating children from the adult world is arbitrary.

First, according to the liberationist conception, childhood is a social construction and historically new phenomenon. This argument gets its support from a leading book,

[31] For this particular understanding of "conception" see David O Brink, *Originalism and Constructive Interpretation*, *in* THE LEGACY OF DONALD DWORKIN 273, 280 (Will Waluchow & Stefan Sciaraffa eds., 2016). For the distinction between a concept and a conception see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 135 (1977); JOHN RAWLS, A THEORY OF JUSTICE 5 (1971).

[32] Martha Minow, *What Ever Happened to Children 's Rights ?*, 80 MINN. LAW REV. 267, 270 (1995).

Centuries of Childhood: A Social History of Family Life, authored by Philippe Aries, which argues that the modern conception of childhood did not exist until the 16th century. Relying heavily on this finding, Holt suggests that childhood is a local and recent invention without a universal appeal.[33] Different from the earlier periods, according to Holt, what is particularly bad about modern childhood is that children are excluded from the adult world deliberately, and they have almost no contact with adults other than their parents.[34] In a similar vein, Firestone uses Aries' findings to claim that the values of the patriarchal nuclear family were dependent on particular cultural conditions.[35]

Second, the liberationist conception suggests that the modern institution of childhood is oppressive. As Holt argues, being a child is "a mixture of expensive nuisance, slave and super-pet."[36] It is not a "walled garden" in which children are protected from the harshness of the outside world. In reverse, many young people experience it as a prison. For this reason, he argues that a "happy, safe, protected, innocent childhood" does not exist for many children.[37] Similarly, Firestone describes childhood as "hell" enforced by economic dependence, sexual, family, and educational repression,[38] and she claims that childhood happiness is a myth.[39]

Given the broader environment where the liberationist conception was born, it is no surprise that it links the social and political status of children with those of other oppressed groups. For instance, Firestone is remarkable for relating child liberation with women's liberation. As she argues, their oppression is intertwined and mutually reinforcing.[40] In this regard, she points out the similarities between the myth of childhood and the myth of femininity. Accordingly, both are asexual and purer than men, they get an ill-conceived form of respect, and they have fancy and non-functional clothing and particular tasks in

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[33] JOHN HOLT, ESCAPE FROM CHILDHOOD: THE NEEDS AND RIGHTS OF CHILDREN 28 (1974).

[34] *Id.*, at 32

[35] SHULAMITH FIRESTONE, THE DIALECTIC OF SEX THE CASE FOR FEMINIST REVOLUTION 75 (1971).

[36] HOLT, *supra* note 33, at 15.

[37] *Id.*, at 22.

[38] FIRESTONE, *supra* note 35, at 103.

[39] *Id.*, at 94.

[40] *Id.*, at 72.

way of homework for children and housework for women.[41] As she suggests, their oppression is equally challenging to end since it "is couched in the phraseology of 'cute.'"[42]

For the liberationist conception, families and schools have essential roles in institutionalizing the oppression of children. Holt describes the family as "a miniature of dictatorship" in which children live under an absolute and unquestionable power.[43] The modern family, contrary to the earlier forms, is problematic for being a small unit surrounded by intense relationships and feelings. Due to the dependency on love and powerful emotions, the family is easily threatened by anything.[44] As a remedy, Holt advocates for extended families where children would relate to a network of people,[45] and children would hold a right to decide whether the home is good or not and the right to choose something else.[46] While Holt accepts that children's dependence is also a burden for parents, he argues that they still benefit from having "someone to boss, someone to help and someone to love."[47] In a similar vein, Harris advocates for a parent-child relationship between equal partners. Such a relationship would allow adults "to persuade, cajole, criticize, rebuke, and so on; what it would not do is give them the freedom to coerce."[48]

As the institution of family, schools are also oppressive institutions for children. Firestone claims that the modern school is the institution that has turned the abstract concept of childhood into reality.[49] In modern schooling, discipline is the key, and it is even more important than imparting knowledge. As she argues, schools demand a disrespect for and

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[41] *Id.*, at 88.

[42] *Id.*, at 89.

[43] HOLT, *supra* note 33, at 39.

[44] *Id.*, at 41.

[45] *Id.*, at 42.

[46] *Id.*, at 115.

[47] *Id.*, at 59.

[48] John Harris, *Harris' Reply*, *in* THE LIBERATION DEBATE : RIGHTS AT ISSUE 162, 164 (Michael P T Leahy & Dan Cohn-Sherbok eds., 1996).

[49] FIRESTONE, *supra* note 35, at 81.

underestimation of the abilities of children.[50] As children are kept in a special place with their kind and with a restrictive age group at the expense of slowing down their development,[51] they remain economically dependent on their families for longer times.[52]

Third, the supporters of the liberationist conception argue that the separation of children from the adult world is arbitrary.[53] The separation is arbitrary, as they claim since many proficient children below the designed age limit are denied rights, while many incompetent adults are granted rights only because they meet the age criterion. Further, it misses the differences between children of different ages. Holt argues that "rights, privileges, duties, responsibilities of adult citizens be made available to *any young person, of whatever age*, who wants to make use of them."[54] These should include the right to equal treatment, the right to vote, the right to be legally responsible for one's actions, the right to work, the right to privacy, the right to financial independence, the right to property, the right to direct one's education, the right to travel, the right to choose one's guardian, the right to a guaranteed income, and lastly "the right to do, in general, what any adult may legally do."[55] Harris also supports this view and argues that children are entitled to the same freedoms and self-determination as any other member of the community.[56]

The advocates of the liberationist conception further argue that the separation of children from the adult world is a "self-confirming ideology."[57]As long as children are denied from making their own choices due to their presumed incompetence, they never find a chance actually to develop those competencies. As Holt suggests, the obstacle behind

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[50] *Id.*, at 83.

[51] *Id.*, at 85-87.

[52] *Id.*, at 87.

[53] Henry H Foster & Doris Jonas Freed, *A Bill of Rights for Children*, 6 FAM. LAW Q. 343, 345 (1972); Hillary Rodham, *Children under the law*, 43 HARV. EDUC. REV. 487, 489 (1973).

[54] HOLT, *supra* note 33, at 11 (emphasis added).

[55] *Id.*, at. 11-12.

[56] John Harris, *Liberating Children*, *in* THE LIBERATION DEBATE : RIGHTS AT ISSUE 133, 135 (Michael P T Leahy & Dan Cohn-Sherbok eds., 1996).

[57] ARCHARD, *supra* note 25, at 47.

children's independence and competence is the adults' reluctance to give up their interest in children's dependency and incompetence.[58]

The liberationist conception has been seen as a "radical trend" in the development of children's rights.[59] For some, by giving the impression that children should possess adult rights, this conception harmed the concept of children's rights in the long term.[60] The advocates of this position disregarded the values of childhood and pictured adulthood as an ultimate and problem-free state that can replace childhood.[61] Nevertheless, they are also praised for asking an essential question of how to justify power over someone's nurturance, training, and experience[62] and challenging the restrictive notions of childhood and children's rights.[63]

This conception has attracted strong substantive objections. The first objection concerns the social construction of childhood. Purdy criticizes the liberationists for misusing historical evidence. She suggests that there is no guarantee that a particular model adopted in feudal agricultural and artisan society would work in a complex technological one.[64] However, this objection does not do justice to the liberationist conception. Although its description of pre-modern childhood might sound nostalgic, the liberationist conception does not call for a direct application of that form of childhood to today's societies.

The second objection is raised against the analogy drawn by the liberationist conception between children and other oppressed groups. O'Neill provides two reasons why such an

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[58] HOLT, *supra* note 33, at 77.

[59] Eugeen Verhellen, *Changes in the Images of the Child*, *in* THE IDEOLOGIES OF CHILDREN'S RIGHTS 79, 82 (Michael Freeman & Philip E Veerman eds., 1992); Rudi Roose & Maria Bouverne-De Bie, *Do children have rights or do their rights have to be realised? the United Nations convention on the rights of the child as a frame of reference for pedagogical action*, 41 J. PHILOS. EDUC. 431, 432 (2007).

[60] JANE FORTIN, CHILDREN'S RIGHTS AND THE DEVELOPING LAW 4 (2nd ed. 2005).

[61] Bronagh Byrne, *Do Children still need to Escape Childhood? A Reassessment of John Holt and his Vision for Children's Rights*, 24 INT. J. CHILD. RIGHTS 113, 118 (2016).

[62] Robert H. Mnookin, *Thinking About Children's Rights -Moving Beyond Kiddie Libbers and Child Savers*, 16 STANFORD LAWYER 24, 25 (1981).

[63] Anne McGillivray, *Why Children Do Have Equal Rights: In Reply to Laura Purdy*, 2 INT. J. CHILD. RIGHTS 243, 245 (1994).

[64] Laura M Purdy, *Does Women's Liberation Imply Children's Liberation?*, 3 HYPATIA 49, 58 (1988).

analogy is not useful. First, the dependence of children is not artificially produced as for other groups and, for this reason, cannot be ended by social or political changes. Second, adults are not reciprocally dependent on children as the other social groups who served as servants, workers, or soldiers to their oppressors. In reverse, children's dependence is a burden for those on whom they depend.[65] Purdy adopts a similar view and suggests that while there are no moral differences that can justify inequality between men and women, there are those moral differences between children and adults. She argues that children need "time and practice to develop the capacities for handling freedom in ways consonant with their own long-term self-interest and the needs of society."[66]

The third objection challenges the description of schools in the liberationist conception. Purdy criticizes the liberationist conception for ignoring the opportunities provided by schools to overcome inequalities. As she rightfully notes, "weakening schools attacks the wrong enemy."[67] She is equally concerned with the outcome of abolishing compulsory education for children. The results of the lack of education will not be equally distributed. When schooling becomes optional, the middle and upper-class children will continue to go to school; however, poor children will face the pressure to earn money and join the labor market.[68]

1.2. The Paternalist Conception of Children's Rights: Children as Becomings

The paternalist conception is in an intense rivalry with the liberationist conception.[69] Unlike the latter, the former does not recognize children as equal members of society and holders of all rights. The arguments around which the paternalist conception has been built can be summarized in three points. First, children are not rational and competent beings. Rather, they are "becomings" who are in a developmental process that will lead

[65] Onora O'Neill, *Children's Rights and Children's Lives*, 98 ETHICS 445, 461 (1988).

[66] Purdy, *supra* note 64, at 59.

[67] Laura M Purdy, *Why children shouldn't have equal rights*, 2 INT. J. CHILD. RIGHTS 223, 238 (1994).

[68] *Id.*, at 238.

[69] For an elaborative discussion of the differences between these two conceptions – commonly referred to as "the child liberationists" and "the care takers" see ARCHARD, *supra* note 25, at 43-56; Annemie Dillen, *Children between liberation and care: Ethical perspectives on the rights of children and parent-child relationships*, 11 INT. J. CHILD. SPIRITUAL. 237 (2006); Roose and Bouverne-De Bie, *supra* note 59.

them to the desired end: rational adulthood. Second, due to their evolving but not yet achieved capacity, children's rights should be limited to protection or welfare rights. Assigning full autonomy or choice rights to children is not desirable for a well-functioning society. Third, children are in special need of parental authority for their constant care and guidance. Although children possess the right to be protected from abuse and neglect and the right to receive basic goods, rights should not be the governing factor in parent-child relationships.

First, the idea that children are becomings derives from a developmental model according to which childhood represents a biological phase before adulthood. This is in clear contrast with the idea of childhood as a social construction. Archard discusses that the developmental model has three characteristics: teleology, necessity, and endogeneity.[70] First, the developmental model is teleological because adulthood is represented as an ideal end to be reached. When one is moving from childhood to adulthood, she is reaching a qualitatively different and higher level. Second, development is necessary. This means that every human being experiences development in stages does not vary from culture to culture.[71] Third, the developmental model is based on endogeneity. As Archard notes, development "derives its motive force from structures, functions, and processes which are rooted within the child's nature," and this nature is "genetically inherited and biologically fixed."[72]

The most important implication of the developmental model is the contradiction drawn between adults and children in which the latter has an inferior status. As Mayall suggests, childhood is associated with the labels such as "incompetent, unstable, credulous, unreliable, emotional," whereas adults are assigned the opposite characteristics of "competent, stable, well informed, reliable and rational."[73]

Second, as a corollary of the understanding of childhood as an inferior stage before adulthood, children are not regarded as moral agents and autonomous beings. That is why,

[70] ARCHARD, *supra* note 25, at 33.

[71] *Id.*, at 34.

[72] *Id.*, at 34.

[73] Berry Mayall, *The Sociology of Childhood in Relation to Children's Rights*, 8 INT. J. CHILD. RIGHTS 243, 246 (2000).

on the paternalist conception, children should not hold choice or autonomy rights. This is again in complete contradiction with the liberationist conception, which assigns all adult rights to children. According to Purdy, society cannot function well if children are considered equal players before reaching moral proficiency.[74] She suggests that an average adult is more moral and prudent than an ordinary child.[75] As she notes, prudence requires "a willingness to evaluate and order one's life goals." Morality entails "genuine care and concern for others, and a willingness to put the interests of others before one's own."[76] As she points out, the liberationist conception tends to focus too much on autonomy and self-realization that common welfare is unnoticed. It underestimates other values, such as trust and altruism, that are necessary to keep society functioning.[77] According to Purdy, the world is already a mess due to the moral inadequacies of some adults. Adding new actors who suffer more from those inadequacies would make it more difficult to cope with already existing problems.[78]

Although children's inferior status bars them from holding autonomy rights, the paternalist conception does not deny that children possess protective rights. Indeed, the right to be protected from abuse and neglect is accepted as a legitimate limitation on parental rights.[79] Similarly, Brighouse argues that the difference between children and adults is one of degree but not one of a kind. However, it is of a significant degree that justifies differences in the structure of their rights.[80] In terms of agency rights, Brighouse believes that there must be a threshold of competence and rationality above which agency rights can be granted. Nonetheless, that structural difference does not apply to welfare rights.

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[74] Laura M. Purdy, *Children's Liberation: A Blueprint for Disaster*, *in* THE LIBERATION DEBATE : RIGHTS AT ISSUE 145, 152 (Michael P T Leahy & Dan Cohn-Sherbok eds., 1996).

[75] *Id.*, at 153.

[76] Purdy, *supra* note 67, at 230.

[77] Purdy, *supra* note 74, at 152.

[78] Purdy, *supra* note 67, at 229.

[79] Bruce C Hafen, *Children' s Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their Rights*, 1976 BYU LAW REV. 605, 629 (1976).

[80] Harry Brighouse, *What Rights (If Any) Do Children Have?*, *in* THE MORAL AND POLITICAL STATUS OF CHILDREN 31, 45 (David Archard & Colin Macleod eds., 2002).

Third, according to the paternalist conception, children's rights should not extend to the parent-child relationship. This would endanger legitimate parental authority and the special need of children for parental care and guidance. Purdy argues that by taking the angle of rights to the parent-child relationship, parents would feel insecure since "love, by itself, is no real guide to the decisions that daily confront those who deal with children."[81] From a similar caretaker perspective, Hafen suggests that children's most crucial needs are a satisfying and psychological relationship with their parents. Liberating children from the right family relationship would mean "the most ironic adult treatment of children - abandoning them to their 'rights.'"[82] As he claims, traditional parental authority "is still preferable to the anarchy that would result from state support of some kind of democratic egalitarianism among all family members."[83]

1.3. The Liberal Conception of Children's Rights: Children's Rights *qua* Children

What distinguishes the liberal conception of children's rights from the early conceptions is its treatment of children's rights *qua* children with attention to children's unique interests. The central themes identifying the liberal conception are the following: i) the rejection of the developmental model, ii) cautious attitude towards autonomy rights of children, iii) the endorsement of parental guidance and control, and iv) the support given to the interest theory of rights to explain children's rights.

First, unlike the paternalist conception, the liberal conception of children's rights shares the vision of the liberationist conception to alter the political and legal status of children. It inherits the idea that childhood is a social construction but not a mere biological phase before adulthood.[84] In this regard, Hanson criticizes the view of children as "not-yet-being" for enforcing a teleological perception according to which children are inevitably developing towards an optimal end. As he states,

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[81] Purdy, *supra* note 67, at 225.

[82] Hafen, *supra* note 79, at 651.

[83] *Id.*, at 654.

[84] Michael D A Freeman, *Taking Children's Rights More Seriously*, *in* CHILDREN, RIGHTS AND THE LAW 52, 56 (Philip Alston, Stephen Parker, & John Seymour eds., 1992); Manfred Liebel, *Introduction*, *in* CHILDREN'S RIGHTS FROM BELOW : CROSS-CULTURAL PERSPECTIVES 1, 3 (Manfred Liebel ed., 2012).

> "Moving towards an optimal predefined end goal supposes a belief in an agenda of the optimal end state which has been set by nature or divinity, rather than a rational explanation for human developments and evolutions."[85]

Therefore, unlike the developmental model accepting the child as a becoming who will gradually acquire adult rationality through education, the liberal conception sees the child as a being.[86] This view of the child as "being" is reflected in the justifications of the liberal conception of children's rights. Accordingly, children have rights due to their independent intrinsic value[87], human dignity[88], and worth of equal respect and concern.[89]

Second, the liberal conception is cautious about ascribing all autonomy rights to children of all ages. This is the crucial point where the liberal conception diverges from the liberationist conception. This divergence can be explained in four steps. Firstly, for the liberal conception, autonomy or choice rights cannot be granted to *all* children who would like to use them. The very young children lack either immediate interest in using those rights or the capacity to exercise them.[90] Secondly, extending all adult rights to children, particularly sexual rights, carries the risk that rights become an exploitative and dangerous tool when children are manipulated, threatened, or coerced to make use of rights.[91] Thirdly, the mere focus on giving adult rights to children dilutes the concept of children's rights. As Campbell notes, "we are not dealing with the right of children at all, but with the rights of adults who are erroneously being treated as children."[92] Lastly, the

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[85] Karl Hanson, *Schools of Thoughts in Children's Rights*, *in* CHILDREN'S RIGHTS FROM BELOW : CROSS-CULTURAL PERSPECTIVES 63, 67 (Manfred Liebel ed., 2012).

[86] Barbara Arneil, *Becoming versus Being: A Critical Analysis of the Child in Liberal Theory*, *in* THE MORAL AND POLITICAL STATUS OF CHILDREN 70, 87 (David Archard & Colin Macleod eds., 2002).

[87] Tom D Campbell, *The Rights of the Minor: as Person, as Child, as Juvenile, as Future Adult*, *in* CHILDREN, RIGHTS AND THE LAW 1, 12 (Philip Alston, Stephen Parker, & John Seymour eds., 1992).

[88] McGillivray, *supra* note 63, at 244.

[89] Freeman, *supra* note 84, at 64.

[90] ARCHARD, *supra* note 25, at 48; Campbell, *supra* note 87, at 17.

[91] Byrne, *supra* note 61, at 128; Freeman, *supra* note 84, at 68.

[92] Campbell, *supra* note 87, at 18.

liberationist conception undermines the need of protective rights.[93] Campbell suggests that children's rights related to 'real' childhood stem from the interest in care, security, and protection from harm.[94] Freeman also underlines that protection is at the core of protecting both the present and future autonomy of children:

> "We have to treat them as persons entitled to equal concern and respect and entitled to have both their present autonomy recognized and their capacity for future autonomy safeguarded. And this is to recognize that children particularly younger children, need nurture, care and protection."[95]

Third, the liberal conception endorses parental guidance and control in the children's lives. Unlike the liberationist conception, which sees any adult control as oppressive and harmful to the child, the liberal conception accepts that children need care, guidance, and supervision from adults.[96] Freeman finds it dangerous to give complete liberation to children. Instead, he favors paternalistic interventions in children's lives to protect them from their irrational actions. What must be regarded as "irrational," as Freeman notes, must be strictly determined to allow a pluralistic conception of the good and to prevent intrusion of the subjective values of the protector. The intervention should be confined to preventing immediate harm and protecting the future capacities of the child.[97]

The endorsement of parental guidance is not in parallel with the paternalist conception either. For the paternalist conception, paternalism is justified because children are not capable of making rational and autonomous decisions.[98] However, for the liberal conception, the justification lies in the future consent of the child.[99] Eekelaar accepts that

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[93] Byrne, *supra* note 61, at 122.

[94] Campbell, *supra* note 87, at 21.

[95] Freeman, *supra* note 84, at 66.

[96] Tom D Campbell, *Really Equal Rights – Some Philosophical Comments on Why Children Shouldn't Have Equal Rights' by Laura M. Purdy*, 2 INT. J. CHILD. RIGHTS 259, 263 (1994); Minow, *supra* note 32, at 297.

[97] Michael Freeman, *Limits of Children's Rights*, *in* THE IDEOLOGIES OF CHILDREN'S RIGHTS 29, 38 (Michael Freeman & Philip E Veerman eds., 1992).

[98] ARCHARD, *supra* note 25, at 50.

[99] Freeman, *supra* note 84, at 68.

children often lack information and the ability to decide on what is best for them. In this situation, what is needed is "to make some kind of imaginative leap and guess what a child might retrospectively have wanted once it reaches a position of maturity."[100] This retrospective justification of paternalism has been faced with internal critiques. Campbell considers this justification "methodologically dubious in so far as the adult that retrospects is the adult who is produced by a particular sort of education."[101] Similarly, Archard argues that this method is self-justifying. In his words, "we could brainwash someone to think that brainwashing was a good thing."[102]

For some advocates of the liberal conception, the parental role is not confined to paternalistic actions to prevent immediate harm. Archard points out the role of adults in forming the convictions and values of children. According to him, no one possessing full autonomy can exist in a vacuum that is free from any beliefs or commitments, and parents cannot avoid forming their children's characters.[103] He believes that making morally sound decisions, developing a sense of belonging to communities with shared values and histories, and fulfilling natural abilities should also guide a child's upbringing. [104]

Fourth, for the liberal conception, the justification of why children have rights lies in the interest theory of rights rather than the will or choice theory. The will theory explains rights as choices that are open to one to impose a corresponding duty to others. In other words, the performance of or abstention from that duty is dependent on "the choice of the individual who is said to have the right or the choice of some person authorized to act on his behalf."[105] The will theory inherently links moral rights with normative power. The latter is the prerequisite for the former.[106] Due to this equation, MacCormick suggests that the will theory does not fit the case of children's rights to care, nurture, and love. Unlike

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[100] John Eekelaar, *The Emergence of Children's Rights*, 6 OXF. J. LEG. STUD. 161, 170 (1986).

[101] Campbell, *supra* note 87, at 21.

[102] ARCHARD, *supra* note 25, at 52.

[103] *Id.*, at 53.

[104] *Id.*, at 54.

[105] H L A Hart, *Definition and Theory in Jurisprudence*, *in* ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 21, 35 (1983).

[106] Neil MacCormick, *Children's Rights : A Test-Case for Theories of Right*, 62 ARCH. PHILOS. LAWAND SOC. PHILOS. 305, 307 (1976).

the will theory, for MacCormick, power is ancillary to the rights but not its constitutive element. Therefore, he criticizes the will theory for confusing substantive rights with ancillary remedial provisions.[107] At this point, MacCormick differentiates the moral requirement to take care of children and the legal right of every child to be cared for, nurtured, and loved.[108] He believes that the legal right might justify the moral requirement, "but not vice versa."[109] For him, rights can exist before moral duties;[110] therefore, he states,

> "It certainly does not seem to me in any way objectionable to say that it is *because* children have a right to care and nurture that parents have the duty to care for them. There might be other and different grounds (e.g. saving taxpayers' money) for imposing such a duty on parents or on whomsoever it may be imposed; but recognition of children's rights is one distinctive reason for doing so."[111]

The emphasis of the will theory on power (or capacity) led the advocates of the liberal conception of children's rights to endorse the interest theory.[112] Nonetheless, the application of the interest theory to children's rights has two difficulties: first, to explain why the emphasis is on "interests" rather than on goods, needs, or desires, and second to ascertain which interests children have that are worthy of being qualified as rights.[113] The liberal conception seems to have partly overcome the second difficulty. Campbell argues that children have distinct interests as children, as persons, as juveniles, and as future

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[107] *Id.*, at 308; For a contrary view see Hamish Ross, *Children's Rights – a Defence of Hartian Will Theory*, 22 INT. J. CHILD. RIGHTS 43 (2014).

[108] MacCormick, *supra* note 106, at 309.

[109] *Id.*, at 312.

[110] *Id.*, at 312.

[111] *Id.*, at 313 (emphasis in original).

[112] Eekelaar, *supra* note 100; Freeman, *supra* note 84; Campbell, *supra* note 87*;* Tobin, *supra* note 20; Lars Göran Sund & Marie Vackermo, *The Interest Theory, Children's Rights and Social Authorities*, INT. J. CHILD. RIGHTS (2015); Lars Göran Sund, *The Rights of the child as legally protected interests*, INT. J. CHILD. RIGHTS (2006); Manfred Liebel, *Welfare or Agency? Children's Interests as Foundation of Children's Rights*, 26 INT. J. CHILD. RIGHTS 597 (2018).

[113] Campbell, *supra* note 87, at 16; Liebel, *supra* note 112, at 612-613.

adults.[114] At the juvenile stage, children have autonomy-related interests.[115] In a similar vein, Eekelaar divides children's interests into three: basic, developmental, and autonomy interests. While he accepts the existence of children's autonomy interests, he argues that autonomy interests are subordinate to the basic and developmental interests[116] and can be recognized only through an empirical assessment of full capacity.[117]

1.4. The Concept Deniers: Against Rights-Discourse for Children

The concept of children's rights has competing conceptions, notably liberationist, paternalist, and liberal conceptions. Although they diverge on the nature of childhood and the scope and basis of children's rights, they share a common concept of children's rights. However, there is a line of scholarship that denies the concept of children's rights. These concept deniers advocate for abandoning the rights discourse for children. First, they point out the dangers or inadequacies of the rights discourse to evaluate the relationships of children. Second, instead of using the language of rights, they propose using the rhetoric of obligation, care, or responsibility towards children.

First, they are concerned with the outcomes of the rights discourse for families and relationships. Schoeman believes the rights talk poses the danger of encouraging people to think the proper relationship between them and their children is an abstract one:

> "Emphasis on the rights of children might foster thinking about the relationship between parent and child as quasi-contractual, limited, and directed toward the promotion of an abstract public good. Such emphasis unambiguously suggests that the relationship is a one-way relationship aimed almost solely at promoting the best interest of the child."[118]

As opposed to the one-way relationship offered by the rights talk, intimacy provides a two-way sharing of benefits. As Schoeman argues, children have rights as persons. However, as infants in their relationship with their parents, they should primarily be

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[114] Campbell, *supra* note 87.

[115] *Id.*, at 19.

[116] Eekelaar, *supra* note 100, at 171.

[117] *Id.*, at 181.

[118] Ferdinand Schoeman, *Rights of Children, Rights of Parents, and the Moral Basis of the Family*, 91 ETHICS 6, 9 (1980).

considered as having needs. The satisfaction of these needs entails intimate and intense relationships with others.[119]

Similarly, Arneil suggests that children's need for affection and kindness does not fit the language of rights. Given the universal characteristics of children, namely dependency and their transition to maturity, the central issue should not be the authority, status, or rights but care.[120] By adopting the ethics of care approach, she argues that the relationship between state and family should be more supportive, and the families should be viewed as communities rather than associations.[121]

Second, they call for a change in the rhetoric to address children's issues. O'Neill is a strong advocate for using the rhetoric of obligations. She divides the obligations owed to children into three categories.[122] The first kind of obligation is owed by all agents to all children, such as the obligation to refrain from abuse and molestation. It is a *perfect* obligation giving rise to a fundamental right not to be abused and molested. The second kind is owed by persons who have undertaken care for specific children. It is also a *perfect* obligation and gives rise to a right to be cared. However, this right is not fundamental since it is based on a special relationship. The third kind is the obligation to be kind and considerate in dealing with children. As O'Neills argues, unlike the first two kinds of obligations, the third kind is an *imperfect* obligation and does not create any rights for children.[123] In this case, "there are no right holders, and nobody can either claim or waive performance of any right."[124]

O'Neill confirms that there are valid reasons to resort to the rhetoric of rights. It provides the perspective that the recipient of the obligation is not a loyal subject who petitions for a favor. Instead, she is "a claimant who demands for what is owed and is wronged if a rightful claim is denied."[125] She accepts that rights can be instruments for the powerless

[119] *Id.*, at 9.

[120] Arneil, *supra* note 86, at 88.

[121] *Id.*, at 90-91.

[122] O'Neill, *supra* note 65, at 447.

[123] *Id.*, at 448.

[124] *Id.*, at 448.

[125] *Id.*, at 460.

to move away from dependence.[126] This function of rights to empower the powerless may be politically advantageous despite their theoretical difficulties.[127] However, this advantage is not appealing to children as their situation is not the same as other oppressed groups. Therefore, O'Neill suggests using the rhetoric of obligations instead of rights:

> "Those who urge respect for children's rights must address not children but those whose action may affect children; they have reason to prefer the rhetoric of obligations to that of rights, both because its scope is wider and because it addresses the relevant audience more directly."[128]

As O'Neill argues, the rhetoric of rights is useful for agents who are capable of creating pressure from below. However, children are less permanently powerless, and "their main remedy is to grow up."[129] Coady and Freeman criticize this argument for ignoring the fact that the conditions of childhood determine future adulthood.[130]

Goodin and Gibson adopt a similar approach arguing that it is a mistake to place the case of the very young and the very old into the template of rights. They claim that the duties towards them must be described under a much broader and demanding notion of "right conduct."[131]

Simon also proposes a change in the language by adopting the "harm perspective," addressing the most pressing problems of children. Unlike other theorists, he does not favor a total abandonment of the rights talk, but he points out its inadequacies.[132] His "harm perspective" directs the attention to more "invisible" hands, causing the greatest

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[126] *Id.*, at 460.

[127] *Id.*, at 461.

[128] *Id.*, at 462.

[129] *Id.*, at 463.

[130] C. A. J. Coady, *Theory, Rights and Children: A Comment on O'Neill and Campbell*, *in* CHILDREN, RIGHTS AND THE LAW 43, 49 (Philip Alston, Stephen Parker, & John Seymour eds., 1992); Michael Freeman, *Why it remains important to take children's rights seriously*, 15 INT. J. CHILD. RIGHTS 5, 10 (2007).

[131] Robert E. Goodin & Diane Gibson, *Rights, young and old*, 17 OXF. J. LEG. STUD. 185, 185 (1997).

[132] Thomas W Simon, *United Nations Convention on Wrongs to the Child*, 8 INT. J. CHILD. RIGHTS 1, 2 (2000).

harm to children rather than focusing only on the visible hands of abusing parents.[133] He claims that the relationship between poverty and child abuse is ignored, and this undermines the more extensive societal obligations.[134] As he notes,

> "It is important not to stop the analysis at a determination of harm to a child and pointing an accusing finger at the perpetrators. We must question the conditions under which parents and other caregivers discharge their obligations. We must determine our fundamental obligation to address the conditions, outside the immediate parental structure, that lead to these harms. The Harm Perspective at least opens up this line of inquiry."[135]

In such an extended view, every individual is under an obligation to protect the child from harm and prevent it before occurring. Therefore, in cases of child abuse, the privacy of the home does not prevent those witnessing from intervening.[136]

The deniers of the concept of children's rights have attracted important criticisms. First, rights do not need to contest with love and care in a relationship. Instead, they can shape the relationship which holds a proper place for love.[137] Second, the parent-child relationships are not always in their ideal form, where different interests exist in harmony.[138] In that sense, it is not realistic to assume that the interests of parents and children always coincide. Third, respecting children's rights does not mean that the daily care of children would be dominated by rights discourse, and its presence does not necessarily rule out other essential values.[139] The realization of those values would not be possible through unregulated care without respect for children's rights.[140] Fourth, there are theoretical and practical costs of abandoning the rights discourse. Rights have a

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[133] *Id.*, at 9.

[134] *Id.*, at 9.

[135] *Id.*, at 12.

[136] *Id.*, at 13.

[137] Brighouse, *supra* note 80, at 34.

[138] Freeman, *supra* note 84, at 55.

[139] Colin Macleod, *Are Children's Rights Important?*, *in* PHILOSOPHICAL FOUNDATIONS OF CHILDREN'S AND FAMILY LAW 191, 208 (Elizabeth Brake & Lucinda Ferguson eds., 2018).

[140] *Id.*, at 208.

signaling function, a normative weight to trump other interests, and an enforcement dimension that justifies legal recognition and institutional mechanisms.[141]

1.5. Conclusion

This chapter provided an overview of the competing conceptions of the concept of children's rights. The differences between these conceptions can be summarized in three points. Firstly, they diverge on the nature of childhood. While the liberationist and liberal conceptions assert that childhood is socially constructed, the paternalist conception believes that childhood is a phase in a biologically determined process of development. Secondly, their perspectives differ on which rights children should have. For the liberationist conception, children should have all the rights adults have. However, on the paternalist conception, children's rights should be confined to protective rights. The liberal conception also advocates for the autonomy or choice rights of children, but with caution. This conception does not support ascribing autonomy rights to young children. Thirdly, these conceptions differ based on parental guidance and supervision. For the liberationist conception, parental control over children is one source of oppression from which children should be liberated. Nevertheless, paternalist and liberal conceptions suggest that children need parental control. While for the paternalist conception, the justification is children's lack of rationality and autonomy, for the liberal conception, it is the child's future consent.

[141] *Id.,* at 194.

2. The Conceptions of Parental Control Rights

The second chapter explores different conceptions of parental control rights. Similar to the concept of children's rights, as discussed in the previous chapter, there are competing conceptions of parental rights having different perspectives on the demands and nature of the concept. The following three sections discuss different conceptions of parental control rights: the proprietorial conception, the fiduciary conception, and the relational conception. These sections demonstrate that these conceptions differ on two grounds: first on the origin or basis of parental rights, and second on the scope of these rights. The last section examines those arguments denying the concept of parental rights.

2.1. The Proprietorial Conception of Parental Rights: Procreation, Biology, and Genetic Ties

On the proprietorial conception of parental rights, the bases of parental rights are the act of procreation and the biological or genetic ties that exist between natural parents and the child. This conception does explain not only the possession rights but also parental control rights over children.[142] In other words, procreation naturally gives parents the right to control children's lives without an allocation or endorsement by a political authority. Two points explain the proprietorial conception: one is that the basis of parental rights lies in the physical act of reproduction and the biological or genetic ties that it generates, and the second is that parents have broad control rights, including both nurturing children and shaping their values.

First, in the proprietorial conception, the physical act of reproduction gives rise to parental rights. As Fried contends, the special bond between the parent and the child is based on "human reproduction."[143] Similarly, Gilles argues that children belong to their parents because they owe their existence to sexual intercourse between their mothers and fathers

[142] For the distinction between possession rights and control rights see Dwyer, *supra* note 23.

[143] CHARLES FRIED, RIGHT AND WRONG 153 (1978).

and their birth to the mother's reproductive labor. For this reason, as he notes, the child is the parent's "own."[144]

Some justify the parents' ownership over children by resorting to Locke's labor theory.[145] According to this theory, when one takes an unowned thing and mixes his labor with it, it becomes one's property, and the annexation of labor with that thing excludes others' rights.[146]At first sight, one can argue that the reproductive labor of one couple fits the Lockean formula. The conceived child "could not have come into existence but for their sexual congress, and its unique genetic identity is solely attributable to their powers and nature."[147] However, this argument has serious shortcomings. First, reproductive labor is not equally shared between mother and father. Maternity is apparent in the very act of giving birth, and the role of women continues from the moment of conception until birth.[148] Second, if natural parents own their children only by their reproductive labor, it would not be plausible to argue that ownership ends when the child reaches maturity.[149]

Along with the act of reproduction, the proprietorial conception regards the child as the parent's biological and genetic extension. As an advocate of this conception, Page argues that the ultimate foundation of parental rights is the specific value of parenthood, which is not restricted to children's care and protection. But it also includes the continuation of the human race.[150] Page believes that there are two aspects of parenthood:

> "One aspect in raising their child parents do much to shape the person it will become. This would do in any case, even if it were not part of their design, but I have argued parents characteristically have a positive desire to determine the kind of person child

[144] Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 UNIV. CHICAGO LAW REV. 937, 961 (1996).

[145] HILLER STEINER, AN ESSAY ON RIGHTS 248 (1996).

[146] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION (Mark Goldie ed., 2016), Chapter V, par. 27.

[147] David Archard, *Do parents own their children?*, 1 INT. J. CHILD. RIGHTS 293, 296 (1993).

[148] *Id.*, at 297.

[149] *Id.*, at 299.

[150] Edgar Page, *Parental Rights*, 1 J. APPL. PHILOS. 187, 196 (1984).

becomes. The other aspect is that natural parents produce from their bodies the material to be shaped, the organism that is to become a person."[151]

Therefore, he argues that procreation and control of children are "parts of a single process."[152] Page is not alone in this view. Hall also explains that natural parents must have the "original charge" of their children. It means that they have "the initial legal and moral claims to and responsibilities for their progeny."[153] For Hall, what bases this idea on is the fact that the child represents a "genetic part" of her parents. Therefore, as the notion of self-ownership suggests, parents are entitled to their children, as any other thing that is part of themselves.[154] In a similar vein, Fried describes parenthood as "a physical continuity" which is tied to the moral continuity of parents' autonomy through their control over children.[155]

Second, the supporters of the proprietorial conception advocate for wide parental rights not limited to the right to nurture the child. Due to the strong physical relationship between the parent and the child, any limitation on the parents' inculcation of their own values and convictions in the child would breach their personal rights. As Fried suggests, since the child is the extension of the parent's self, forming the child's values and life plans is an extension of "the basic right not to be interfered with in doing these things for oneself."[156] For Page, parents have a natural tendency and a fundamental interest in shaping their children's lives. These justify a broad range of rights, including the right to determine the child's education, religion, values, and lifestyle.[157]

The proprietorial conception of parental rights is not appealing for three reasons. First, this conception is difficult to accept for those adhering to the concept of children's rights as it treats children as mere extensions of their parents with the potential to undermine their independent moral status. Second, it fails to explain the role of the state in the child's

[151] *Id.*, at 200.

[152] *Id.*, at 201.

[153] Barbara Hall, *The Origin of Parental Rights*, 13 PUBLIC AFF. Q. 73, 74 (1999).

[154] *Id.*, at 76.

[155] FRIED, *supra* note 143, at 155.

[156] *Id.*, at 152.

[157] Page, *supra* note 150, at 196.

upbringing. If natural parents have rights over their children similar to their rights over their own bodies, the state would not have a legitimate basis to limit those rights.[158] Third, it exaggerates the importance of biological or genetic ties between parents and children. The social, moral, and relational goods that parenthood generates are ignored to a great extent.[159]

2.2. The Fiduciary Conception of Parental Rights: The Duties Towards the Child

Under the fiduciary conception, parents are fiduciaries who are entrusted with the duty to protect and promote the rights of the child. Unlike the proprietorial conception, which considers parental rights as a derivative of the natural ties between the parent and the child, the fiduciary conception sees the parent-child relationship as a juridical one that is shaped by the rights of the child. Brennan and Noggle, for instance, oppose considering that relationship as a mere biological relationship. Instead, they regard that relationship as one of "care, advocacy and protection."[160]

This conception accepts parental rights only for the sake of the child's interests. Accordingly, parental rights are necessary to guarantee that children receive intimate and continuous care.[161] And parents are in the best position to provide that care. Furthermore, parental rights assure that parenthood is appealing to everyone. This argument assumes that people would not choose to become parents when the child's upbringing is considered completely as a public endeavor. In such a case, children's interests would be at risk in the long run.[162]

What distinguishes the fiduciary conception from other conceptions of parental rights is it being conditional on the needs and interests of the child. Accordingly, parents are under

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[158] Amy Gutmann, *Children , Paternalism , and Education : A Liberal Argument*, 9 PHILOS. PUBLIC AFF. 338, 346 (1980).

[159] MICHAEL W AUSTIN, CONCEPTIONS OF PARENTHOOD ETHICS AND THE FAMILY 17 (2007).

[160] Samantha Brennan & Robert Noggle, *The Moral Status of Children: Children's Rights, Parents' Rights, and Family Justice*, 23 SOC. THEORY PRACT. 1, 12 (1997).

[161] ARCHARD, *supra* note 25, at 129; JAMES G DWYER, RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS 81 (1998).

[162] Harry Brighouse & Adam Swift, *Parents' Rights and the Value of the Family*, 117 ETHICS 80, 85 (2006).

the constant duty to protect and promote them. In that respect, Brennan and Noggle suggest the "stewardship" rights of parents are with thresholds. They can be overridden when their exercise harms the child or when the child's needs are not met.[163] In that respect, the parent's role as a steward brings three sets of duties: i) not to breach the rights of the child, ii) to prevent others from breaching the rights of the child, and iii) to promote the interests of the child.[164] Likewise, as Archard notes, parents' rights as trustees of the child last "only as long as the trust, namely point where the trust's purpose has been accomplished, and the children exercise their own rights for themselves."[165]

The priority given to the child's rights poses a question of how much discretion parents can enjoy. According to Brennan and Noggle, parents should have considerable discretion on how to fulfill the duty to promote the interests of the child.[166] In some cases, it might be permissible for parents to infringe the rights of the child to fulfill their duties to nurture. However, even in these cases, parents have a duty to minimize these infringements and seek other ways for the child to exercise those rights.[167]

On the question of discretion, Blustein makes a distinction between instrumental and discretionary trust. While the former means that the rights are mere instruments to fulfill the duties, the latter allows the trust to make independent judgments. He argues that the parent-child relationship resembles discretionary trust, and therefore parents should be in a position to make their own judgments on how to raise children.[168]

Granting discretion to parents in fulfilling their fiduciary duties is particularly important when one considers the unique characteristics of the parent-child relationship, which differ from other fiduciary relationships. Noggle suggests that one component is peculiar to the parent-child relationship, and that is parental authority. Parents possess the

[163] Brennan and Noggle, *supra* note 160, at 9-10.

[164] *Id.*, at 13.

[165] David Archard, *Child Abuse: parental rights and the interests of the child*, 7 J. APPL. PHILOS. 183, 187 (1990).

[166] Brennan and Noggle, *supra* note 160, at 13.

[167] *Id.*, at 16.

[168] Jeffrey Blustein, *On the Doctrine of Parens Patriae: Fiduciary Obligations and State Power*, 2 CRIM. JUSTICE ETHICS 39, 41 (1983).

authority to give instructions to the child and exercise some coercion to enforce them. [169] According to Noggle, this is justified because children are special agents who have not fully developed as moral agents. Although they have a simple agency to seek their immediate interests, they lack a temporally extended agency to pursue a set of goals that are stable over time. This is the reason why the parents' role is needed:

> "The parent, in effect, helps the child achieve temporal extension by exercising authority *vis-à-vis* the child's present self in the name of the future self. If a temporally extended agent is one who grants authority to both present and future interests, the child can gain temporal extension when the parent exercises authority in the name of the child's future self."[170]

Interestingly, the fiduciary conception receives criticism from a child-centered perspective. First, the fiduciary conception assumes that parents are in the best position to guide children. However, this might be questionable in some settings. For instance, regarding the consent to medical treatment, doctors and medical personnel are in a better position to judge the well-being of the child.[171] Second, if the care and welfare of the child are at the center, the fiduciary conception fails to explain why rights are granted to parents but not to children themselves.[172]

Third, the argument justifying the fiduciary conception that parenthood would not be appealing exaggerates the possible intrusions into the parent-child relationship. Dwyer argues that eliminating parental rights would not increase the level of restrictions; instead, it will change the formal procedure. The procedure will focus on balancing the costs and benefits to the child rather than balancing the child's or societal interests against parental rights. He believes that such an argument is also a misrepresentation of parental motivation:

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[169] Robert Noggle, *Special Agents: Children's Autonomy and Parental Authority*, *in* THE MORAL AND POLITICAL STATUS OF CHILDREN 97, 97 (David Archard & Colin Macleod eds., 2002).

[170] *Id.*, at 104.

[171] Page, *supra* note 150, at 190.

[172] DWYER, *supra* note 161, at 84.

> "It presupposes that parents' attachment to their children is fragile and arises primarily from a selfish desire to possess and control another human being, so that once that desire is frustrated little or no motivation to care for children remains."[173]

The fiduciary conception of parental rights receives significant objections from a parent-centered perspective as well. When parental rights are based on children's interests to be cared for, guided, and directed, it paves the way for "strategic allocation" of the child's care, meaning that the separation of children from their parents can be justified when third parties or institutional settings can better serve children's interests.[174] This concern leads the parental rights advocates to provide a justification based on parents' own interests rather than children's interests.

2.3. The Relational Conception of Parental Rights: Intimacy, Human Flourishing, and Authenticity

On the relational conception of parental rights, what justifies parental control rights is the parents' own interests. The advocates of this conception focus on the particular goods created by the parent-child relationship, most notably intimacy, human flourishing, and authenticity. In this conception, similar to the proprietorial conception, parents should have extensive rights not limited by the interests of the child.

First, Schoeman argues that parental control rights are justified because of parents' right to an intimate relationship. According to Schoeman, the relationship between parent and infant can only be described in a "poetic-spiritual language" and characterized by a shared intimacy.[175] The child depends on the parent for emotional and material needs, and the parent depends on the child for intimacy.[176]

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[173] *Id.*, at 89.

[174] I borrow the term "strategic allocation" from Colin Macleod, *Raising Children: Who is Responsible for What?*, *in* TAKING RESPONSIBILITY FOR CHILDREN 1, 10 (Samantha Brennan & Robert Noggle eds., 2007). See also Anca Gheaus, *The Right to Parent One's Biological Baby*, 20 J. POLIT. PHILOS. 432 (2012); CLAYTON, *supra* note 25, at 52; Hannan and Vernon, *supra* note 24, at 174; Gutmann, *supra* note 158, at 344; Brighouse and Swift, *supra* note 162, at 86; Schoeman, *supra* note 118, at 13.

[175] Schoeman, *supra* note 118, at 8.

[176] *Id.*, at 10.

For Schoeman, personal commitments to others are constitutive of intimate relationships. The strength of these relationships varies with the degree of social intrusion. As he notes, the prospect of state intervention harms the sense of security, and it makes people hesitant to "see their interests fused with those of another."[177] Parental rights ensure that the relationships are formed on people's own terms independently from the general social concerns. Giving the state the authority to intervene would mean "redirection or socialization of these relationships."[178]

Schoeman's intimacy view provides a "strong, though rebuttable, moral presumption" in favor of the family, although there might be more effective ways to promote the child's best interests.[179] According to this view, such a presumption does not infringe on the rights of children because parents are "representing the interests of the family as an integrated whole in addition to representing their own particular interests."[180] Even when there is a conflict between parental rights and the rights of children, "important ends are served by relegating to parents the right to decide important issues for the family."[181]

Brighouse and Swift criticize Schoeman's intimacy view for failing to see the differences between intimate relationships between adults and those between parents and children. Firstly, while the parent-child relationship is not among people with equal power, the power is reciprocal in adult relationships.[182] Secondly, even in adult-adult relationships with unequal power, the less powerful person usually has or should have the option to exit the relationship. Children lack such an ability to exit at least until they reach a certain age.[183] Thirdly, the quality of intimacy is different. In their own words:

> "The love one receives from one's children, again especially in the early years, is spontaneous and unconditional and, in particular, outside the rational control of the

[177] *Id.*, at 14.

[178] *Id.*, at 15.

[179] *Id.*, at 18.

[180] *Id.*, at 19.

[181] *Id.*, at 19.

[182] Brighouse and Swift, *supra* note 162, at 92.

[183] *Id.*, at 92.

child. She shares herself unselfconsciously with the parent, revealing her enthusiasms and aversions, fears and anxieties, in an uncontrolled manner."[184]

Finally, the moral quality of the relationship is different. The parent is responsible for both the child's immediate welfare and the development of the child's capabilities. The parents' fiduciary obligations require them to coerce the child against her own will and even to manipulate her will to make it accord with her interests.[185]

Schoeman's account has also been criticized for linking parental control rights with privacy. A certain degree of privacy might be necessary for intimate relationships; however, this does not justify such a broad version of parental control rights defended by Schoeman.[186] Additionally, privacy can also function as a shield against outside control in cases of abuse and neglect. Within the family's private and intimate setting, many victims of child abuse might think of the ill behavior as the healthy functioning of the family.[187]

Additional opposition to Schoeman's approach concerns the emphasis on intimacy. Archard suggests that the child has a right to the best possible caretaker who can provide an intimate and loving relationship; however, this cannot justify parental rights. As he notes:

"My loving you does not give me rights over you. But if you have a right to certain kinds of treatment and my love for you guarantees that treatment, then it may follow that I am the person to love you. This, however, is your right not mine."[188]

Second, another parental good justifying parental rights is human flourishing. Brighouse and Swift suggest that parents have a non-fiduciary interest in playing the fiduciary role. Through this role, "a parent comes to learn more about herself, she comes to develop as a person, and she derives satisfaction that otherwise would be unavailable."[189] Therefore,

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[184] *Id.*, at 93.

[185] *Id.*, at 94.

[186] Altman, *supra* note 24, at 214.

[187] Archard, *supra* note 165, at 192.

[188] ARCHARD, *supra* note 25, at 101.

[189] Brighouse and Swift, *supra* note 162, at 95.

it is crucial for human flourishing, and it contributes to the success of the parents' lives as well.

It is important to note that parental rights pictured by Brighouse and Swift are not as broad as those defended by Schoeman. They admit that parental rights include a series of associational rights that directly derive from "the right to a relationship of a certain kind."[190] They accept that parents have a fundamental interest in shaping the values of the child, and it derives from the shared enthusiasm between the parent and the child:

> "It is hard for us to imagine that two people can maintain intimacy without having some distinctive enthusiasms and interests in common. These shared enthusiasms provide for the interactions which to a considerable extent constitute the intimacy of the relationship and allow for the relationship to be pursued in a way that is not constantly self-conscious."[191]

However, this interest should not extend to indoctrinating children. As they suggest, parental rights can include influencing the child's values but without endangering the child's prospective autonomy.

The third parental good to justify parental rights is authenticity. Altman suggests that parental interests in nurturing, counseling, and educating are the basis of parental control rights, and these activities require authenticity and discretion to be valuable. According to Altman, parental interests in nurturing, counseling, and educating differ from an interest in being a fiduciary. At this point, Altman disagrees with Brighouse and Swift. Unlike fiduciaries, he suggests, parents do not fulfill someone else's mission; instead, they have interests in shaping a child's life. However, parents should not feel compelled to form the child toward a view of goodness or happiness that they reject.[192] As Altman argues, the importance of authenticity is not limited to deep commitments or comprehensive understandings. More broadly, parental control involves simple judgments that are not necessarily linked to deep commitments.[193]

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[190] *Id.*, at 102.

[191] *Id.*, at 104.

[192] Altman, *supra* note 24, at 221.

[193] *Id.*, at 223.

Altman's authenticity view sees parenthood as a creative role attached to a specific child. It differs from the accounts of Schoeman, Brighouse and Swift. As he notes, while intimacy and shared enthusiasm can still prosper with substantial outside regulation, authenticity and the creativity that it depends on are harmed by regulation.[194]

Against these arguments justifying the relational conception, Dwyer suggests that this conception does not serve the long-term parental interests. Given the context of religious child-rearing practices, he believes that many parents derive immediate pleasure from controlling children's lives. However, such pleasure cannot last long. As children grow older and become able to form their own opinions, parents being possessive of their children is very likely to create tension and hostility between children and parents. It would be beneficial for both sides if parents, from the very beginning, recognize the fact that children might have different views and choose differently for themselves.[195] This view is also shared by Callan, who argues that the educational ambitions of parents should not mean fixing children to a pre-determined image. As he points out, "an obsession with the adult-in-the-making strikes us as a pathology of parenthood rather than an authentic human good to which we should defer."[196]

2.4. The Concept Deniers: Parental Control Rights as a Deviation from the Liberal Principles

Parental control rights give rise to an essential question as to whether the liberal theory allows someone to possess a right to control someone else's life. Those who deny the concept of parental rights provide a negative answer to this question and argue that this concept is a deviation from the liberal understanding of rights.

Montague argues that neither interest theory nor choice theory applies to parental rights. First, if interest theory applies to parental rights, this would mean permission to protect parental interests in their children's welfare. Montague considers that this makes parental rights closely associated with property rights.[197] Second, if choice theory applies to parental rights, this would provide an area of activity within which parents have moral

[194] *Id.*, at 225-226.

[195] DWYER, *supra* note 161, at 93.

[196] EAMONN CALLAN, CREATING CITIZENS : POLITICAL EDUCATION AND LIBERAL DEMOCRACY 143 (2004).

[197] Phillip Montague, *The Myth of Parental Rights*, 26 SOC. THEORY PRACT. 47, 55 (2000).

discretion to make decisions about their children's lives. However, in this case, parental rights would concern directly with the interests of children, but indirectly with those of parents. This, according to Montague, makes parental rights a counterexample of "rights oriented towards their possessors." In this regard, it resembles the rights of an attorney toward her client or the rights of a physician toward her patient.[198]

A counter-argument could be that parental rights are needed to provide care for the child, as the fiduciary conception asserts. Montague opposes such an argument. He claims that if parental rights are formulated as a right to claim the means to perform a duty, they are no longer parental rights but parental obligations. Then, parental obligations are obligations that are oriented to their possessors. While Montague accepts that parents have broad discretion on how to fulfill these obligations, he argues that they do not have discretion on whether to fulfill them. He argues that in any case, such discretion does not generate parental rights:

> "The fact that you are permitted to determine how exactly you fulfil your obligation does not, however, imply that you have rights to act according to your choices. No one is obligated to refrain from interfering with your fulfilling your obligation in a particular way, as long as this does not, in the circumstances, prevent you from fulfilling your obligation."[199]

Dwyer shares this view. Accordingly, parents simply have a privilege limited in its scope to the actions and decisions which are compatible with the temporal interests of children, and this privilege does not confer the right to direct a child's life.[200] What he calls the "limited rights principle" forbids an individual to use another nonconsenting person as an instrument to advance his own interests.[201] Accordingly, rights rest on self-determining objectives such as protection of integrity, property, or direction of one's own life, and they do not create an entitlement to control someone else's life. This is similar to what Montague is suggesting by the term "rights oriented towards their possessors."

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[198] *Id.*, at 57.

[199] *Id.*, at 62-63.

[200] DWYER, *supra* note 161, at 64.

[201] *Id.*, at 67.

The argument that parental rights are a deviation from liberal principles is also partly supported by parental rights advocates. Brighouse and Swift agree with Montague and Dwyer that a right granting authority to its holder to direct another person's life is a challenge for the liberal theory. In this regard, they compare parental rights with the rights of corporate entities, which extend beyond the rights of individuals constituting those entities. However, in this example, individuals have a "realistic exit option," unlike children in the parent-child relationship.[202] Sometimes, rights over others are justified to the extent that they promote the interests of those others. In fiduciary relationships, the agent directs the affairs of the principal upon the appointment by the principal herself and is guided by her best interests. Brighouse and Swift admit that there is no example other than the parent-child relationship where the rights over others are regarded as fundamental and partly justified by the interests of the rights holder.[203]

2.5. Conclusion

The differences between the conceptions of parental control rights can be summarized in two points. First, they disagree on the source or basis of parental rights. For the proprietorial conception, the basis is the physical act of procreation and the biological or genetic ties generated by it. The fiduciary conception base parental rights on children's interests and well-being, while the relational conception bases them on parental interests, which can be intimacy, human flourishing, and authenticity. Second, the justifications of these conceptions differ regarding the scope of parental rights. On the one hand, the proprietorial and relational conceptions suggest that parental rights should include extensive rights not limited by the rights of the child. On the other hand, the fiduciary conception considers these rights as grounded on the parents' duties to promote the rights of the child.

[202] Brighouse and Swift, *supra* note 162, at 82.

[203] *Id.*, at 82.

3. The Role of the State in the Child's Upbringing

This chapter discusses what roles the liberal state can play in the child's upbringing. It does not evaluate the state's exclusive powers in general, which might include the debates on public participation and children's citizenship or the differences between adults and children in the application of criminal and labor laws. This chapter focuses on those roles of the state, which potentially compete with parental control rights. To that end, the chapter is divided into three sections. The first section focuses on the state's role in protecting the present child from harm and discusses the ideas of a minimal and maximal state. The second section examines the state's supplementary role in supporting the parents or prescribing standards of child-rearing. The last section is on the aims and scope of liberal education.

3.1. The State's Role to Protect the Child from Harm

There is a widespread agreement on the idea that the state has a legitimate power to protect children from any harm, even that is inflicted by their parents. However, the scope of this power vis-à-vis parental control rights is contested. First, according to the idea of the minimal state, the state should hold a secondary responsibility of intervention that is only triggered when the parents do not fulfill their primary responsibility. This, of course, opens a debate on what should be the exact threshold for that intervention. Second, the idea of the maximal state advocates for a more proactive role for the state to set the standards for child care through licensing and monitoring parents. Third, the ideas of the supportive and prescriptive state move beyond the binary distinction between primary and secondary responsibilities and propose a supplementary role for the state.

3.1.1. The Minimal State: Intervention to Protect the Child

In liberal political theory, due to the primacy of parental responsibility for children, the state has an exceptional and minimal role. The early liberal theorists pictured the family as a natural and private association consisting of the father, the mother, and their

biological children. The father had authority over his wife and children, was responsible for the economy of the household, and represented his family in the political domain.[204]

In this understanding, the parents were the primary and natural caregivers of the children. As stated by Locke, "all parents were, *by the law of nature*, under an obligation to preserve, nourish, and educate the children."[205] Mill also asserted that the obligation "after summoning a human being into the world, to give to that being an education fitting him to perform his part well in life towards others and towards himself" is "one of the most *sacred* duties of the parents."[206] Parental authority and power over children were derived from this natural duty to take care of and educate children. However, this power was distinct from political power in terms of its foundations and ends.[207]

The contemporary liberal theorists also endorse the private nature of the family and the primacy of parental responsibility. As suggested by Rawls, the political principle of justice does not apply to the inner life of many associations, including family.[208] These principles, as Rawls notes, "impose essential constraints on the family as an institution and so guarantee the basic rights and liberties, and the freedom and opportunities, of all its members."[209] For Rawls, political principles cannot guide people on how to raise their children. Apart from the externally imposed prohibition on abuse and neglect, "society has to rely on the natural affection and goodwill of the mature family members."[210]

Similarly, Ackerman is cautious about the state's intervention in the parent-child relationship:

> "[T]he power to remove children from their primary families must be exercised with caution, both out of a justifiable fear of tyranny and a recognition that removing the

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[204] Martha Minow & Mary Lyndon Shanley, *Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law*, 11 HYPATIA 4, 7 (1996).

[205] LOCKE, *supra* note 146, Chapter VI, par. 56 (emphasis added).

[206] JOHN STUART MILL, ON LIBERTY 69 (2000) (emphasis added); Dale E. Miller, *Mill on the Family*, *in* A COMPANION TO MILL 472, 484 (Christopher Macleod & Dale E Miller eds., 2016).

[207] LOCKE, *supra* note 146, Chapter VI, par. 71.

[208] John Rawls, *The idea of public reason revisited*, 64 UNIV. CHICAGO LAW REV. 765, 788 (1997).

[209] *Id.*, at 789.

[210] *Id.*, at 790.

child from its primary environment may itself undermine the child's capacity to deal with his aggressions."[211]

In addition to being exceptional and minimal, the role of the state is also reactionary. The state assumes a public role in the child's life only in the last instance when the family no longer functions naturally.[212] But what should the threshold be to determine that natural affectionate bonds in the family are broken, and the state can legitimately step in to protect the child? Where the threshold is set determines how much weight is given to the rights of children and the standard of care that is expected from parents.[213] That is why the definitions of abuse and neglect – as the most common thresholds for intervention – are culturally variable.[214]

Some theorists support a high threshold that is imposed by narrow definitions of abuse and neglect. For instance, Wald suggests that the focus of intervention must be the specific harm experienced by the child, but not the parental behavior or home environment.[215] And the type of harm should be serious enough to be outweighed by the potential harm caused by the coercive intervention.[216] In terms of physical harm, he argues that only the most severe forms of physical injury, namely intentional harm and excessive way of disciplining, should be reasons for intervention.[217] In any case, inadequacy in parental behavior or home environment should not form the threshold.[218]

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[211] BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 149 (1981).

[212] ARCHARD, *supra* note 25, at 110; Arneil, *supra* note 86, at 83.

[213] Brighouse and Swift, *supra* note 162, at 105.

[214] Mark C Vopat, *Child Abuse and Neglect*, *in* INTERNATIONAL ENCYCLOPEDIA OF ETHICS 1, 1 (Hugh Lafollette ed., 2019); Gideon Calder, *Children and the Care System*, *in* THE ROUTLEDGE HANDBOOK OF THE PHILOSOPHY OF CHILDHOOD AND CHILDREN 362, 364 (Anca Gheaus, Gideon Calder, & Jurgen De Wispelaere eds., 2019).

[215] Michael Wald, *State Intervention on Behalf of Neglected Children : A Search for Realistic Standards*, 27 STANFORD LAW REV. 985, 1003 (1975).

[216] *Id.*, at 1005.

[217] *Id.*, at 1012.

[218] *Id.*, at 1022.

In a similar vein, Buss also suggests that the state's role should be limited to "the suffering of serious and demonstrable detriment."[219]

The high threshold is difficult to be endorsed by the liberationist and liberal conceptions of children's rights as they claim children hold autonomy and developmental interests exceeding the basic interest to be free from abuse and neglect. In that regard, Engster suggests that the traditional liberal idea of the minimal state based on parental autonomy and familial privacy cannot coexist with the full recognition of children's rights.[220] The high threshold is not appealing to the supporters of the fiduciary conception of parental rights either. As supporters of that conception, Brennan and Noggle note that the high threshold is not the best option to save the parent-child relationship. Instead of waiting until the moment when the problems of that relationship reach the level of serious harm, earlier intervention should be possible, and this would better serve the aim of protecting families.[221]

For these reasons, some theorists offer a lower threshold that is aimed at maximizing the standard of child care. As Vopat notes, this approach accepts that society owes children "the best possible life" that it can provide.[222] Gil's definition of child abuse exemplifies this approach. Accordingly, child abuse refers to:

> "[I]nflicted gaps or deficits between circumstances of living which would facilitate the optimal development of children, to which they should be entitled, and their actual circumstances, irrespective of the sources or agents of the deficit."[223]

The prioritization of the welfare of the child as such raises a number of concerns. Archard suggests the low threshold, as found in Gil's definition, might primarily target those

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[219] Emily Buss, *Allocating developmental control among parent, child, and the state*, 2004 UNIV. CHIC. LEG. FORUM 27, 33 (2004).

[220] DANIEL ENGSTER, JUSTICE, CARE AND THE WELFARE STATE 39 (2015).

[221] Brennan and Noggle, *supra* note 160, at 19.

[222] Vopat, *supra* note 214, at 2.

[223] David G. Gil, *Unraveling child abuse*, 45 AM. J. ORTHOPSYCHIATRY 346, 346-347 (1975).

parents who cannot provide optimal development due to poverty.[224] An additional concern is a danger of blurring the distinction between bad parenting and abusive parenting. As a defender of the proprietorial conception, Page suggests that a low threshold imposes a requirement of good parenthood. However, as he argues, parents hold rights just because they are parents, not because they are good parents.[225] Likewise, Archard argues that abuse should be differentiated from a mere failure in parenting.[226]

3.1.2. The Maximal State: Licensing and Monitoring Parents

As opposed to the liberal standard, which allows the state to play a minimal and reactionary role in the parent-child relationship, the idea of the maximal state in the child's upbringing confers a more proactive role in the state. In that regard, the methods of licensing and monitoring parents appear as alternatives to *ex post facto* intervention to protect the child. In these methods, the focus shifts to the regulation of parental behavior and taking steps before the harm occurs.

The first method requires all future parents to be licensed for child-rearing. LaFollette suggests the regulation of potentially harmful activities in the way of licensing should also apply to parenting for two reasons. First, parenting can be harmful to children. Many children are psychologically or physically abused or neglected by their parents.[227] Second, parenting also entails a certain level of competence.[228] The major theoretical implication of the licensing method is that it denies the idea that natural parents have an automatic right to rear children. As LaFollette claims, "a person has a right to rear children if he meets certain minimal standards of child-rearing."[229] In this way, it opposes the proprietorial conception of parental rights.

One practical implication of licensing is that it shifts the focus from potential harm inflicted on the child to the desired ways of parenting. At this point, LaFollette argues

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[224] David Archard, *Can Child Abuse be Defined?*, *in* MORAL AGENDAS FOR CHILDREN'S WELFARE 57, 62 (Michael King ed., 1999).

[225] Page, *supra* note 150, at 189.

[226] Archard, *supra* note 224, at 66.

[227] Hugh Lafollette, *Licensing Parents*, 9 PHILOS. PUBLIC AFF. 182, 184 (1980).

[228] *Id.*, at 185.

[229] *Id.*, at 187.

that the proposed model does not aim to license only the best parents, "rather, it is designed to exclude only the very bad ones."[230] LaFollette admits that the authorities might misuse the tests to determine harmful parents, or those tests might not be accurate. He points out that the existing licensing systems carry equal risks of inaccuracy or misuse; however, they are still maintained.[231] He further suggests that the licensing model is not as radical as it seems. In fact, the state already determines who is suitable for rearing a child in the adoption process. [232]

There are strong objections to parental licensing. First, it is difficult to establish the standard of competence to rear children and determine the potential abusers.[233] Second, it is unclear what the sanctions would be for those who do not comply with the rules of licensing. It is practically impossible to prevent unlicensed parents from rearing children. In those cases, methods such as compulsory abortion, sterilization, or removing the child from natural parents are ineffective in realizing the pursued aims.[234] Third, the sanctions would not be equally imposed in terms of gender. Only women can bear children, and mostly they take child-care responsibilities. Therefore, they would adversely be affected.[235]

The second method proposes rigorous monitoring of parents while they exercise their child-rearing duties. As an advocate of this method, Archard denies the assumption that the best interests of children are better served if they remain with their natural parents. In advance of any other information, he opposes granting a right to rear to them only by virtue of being natural parents. With this, it contradicts the proprietorial conception of parental rights. However, differently from the licensing method proposed by LaFollette,

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[230] *Id.*, at 190.

[231] *Id.*, at 191-192.

[232] *Id.*, at 193.

[233] ARCHARD, *supra* note 25, at 142.

[234] *Id.*, at 143-144.

[235] Daniel Engster, *The Place of Parenting within a Liberal Theory of Justice: The Private Parenting Model, Parental Licenses, or Public Parenting Support?*, 36 SOC. THEORY PRACT. 233, 248-249 (2010).

Archard argues that children should stay with their natural parents. He suggests that their development should be monitored extensively and rigorously by the state.[236]

By monitoring, Archard advocates for redrawing the boundaries between the private and public sphere and creating spaces where the health of children can be reviewed. In this method, family doctors, consultants, teachers, police, and any other professional who might be in contact with children should be trained to determine and report abuse.[237] This method is clearly in contrast with the idea of the minimal state where the parents enjoy the benefit of the doubt, and the state carries the burden of proving abuse or neglect. Instead, the monitoring method requires parents to act well.[238]

This method, however, is less likely to be accepted by the supporters of the relational conception of parental rights as it is believed to disrupt the authenticity or intimacy of the parent-child relationship. For instance, Wald argues that the presence of professional oversight of parental behavior may threaten "the psychological system of the family." As a consequence of external pressure, parents might hesitate in their decisions and behavior and blame the child for any problems.[239]

3.2. Beyond the Intervention Debate: The Supportive and Prescriptive State

The ideas of the minimal and maximal state are helpful in understanding how to allocate control over the child's care and upbringing between the agents having primary responsibility (parents) and those having secondary responsibility (the state) and the interplay between these responsibilities. However, these do not exhaust the entirety of the normative perspectives on the child's upbringing. As Macleod asserts, the state may also have a "supplementary responsibility" to support the work of the parents in fulfilling their primary responsibility.[240] This calls for a more supportive role for the state, which rests on two main premises: i) opposition to the binary distinction between intervention and non-intervention, and ii) an appreciation of dependency and caretaking. While endorsing

[236] Archard, *supra* note 165, at 191.

[237] *Id.*, at 192.

[238] *Id.*, at 193.

[239] Wald, *supra* note 215, at 999.

[240] Macleod, *supra* note 174, at 8.

these premises, the idea of a prescriptive state moves a step further and suggests that the state should also promote effective and good ways of parenting.

First, the idea of the supportive state opposes the binary distinction between intervention and non-intervention in the family. This distinction – that is at the center of the idea of the minimal state – treats non-intervention as the norm and intervention as the exception.[241] The assumption of the liberal theory that families function naturally in the absence of state intrusion is mistaken. Some critics of the liberal theory believe that there is no natural or pre-political family.[242] In contrast, "the state constantly defines and redefines the family and adjusts and readjusts family roles."[243]

Additionally, as Olsen notes, the state is never a neutral arbiter in family relations. Indeed, the state decides on specific roles and hierarchy within the family, and sometimes the state's refusal to reinforce one family member's power is considered an intervention.[244] In a similar vein, Dwyer argues that the state intervenes in children's lives regardless of how much power or authority parents have. It creates legal parent-child relationships and confers legal parents some powers and privileges. As Dwyer notes,

> "Granting them more privileges and powers cannot sensibly be characterized as state non-intervention; it instead amounts simply to intervening more in children's lives by one means (delegation of power) than by another (direct exercise of power)."[245]

Second, the supportive state challenges the liberal ideal that citizens are able and autonomous adults who need equality and freedom. However, this does not reflect reality as the citizens always depend on others to varying degrees. As an alternative, Eichner

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[241] Frances Olsen, *The Myth of State Intervention in the Family*, 18 UNIV. MICHIGAN J. LAW REFORM 835, 841 (1985).

[242] Maxine Eichner, *The supportive state: Government, dependency, and responsibility for caretaking*, *in* CARE ETHICS AND POLITICAL THEORY 87, 93 (Daniel Engster & Maurice Hamington eds., 2015); Martha Minow, *All in the Family and in all Families: Membership, Loving, and Owing*, *in* SEX, PREFERENCE, AND FAMILY : ESSAYS ON LAW AND NATURE 249, 250 (David M Estlund & Martha C Nussbaum eds., 1998).

[243] Olsen, *supra* note 241, at 842.

[244] *Id.*, at 846.

[245] James G. Dwyer, *Regulating Child Rearing in a Culturally Diverse Society*, *in* PHILOSOPHICAL FOUNDATIONS OF CHILDREN'S AND FAMILY LAW 273, 276 (Lucinda Ferguson & Elizabeth Brake eds., 2018).

suggests caretaking and human development should supplement the liberal values of equality and freedom. She argues for the recognition of dependency as part of human lives. Accordingly, autonomy is not acquired merely by birth; instead, it is achieved incrementally and has specific conditions. The acquisition of autonomy is dependent on the caretaking and development of capabilities.[246] Incorporating these goods into political theory, she notes, transforms the role of the state from a neutral protector of rights to a supporter of the development of capacities.[247] And this provides a more interconnected and long-term relationship between the state and parents that cannot be reduced to a single moment where the state would come to rescue and prevent harm. [248]

What should be the extent of support the state should provide? According to Eichner, the support should be sufficient for the parents to meet the fundamental physical, mental and emotional needs of children. It should cover direct financial assistance, access to daycare, and regulation of the workplace.[249] Through these means, family autonomy can be protected from the threats coming from the market.[250]

Some theorists find the supportive state insufficient to increase the quality of parenthood as it does not necessarily aim at transforming parenting practices. According to Engster, "states should not just support parental caretaking, but also promote those childrearing practices that have proven most effective in supporting children's survival, development, and well-being."[251] This requires a "prescriptive role" for the state.[252]

One way to realize that prescriptive role is training parents. Engster and Gonzales note that parenthood is a learned activity and can be improved through training and practice.[253] The problem with this method is that attendance might not be high. To counter this

[246] Eichner, *supra* note 242, at 90.

[247] *Id.*, at 91.

[248] *Id.*, at 98.

[249] *Id.*, at 100-101.

[250] *Id.*, at 104.

[251] ENGSTER, *supra* note 220, at 35.

[252] *Id.*, at 35.

[253] Daniel Engster & Ramiro Gonzales, *Children and Justice: A Proposal for National Parent Training Classes*, 26 PUBLIC AFF. Q. 221, 228 (2012).

problem, instead of imposing sanctions on non-attendance, Engster and Gonzales argue that attendance might be required by the state to become eligible for some public benefits.[254]

The theorists advocating for the fiduciary conception of parental rights favor the idea of the supportive state. Brennan and Noggle suggest that parents might be unable to promote the rights of the child due to the lack of resources or knowledge. This should be remedied by the state through the provision of educational programs, financial assistance, and childcare institutions.[255] The provision of material sources to parents can also be favored by the paternalist conception of children's rights and the deniers of the concept of children's rights from an ethics of care perspective. Although these approaches sustain their objections to the autonomy rights of children, they accept that society has minimum obligations to secure the child's protection from harm and receive adequate physical care.[256]

3.3. The State's Role in Education

The first role of the state in the child's upbringing, i.e., protecting the present child, centers on the child's current interests to be protected from harm. However, the state can also assume another important role in education, focusing on children's future autonomy and their prospective role as citizens. This section aims to discuss the scope and purposes of public education in liberal theory and how it reconciles with different conceptions of children's rights and parental rights. One approach focuses on the promotion of the child's autonomy that can be achieved either minimally by ensuring that the child transforms into a self-reliant adult, or it can have a broader purpose to maximize the options for children and to provide them an "open future." Another approach seeks civic interests through public education. It is expected that children can turn into democratic citizens committed to liberal ideas and be tolerant and respectful towards differences.

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[254] *Id.*, at 232.

[255] Brennan and Noggle, *supra* note 160, at 21.

[256] Macleod calls these minimum standards (also including access to basic education) as "Minimum Provision Thesis" see Colin M. Macleod, *Conceptions of Parental Autonomy*, 25 POLIT. SOC. 117, 120 (1997).

3.3.1. Education for Autonomy: Self-Reliance and an "Open Future"

Children are not only members of their families, but they are also future autonomous members of a broader community. This belief entails that public education should foster the child's future autonomy. If autonomy is understood in a narrow sense as not being dependent on others, education must focus on turning children into self-reliant members of society. Accordingly, children should be prepared to be able to earn an income and live a decent life without the support of others or social institutions. This economic self-reliance is also a way for them to contribute to the wider society.[257] Education would meet the conditions of this narrow understanding by equipping children with basic literal and mathematical skills that would enable them to participate in social and economic settings.[258]

The goal of self-reliance is not necessarily in conflict with parental control rights.[259] Even the advocates of broad parental rights support that education should seek these minimal ends. For instance, Galston notes that education should enable individuals to have economic independence and fulfill their duties to their families.[260] Likewise, Moschella notes that education should ensure that children become "productive and law-abiding members of society."[261]

Parental control rights are likely to be in tension with the child's right to an open future. This term – which was coined by American philosopher Joel Feinberg – connotes that

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[257] Harry Brighouse, *Moral and Political Aims of Education*, *in* OXFORD HANDBOOK OF PHILOSOPHY OF EDUCATION 35, 37 (Harvey Siegel ed., 2009) {calling this aspect of education "contributory effectiveness"}; Gina Schouten, *Schooling*, *in* THE ROUTLEDGE HANDBOOK OF THE PHILOSOPHY OF CHILDHOOD AND CHILDREN 351, 355 (Anca Gheaus, Gideon Calder, & Jurgen De Wispelaere eds., 2019).

[258] Rob Reich, *Educational Authority and the Interests of Children*, *in* THE OXFORD HANDBOOK OF PHILOSOPHY OF EDUCATION 469, 475 (Harvey Siegel ed., 2009).

[259] See also *Id.*, at 476 {suggesting that parental rights most often conflict with the demands of civic education}.

[260] William A. Galston, *Parents, Government, and Children: Authority Over Education in the Liberal Democratic State*, 44 NOMOS 211, 215 (2003).

[261] MELISSA MOSCHELLA, TO WHOM DO CHILDREN BELONG?: PARENTAL RIGHTS, CIVIC EDUCATION, AND CHILDREN'S AUTONOMY 74 (2016).

education should maximize the future options of the child even though those options might conflict with the values instilled by the parents.

The role of the state in giving the child an open future relies on the future autonomy rights of children. At this point, Feinberg's distinction between A-rights and C-rights is valuable.[262] According to Feinberg, A-rights are those autonomy rights that only adults can exercise, such as the right to vote and free exercise of religion. C-rights are specific to children and divided into two groups. The first group of C-rights derives from their dependence on others for basic goods such as food, shelter, and protection. The second group of C-rights look similar to adult autonomy rights; they are "rights in trust," meaning that children cannot exercise them until they become capable. However, these rights can be violated now, before the child reaches adulthood, if certain key options are closed to her. Therefore, he sums these rights as "a right to an open future."[263]

Keeping future options open for the child might conflict with parental educational choices and their wishes to instill their values and convictions into the child as endorsed by the proprietorial and relational conceptions of parental rights. On the question of whether religious parents can be exempted from compulsory education, Feinberg explains how to apply children's right to an open future:

> "An impartial decision would assume only that education should equip the child with the knowledge and skills that will help him to choose whichever sort of life best fits his native endowment and matured disposition. It should send him into an adult world with *as many open opportunities as possible, thus maximizing his chances for self-fulfillment*."[264]

Accordingly, parental choices that would deprive the child of reaching "as many open opportunities as possible" would be violating the child's right to an open future. Callan also agrees with this conclusion. He pictures an "ethically servile child" whose parents instill antipathy towards all ideas and views conflicting with their own. In his view, instilling ethical servility is quite different from a poor educational choice, because it

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[262] Joel Feinberg, *The Child's Right to an Open Future*, *in* PHILOSOPHY OF EDUCATION : AN ANTHOLOGY (Randall R. Curren ed., 2007).

[263] *Id.*, at 113.

[264] *Id.*, at 116 (emphasis added).

denies "one of the developmental preconditions of adult rights—viz. a level of autonomous development sufficient to overcome the vice of ethical servility."[265] And the form of schooling that can work as "an antidote to such servility" does not violate parental rights.[266]

Macleod also suggests that parental choices can be restricted to allow the child to access available deliberative sources in a pluralistic public culture. Based on the social conditions of autonomy, he suggests that the child cannot achieve autonomy by only following the parent's single conception of the good. Therefore, Macleod rejects that parents have a right to "fix authoritatively their children's conceptions of the good."[267]

The state's power to provide a plurality of options through education does not mean parental control is eliminated altogether. Indeed, parents' inculcation of values at an early age is desirable. According to Ackerman, infants need "cultural coherence" before being exposed to endless choices, and parents should be the ones assuming responsibility for primary education.[268] Macleod has a similar understanding when he argues that very young children do not possess the emotional and cognitive capacities required for autonomy. As he notes, "children without any initial beliefs about value cannot be expected to adopt a life plan of their choosing from an initial menu of options presented to them in the public culture."[269] Parents can provide an initial value structure that can be developed later by children.[270]

The theorists supporting the child's right to an open future do not abandon the value of neutrality. Accordingly, state education should provide the child plurality of options without favoring a particular option over the others. Ackerman describes state education as "a great sphere":

> "The entire educational system will, if you like, resemble a great sphere. Children land upon the sphere at different points, depending upon their primary culture; the

[265] CALLAN, *supra* note 196, at 155.

[266] *Id.*, at 157.

[267] Macleod, *supra* note 256, at 134.

[268] ACKERMAN, *supra* note 211, at 141-142.

[269] Macleod, *supra* note 256, at 133.

[270] *Id.*, at 134.

> task is to help them explore the globe in a way that permits them to glimpse the deeper meanings of the life dramas passing on around them. At the end of the journey, however, the now mature citizen has every right to locate himself at the very point from which he began— just as he may also strike out to discover an unoccupied portion of the sphere."[271]

In schooling as a great sphere, as Callan argues, others' beliefs and values are taken into account as potential elements within the conceptions of the good among which the future adult will choose for herself.[272] He suggests that the acknowledgment of a variety of possible lives for children does not lead to "a reading of personal sovereignty that protects only lives that aim to meet the maximal demands of autonomous reflection and choice."[273] Similarly, Feinberg asserts that a reasonable conception of neutrality requires letting all options be available for the child on an equal footing without influencing her toward any of them. In this way, he adds, "it can be hoped that the chief determining factor in the grown child's choice of vocation and lifestyle will be his own governing values, talents and propensities."[274]

Two critical objections are raised against the state's role as the provider of an open future for the child. First, Arneson and Shapiro point out the difficulty of identifying and counting options and opportunities for the child. Some of the child's options, such as developing proficiency on a musical instrument or mastering sports, might require intense concentration and serious commitment from an early age. Choosing these options as early as possible; in return, irreversibly excludes other options. As Arneson and Shapiro rightfully put it, "in order to open this door even by a crack one must simultaneously close many other doors."[275]

Second, the availability of conflicting views and ideas for the child in schools imperils religious parents' ability to make their children devoted to religious ways of life. As Burtt

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[271] ACKERMAN, *supra* note 211, at 159.

[272] CALLAN, *supra* note 196, at 133.

[273] *Id.*, at 149.

[274] Feinberg, *supra* note 262, at 116.

[275] Richard J. Arneson & Ian Shapiro, *Democratic autonomy and religious freedom: A critique of Wisconsin v. Yoder*, *in* POLITICAL ORDER: NOMOS XXXVIII 365, 392 (1996).

discusses, religious life options might depend on not being exposed to secular views too early.[276] In addition, as Moschella argues, children, even adolescents, are not equipped with the moral capacities to reflect and choose morally conflicting views.[277] Exposure to those views and criticisms of those inculcated by their parents endangers the development of their rational capacities, especially in the case when such exposure takes place in schools as opposed to inevitable interaction with the larger culture through Internet, television, or billboards, given that children are taught to accept teachers as trustworthy authorities.[278]

3.3.2. Education for Civic Interests: Shaping the Future Citizens

In addition to the autonomy-related goals, the liberal state can also expect its citizens to possess certain civic virtues and design its education accordingly. These virtues are first the commitment to democratic ideals and the capacity to advance them. The second is developing toleration and mutual respect towards different cultural, religious, or moral standings. While these do not necessarily exclude each other, for the purposes of this analysis, these sets of interests are divided as "civic education" and "multicultural education," respectively.

For the advocates of civic education, the liberal state has an interest in determining the desired end of education and ensuring that children embrace shared political ideals. Shapiro argues that this is necessary because the future of democratic order entails a firm commitment to its principles rather than reliance on short-term self-interests.[279] Gutmann also follows a similar line of thought when she claims that education should aim at "conscious social reproduction." As she suggests, schools should be able to pursue those moral virtues that "are necessary to give children the chance collectively to shape their society."[280]

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[276] Shelley Burtt, *Religious Parents, Secular Schools: A Liberal Defense of an Illiberal Education*, REV. POLIT. 51, 66 (1994).

[277] MOSCHELLA, *supra* note 261, at 135.

[278] *Id.*, at 140.

[279] IAN SHAPIRO, DEMOCRATIC JUSTICE 89 (1999).

[280] AMY GUTMANN, DEMOCRATIC EDUCATION 39 (1999).

For Arneson and Shapiro, the desired end of education should be democratic citizenship. They discuss that autonomy is not about "allegiance only to spontaneously self-chosen values that are untainted by environmental influence," but it means an ability to make critical reflection about values and change them as a result of that reflection.[281] On the question of what kind of education is needed to turn children into autonomous citizens, they argue that education should provide beyond basic literacy and include skills for democratic deliberation.[282] For Arneson and Shapiro, everyone in a democratic society has a compelling interest in raising each member of the society with the capacities entailed by democratic citizenship. These include "skills and habits of critical thinking that enable one to participate effectively in democratic deliberation."[283] Macedo envisages a similar end for civic education:

> "A basic aim of civic education should be to impart to all children the ability to reflect critically on their personal and public commitments for the sake of honoring our shared principles of liberal justice and equal rights for all."[284]

The emphasis on critical thinking and citizenship attracts strong criticism. First, Burtt opposes the characterization of religious parents as hostile to critical thinking. As she suggests, just because religious education does not promote radical skepticism towards one's own commitments, it cannot be deemed hostile to critical thinking.[285] On the problem of whether to accommodate the wishes of religious parents in state education, for Burtt, the choice is not between an education promoting autonomy and civic virtues and one which does not. The choice is between "an education for personal autonomy and civic responsibility grounded in religious faith against one grounded in secular certainties."[286] Second, the critics focus on the manner of raising the child to meet the requirements of democratic citizenship and argue that this ignores the moral and spiritual

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[281] Arneson and Shapiro, *supra* note 275, at 393.

[282] *Id.*, at 377.

[283] *Id.*, at 404.

[284] STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY 239 (2003).

[285] Shelley Burtt, *In Defense of Yoder: Parental Authority and the Public Schools*, *in* POLITICAL ORDER: NOMOS XXXVIII 412, 416 (1996).

[286] *Id.*, at 418.

needs of children as well as the fact that they are members of distinct cultural communities.[287] Moschella criticizes civic education arguments for prioritizing political virtues over moral virtues such as justice, self-mastery, and honesty which are also fundamental for good citizenship.[288]

According to the theorists advocating for civic education, the liberal state does not need to be neutral towards alternative conceptions of the good. Macedo argues that faith in the liberal political order cannot rely on an invisible hand that will lead people in a specific direction. Rather, political order should be understood "as a construction for discernible collective ends and purposes, including the preservation of a broad swath of liberty."[289] As he argues, liberalism should not be limited to the negative constitutional project of protecting individual liberty. The aims of liberal order should also include sustainability of civic life through generations. Indeed, the success of that negative project "depends on a more positive, transformative enterprise that aims to shape normative diversity in a basic way, to foster a civic life supportive of liberal citizenship."[290] Therefore, civic education as a means of positive transformation does not guarantee that an equal distance is preserved towards all ways of life:

> "The crucial point is to celebrate critical thinking and autonomy for broadly civic purposes, not to advance particular religious or comprehensive philosophical convictions. It is of course true, and inevitable, that our broad civic ideals (and even our narrowest and most basic political aims) are more compatible with some religions than with others."[291]

Similarly, in Gutmann's description of the "democratic state of education," educational authority should be allocated among parents, citizens, and educators. However, such an allocation does not guarantee that "education will be neutral among competing conceptions of the good life."[292] According to Gutmann, the reason for non-neutral

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[287] *Id.*, at 425.

[288] MOSCHELLA, *supra* note 261, at 104.

[289] MACEDO, *supra* note 284, at 5.

[290] *Id.*, at 10.

[291] *Id.*, at 240.

[292] GUTMANN, *supra* note 280, at 42.

education is that children do not only need freedom of choice; rather, they need to identify with and participate in the politics of their society.[293] The disregard for neutrality does not mean an endorsement of repressive actions of the state. As Gutmann notes, "the principle of non-repression prevents the state, and any group within it, from using education to restrict rational deliberation of competing conceptions of the good life and the good society."[294]

This trade-off between liberal political values and neutrality is likely to clash with another objective of the liberal order: respect for diversity. In that respect, Williams argues that there is a "dark side" of civic education which shows itself as distrust towards those individuals who do not commit to liberal values and a fear that their lack of commitment would cause the disorder.[295] Furthermore, Galston highlights the "colonization effects" of the liberal state, referring to the ways in which the sub-communities are required to conform to the liberal public principles beyond the minimum expectations of shared citizenship. As Galston suggests, a state respecting diversity should avoid those colonizing effects.[296] Therefore, the liberal state should not compel private groups to abide by the liberal principles, particularly individual autonomy, in their internal structures as long as the individuals within that group have the right to exit.[297]

In addition to civic education, multicultural education could be a means of achieving civic aims. The claim is that children's knowledge and understanding of cultures and religions other than their own is essential for their development as liberal citizens.[298] Levinson

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[293] *Id.*, at 43.

[294] *Id.*, at 44.

[295] Melissa S. Williams, *Citizenship as Identity, Citizenship as Shared Fate, and the Functions of Multicultural Education*, *in* EDUCATION AND CITIZENSHIP IN LIBERAL-DEMOCRATIC SOCIETIES: TEACHING FOR COSMOPOLITAN VALUES AND COLLECTIVE IDENTITIES 208, 219 (Kevin McDonough & Walter Feinberg eds., 2003).

[296] William A. Galston, *Two Concepts of Liberalism*, 105 ETHICS 516, 530 (1995).

[297] *Id.*, at 533.

[298] MACEDO, *supra* note 284, at 240; Philip L. Barnes, *Religious Education: Educating for Diversity*, *in* RELIGIOUS EDUCATION: EDUCATING FOR DIVERSITY 12 (Philip L. Barnes, Andrew Davis, & J. Mark Halstead eds., 2015); Doret J. de Ruyter & Michael S. Merry, *Why Education in Public Schools Should Include Religious Ideals*, 28 STUD. PHILOS. EDUC. 295, 296 (2008).

notes that liberal theorists have different expectations from multicultural education. While some find it sufficient that students learn to tolerate people with different cultures, others also hope that education will equip students with respect for differences.[299] For Galston, it is sufficient for the state to expect its citizens to tolerate each other. The practice of toleration refers to refraining from acts that would prevent others from living according to their own conceptions of the good. This is a way to avoid repression and conflict and itself an important achievement for the liberal order.[300] However, Gutmann contests this. As she argues, without mutual respect, the principle of nondiscrimination cannot be respected, and "reciprocal positive regard" towards differences is the only way to advance liberal democracy.[301]

3.4. Conclusion

This chapter examined the state's role in the child's upbringing on three levels: one is the secondary obligation to protect the child, the second is a supplementary role to support parents and prescribe standards of care, and the other is educating the child.

First, this chapter showed that there exist two models of the state's role in protecting the child. One is the idea of the minimal state that is grounded on the understanding that families function naturally without any involvement of the state, and intervention is exceptional. Some suggest that a natural bond is broken when there appears serious harm to the child (high threshold), while others prioritize optimal development of the child (low threshold). As an alternative to this minimal understanding, some theorists ask for a maximal state which will focus on parental behavior rather than actual harm inflicted on the child.

Second, this chapter discussed the supportive and prescriptive role of the state. The idea of the supportive state moves beyond the dichotomy between intervention and non-intervention and appreciates the state's role in developing parents' capacities. The

[299] Meira Levinson, *Mapping Multicultural Education*, *in* THE OXFORD HANDBOOK OF PHILOSOPHY OF EDUCATION 428, 431 (Harvey Siegel ed., 2009).

[300] WILLIAM GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE 119 (2002).

[301] Amy Gutmann, *Civic Education and Social Diversity*, 105 ETHICS 557, 577-578 (2015).

prescriptive state, in addition, accepts that the state also has a role in promoting good ways of parenting.

Third, this chapter further reviewed the approaches to the state's role in education. One important role is facilitating children's autonomy. This can be achieved either by creating self-reliant citizens who are not dependent on others (narrow understanding) or maximizing future options for the child and providing her an open future (broad understanding). Another important role is ensuring that children as future citizens possess certain political virtues. Accordingly, children – as future citizens – should commit to liberal political ideas and have the capacity to advance them (civic education). And education should provide children with an understanding and knowledge of different religions, cultures, and moral convictions either to ensure that they develop a mere tolerance or also feel respect towards those differences (multicultural education).

4. Appraisal: Is Reconciliation Possible?

The answer to the question of whether children's rights are reconcilable with parental control rights and the state's role depends on the particular conceptions endorsed, and developing a single answer would not be plausible. Therefore, this part proposes four models which can reconcile different conceptions of children's rights, parental rights, and the state's role (see Table 1 below).

First, in Model I, the liberationist conception of children's rights can reconcile with the deniers of the concept of parental rights. Since this conception regards any parental role as oppressive, it cannot coexist with any conception of parental rights. On the state role to protect the child, it cannot reconcile with the idea of the minimal state, which favors familial privacy. However, this conception can align with the maximal state, which tends to scrutinize the parents' behavior. In the state's role to educate, the advocates of the liberationist conception can support autonomy-seeking goals as they put an emphasis on children's autonomy interests. However, due to their understanding that state education is a form of oppression, it is difficult to reconcile their demands with civic interests in education.

Second, in Model II, the paternalist conception of children's rights can reconcile with the proprietorial and relational conceptions of parental rights. As discussed earlier, the paternalist conception does not support children's autonomy rights, particularly in the parent-child relationship. Therefore, it endorses extensive parental control rights, including parents' right to shape the child's values as consistent with the proprietorial and relational conceptions of parental rights. These extensive rights would be better protected if the state maintains a minimal role and high threshold for intervention. Additionally, the paternalist conception can also coexist with the idea of a supportive state if it is limited to the provision of the basic material needs of children. In education, these conceptions would favor an education turning children into self-reliant members of society and a multicultural education that can teach children to develop tolerance towards differences. However, they are unlikely to reconcile with civic education since its deviance from the value of neutrality can undermine parents' educational rights.

Third, in Model III, the liberal conception of children's rights can reconcile with the fiduciary conception of parental rights. As explained earlier, on the liberal conception,

children should have autonomy rights, and parental control can only be justified based on the child's future consent. Therefore, this conception can align with the fiduciary conception of parental rights, which grounds parental rights on parents' duties towards the child. In the state's role to protect the child, the liberal conception can coexist with a minimal state having a low threshold for intervention and a supportive and prescriptive state. Regarding the state's role in educating, these conceptions would not oppose liberal state actions to insulate the values of the child from the religious, cultural, or moral convictions of the parent. For this reason, it can reconcile with the educative role of the state for both autonomy and civic interests.

Fourth, in Model IV, those who deny the concept of children's rights by suggesting that care and responsibility should govern the parent-child relationship can reconcile with the deniers of the concept of parental rights. Instead of parental rights, parental responsibility would be the governing concept under this model. As a corollary of the emphasis on a collective understanding of care, the concept deniers can endorse a supportive and prescriptive state.

Table 1: Normative Models on the Child's Upbringing

Reconciliation	Children's Rights	Parental Rights	State's Roles
Model I	Liberationist	Denier (deviation from liberal principles)	• Maximal State • Education for Autonomy (broad understanding)
Model II	Paternalist	Proprietorial and Relational	• Minimal State (high threshold) • Supportive State • Education for Autonomy (narrow understanding) • Education for Civic Interests (multicultural education)
Model III	Liberal	Fiduciary	• Minimal State (low threshold) • Supportive & Prescriptive State • Education for Autonomy (broad understanding) • Education for Civic Interests
Model IV	Denier (ethics of care)	Denier (parental responsibility)	Supportive & Prescriptive State

PART II – THE DUAL RECOGNITION OF CHILDREN'S RIGHTS AND PARENTAL RIGHTS IN INTERNATIONAL HUMAN RIGHTS LAW

Following the normative perspectives on the tripartite relationship between the child, the parent, and the state, the second part of the thesis aims to explore in which ways children's rights, parental rights, and state interests are reconciled in the making of international human rights law. To that end, it examines the archival documents indicating the drafting histories of international human rights declarations and treaties, their final texts, and the secondary sources discussing the historical and legal developments on children's rights, parental rights, and state obligations.

This part comprises three main chapters and an appraisal. First, it discusses the process of legalizing children's rights through the lenses of victimhood, dependency, autonomy, and responsibility. It argues that with the adoption of the CRC, the earlier paternalist conception of children's rights has moved towards a liberal conception. Second, it turns to the legalization of parental rights and argues that the process marks a move towards fiduciary conception and a dynamic understanding of parental rights. Third, it examines the state's role in the child's upbringing and discusses the reflections of the minimal state, supportive state, and the state's educative functions. Fourth, it provides an appraisal of the changing conceptions in the legalization process and discusses the ways of reconciliation they offer between children's rights, parental rights, and state interests in the child's upbringing.

1. The Legalization of Children's Rights in International Human Rights Law

This chapter discusses the legalization process of children's rights in international human rights law and aims to show the gradual changes in the conceptions of children's rights over time. While the chapter adopts a linear narrative to explain better the changes in the conceptions of children's rights, this does not suggest there were evident ruptures, and the earlier conceptions were completely abandoned. The first section explains the early international efforts to increase child welfare standards, which had seen children through the lens of victimhood. The second section discusses the post-WWII human rights instruments' paternalist conception of children's rights. The third section focuses on the drafting process of the CRC and asks whether it upholds the idea of autonomy as in the liberal or liberationist conception of children's rights. The final section provides an overview of the universality critique and discusses the child's responsibility as accepted in the African Charter on the Rights and Welfare of the Child (ACRWC).

1.1. Children as Victims: The Protection from War, Slavery, and Exploitation

The child has become an international concern first as an object of protection from war, slavery, and exploitation. As historical studies show, until the 18th century, childhood did not attain a special legal category in the Western world. According to Weisberg, child care was not a desirable experience, and children were easily subject to maltreatment and physical abuse.[302] In legal terms, children were merely properties of their fathers.[303] The studies on the history of childhood in Europe observe that the transformation of children's social and legal status is attributed to the emergent challenges arising from the new industrial society in the mid-19th century.[304] The emergence of women's rights in the 19th

[302] D. Kelly Weisberg, *Evolution of the Concept of the Rights of the Child in the Western World*, 21 ICJ REV. 43, 43-44 (1978).

[303] *Id.*, at 45.

[304] Dominique Marshall, *The Construction of Children as an Object of International Relations: The Declaration of Children's Rights and the Child Welfare Committee of League of Nations, 1900--1924*, 7 INT. J. CHILD. RIGHTS 103, 137 (1999); Eckhardt Fuchs, *Children's Rights and Global Civil Society*, 43

century also accelerated the recognition of a new legal understanding of childhood which paved the way for introducing child labour laws and imposition of compulsory schooling in Europe.[305] Following Britain, which adopted its minimum age legislation in 1833, other European and North American states regulated child labour.[306]

Beginning in the late 19th century, the mission to increase child welfare standards gained speed. Moody explains that the frequent international congresses and networks in Europe provided an impetus for adopting new national models and policies of child welfare.[307] These efforts were initially limited in scope. At first, they only targeted the children at risk, such as children without families, street children, working children, and delinquent children. Later, the concern for children expanded to all children irrespective of their social and economic background.[308] Nevertheless, during this period, child welfare was considered only in national terms by associating children with the identity and future of the state.[309]

The early 20th century witnessed the internationalization of the welfare of the child with an increasing romanticism on the victimhood of children. The first reason behind this development was the deaths and starvation of children during the First World War. The visual images of children struggling with the tragedies of the war caused strong feelings among the public.[310] The second reason was the foundation of transnational child welfare organizations. The creation of the International Association for Child Welfare in 1904 centralized many activities of international congresses on child welfare.[311] This was

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COMP. EDUC. 393, 394 (2007); C R Margolin, *Salvation versus Liberation: The Movement for Children's Rights in a Historical Context*, 25 SOC. PROBL. 441, 442 (1978).

[305] Weisberg, *supra* note 302, at 46.

[306] Marianne Dahlén, *The Negotiable Child: The ILO Child Labour Campaign 1919-1973*, UPPSALA UNIVERSITET (2007), http://uu.diva-portal.org/smash/get/diva2:169702/FULLTEXT01.pdf., at 79-83.

[307] Zoe Moody, *The United Nations Declaration of the Rights of the Child (1959): Genesis, transformation and dissemination of a treaty (re)constituting a transnational cause*, 45 PROSPECT. 15, 17 (2015).

[308] *Id.*, at 17.

[309] Paula S Fass, *A Historical Context for the United Nations Convention on the Rights of the Child*, 633 ANN. AM. ACAD. POL. SOC. SCI. 17, 19 (2010).

[310] *Id.*, at 22; Marshall, *supra* note 304, at 132.

[311] Fuchs, *supra* note 304, at 395.

followed by the foundation of the Save the Children International Union (SCIU) in 1920 and the International Association for the Promotion of Child Welfare (IAPCW) in 1921. This period marked the conception of childhood as "the hope of humanity, as opposed to the hope of a nation."[312] As Margolin notes, while the child became an international concern, the mission to save children from the realities of the world and secure the beauty of childhood gained momentum.[313]

The growing sympathy towards victim children in the early 20th century led to significant legal steps to protect children from exploitation, trafficking, and slavery. The Minimum Age Conventions adopted in 1919-1921 by the International Labour Organization (ILO) were the first international treaties concerning children.[314] The Covenant of the League of Nations also enshrined the protection of children from hazardous labor conditions and human trafficking. Its Article 23 set out that the member states would "endeavour to secure and maintain fair and humane conditions of labour for men, women, and *children*, both in their own countries and in all countries to which their commercial and industrial relations extend"[315] and "entrust the League with the general supervision over the execution of agreements with regard to the traffic in women and *children*."[316] These were followed by the International Convention for the Suppression of the Traffic in Women and Children in 1921.[317]

In addition to the increasing legal protection for children, the first half of the 20th century also witnessed a more institutionalized child welfare network under the auspices of the League of Nations compared to the international congresses on child welfare in the pre-war period.[318] Although the proposal to establish a Bureau for Child Welfare by the Comité International de la Croix-Rouge, the League of Red Cross Societies, and the SCIU

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[312] Moody, *supra* note 307, at 18.

[313] Margolin, *supra* note 304, at 443.

[314] Minimum Age (Industry) Convention, 1919 (No. 5), Oct. 29, 1919; Minimum Age (Sea) Convention, 1920 (No. 7), June 15, 1920; Minimum Age (Agriculture) Convention, 1921 (No. 10), Oct. 25, 1921.

[315] League of Nations Covenant art. 23 (a) (emphasis added).

[316] *Id*., art. 23 (c) (emphasis added).

[317] International Convention for the Suppression of the Traffic in Women and Children, Sep. 30, 1921, League of Nations T.S. 415.

[318] Fuchs, *supra* note 304, at 397.

was rejected, after the joining of the IAPCW and continuing pressure from those organizations, the Child Welfare Committee (CWC) was established in 1925. The CWC was tasked with working in collaboration with the Advisory Committee on the Traffic in Women and Children, which was established two years prior to the CWC. Despite the divergences between different state delegates on the extent of child welfare, Fuchs suggests that the CWC successfully united international organizations and made the national governments aware of child-related problems.[319]

The most significant success of the League of Nations on child welfare was the adoption of the Declaration on the Rights of the Child on 26 September 1924.[320] The Declaration was a result of the initiative of the SCIU and was drafted by its British founder Eglantyne Jebb. Therefore, as Bolzman notes, the vision of childhood embodied in the 1924 Declaration reflects the idealistic mission of the SCIU to relieve the tragedies of the war and unify nations.[321]

The declaration comprises five principles addressing "men and women of all nations" with the belief that "mankind owes to the Child the best that it has to give." First, children should be provided with "the means requisite for its normal development, both materially and spiritually." Second, children in need should be aided and nourished. As the wording of the Declaration sets out, "[t]he child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succoured." Third, the child should be "the first to receive relief in times of distress." Fourth, the child must be able to "earn a livelihood and must be protected against every form of exploitation." Finally, the child "must be brought up in the conscience that its talents must be devoted to the service of his fellow-men."

The 1924 Declaration had been critiqued for the absence of legal language. In the words of a children's rights pioneer of the 20th century – Janusz Korczak, "[t]he Geneva lawgivers have confused duties with rights. The tone of the declaration is not insistence

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[319] *Id.*, at 402.

[320] Geneva Declaration of the Rights of the Child of 1924, Sept. 26, 1924, League of Nations O.J. Spec. Supp. 21, at 43 (1924).

[321] Lara Bolzman, *The Advent of Child Rights on the International Scene and the Role of the Save the Children International Union 1920-45*, 27 REFUG. SURV. Q. 26, 31 (2008).

but persuasion: an appeal to good will, a plea for kindness."[322] Nevertheless, some point out the accomplishment of the Declaration in putting the different needs of children on the agenda of international politics. Although it expressed the minimum requirements for the welfare and protection of children, according to Kerber-Ganse, its principles set the scene for a broader list of children's rights in the future.[323] In addition to this, it introduced childhood as a special and morally distinct status having a universal character. Particularly, the third principle on children being the first one to receive relief in times of distress gave priority to children over adults.[324] This was remarkable considering the fact that the best interests of the child have never been expressed or interpreted as giving priority to the interests of children in the subsequent international instruments.

The concern for the welfare of the child, particularly in the case of distress and war, continued in the aftermath of WWII. In this regard, the creation of the International Children's Emergency Fund (UNICEF) by the General Assembly in 1946 is notable. The Fund was decided to be utilized "for the benefit of children and adolescents" from the countries which were victims of aggression and were already receiving assistance from the United Nations Relief and Rehabilitation Administration and for child health purposes generally.[325]

Finally, in 1949, the protection of child victims of war was expressed in a legally binding instrument - the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War.[326] First, it sets out that the state parties are under the obligation to protect children from the imminent harm that might be caused by war. These include establishing hospital and safety zones and localities to protect "children under fifteen" (Article 14), concluding local agreements to evacuate children from the conflict areas (Article 17), and permitting the free passage of all consignments of essential foodstuffs, clothing, and

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[322] Janusz Korczak, *Selected Works of Janusz Korczak* (1967), http://www.januszkorczak.ca/legacy/CombinedMaterials.pdf.

[323] Waltraut Kerber-Ganse, *Eglantyne Jebb - A Pioneer of the Convention on the Rights of the Child*, 23 INT. J. CHILD. RIGHTS 272, 279 (2015).

[324] Murray Last, *Putting Children First*, 18 DISASTERS 192, 193 (1994).

[325] G.A. Res. 57 (I), (Dec. 11, 1946).

[326] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

tonics intended for children under fifteen (Article 23), facilitating the reception of children with no families in a neutral country during the conflict (Article 24/2), and arrange for all children under twelve to be identified by the wearing of identity discs, or by some other means (Article 24/3).

Second, the protection of the child in the time of war extends to the maintenance, religion, and education of children who are deprived of a family environment. Under the provision titled "measures relating to child welfare," the Geneva Convention stipulates that state parties are obliged to "take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances."[327] In the case of occupation, the proper working of all institutions devoted to the care and education of children and the identification of children, and the registration of their parentage rest upon the occupying power.[328]

Hence, the victimhood of children dominated the initial international efforts to increase the standards of child welfare. The first international treaties under the auspices of the ILO and the League of Nations concerning children focused on trafficking, exploitation and slavery. Later, the 1924 Declaration presented childhood as a morally distinct category entitled to special protection. The concern for the victimhood of the child continued in the aftermath of WWII, as notably seen in the creation of UNICEF and the adoption of specific provisions on child welfare in the 1949 Fourth Geneva Convention. In none of these legal instruments, however, the interests of children were couched in the language of rights.

1.2. Children as Dependents: The Rise of the Paternalist Conception of Children's Rights

Following WWII, the international legal concern for children moved beyond the tragedies of war, exploitation, and slavery, and the internationalization of child welfare was gradually replaced by a paternalist conception of children's rights in international human rights law. The comparison of the 1924 Declaration with the 1959 Declaration on the

[327] *Id.*, art. 24.

[328] *Id.*, art. 50.

Rights of the Child demonstrates this remarkable transformation. The 1959 Declaration departed from its predecessor by embracing a language of rights. Its first principle read as "the child shall enjoy all the rights set forth in this Declaration." [329] It followed the purpose of "bringing home to the hearts of men an awareness of the rights of the child."[330] It also extended the content of the 1924 Declaration considerably by recognizing equality (Principle 1), right to a nationality (Principle 3), right to social security, health, housing, and recreation (Principle 4), special treatment of disabled children (Principle 5), right to parental care (Principle 6), and right to education (Principle 7). It also filled an important gap by expressing the best interests of the child as the guiding principle of those responsible for the child's education and guidance.

The 1959 Declaration also amended certain principles which already existed in the 1924 Declaration. Unlike the fifth principle of the 1924 Declaration, the 1959 Declaration accepted that the child shall be "*among the first* to receive protection and relief."[331] Additionally, the devotion of the talents of the child to "the service of its fellow men" was joined with the requirement of being brought up "in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood."[332]

As the paternalist conception was finding its place in international human rights instruments, children's rights were expressed in relation to the protection of motherhood and family. It is worth noting that this reflected the constitutional traditions of the early 20th century, where children were either invisible or were perceived as passive objects in need of special protection.[333] The special protection was commonly expressed in the form

[329] See the Preamble in G.A. Res. 1386(XIV), Declaration on the Rights of the Child (Nov. 20, 1959) [hereinafter *1959 Declaration on the Rights of the Child*].

[330] U.N.G.A., 14th Sess., *Agenda item 64: Draft Declaration of the Rights of the Child, Report of the Third Committee (A/4249 and Corr.2)* (Nov. 20, 1959) [hereinafter *Report of the Third Committee*], para. 31.

[331] *1959 Declaration on the Rights of the Child*, *supra* note 329, Principle 8 (emphasis added).

[332] *Id.*, Principle 10.

[333] John Tobin, *Increasingly Seen and Heard: The Constitutional Recognition of Children's Rights*, 21 S. AFR. J. HUM. RIGHTS 86, 88 (2005).

of relational rights rather than individual rights, as the protection of children had been subsumed under the broader protection of the family and motherhood.[334]

Against this background, like the constitutional models of that time protecting children in relation to motherhood and the family, the Universal Declaration of Human Rights (UDHR) stipulates that "motherhood and childhood are entitled to special care and assistance."[335] This provision reflects the dominant family structure of the time in which the man was the breadwinner while the woman was the caretaker.[336] A similarly worded provision also exists in the American Declaration of the Rights and Duties of Man, which sets out that "all women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid."[337]

In a similar vein, the International Covenant on Economic, Social, and Cultural Rights (ICESCR) regulates the protection of children together with the protection of family and motherhood. Article 10(1) sets out that the family should be afforded protection and assistance "while it is responsible for the care and education of dependent children."[338] Unlike the earlier instruments, this provision is limited in its scope as it covers the "dependent" children in the family environment.

The efforts to separate the protection of motherhood from childhood were visible during the drafting of the UDHR. Following the first French proposal joining the right of mothers and children to special regard, care, and resources,[339] the USA proposed to split the protection of mothers and children into two sentences: "Mothers have the right to special

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[334] Warren Binford, *Rights of Children*, MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW (2016), http://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e81.

[335] G.A. Res. 217 A(III), Universal Declaration of Human Rights, Resolution, U.N. Doc. A/810 91 (Dec. 10, 1948) [hereinafter *UDHR*], art. 25.

[336] Tobin, *supra* note 333, at 105 (Tobin also addresses Article 25(1) of the UDHR which sets out "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family").

[337] American Declaration of the Rights and Duties of Man, May 2, 1948, art VII.

[338] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter *ICESCR*].

[339] U.N. Econ. & Soc. Council, Commission on Human Rights Drafting Committee, *Suggestions Submitted by the Representative of France for Articles 7–32 of the International Declaration of Rights*, U.N. Doc. E/CN.4/AC.1/W.2/Rev.1 (June 18, 1947).

provisions, care, and welfare. Children are similarly entitled to special provisions."[340] This was successful in the Working Group. However, the juxtaposition of the words mother and child was reinstated by the Sub-Committee[341] and then by the Chinese proposal during the discussion at the Third Committee of the General Assembly. The latter read as "Motherhood and childhood are entitled to special care and assistance."[342] Despite the Soviet objection arguing that abstract ideas such as motherhood and childhood could not be entitled to legal protection, the Chinese proposal was adopted by the Third Committee.[343]

Despite this interrelatedness between motherhood and childhood, Morsink argues that the abstract language chosen by the drafters does not show an intention to confine the rights of children to their status in the family. The abstract notion of "childhood" coupled with the following sentence on the protection of children born out of wedlock confirms that children have their human rights "by virtue of their own humanity and not by virtue of the family they happen to be born into or not born into."[344] However, it is also important that the drafters assumed an alliance between the child's interests and the interests of the mother and the broader family.

The regional human rights treaties in the 1980s sustained the paternalistic legacy of the early human rights instruments on the dependency of children on their families. In 1981, the African Charter on Human and People's Rights (ACHPR) imposed an obligation on state parties to "ensure the protection of the rights of the woman and the child as stipulated

[340] U.N. Econ. & Soc. Council, Commission on Human Rights, 2nd Sess., Working Group on the Declaration of Human Rights, *Summary Record of the Eighth Meeting*, U.N. Doc. E/CN.4/AC.2/SR.8 (Dec. 10, 1947) [hereinafter *Summary Record of the Eighth Meeting]*.

[341] U.N. Econ. & Soc. Council, Commission on Human Rights, 3rd Sess., Report of the Sub-Committee Consisting of the Representatives of France, India and the United Kingdom on Articles 25–26 of the Draft International Declaration on Human Rights, U.N. Doc. E/CN.4/127 (June 11, 1948).

[342] U.N.G.A., Third Comm., 3rd Sess., *China: Draft Amendment to Article 22*, U.N. Doc. A/C.3/347/Rev.1 (Nov. 18, 1948).

[343] U.N.G.A., Third Comm., 3rd Sess., Summary Record of the Hundred and Forty-Fifth Meeting, U.N. Doc. A/C.3/SR.145, (Nov. 18, 1948).

[344] MORSINK, *supra* note 28, at 258.

in international declarations and conventions."[345] In the same year, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) posited adequate nutrition for children at the nursing stage and during school years and protection of adolescents as part of broader protection of the family.[346]

Another important feature of the paternalist conception of children's rights was that the rationale for adopting children's rights was not granting them more autonomy. Although children were viewed worthy of rights protection, they were still seen as not-yet-beings needing adult supervision. The preamble of the 1959 Declaration sets out that the child needs special care and legal protection "by reason of his physical and mental immaturity." In the words of the Rapporteur of the Third Committee of the General Assembly, the 1959 Declaration derives from the "undisputed principle" that children are weak.[347] Since children are incapable of protecting themselves, the Declaration "calls upon the child's elders as individuals organized into family and national groups to respect and maintain the rights of every child."[348] Children should hold rights to become "complete and perfect" human beings.[349]

A few years later, the International Covenant on Civil and Political Rights (ICCPR) and the American Convention on Human Rights (ACHR) sustained this paternalist conception of children's rights with a focus on protection.[350] Article 24 of the ICCPR enshrines the right to protection of every child without discrimination "as are required by his status as a minor, on the part of his family, society and the State" in addition to the right to name

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[345] African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev 5, 1520 U.N.T.S. 217 [hereinafter *ACHPR*], art. 18 (3).

[346] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 17, 1988, O.A.S.T.S. No. 69 [hereinafter *Protocol of San Salvador*], art. 15 (3) (b) and (c).

[347] *Report of the Third Committee, supra* note 330, para. 32.

[348] *Id*., para. 32.

[349] *Id*., para. 34.

[350] American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter *ACHR*]; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter *ICCPR*].

and nationality. Article 19 of the ACHR and Article 16 of the Protocol of San Salvador also enshrine the child's right to protection in similar words. A broader protection is in Article 10(3) of the ICESCR, which stipulates that "special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions."

Thus, these legal developments focusing on the child's dependence have three characteristics. First, different from the earlier international efforts to improve child welfare, the entitlements of children were expressed in legal terms and expanded in content covering many economic and social rights, not limited to the context of war, exploitation, and slavery. Second, children's rights were expressed as an extension of the protection of motherhood and family. Third, the instruments embracing the paternalist conception did not grant children autonomy rights.

1.3. The Drafting of the Convention on the Rights of the Child: Towards the Child's Autonomy?

The Convention on the Rights of the Child has been the turning point in the development of international children's rights.[351] Several commentators explain the content of the rights package brought by the CRC through the "three P's model": protection, provision, and participation.[352] The recognition of children as holders of rights – particularly participation rights – indicates an evolution of childhood image to an autonomous rights holder.[353] Nevertheless, a protective perspective on children has not disappeared. As argued by Verhellen, the three P's model signals the "simultaneous importance of both dependency and autonomy of children."[354] The co-existence of dependency and

[351] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

[352] Didier Reynaert, Maria Bouverne-De Bie & Stijn Vandevelde, *A Review of Children's Rights Literature since the Adoption of the United Nations Convention on the Rights of the Child*, 16 CHILDHOOD 518, 521 (2009). For a critique of these categories see Ann Quennerstedt, *Children, But Not Really Humans? Critical Reflections on the Hampering Effect of the "3 p's"*, 18 INT. J. CHILD. RIGHTS 619 (2010).

[353] Verhellen, *supra* note 59.

[354] Eugeen Verhellen, *The Convention on the Rights of the Child: Reflections from a Historical, Social Policy and Educational Perspective*, *in* THE ROUTLEDGE INTERNATIONAL HANDBOOK OF CHILDREN'S RIGHTS STUDIES 43, 54 (Wouter Vandenhole et al. eds., 2015); Reynaert, Bouverne-De Bie, and Vandevelde, *supra* note 352, at 521.

autonomy of children corresponds to a liberal conception of children's rights. However, a closer look at the drafting history of the CRC demonstrates that the liberal conception was not easily embraced. The drafters intended not to apply civil and political rights in the parent-child relationship, and in the post-drafting process, several states entered reservations on these rights, and the USA did not ratify the CRC.

It was January 1978 when Poland submitted its first Draft Convention on the Rights of the Child, believing that the conditions to take more consistent steps to adopt a convention had matured.[355] Several states supported this by asking for the draft convention to become a priority matter for the General Assembly.[356] However, several NGOs opposed the timing of the draft convention and proposed to wait until 1980 to observe the outcome of the programs adopted during the IYC.[357] Canada, Sweden, Australia, and the United Kingdom agreed with the statement of the NGOs and considered that it would be premature to adopt the convention too rapidly.[358] Despite these objections to the timing of the convention, it is noteworthy that no state opposed the idea of having a convention on the rights of the child. Only the representative of the United Kingdom argued that the

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[355] U.N. Econ. & Soc. Council, Commission on Human Rights, 34th Sess., *Letter dated 17 January 1976 from the Permanent Representative of Poland to the United Nations Office at Geneva addressed to the Director of the Division of Human Rights*, U.N. Doc. E/CN.4/1284 (Jan.18, 1978).

[356] U.N. Econ. & Soc. Council, Commission on Human Rights, 34th Sess., Question of A Convention on the Rights of the Child, *Austria, Bulgaria, Colombia, Jordan, Peru, Poland, Senegal and Syrian Arab Republic: revised draft resolution,* U.N. Doc. E/CN.4/L.1366/Rev.2 (Mar. 1, 1978).

[357] U.N. Econ. & Soc. Council, Commission on Human Rights, 34th Sess., Question of A Convention on the Rights of the Child, *Written statement submitted by the following non-governmental organizations in consultative status: International Council of Women, International Planned Parenthood Federation (category I), All India Women's Conference, Anti- Slavery Society, International Child Bureau, International Council of Jewish Women, International Federation for Human Rights, International Federation of Business and Professional Women, International Federation of Women in Legal Careers, International Federation of Women Lawyers, International Social Service, International Union for Child Welfare, International Union of Family Organizations, St. Joan's International Alliance, World Association of Girl Guides and Girl Scouts, World Jewish Congress, World Movements of Mothers, World Union of Catholic Women's Organizations, World Union of Organizations for the Safeguard of Youth, World Young Women's Christian Association (category II), International Federation for Parent Education (roster),* U.N. Doc. E/CN.4/NGO/225 (Feb. 23, 1978).

[358] U.N. Econ. & Soc. Council, Commission on Human Rights, 34th Sess., *Summary Record of the 1471st Meeting*, U.N. Doc. E/CN.4/SR.1471 (Mar. 13, 1978).

supporters of the original Polish Draft did not demonstrate "the advantages that a convention on the rights of the child would have over the 1959 Declaration of the Rights of the Child." [359]

The original Polish draft was almost identical to the principles adopted in the 1959 Declaration. Several states were discontent with this strong resemblance.[360] The Netherlands argued that copying a document adopted in 1959 does not reflect the social, economic, and cultural changes. Similarly, Sweden suggested that since 1959 "in many countries, views on the family, on marriage, on the relations between children and parents and on the child as an individual having its own needs and rights have undergone important changes."[361]

Before the revised Polish Draft submission, the European Conference on the Rights of the Child held in Warsaw in January 1979 was influential in conceptualizing children's rights in broader terms and in recognizing the autonomy of children.[362] The "Statement of Principles on the Legal Protection of the Rights of the Child" adopted at this Conference included several novel principles departing from a paternalist conception of children's rights. First, it explicitly recognized the child's right to be consulted. The third principle read as "both the State and parents should respect the right of the child to be consulted about its welfare whenever the child is in a position to express such opinions." Second, it considered children as one of the actors who should be responsible for the

[359] *Id*., para. 72.

[360] See the comments of Austria, Belgium, Denmark, Federal Republic of Germany, Netherlands and Sweden in U.N. Econ. & Soc. Council, Commission on Human Rights, 35th Sess., Question of A Convention on the Rights of the Child, *The Report of the Secretary General*, U.N. Doc. E/CN.4/1324 (Dec. 27, 1978) [hereinafter *The Report of the Secretary General (1978)]*; See the comments of France in U.N. Econ. & Soc. Council, Commission on Human Rights, 35th Sess., Question of A Convention on the Rights of the Child, *The Report of the Secretary General: Addendum*, U.N. Doc. E/CN.4/1324/Add.1 (Feb.1, 1979) [hereinafter *The Report of the Secretary General: Addendum]*.

[361] *The Report of the Secretary General*, *supra* note 360, at 17.

[362] ANNA HOLZSCHEITER, CHILDREN'S RIGHTS IN INTERNATIONAL POLITICS : THE TRANSFORMATIVE POWER OF DISCOURSE 153 (2010).

content and form of education.[363] Third, it accepted that "even before it reaches the age of majority" the child has a right to participate in any important decision about its physical and mental health.[364] As a result, the revised Polish Draft departed from the 1959 Declaration and its image of a dependent child. Unlike the earlier draft, it recognized the child's right to express an opinion[365] and different stages of the child's development.[366]

Accepting children's civil and political rights during the drafting process of the CRC was not a smooth process. Except for freedom of religion, civil and political rights did not come to the attention of the drafters until 1988. That year, the USA proposed a joint article on freedom of association, freedom of expression, and the right to peaceful assembly and a separate article on the right to privacy.

In addition to the slow progress on these rights, the idea of the autonomous child faced strong resistance on two grounds. First, the drafters questioned the capacity of children to have civil and political rights. The second USA proposal on freedom of association, freedom of expression, and the right of peaceful assembly declared that the article "shall not be interpreted as affecting the lawful rights and duties of parents or legal guardians, which should be exercised *in a manner consistent with the evolving capacities of the child*."[367] According to the US delegate, the term "child" in the draft Convention included

[363] U.N. Econ. & Soc. Council, Commission on Human Rights, 35th Sess., Question of A Convention on the Rights of the Child, *Warsaw Conference on The Legal Protection of The Rights of The Child, 16-19 January*, U.N. Doc. E/CN.4/L.1428 (Feb. 23, 1979), at 4 see Principle 5.

[364] *Id*., at 5 see Principle 10.

[365] U.N. Econ. & Soc. Council, Commission on Human Rights, 36th Sess., Question of A Convention on the Rights of the Child, *Note verbale dated 5 October 1979 addressed to the Division of Human Rights by the Permanent Representation of the Polish People's Republic to the United Nations in Geneva*, U.N. Doc. E/CN.4/1349 (Oct. 10, 1979) [hereinafter *Note Verbale by Poland*], See art. 7.

[366] *Id*., See Articles 3(2), 15, 18, and 20.

[367] U.N. Econ. & Soc. Council, Commission on Human Rights, 43rd Sess., Question of A Convention on the Rights of the Child, *Report of the Working Group on a Draft Convention on the Rights of the Child*, U.N. Doc. E/CN.4/1987/25 (Mar. 9, 1987) [hereinafter *1987 Report of the Working Group*], para. 111 (emphasis added).

adolescents "who had often acquired the skills needed to participate fully and effectively in society."[368] The Chinese delegation argued that these rights

> "could not be enjoyed by children in the same way as they are enjoyed by adults because the intellect of a child was not as developed as that of an adult, and therefore a child could only engage in activities commensurate with its intellect."[369]

Some speakers also argued that children "because their age and maturity" needed adult guidance and that those children without maturity could act against their best interests. Therefore, they proposed to include "the promotion of the best interests of the child" as a basis for limiting freedom of association and freedom of peaceful assembly.[370] In the end, Articles 13, 15, and 16 did not differentiate children based on their age or capacities, and the child's best interests did not appear as a basis for limitation. The principle of evolving capacities of the child was enshrined as part of Article 5 on parental guidance.

Second, the drafters were concerned about the level of weight given to the child's rights, which could undermine the rights of parents. In that respect, freedom of religion was among the most contentious issues. At first, the initial US proposal on freedom of religion did not mention parental rights or convictions, and this did not satisfy certain delegates. As they argued, the child's religion is not a matter of state responsibility, and the child generally follows her parents' religion.[371]

Later, the USA revised its proposal to include that religious education should be in accordance with her parent's wishes, and the child shall not be compelled to receive teaching on religion or belief against the wishes of the parents.[372] In the subsequent proposals, the parents' wishes were formulated as "right and duties" to provide religious

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[368] *Id*., para. 112.

[369] *Id*., para. 114-117.

[370] U.N. Econ. & Soc. Council, Commission on Human Rights, 44th Sess., Question of A Convention on the Rights of the Child, *Report of the Working Group on a Draft Convention on the Rights of the Child,* U.N. Doc. E/CN.4/1988/28 (Apr. 6, 1988) [hereinafter *1988 Report of the Working Group*], para. 53.

[371] U.N. Econ. & Soc. Council, Commission on Human Rights, 39th Sess., *Report of the Working Group on a Draft Convention on the Rights of the Child,* U.N. Doc. E/CN.4/1983/62 (Mar. 25, 1983), para. 55.

[372] *Id*., para. 57.

direction. Cohen argues that the inclusion of parental rights in Article 14 was a compromise to please the disagreeing delegations, and that weakened the final text of the Convention.[373]

Despite the inclusion of parental rights in Artice 14, there were still some strong objections. In its general comments on the draft convention, Bangladesh pointed out that the child's freedom of religion "appears to run counter to the traditions of the major religious systems of the world and in particular to Islam" and it infringes "the sanctioned practice of a child being reared in the religion of his parents."[374] Similarly, Morocco claimed that the child's right to choose religion is against Islamic law, according to which the child follows the religion of their parents.[375]

The concerns over parental rights continued with the discussion on other civil and political rights. During the talks on the right to privacy, some expressions suggested that this right could endanger the parent-child relationship.[376] One representative argued that the application of the right to privacy "might have repercussions on the right of parents to guide and educate their children and, consequently, have repercussions on the family, the basis of society."[377] In defense of their proposal, the US delegate assured the others that civil and political rights "protect children from action of the State, and would not affect the legitimate rights of parents or legal guardians to provide direction and guidance to children."[378] Quennerstedt, Robinson and I'Anson note that while there was an overall consensus on the idea that children hold civil and political rights, the drafters came to a compromise that these rights cannot eliminate parental rights.[379]

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[373] Cynthia Price Cohen, *The Role of United States in the Drafting of the Convention on the Rights of the Child*, 20 EMORY INT. LAW REV. 185, 192 (2006).

[374] U.N. Econ. & Soc. Council, Commission on Human Rights, 42nd Sess., Question of A Convention on the Rights of the Child, *Report of the Working Group on a Draft Convention on the Rights of the Child,* U.N. Doc. E/CN.4/1986/39 (Mar. 13, 1986), annex IV.

[375] *1988 Report of the Working Group*, *supra* note 370, para. 42.

[376] *Id.*, para. 56.

[377] *Id*., para. 59.

[378] *Id*., para. 36.

[379] Ann Quennerstedt, Carol Robinson & John I'Anson, *The UNCRC: The Voice of Global Consensus on Children's Rights?*, 36 NORD. J. HUM. RIGHTS 38, 53 (2018).

These adaptations, however, were not sufficient to discard the concerns of the drafters over parental rights. This is evident in the reservations or declarations of several states, particularly on Article 13 on freedom of expression, Article 14 on freedom of religion, Article 15 on freedom of association, and Article 16 on the right to privacy.[380]

Several states excluded freedom of religion as a whole or the child's right to choose his/her own religion. For instance, Iraq declared that the child's right to change his or her religion "runs counter to the provisions of the Islamic Shariah." Likewise, Maldives put a reservation on Article 14 "since the Constitution and the Laws of the Republic of Maldives stipulate that all Maldivians should be Muslims."[381] Similarly, some states made sweeping declarations or reservations limiting the application of the CRC to those provisions compatible with the values of Islam or Sharia law. Iran, for example, reserved "the right not to apply any provisions or articles of the Convention that are incompatible with Islamic Laws and the international legislation in effect."[382]

Additionally, some parties declared that civil and political rights should be interpreted as long as they conform to parental rights. Holy See declared that it interprets the CRC "in a way which safeguards the primary and inalienable rights of parents." In a similar fashion, Poland expressed that children's civil and political rights "shall be exercised with respect for parental authority, in accordance with Polish customs and traditions regarding the place of the child within and outside the family." And Singapore declared that these rights should be interpreted "with respect for the authority of parents."

Lastly, some expressed the conditions of maturity and capacity for applying these rights. Luxembourg declared that Article 15 of the CRC "does not impede the provisions of Luxembourg legislation concerning the capacity to exercise rights." The Netherlands

[380] For an extensive discussion on the reservations to the CRC in general and their compatibility with the object and purpose of the Convention see William Schabas, *Reservations to the Convention on the Rights of the Child*, 18 HUM. RIGHTS Q. 472 (1996).; For a detailed review of the reservations and objections to these reservations see Lawrence J Leblanc, *Reservations to the Convention on the Rights of the Child: A Macroscopic View of State Practice*, 4 INT. J. CHILD. RIGHTS 357 (1996).

[381] Other state parties making similar reservations on Article 14 of the CRC are Algeria, Bangladesh, Brunei Darussalam, Jordan; Malaysia, Maldives, Morocco, Oman, Qatar, Somalia, and United Arab Emirates.

[382] Other states having similar declarations are Afghanistan, Kuwait, Mauritania, Saudi Arabia, and Syrian Arab Republic.

stated that Article 14 includes the child's right to adopt a religion of her choice "as soon as the child is capable of making such choice in view of his or her age or maturity."

A further development indicating the difficulty of embracing the child's autonomy was the USA's failure to ratify the CRC. This failure was an unpleasant turn of events considering that the USA was the main sponsor of the proposals on children's civil and political rights. According to Kilbourne, the reluctance to ratify was the outcome of the campaigns of several conservative organizations which disseminated misinformation about the content of the CRC and its implementation process. As she notes, one of the arguments of these organizations was that the CRC would undermine parental authority, threaten the traditional family by increasing state control, and give children a right to "rebel against the parents."[383] The opposing arguments also covered children's civil and political rights, with a concern that these rights disrupt the rights of parents to guide their children.[384]

Thus, while the CRC made an enormous contribution to advancing the idea of the autonomous child, the drafters raised concerns about its effects on parental control and the child's capacity. The compromises in Article 14 to comfort the objecting states did not prevent them and others from entering reservations. Additionally, the USA – the main sponsor of civil and political rights of children during the drafting process – failed to ratify the CRC. These indicate that the liberal conception of children's rights faced important resistance.

1.4. Universality Critique and the Child's Responsibility

The Convention on the Rights of the Child received criticisms for enforcing a Western conception of childhood, which has limited appeal for developing countries. Pupavac contends that this Western conception "as a time of play and training for adulthood has become the universal standard to be enforced under the Convention to the age of

[383] Susan Kilbourne, *U.S. Failure to Ratify the U.N. Convention on the Rights of the Child: Playing Politics with Children's Rights*, 6 TRANSNATL. LAW CONTEMP. PROBL. 437, 441 (1996). See also Soo Jee Lee, *A Child's Voice vs. a Parent's Control: Resolving a Tension Between The Convention on the Rights of the Child and U.S. Law*, 117 COLUMBIA LAW REV. 687 (2017).

[384] Kilbourne, *supra* note 383, at 453.

eighteen."[385] The standardization of this conception in the CRC, according to the critics, has two significant effects. First, this conception views children as "passive objects of duties." Therefore, the CRC fails to acknowledge the agency of children committing violent crimes, children taking part in armed conflicts, or working children.[386] Second, it delegitimizes different conceptions of childhood in developing countries. According to Pupavac, "Southern societies through the failure to comply with Western childhoods become permanent objects of outside intervention." She further claims that "the discourse on children's rights infantilizes the South."[387] For Pupavac, enforcing the model of childhood, which is the outcome of the industrialization of the Global North in the pre-industrialized South, is contradictory and a continuation of global inequalities:

> "There is something very Pollyanna-ish about children's rights advocacy: people's nastiness to each other is so unnecessary, if only people could be nice to each other, if only adults could stop being horrible and hitting their children, then peace and harmony could be released through innocent children. Seeking to enforce post-industrial cultural norms in developing societies, without intending to transform the material conditions of childhood substantially, is perverse, and only reinforces international inequalities."[388]

In addition to the content and standard-setting of the CRC, its drafting process is also subject to criticism. Even though the Working Group on a Draft Convention on the Rights of the Child was open-ended, the Western states had dominated the drafting process, and the number of representatives from Asia, South America, Africa, and the Middle East was

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[385] Vanessa Pupavac, *The Infantilization of the South and the UN Convention on the Rights of the Child*, *in* INTERNATIONAL HUMAN RIGHTS IN CONTEXT : LAW, POLITICS, MORALS : TEXT AND MATERIALS 517, 517 (Philip Alston, Ryan Goodman, & Henry J. Steiner eds., 2008).

[386] Kristina Anne Bentley, *Can There be Any Universal Children's Rights?*, 9 INT. J. HUM. RIGHTS 107, 117 (2005).

[387] Pupavac, *supra* note 385, at 518.

[388] Vanessa Pupavac, *Punishing Childhoods: Contradictions in Children's Rights and Global Governance*, 5 J. INTERV. STATEBUILDING 285, 307 (2011).

few.[389] In fact, the Western domination had frustrated some delegates. Senegalese delegation expressed that the drafting process disregarded the concerns of the developing countries.[390] In response, the Chairperson of the Working Group noted that the developing countries made important contributions to the draft, and they reflected universal problems.[391]

Later at the next session of the Working Group, Senegal reiterated its concern:

> "The concerns and needs - including cultural needs - of all countries, but particularly of the developing countries, to express their aspirations and to make their contributions to the draft convention should be taken into account. Noting that the same concerns had been expressed at previous sessions of the Working Group, he expressed the hope that the current session would see reflected in the draft convention the cultural diversity of the various nations and that universality which was so much desired."[392]

Despite the under-representation of non-Western states, some commentators assert the positive aspects of the CRC. For instance, the active role of the non-governmental and intergovernmental organizations was found influential in making the drafting process more inclusive.[393] According to Harris-Short, the number of women's organizations and organizations working on minority and indigenous rights increased the cultural legitimacy of the drafting process. Additionally, as she suggests, most of the children's rights organizations participating in the drafting process had culturally diverse members or had

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[389] Sonia Harris-Short, *Listening to "the other"? The Convention on the Rights of the Child*, 2 MELB. J. INT. LAW 304, 316 (2001); Russell Lawrence Barsh, *The Draft Convention on the Rights of the Child: A Case of Eurocentricism in Standard-Setting*, 58 NORD. J. INT. LAW 24, 24(1989).

[390] *1988 Report of the Working Group*, *supra* note 370, para. 252.

[391] *Id*., para. 253.

[392] U.N. Econ. & Soc. Council, Commission on Human Rights, 45th Sess., Question of A Convention on the Rights of the Child, *Report of the Working Group on a Draft Convention on the Rights of the Child*, U.N. Doc. E/CN.4/1989/48 (Mar. 2, 1989) [hereinafter *1989 Report of the Working Group*], para. 12.

[393] For the impact of NGO participation on the drafting of the CRC in general see Gamze Erdem Türkelli & Wouter Vandenhole, *The Convention on the Rights of the Child: Repertoires of NGO Participation*, 12 HUM. RIGHTS LAW REV. 33 (2012); Cynthia Price Cohen, *The Role of Nongovernmental Organizations in the Drafting of the Convention on the Rights of the Child*, 12 HUM. RIGHTS Q. 137 (1990).

experience in and knowledge of developing countries.[394] Another positive aspect of the CRC is voiced compared to other human rights treaties. Alston suggests that though not perfect, the CRC is more sensitive to different cultural approaches than other human rights treaties.[395]

The discussions on the universality of children's rights gave rise to a regional children's rights treaty. The Organization of African Unity adopted the African Charter on the Rights and Welfare of the Child (ACRWC) on 11 July 1990, shortly after the adoption of the CRC.[396] Viljoen explains that adopting the ACRWC was a reaction to the perceived exclusion or marginalization of the African states during the drafting of the CRC.[397]

The preamble of the ACRWC reflects the particularities of the African child. The state parties note that the situation of African children is "dependent on the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger" and they also take into consideration "the virtues of their cultural heritage, historical background and the values of the African civilization which should inspire and characterize their reflection on the concept of the rights and welfare of the child."

The most notable difference in the ACRWC[398] challenging the Western conception of childhood is the recognition of the child's responsibilities. Article 31 of the ACRWC reads as follows:

> "Every child shall have responsibilities towards his family and society, the State and other legally recognized communities and the international community. The

[394] Harris-Short, *supra* note 389, at 320-321.

[395] Philip Alston, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, 8 INT. J. LAW FAM. 1, 11 (1994).

[396] African Charter on the Rights and Welfare of the Child, July 11, 1990, OAU Doc. CAB/LEG/24.9/49 (1990) [hereinafter *ACRWC*].

[397] FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 391 (2nd ed. 2012).

[398] For a detailed examination of the differences between the CRC and ACRWC see Amanda Lloyd, *The African Regional System for the Protection of Children's Rights*, *in* CHILDREN'S RIGHTS IN AFRICA: A LEGAL PERSPECTIVE (Julia Sloth-Nielsen ed., 2008).

child, subject to his age and ability, and such limitations as may be contained in the present Charter, shall have the duty:

(a) to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need;

(b) to serve his national community by placing his physical and intellectual abilities at its service;

(c) to preserve and strengthen social and national solidarity;

(d) to preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society;

(e) to preserve and strengthen the independence and the integrity of his country;

(f) to contribute to the best of his abilities at all times, and at all levels, to the promotion and achievement of African Unity."

The notion of the child's responsibilities or duties is not brand new. Previously, the 1924 Declaration, in its fifth principle, set out that the child "must be brought up in the conscience that its talents must be devoted to the service of his fellow-men." This was re-formulated but kept in the 1959 Declaration on the Rights of the Child. Much later, the ACHPR, under a comprehensive list of individual duties in Article 29, included the duty "to respect his parents at all times, to maintain them in case of need."

In drafting the CRC, Senegal proposed to include the sentence "[t]he child has the duty to respect his parents and to give them assistance, in case of need" in Article 5.[399] Some delegates opposed this addition because they thought this was a moral duty, not a legal one, and it would be difficult for state parties to report on the provision.[400] Upon Canada's suggestion, the discussion on this matter was postponed to drafting the aims of education.[401] In Article 29 of the CRC, the objectives of education included developing respect for the child's parents.

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[399] Commission on Human Rights, 45th Sess., *Proposal Submitted by Senegal*, U.N. Doc. E/CN.4/1989/WG.1/WP.17 (Nov. 29, 1988), para. 5 and 6.

[400] *1989 Report of the Working Group*, *supra* note 392, para. 706.

[401] *Id*., para. 709-711.

The importance of Article 31 of the ACRWC lies in the fact that the child's responsibilities are listed comprehensively. Nevertheless, there are diverging views on the implications of this provision. On the one hand, some commentators express their concerns about applying Article 31 in a way that could undermine children's rights. Arts argues that the provision seems symbolic without legal enforcement but still runs the risk of abuse by authorities.[402] Lloyd discusses the child's consent to the decisions affecting them and claims that the notion of consent is incompatible with the duty "to respect his parents, superiors and elders at all times."[403] Chirwa notes that it is unclear which rights correlate with these duties enshrined in the ACRWC and fears that these can be used to justify violations of children's rights. He also points out the possible conflict between the duty to respect parents and the child's right to participate in decisions affecting them.[404]

On the other hand, some commentators do not share the concerns that Article 31 runs counter to the child's rights. Nielsen and Mezmur point out two internal limitations of the provision. Accordingly, the child's duties are "subject to his age and ability, and such limitations as may be contained in the present Charter." This means the child's duties should be proportional to the child's evolving capacities, and the child should not bear adult responsibilities prematurely.[405] Additionally, these duties should be interpreted within the broader context of the ACRWC. In this regard, Viljoen notes that the duty to respect the parents at all times must be balanced with the child's right to privacy or freedom of expression and the parents' own responsibilities to take regard the best interests of the child.[406]

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[402] Karin C.J.M. Arts, *The International Protection of Children's Rights in Africa: The 1990 OAU Charter on the Rights and Welfare of the Child*, 5 AFRICAN J. INT. COMP. LAW 139, 154 (1993).

[403] Amanda Lloyd, *A Theoretical Analysis of the Reality of Children's Rights in Africa: An Introduction to the African Charter on the Rights and Welfare of the Child'*, 2 AFRICAN HUM. RIGHTS J. 11, 17 (2002).

[404] Danwood Mzikenge Chirwa, *The Merits and Demerits of the African Charter on the Rights and Welfare of the Child*, 10 INT. J. CHILD. RIGHTS 157, 169 (2002).

[405] J. Sloth-Nielsen & B. D. Mezmur, *A Dutiful Child: The Implications of Article 31 of the African Children's Charter*, 52 J. AFR. LAW 159, 171-172 (2008).

[406] VILJOEN, *supra* note 397, at 394. Nielsen and Mezmur also argue that the child's duties should be interpreted together with parental duties, see Sloth-Nielsen and Mezmur, *supra* note 405, at 175.

These commentators also consider the responsibilities of the child as an African reality and a positive contribution to the African conception of human rights. Kaime shows that many young children in Africa take care of their siblings and carry out many tasks in the household while their parents are absent. Accordingly, the image of childhood free from responsibilities is "a luxury" that developing countries cannot realize.[407] Nielsen and Mezmur also contend that the idea of communitarianism distinguishes the African context from others. They interpret the child's duty to preserve and strengthen social and national solidarity as an extension of this idea. They refer to the concept of *ubuntu* which "emphasizes communality and the interdependence of the members of the community, and that every individual is an extension of others."[408] Likewise, Mutua suggests moving from the Western conception of human rights based on an antagonistic relationship between the individual and the state toward a more harmonious relationship between rights and duties. In his own words, this harmony between rights and duties "is an excellent point of departure in the reconstruction of a new ethos and the restoration of confidence in the continent's cultural identity."[409]

Thus, the view that the child needs to be free from her parents and the broader community is historically and culturally determined. The vague phrases used in Article 31 of the ACRWC, such as respecting parents "at all times" or placing his/her abilities "at the service" of the national community must be interpreted diligently. As long as the responsibilities of the child are not interpreted as pre-conditions or alternatives to the child's rights, the idea of the responsible child is not inconsistent with the child's autonomy. The child's responsibilities as a member of the family and the broader community can enrich the understanding of autonomy.

1.5. Conclusion

Childhood as a distinct legal category attained international protection initially through the lens of victimhood. This approach was prevalent in international instruments protecting the child from societal ills such as war, slavery, and exploitation without

[407] Thoko Kaime, *The African Children's Charter: Does It Represent a Relevant Vision of Childhood and Children's Rights?*, 29 CHILD. LEG. RIGHTS J. 11, 20 (2009).

[408] Sloth-Nielsen and Mezmur, *supra* note 405, at 180.

[409] Makau Wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J. INT. LAW 339, 380 (1995).

resorting to a language of rights. In the post-WWII developments – the UDHR, ICCPR, ICESCR, and the 1959 Declaration on the Rights of the Child – the child's dependency was at the front. Since the child's autonomy was not a primary concern, these developments correspond to a paternalist conception of children's rights.

The CRC marks the recognition of the autonomous child and a move towards a liberal conception of children's rights. However, the child's autonomy faced some resistance in the drafting and the post-adoption processes. The drafters had concerns over the child's maturity as well as the child's status against her parents. Later, several states put reservations on civil and political rights, and the USA did not ratify the CRC.

The CRC has been criticized for enforcing a Western understanding of childhood, and the ACRWC was a reaction to the perceived exclusion of non-Western experiences. In that regard, the image of a responsible child enshrined in the ACRWC provides an alternative vision to the Western understanding of autonomy by recognizing the child as an agent possessing duties towards her family and society.

2. The Legalization of Parental Rights in International Human Rights Law

The purpose of the second chapter is to analyze the legalization process of parental rights in international human rights law. The first section discusses the intention of the drafters to protect parents' autonomy against repressive state practices on the child's upbringing. The second section studies the drafters' concerns on those parents who deny their children compulsory education and also those who do not commit to democratic values. The third section examines how the conception of parental rights has shifted to a fiduciary one with the adoption of the CRC.

2.1. The Plea for Autonomous Parents: Haunting Memories of the Totalitarian Past

Unlike children who became an international concern in the 19th century on the basis of their victimhood, the legalization of parental rights was possible after WWII. Article 26(3) of the UDHR reads as "parents have a prior right to choose the kind of education that shall be given to their children." In parallel to this provision, Article 2 of the First Protocol (P1) to the European Convention on Human Rights (ECHR) enshrines that states should respect the rights of parents to ensure that the child's education is "in conformity with their own religious and philosophical convictions."[410] Article 13 (3) of the ICESCR likewise urges the states to respect the liberty of parents to choose private schools and "to ensure the religious and moral education of their children in conformity with their own convictions." Unlike the UDHR, ECHR, and ICESCR, the ICCPR includes parental rights as part of freedom of religion under Article 18(4). However, it mirrors the language of Article 13(3) of the ICESCR. The parental right to shape the religious and moral education of the child as part of freedom of religion is also adopted in Article 12 of the ACHR.

The drafting histories of the UDHR and ECHR indicate that the totalitarian practices in Europe infringing parental rights prompted the drafters to secure the autonomy of parents against the totality of state control in the child's upbringing. First, the discussions during the drafting of Article 26(3) of the UDHR demonstrate the influence of the memories of

[410] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 E.T.S. 5, 213 U.N.T.S. 221 [hereinafter *ECHR*].

totalitarian practices on families and the upbringing of children. It was first the Lebanese representative Mr. Malik, who emphasized the need to eliminate any possibility of the dictators preventing the parents from educating their children. Accordingly, "control of education could not be left entirely to the discretion of the State; parents should be allowed the freedom to determine the spirit in which they wished their children to be brought up."[411] Similar remarks were also made by the representative of the International Union of Catholic Women's Leagues, who argued that if this right was not included in the Declaration, "there might very well be a recurrence of situations such as that which prevailed in Germany under Hitler."[412]

These led some delegates to object to the word "compulsory" with a concern that this could result in excessive state power over education. Mr. Pavlov, the Russian delegate, calmed these fears by stating that it "could only work to the advantage of the child whose parents might not understand his vital interests and to the improvement of society, which would receive educated individuals."[413] In search of a compromise, Lebanon proposed to include the rights of parents to choose the education of the child as a separate paragraph to avoid any misinterpretation.[414] While it was initially rejected by the Commission on Human Rights,[415] it succeeded in convincing the majority at the Third Committee.

Second, the drafting process of the ECHR reveals that parental rights in education were considered a strong reaction to the totalitarian practices of the (then) recent past. This right was first discussed as a component of the right to family life. In the draft submitted by the European Movement to the Committee of Ministers, it was phrased as "the natural

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[411] U.N. Econ. & Soc. Council, Commission on Human Rights, 3rd Sess., *Summary Record of the Sixty-Seventh Meeting*, U.N. Doc. E/CN.4/SR.67 (June 10, 1948) [hereinafter *Summary Record of the Sixty-Seventh Meeting*], at 14.

[412] *Id.*, at 16.

[413] U.N. Econ. & Soc. Council, Commission on Human Rights, 3rd Sess., *Summary Record of the Sixty-Eighth Meeting*, E/CN.4/SR.68 (June 10, 1948) [hereinafter *Summary Record of the Sixty-Eighth Meeting*], at 6.

[414] U.N.G.A., 3rd Sess., Third Committee, *Lebanon: Amendments to Draft Declaration (E/800)*, U.N. Doc. A/C.3/260 (Oct. 12, 1948).

[415] It was rejected by ten votes to three, with one abstention see *Summary Record of the Sixty-Eighth Meeting, supra* note 413.

rights deriving from marriage and paternity and those pertaining to the family." In the explanatory memorandum, family rights were considered to include "the prior right of parents to choose the kind of education to be given to their children." Mr. Teitgen justified the inclusion of family rights with these words:

> "The father of a family cannot be an independent citizen, cannot feel free within his own country, if he is menaced in his own home and if, every day, the State steals from his soul, or the conscience of his children." [416]

These words of Mr. Teitgen showed some signs of a proprietorial conception of parental rights by forming a strong relationship with the father's personality and his children. Such signs were also visible in the expressions of other delegates. For them, parental right was "a profoundly democratic right constituting a natural unquestionable right,"[417] "my most natural right, one that is the nearest to my heart,"[418] and "a natural, innate right, like the right to live."[419] These indicate that the drafters considered parents' control over children to appear naturally without being delegated by political power. In that respect, these expressions coincide with the proprietorial conception.

In drafting the ECHR, the parental right to choose the child's education initially faced resistance. The United Kingdom's delegate Lord Layton opposed the inclusion of family rights by asserting that the Convention should be "limited to the absolute minimum necessary to constitute the cardinal principles for the functioning of political democracy." According to Layton, the unpleasant experience of the past might not occur in countries where free elections and freedom of speech were guaranteed.[420] This, however, did not convince the Consultative Assembly. As a response to the UK delegate, the delegate of Ireland emphasized "the ruthless and savage way" in which the totalitarian regimes tried to eliminate the concept of family. This was followed by similar statements from other delegates strongly defending the rights of parents. The Italian delegate reminded "the

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[416] Preparatory Work on Article 2 of the Protocol I the Convention, CDH (67)2 (1967), https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-P1-2-CDH(67)2-BIL2292567.pdf., at 6.

[417] *Id.*, at 38 see the statement of Mr. Van Cauwelaert (Belgium).

[418] *Id.* at 84-85 see the statement of Mr. Pernot (France).

[419] *Id.*, at 178 see the statement of Mrs. Weber (German Federal Republic).

[420] *Id.*, at 9.

gravest wrongs committed by Fascism in Italy" including "the tearing of children from their families to make them supporters of the dictatorship."[421] The Irish delegate also described the right of parents as a right "most bitterly assailed in totalitarian states."[422]

As a result, the UK resistance was broken in the Consultative Assembly; however, the right of parents to choose education did not succeed in securing a place under the right to family life by a sudden removal by the Committee of Ministers. Following this unexpected turn of events, the right of parents started to be discussed as part of the right to education in the additional protocol. During these discussions, the delegate of the Federal Republic of Germany emphasized the importance of parental rights with reference to the practice of Nazi Germany:

> "We are impatiently waiting for the Assembly and the Committee of Ministers to adopt this [sic] articles. The implementation of this right is for us a very urgent matter. Under the Third Reich we in Germany suffered cruelly from the enslavement of conscience to which parents and children were subjected in every school in the matter of education and teaching. All young people, infants and older children, were under the domination of the totalitarian state. The same dreadful position holds today in the Eastern zone of Germany under Russian domination. It is torture for families which have to send their children to school every day."[423]

These findings show that the legalization of parental rights in the post-WWII era was a strong reaction to the totalitarian past in Europe, where the state claimed extensive control over the child's upbringing. The memories of the totalitarian past urged the drafters to secure the privacy of the family through adopting parental rights.

2.2. The Scope of Parental Rights in Education: The Fear of Negligent and Undemocratic Parents

Despite the strong intention to protect parental rights as influenced by the horrors of the repressive states, the drafters foresaw some interests that could outweigh parental rights. They expressed two main concerns: one was the parents refusing to send their children to school, and the second one was the parents who were hostile to the essential values of the

[421] *Id.*, at 20.

[422] *Id.*, at 29.

[423] *Id.*, at 178.

democratic regimes. These concerns indicate that the drafters endorsed the state's role to create self-reliant members of the society and the state's civic interests to secure liberal democracy through education.

The importance of basic education for the child's interests was repeatedly expressed in the drafting process of Article 26 of the UDHR, particularly in the debates surrounding the word "compulsory." The French delegate Mr. Cassin argued that compulsory education should mean that "no one (neither the State, nor the family) could prevent the child from receiving elementary education."[424] According to the delegate of Soviet Russia, compulsory education "could only work to the advantage of the child whose parents might not understand his vital interests and to the improvement of society, which would receive educated individuals"[425] Later, Mr. Pavlov also emphasized that "a child had an absolute right to education, and independently of the wishes of its parents."[426] Even the holder of the proposal on the right of parents – the Lebanese delegate – accepted that "the State must compel negligent parents to see that their children obtained education."[427]

Similar concerns for negligent parents were also raised during the discussions on the Draft Covenant on Human Rights and later on Article 14(3) of the ICESCR, and the drafters gave priority to the child's right to education. Ms. Roosevelt declared that "the ultimate aim of education was the good of the child." Although she did not favor a complete state control over education, she was of the view that "if necessary, the good of the child should take precedence over the wishes of his parents."[428] Several delegates also expressed that

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[424] *Summary Record of the Sixty-Eighth Meeting*, *supra* note 413, at 3.

[425] *Id*., at 6.

[426] U.N.G.A., 3rd Sess., Third Comm., *Summary Record of the Hundred and Forty-Seventh Meeting*, U.N. Doc. A/C.3/SR.147 (Nov 19, 1948) [hereinafter *Summary Record of the Hundred and Forty-Seventh Meeting*], at 589.

[427] U.N.G.A., 3rd Sess., Third Comm., *Summary Record of the Hundred and Forty-Sixth meeting*, U.N. Doc. A/C.3/SR.146 (Nov. 19, 1948), at 584.

[428] U.N. Econ. & Soc. Council, Commission on Human Rights, 7th Sess., *Summary Record of the Two Hundred and Twenty-Sixth Meeting,* U.N. Doc. E/CN.4/SR.226 (June 27, 1951) [hereinafter *Summary Record of the Two Hundred and Twenty-Sixth Meeting*], at 24.

the right of parents is not an unconditional right and preferred to use the wording "liberty of parents" instead of "rights."[429] In the words of the Iraqi delegate,

> "As, unfortunately, parents did not always know best what to choose for their children, the rights of the child should be protected. The parents should be left free to choose the moral and religious education of their children but they should be prevented from depriving the child of other rights."[430]

The Turkish delegate also pointed out that parents could not be permitted to "keep their children away from school altogether on the ground that they had the right to teach them at home if they so wished."[431]

The second concern – the concern for the parents who are hostile to democratic values – clearly shows how the drafters endorsed the role of the state in raising democratic citizens. This concern came to the agenda of the drafters of the UDHR with the question of whether parents hold a right to determine the content of education. It was first Ms. Roosevelt who raised this concern by arguing that the right of parents to control education might mean they have a right to supervise school curricula which "clearly might have undesirable consequences."[432] As a response, the sponsor of a proposal on parental rights – the Dutch delegate confirmed that their proposal "was not in any way aimed at enabling parents to intervene in drawing up school syllabi." Accordingly, the right of parents was limited to choose the type of education children would receive.[433]

During the preparation of the Draft Covenant on Human Rights, it was first the Chilean representative who objected to the inclusion of a counterpart of Article 26 (3) in the Draft Covenant with a concern on the right of parents to determine the curriculum.[434] The

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[429] See the comment of the Japanese delegate Miss Fujita in U.N.G.A., 12th Sess., Third Comm., *Draft International Covenants on Human Rights*, 786th Meeting, U.N. Doc. A/C.3/SR.786 (Oct. 22, 1957) [hereinafter *Draft International Covenants on Human Rights*, 786th Meeting], para. 7.

[430] *Id.*, para. 42.

[431] U.N.G.A., 12th Sess., Third Comm., *Draft International Covenants on Human Rights*, 782nd Meeting, U.N. Doc. A/C.3/SR.782 (Oct. 16, 1957), para. 32.

[432] *Summary Record of the Hundred and Forty-Seventh Meeting*, *supra* note 426, at 590.

[433] *Id.*, at 599.

[434] *Summary Record of the Two Hundred and Twenty-Sixth Meeting*, *supra* note 428, at 23.

Egyptian delegate, Azmi Bey, pointed out that the child was a member of the society. As he suggested, "when a democratic society decided to adopt a certain political, social or economic outlook, it could not readily be admitted that parents had the right to follow another course, for instance, to teach their children Nazi doctrines."[435] The Danish representative agreed and pointed out the dangers of the misdirection of education as a result of the unrestricted right of parents. Accordingly, such a danger could only be avoided by establishing the fundamental aims of education in accordance with justice and democracy.[436]

The fear of giving "undemocratic" parents wide powers over education led to an important disagreement between the Consultative Assembly and the Committee of Ministers during the drafting of Article 2 of the P1 to the ECHR. While the Assembly preferred the wording "in conformity with their own religious and philosophical conviction," the Committee amended it as "in conformity with their own creeds" in November 1951. According to the commentary of the Secretariat General, the text of the Assembly could mean that "parents whose 'philosophical convictions' are fundamentally opposed to the conceptions of democracy and human rights would have the right to educate their children in the same beliefs."[437]

Mr. Teitgen showed his discontent regarding the amendment made by the Committee of Ministers and addressed the elephant in the room:

> "I am well aware of the obligation that may be raised and you probably guessed it. Ministers were afraid – let us admit it – of Communist propaganda. They probably considered that it would be preferable to guarantee only religious convictions, as that would avoid the difficulty of communist organisations – and even perhaps communist schools and anarchist propaganda – and claiming to benefit under the European guarantee of human rights."[438]

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[435] U.N. Econ. & Soc. Council, Commission on Human Rights, 7th Sess., *Summary Record of Two Hundred and Twenty-Seventh Meeting*, U.N. Doc. E/CN.4/SR.227 (June 27, 1951), at 6.

[436] *Id.*, at 9.

[437] Preparatory Work on Article 2 of the Protocol to the Convention, *supra* note 416, at 152.

[438] *Id.*, at 169.

According to Teitgen, such fears were groundless as Article 17 of the Convention would prevent others from abolishing freedoms guaranteed by the European Convention.[439] Later the Irish delegate represented it as a "very thorny problem" and expressed his mistrust of communist parents:

> "It is quite clear I think, that it could be argued that dialectical Marxism or atheistic Communism is a philosophy and should be included under the Article; but it is also clear that no wise person wants to give full facilities to the avowed enemies of our democratic system. That is quite clear."[440]

Mr. Teitgen once again emphasized that all parents have rights against "the danger of nationalization, absorption, monopolization, requisitioning of young people by the State – irrespective of whether they have religious convictions or merely the philosophical convictions of traditional humanism."[441] As a result, the provision also covered parents with philosophical convictions.

In light of the foregoing, one can conclude that the drafters intended to limit the scope of parental rights in education on two grounds: when it clashes with the state's role to create self-reliant members and its role to create citizens committed to the liberal and democratic values.

2.3. The Best Interests and the Evolving Capacities of the Child: Towards the Fiduciary Parents

As noted in the discussion of the normative perspectives on the child's upbringing, the fiduciary conception of parental rights suggests that parents are entrusted with the child's upbringing to protect and promote the rights of the child. This contradicts the proprietorial conception, which considers the parent-child relationship as a natural one that pre-exists any political order and allocation of responsibility. With the gradual acceptance of the child as an autonomous right holder, international human rights instruments have moved towards a fiduciary conception of parental rights. There are three indicators of this move: first, the terminological change in human rights instruments; second, the recognition of the best interests of the child; and third, the adoption of the evolving capacities of the

[439] *Id.*, at 169.

[440] *Id.*, at 182.

[441] *Id.*, at 195.

child. How the drafters formulated the best interests of the child principle indicates that this move does not mean that parental rights are mere instruments that would always yield to the child's interests.

Before the children's rights instruments, the final texts of the early human rights documents – the UDHR and ECHR – did not include any restrictions on parental rights. Nor did they mention the interests or rights of the child to be taken into account in the exercise of parental rights. Although there were concerns over negligent and undemocratic parents, which would endanger the child's access to education, during the drafting processes, there were scarce references to the substantive rights of children, and the proposals to include children's rights were disregarded in the early stages.

At the drafting process of the ECHR, Mr. Philip, Mr. Mollet, and Mr. Rasquin proposed at the initial discussions of the Consultative Assembly to delete the right of parents in education and insert the following: "The rights of access for every child to culture by educational methods which will allow the gradual development of his individual personality."[442] This was supported by Mr. De La Valle-Poussin, who suggested that the article should be worded not as a right of parents but a duty of the parents. He continued:

> "[I]n a field so fundamental as that of education, to say that any power whatsoever may subject the child to its natural protectors would be something that would appear to us to be abominable."[443]

A similar concern was voiced during the drafting process of the International Covenants on Human Rights by the Syrian delegate, who argued that the ultimate aim of parental responsibility was to protect the child's interests and found the omission of parental responsibility unfortunate.[444] However, these proposals and concerns were not discussed further and did not succeed in convincing the majority.

The first indicator of the move towards a fiduciary conception is the terminological change in describing the parent-child relationship. Different from the UDHR, ECHR, and ICCPR, which mention the "rights" or "liberty" of parents, the CRC and ACRWC adopt the terms "duties" and "responsibilities" of the parents. The signs of this terminological

[442] *Id.*, at 7.

[443] *Id.*, at 11.

[444] *Draft International Covenants on Human Rights*, 786th Meeting, *supra* note 429, para. 27.

change were seen in European instruments adopted before the CRC. In 1979, the European Charter on the Rights of the Child declared that the concept of "parental authority" must be replaced by "parental responsibility" to have "a clear description of children's rights as individual family members."[445]

Likewise, in 1984, the Committee of Ministers of the Council of Europe, in its Recommendation on Parental Responsibilities, defined parental responsibility as:

> "[C]ollection of duties and powers which aim at ensuring the moral and material welfare of the child, in particular by taking care of the person of the child, by maintaining personal relationships with him and by providing for his education, his maintenance, his legal representation and the administration of his property."[446]

One can also observe the sensitivity over these terms in the drafting history of the CRC. For instance, during the discussion on freedom of religion, the parental religious direction was considered "the authority of parents" in the proposal of Canada and the United Kingdom. Later, the joint proposal of Denmark, Finland, Norway, and Sweden used the words "the wishes, freedoms, and rights of the parents." Upon a subsequent proposal of Finland, in the final text, the wording of "the rights and duties of the parents" was preferred.[447]

This terminological change demonstrates that the child's upbringing is no longer understood in proprietorial terms as an adversarial relationship between the parent and the state. Instead, the child's upbringing is a process where the parents hold duties and responsibilities towards the child and society. In this regard, Van Bueren rightly notes that international law experiences a shift from safeguarding the privacy of the family to regulating the quality of family relationships.[448] Likewise, Vandenhole discusses that the

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[445] Council of Europe Parliamentary Assembly, Recommendation 874 (1979) (Oct. 4, 1979), para. 17(2)(c).

[446] Council of Europe Council of Ministers, Recommendation No. R (84) 4 on Parental Responsibilities (Feb. 28, 1984), Principle 1.

[447] U.N. Econ. & Soc. Council, Commission on Human Rights, 40th Sess., Question of A Convention on the Rights of the Child, *Report of the Working Group on a Draft Convention on the Rights of the Child*, U.N. Doc. E/CN.4/1984/71 (Feb. 23, 1984) [hereinafter *1984 Report of the Working Group*], para. 29.

[448] Geraldine Van Bueren, *The International Protection of Family Members' Rights as the Twenty-first Century Approaches*, 17 HUM. RIGHTS Q. 732, 741 (1995).

distinctiveness of children's rights lies in its move beyond the vertical relationship between the individual and the state and its inclusion of parents and caregivers as duty bearers.[449]

The second indicator of the move towards a fiduciary conception is the adoption of the best interests of the child as a guiding principle of the parent-child relationship. The second paragraph of Principle 7 of the 1959 Declaration read as follows: "The best interest of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents." The best interests of the child principle also inspired the discussions of Article 18 of the ICCPR. The holder of the proposal on parental right to choose religious and moral education of the child – Greece cited the 1959 Declaration and declared that "the paramount consideration should be the best interests of the child."[450]

Later, the best interests of the child secured its place in the American Convention on Human Rights, which provides that "[i]n case of dissolution, provision shall be made for the necessary protection of any children *solely on the basis of their own best interests.*"[451] The principle was also accepted in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979.[452] Article 5 regarding gender equality in the responsibility for upbringing and development of the child enshrines that "the interest of the children *is the primordial consideration in all cases*." The CEDAW also provides that states under an obligation to eliminate discrimination against women in the exercise of parental responsibilities and "in all cases the interests of the children shall be paramount."[453]

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[449] Wouter Vandenhole, *Distinctive Characteristics of Children's Human Rights Law*, *in* CHILDREN'S RIGHTS LAW IN THE GLOBAL HUMAN RIGHTS LANDSCAPE: ISOLATION, INSPIRATION, INTEGRATION? 21, 29 (Eva Brems, Ellen Desmet, & Wouter Vandenhole eds., 2017).

[450] U.N.G.A., 15th Sess., Third Comm., 1023rd Meeting, U.N. Doc. A/C.3/SR.1023 (Nov.15, 1960), para. 6.

[451] *ACHR*, *supra* note 350, art. 17(4) (emphasis added).

[452] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter *CEDAW*].

[453] *Id.*, art. 16 (1)(d) and (f).

Finally, two children's rights treaties – CRC and ACRWC – adopted the best interests of the child. Article 3 of the CRC establishes that "in all actions concerning children," the best interests of the child shall be a primary consideration. The principle of the best interests of the child is also the guiding principle for parental rights and responsibilities. Article 18 of the CRC recognizes that "parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child." but adds that "the best interests of the child will be their basic concern."

Similarly, Article 20 of the ACRWC provides that parents have the duty "to ensure that the best interests of the child are their basic concern at all times."[454] Parental responsibilities are regulated in broader terms in the ACRWC, covering the duties "to secure, within their abilities and financial capacities, conditions of living necessary to the child's development"[455] and "to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child."[456] Additionally, as provided by Article 9 of the ACRWC, parental guidance and direction with respect to the freedom of religion of the child must regard the best interests of the child.

One central question is whether parental rights are mere instruments to advance the child's interests. Under the fiduciary conception, instrumentalizing parenthood as such is not desired as it would make child-rearing less appealing. The drafting process of the CRC demonstrates that the drafters avoided that instrumental understanding of parental rights. An important debate in drafting Article 3 of the CRC was on the weight of the child's interests in a balancing exercise between competing interests. This divided the drafters on the basis of which phrase to be used: the paramount consideration, the primary consideration, or a primary consideration.

Echoing the 1959 Declaration, Poland preferred "the paramount consideration" in its initial and revised drafts. However, this was found too broad by some delegates, and one argued that the interests of the child must not be paramount "since other parties might

[454] ACRWC, *supra* note 396, art. 20 (1)(a).

[455] *Id*., art. 20 (1)(b).

[456] *Id*., art. 20 (1)(c).

have equal or even superior legal interests in some cases."[457] Therefore, the USA proposed to change it as "a primary consideration." The UNICEF, however, suggested using "the primary consideration" and explained the difference as follows:

> "By stating that the child's best interest shall be "a primary consideration" this provision uses what amounts to a twofold qualification. The word "primary" implies that other considerations, although not deemed primary, may nevertheless be taken into account. The article "a" indicates that there may be several considerations, each of which is primary. The issue which arises by virtue of standards incorporated in other widely accepted human rights instruments is whether a single qualification is not sufficient. If this were considered to be the case, the wording could be changed to indicate that the child's best interests would be "the primary consideration"[458]

The phrase "the primary consideration" was supported by the observers for Kuwait, Portugal, and Australia since it was compatible with Article 5 of the CEDAW.[459] This was not supported by other observers who claimed that "there were situations in which the competing interests, inter alia, of justice and of the society at large should be of at least equal, if not greater, importance than the interests of the child."[460] Canada also argued that other instruments choosing "the primary consideration" had a narrower application compared to Article 3 of the CRC.[461] In the end, the drafters formed a consensus making the interests of the child only "a" primary consideration.

The distance from the understanding of parents as instrumental trusts is also apparent in how the parent-child relationship was phrased in Article 3. Initially, the revised Polish draft made it explicit that the best interests principle covered all actions concerning

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[457] U.N. Econ. & Soc. Council, Commission on Human Rights, 37th Sess., *Report of the Working Group on a Draft Convention on the Rights of the Child*, U.N. Doc. E/CN.4/L.1575 (Feb 17, 1981) [hereinafter *1981 Report of the Working Group*], para. 23-24.

[458] U.N. Doc. E/CN.4/1989/WG.1/CRP.1, at 13-14 quoted in *Legislative History*, *supra* note 28, at 344.

[459] *1989 Report of the Working Group*, *supra* note 392, para. 118.

[460] *Id.*, para. 121.

[461] *Id.*, para. 122.

children "whether undertaken by their parents, guardians, social or State institutions."[462] Later, the U.S. proposal removed the reference to parents and changed it to "whether undertaken by public or private social welfare institutions, courts of law, or administrative authorities."[463] The U.S. proposal also added a new paragraph stating the obligation of the state to take into account "the rights and duties of his parents, legal guardians, or other individuals legally responsible for him."[464] These proposals were adopted in the final text.

Lastly, adopting evolving capacities of the child principle is a further sign of the fiduciary conception. Unlike the best interests principle, which has been applied in domestic contexts before appearing in international law, the evolving capacities of the child is a brand-new principle. Through this principle, international law on the rights of the child acknowledges that children may acquire competencies at different ages due to their diverse experiences and cultural conditions.[465] In addition to addressing the particularities of children, this principle is important for the CRC framework to integrate both protection and participation rights.[466]

The idea that the scope of parental rights should be adjusted to the evolving capacities of the child was not an issue that attracted the drafters' attention before the CRC. The only proposal to limit parental rights based on the age of the child was raised in the drafting process of the UDHR. It was Mr. Pavlov – the delegate of the USSR – suggesting specifying that parents had rights over the education of only young children.[467] According to Pavlov, "naturally, parents should decide upon the type of education to be given to a

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[462] *Note Verbale by Poland, supra* note 365*,* at 2.

[463] *1981 Report of the Working Group, supra* note 457, para. 20.

[464] *Id*., para. 34.

[465] GERISON LANSDOWN, EVOLVING CAPACITIES OF THE CHILD 3 (2005).

[466] Daniel P Keating, *The Evolving Capacities of the Child: Neurodevelopment and Children's Rights*, *in* HANDBOOK OF CHILDREN'S RIGHTS : GLOBAL AND MULTIDISCIPLINARY PERSPECTIVES 184, 188 (Martin D Ruck; Michele Peterson-Badali; Michael Freeman ed., 2017). For a similar view emphasizing the holistic application of the principle see GARTON SANDIFOLO KAMCHEDZERA, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, ARTICLE 5: THE CHILD'S RIGHT TO APPROPRIATE DIRECTION AND GUIDANCE 34 (2012); LANSDOWN, *supra* note 465, at 15.

[467] U.N.G.A., 3rd Sess., Third Comm., *Summary Record of the Hundred and Forty-Eighth Meeting*, U.N. Doc. A/C.3/SR.148 (Nov. 19, 1948), at 604.

child of twelve years of age, but the position was not the same when a child was fourteen years old or more. In many cases that was the time when a child's vocational aptitudes became apparent and in that connexion parents were too often lacking in understanding."[468] Later, another USSR delegate, Mr. Bogomolov proposed to include an age limit in Article 26 (3) of the UDHR since "it might be interpreted to mean that if a young man of 23 or 24 wished to study a certain subject, his parents had the right to prevent him from so doing."[469] Although this proposal received support of some delegates, it was not adopted in the final text.

The children's instruments introduced a dynamic understanding of parental rights as warranted by the fiduciary conception. Article 5 of the CRC imposes the obligation to respect "rights and responsibilities of parents … to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance" in the exercise of the rights of the child. Article 14 of the CRC also urges the states to respect the parents to provide direction to the child in the exercise of his or her freedom of religion "in a manner consistent with the evolving capacities of the child" Likewise, according to Article 9(2) of the ACRWC, parental guidance and direction should regard the evolving capacities of the child. Also, pursuant to Article 11 (4) of the ACRWC, states have an obligation to respect the rights and duties of the parents "to ensure the religious and moral education of the child in a manner consistent with the evolving capacities of the child."

Hence, these developments demonstrate that a fiduciary conception of parental rights has been gradually adopted in international human rights law. The parent-child relationship has started to be conceptualized under the terms "duties" and "responsibilities," and the best interests and evolving capacities of the child have become its guiding principles. However, it is difficult to argue that these developments correspond to an understanding of parental rights instrumental to the rights of the child. Particularly in formulating the best interests of the child, the drafters avoided giving absolute priority to the child's interests.

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[468] *Id*., at 607.

[469] U.N.G.A., 3rd Sess., Third Comm., *Summary Record of the Hundred and Seventy-Seventh Meeting*, U.N. Doc. A/C.3/SR.177 (Dec. 6, 1948), at 869.

2.4. Conclusion

The drafting histories of the UDHR and ECHR show that the adoption of parental rights was a strong reaction to the totalitarian past. The drafters had a clear intention to safeguard the autonomy of parents as a prerequisite for the privacy of the family against arbitrary state control. However, the drafters were concerned about 'negligent parents' refusing compulsory schooling and 'undemocratic parents' who are hostile to the democratic and liberal state. These concerns demonstrate that, in the drafters' minds, parental rights were limited by the state's role to create self-reliant members and maintain the liberal democratic order.

The CRC made the first steps towards a fiduciary conception of parental rights. The use of the terms 'duties' and 'responsibilities' of parents and the adoption of the best interests and evolving capacities of the child principles distinguish the CRC from the earlier human rights instruments. Nevertheless, the drafters did not consider parental rights as mere instruments that should always be outweighed by the child's interests.

3. The State's Role in the Child's Upbringing

The third chapter aims to understand the extent of state obligations regarding the child's upbringing in international human rights instruments and underline the changes. The first section examines the reflections on the idea of the minimal state. The second section examines Article 9 of the CRC and the best interests of the child as the threshold for state intervention. The third section explores how the human rights instruments endorse the idea of the supportive state. The last section conducts a comparative reading of the human rights instruments regarding the aims of education.

3.1. The Minimal State: Parents with Primary Responsibility

International human rights instruments endorse the idea of the minimal state and rest upon the premise that family environment and parental care have primary roles in the child's upbringing. This primary role is established through three sets of provisions in international human rights instruments: i) the protection of the family as an institution, ii) the individual right to private and family life, and iii) the child's right not to be separated from parents.

First, the family as an institution is worthy of special protection. Article 16 (3) of the UDHR stipulates that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State." Subsequently, this wording was reiterated in Article 23 of the ICCPR, Article 10 of the ICESCR, Article 17 of the ACHR, and Article 18 of the ACHPR.[470] The idea that family is the foundation of society was never questioned in the drafting histories of the UDHR, the ICCPR, and ICESCR.[471] These provisions were considered a protection from the collectivist social orders where states assume a primary role in child-rearing.[472]

Second, family life is protected as an individual human right. Article 12 of the UDHR reads: "[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation." The right to family life is also recognized in the following human rights treaties with a very similar language.

[470] The Banjul Charter imposes the obligation to protect the family unit only to the state, but not to the society unlike the UDHR and other human rights treaties.

[471] TAYLOR, *supra* note 29, at 631.

[472] *Id.*, at 632.

Article 8 of the ECHR embraces everyone's right to "respect for his private and family life, his home and his correspondence." Although formulated negatively, Article 17 of the ICCPR also protects this right by stating, "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

Third, the child's right not to be separated from parents follows the primacy of family and parental care. The state power is only triggered by exceptional circumstances. Principle 6 of the 1959 Declaration reads as follows:

> "The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother."

The fact that this principle was adopted unanimously reflects the consensus on the idea of the minimal state. However, the special attention paid to younger children and their relationship with their mothers was later abandoned in the CRC. In fact, the first Polish draft echoed this part of the 1959 Declaration, yet the phrase "be separated from his mother" was removed due to the objections of several delegates. [473] The majority decided not to distinguish younger children from the others.

Likewise, the CRC reflects the idea of the minimal state. The Preamble of the CRC sets out 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." Additionally, Article 9 allows the separation of the child from parents only if "such separation is necessary for the best interests of the child." According to Article 20, the state's protection and assistance can be possible for those children temporarily or permanently deprived of their family environment, or "in whose own best interests cannot be allowed to remain in that environment." These suggest that physical separation of the child from the parent can take place only as a last resort necessitated by the best interests of the child.

[473] See the comments of Finland, Greece, and Norway in *Report of the Secretary General*, *supra* note 360. See the comment of France in the *Report of the Secretary General: Addendum*, *supra* note 360.

The primary role of parental care is also confirmed in regional human rights treaties. Article 19 of the ACRWC entails the involuntary separation of the child from her parents to be "in the best interests of the child." Article 16 of the San Salvador Protocol sets out that "every child has the right to grow under the protection and responsibility of his parents; save in exceptional, judicially-recognized circumstances, a child of young age ought not to be separated from his mother." Additionally, Article 5 of the Protocol 7 to the ECHR declares that the equal rights and responsibilities of spouses in their relationship which the children "shall not prevent States from taking such measures as are necessary in the interests of the children." These provisions grant a secondary responsibility to the state to intervene when the parents fail their primary responsibilities.

3.2. The Best Interests of the Child as the Threshold for Separation

Article 9 of the CRC and Article 19 of the ACRWC have particular importance in comprehending the threshold required to trigger the secondary responsibility of the state. These two provisions are the first ones that require separation to be for the best interests of the child.[474] The first paragraph of Article 9 of the CRC reads as follows:

> "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence."

This provision lists two instances where separation might be necessary for the best interests of the child. One is parental abuse and neglect, and the second is the separation of parents. The commentators agree that this is not an exhaustive list, and there might be other reasons to separate the child from her parents.[475] This indicates that the CRC does

[474] Later the Convention on the Rights of Persons with Disabilities also adopted that separation of the child from the parents must be "necessary for the best interests of the child." See Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3., art. 23(4).

[475] WOUTER VANDENHOLE, GAMZE ERDEM TÜRKELLI & SARA LEMBRECHTS, CHILDREN'S RIGHTS : A COMMENTARY ON THE CONVENTION ON THE RIGHTS OF THE CHILD AND ITS PROTOCOLS (Ebook ed. 2019), para. 9.11.; JAAP DOEK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE

not endorse the view that only the most serious forms of abuse and neglect should form the threshold. Those harms to the child which fall short of abuse and neglect might justify separating the child from the parents under Article 9 of the CRC. Nevertheless, the commentators also point out the requirement of necessity. Accordingly, this requirement is higher than the best interests of the child being a primary consideration under Article 3 of the CRC[476] and requires the absence of an equally effective measure to protect the best interests of the child.[477]

Establishing the best interests of the child as the threshold for separation carries its own challenges. This standard has long been challenged for being indeterminate and reinforcing paternalism. First, the indeterminacy critique suggests that two or more decision-makers would reach different results in identical cases due to the vagueness of the decision-making process.[478] This critique was first raised by Robert H. Mnookin a long time ago in the context of custody disputes in domestic law. He argues that the determination of the best interests of the child is indeterminate and speculative. What is best for the child "poses a question no less ultimate than the purposes and values of life itself."[479] Its indeterminate nature also opens the allocation of the child's care to abuse. Reece discusses that the best interests of the child serve as a smokescreen for the policy choices favoring certain family forms and relationships over others.[480]

CHILD, ARTICLES 8-9: THE RIGHT TO PRESERVATION OF IDENTITY AND THE RIGHT NOT TO BE SEPARATED FROM HIS OR HER PARENTS 24 (2006).

[476] John Tobin & Judy Cashmore, *Art.9 The Right Not to Be Separated from Parents*, *in* THE UN CONVENTION ON THE RIGHTS OF THE CHILD: A COMMENTARY 307, 319 (John Tobin ed., 2019).

[477] DOEK, *supra* note 475, at 25.

[478] Stephen Parker, *The Best Interests of the Child Principles and Problems*, 8 INT. J. LAW, POLICY FAM. 26, 31 (1994).

[479] Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW CONTEMP. PROBL. 226, 260 (1975). Following Mnookin, the vagueness or indeterminacy of the principle has been a common theme raised by many scholars, see e.g. Jean Zermatten, *The best interests of the child principle: Literal analysis and function*, 18 INT. J. CHILD. RIGHTS 483, 494 (2010); MICHAEL FREEMAN, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, ARTICLE 3: THE BEST INTERESTS OF THE CHILD 2 (2007).

[480] Helen Reece, *The Paramountcy Principle: Consensus or Construct?*, 49 CURR. LEG. PROBL. 304 (1996).

The second critique focuses on the paternalistic aspect of the best interests of the child. Nigel Cantwell describes the best interests of the child principle as a "basically paternalistic and charitable notion in the implementation of the human rights of children."[481] Avoiding a paternalistic perception of the best interests, as John Eekelaar suggests, is possible only through allowing space for the children to determine what their own interests are.[482]

These critiques had reflections in the drafting process of Article 3 of the CRC. The drafters were also concerned with the indeterminacy of the principle and the need to hear the child's views to determine what is the best interests. First, New Zealand questioned the best interests of the child principle by suggesting that it "will be open, through the general terms in which they are couched, to varied interpretations and will in fact be defined nationally in terms of the laws and the child-rearing practices which are adopted and acceptable in that nation."[483] Likewise, Venezuela pointed out the subjective nature of the principle and called for a prior stipulation of the principle in terms of the child's physical, mental, spiritual, moral and social development to avoid different interpretations.[484] However, these views did not convince the majority, and the principle was enshrined in the CRC without any precise definition. According to Alston, the lack of further elaboration on the meaning of the best interests principle might have two reasons. One is that since the principle had wide usage in domestic laws, the drafters might be already familiar with it. The second is that they might be unaware of the controversies surrounding the principle.[485]

Second, the right of the child to express her views was initially discussed as part of Article 3. The USA proposed to include the following paragraph:

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[481] Nigel Cantwell, *The Concept of the Best Interests of the Child: What Does It Add to Children's Human Rights?*, *in* THE BEST INTERESTS OF THE CHILD - A DIALOGUE BETWEEN THEORY AND PRACTICE 18 (2016).

[482] John Eekelaar, *The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism*, 8 INT. J. LAW FAM. 42, 47-48 (1994).

[483] U.N. Econ. & Soc. Council, Commission on Human Rights, 36th Sess., Question of A Convention on the Rights of the Child, *The Report of the Secretary General: Addendum*, U.N. Doc. E/CN.4/1324/Add.5 (Jan 22, 1980) [hereinafter *The Report of the Secretary General: Addendum 5]*.

[484] *1989 Report of the Working Group*, *supra* note 392, para. 120.

[485] Alston, *supra* note 395, at 11. For a similar observation see also FREEMAN, *supra* note 479, at 26.

> "In all judicial or administrative proceedings affecting a child that has reached the age of reason, an opportunity for the views of the child to be heard as an independent party to the proceedings shall be provided, and those views shall be taken into consideration by the competent authorities."[486]

Later, the paragraph was deleted from Article 3 and discussed under a separate article on the right to be heard, which turned into Article 12 of the final text.[487] This separation between the best interests principle and the right to be heard was unfortunate as the drafters missed the chance to strip the former of its paternalistic perception. According to Quennerstedt, with the deletion of the requirement to hear the child, the only remaining right under Article 3 was the right of parents.[488]

It is important to note that the separation of the right to participation from Article 3 did not remove children's opportunity to express their views in child protection cases. The second paragraph of Article 9 sets out that "all interested parties shall be given an opportunity to participate in the proceedings and make their views known." The commentators emphasize that the phrase "all interested parties" should include children as well.[489]

Additionally, Article 12 of the CRC provides that the child "who is capable of forming his or her own views the right to express those views freely *in all matters* affecting the child" and "the views of the child being given due weight in accordance with the age and maturity of the child." According to Article 12, regardless of the age and the capacity to communicate verbally, being "capable of forming his or her views" is sufficient to exercise this right. There should not be an age limit nor any requirement for forming views in "adult" language.[490]

The drafting history also evidences that the child's right to be heard had a broader scope over time. Firstly, the USA proposal (on Article 3) limited the right to be heard to a child

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[486] *1981 Report of the Working Group*, *supra* note 457, para. 20.

[487] *1989 Report of the Working Group*, *supra* note 392, para. 140.

[488] Ann Quennerstedt, *Balancing the Rights of the Child and the Rights of Parents in the Convention on the Rights of the Child*, 8 J. HUM. RIGHTS 162, 166 (2009).

[489] DOEK, *supra* note 475, at 27; Tobin and Cashmore, *supra* note 476, at 327.

[490] LANSDOWN, *supra* note 465, at 12.

"that has reached the age of reason." Several delegates raised objections to the phrase "reached the age of reason," and this was replaced by "is capable of forming his own views."[491] Secondly, the revised Polish draft listed the matters children can express their views as "marriage, choice of occupation, medical treatment, education and recreation." The USA proposal expanded it as covering "religion, political and social beliefs, matters of conscience, cultural and artistic matters, marriage, choice of occupation, medical treatment, education, travel, place of residence, and recreation." Later, most delegations argued that the matters in which the State would enable children to express their views should not be subject to a list.[492] Therefore, that part of the provision was worded as "all matters affecting the child."

3.3. The State's Supportive Role: Towards a Rights-based Approach

While the human rights instruments give parents a primary role in the child's upbringing, they also accept that the state should function as a supplementary supporting mechanism. In the early human rights instruments of the post-war, state support was designed for the family unit. At that time, supporting family and children was essential for the broader aims to secure the social and economic development of the society. Later, with the legalization of children's rights and parental duties or responsibilities, individual parents have become the recipients of state support, and the focus has shifted to improving the quality of intra-family relationships.

In the early instruments in the post-war era, the protection and support of the family unit are expressed in general terms. Article 16(3) of the UDHR provides that the family "is entitled to protection by society and the State." Article 23(3) enshrines the right to receive just and favorable remuneration, ensuring the individual's family "an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection." Article 25 (2) singles out motherhood and childhood for "special care and assistance." These are followed by Article 10(1) of the ICESCR, which sets out that "the widest possible protection and assistance" should be granted to the family. Likewise, the 1959 Declaration on the Rights of the Child made no mention of state support of individual

[491] *1981 Report of the Working Group*, *supra* note 457, para. 29.

[492] *Id.*, para. 78.

parents; instead, in Principle 6, the recipients of state support were children without families and children of large families.

The general protection afforded to the family and childhood does not necessarily address children's rights in the family. The General Assembly resolution proclaiming 1979 as the International Year of the Child (IYC) demonstrates how the well-being of children was tied to the broader aims of economic and social development.[493]As the preambular paragraphs of the Resolution indicate, General Assembly was concerned that many children, particularly in developing countries, were malnourished and without access to health and education services. Adopting programs benefitting children was not necessary "only for the well-being of the children but also as part of broader efforts to accelerate economic and social progress." Therefore, "the concept of basic services for children" was essential to social and economic development.[494]

The legalization of children's rights and parental duties has changed the international framework on state support. The first sign of this change was in the Protocol of San Salvador, which includes the obligation of the state to undertake "special programs of family training so as to help create a stable and positive environment in which children will receive and develop the values of understanding, solidarity, respect and responsibility."[495]

Subsequently, the CRC and ACRWC linked the state's supportive role with the advancement of the child's rights and increasing the quality of the child's upbringing in a more explicit manner. Article 18 (2) of the CRC declares that "for the purpose of guaranteeing and promoting the rights set forth in the present Convention" states are under an obligation to provide appropriate assistance to the parents in the performance of their child-rearing duties. Additionally, Article 18 (3) singles out children of working parents and provides them "the right to benefit from child-care services and facilities for

[493] Linde Lindkvist, *1979: a Year of the Child, but Not of Children's Human Rights*, 1 DIPLOMATICA 202, 205 (2019).

[494] G.A. Res. 31/169, International Year of the Child, (Dec. 21, 1976), at 74.

[495] *Protocol of San Salvador*, *supra* note 345, art. 15.

which they are eligible."[496] It is notable here that this provision formulates state support as the child's own right.

In complementary to Article 18, Article 27 of the CRC enshrines that parents "within their abilities and financial capacities" have the primary responsibility to secure the necessary conditions of living for the child's development. The phrase "within their abilities and financial capacities" confirms that the burden of meeting the material needs of the child does not fall exclusively on the parents.[497] The same provision, in its third paragraph, stipulates the state's supportive role in more detail:

> "States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing."

The drafting history of Article 18 shows how the scope of state support expanded. First, the drafters chose not to single out large families. Initially, the first Polish draft noted that children of large families were entitled to state assistance. Some representatives were not content with the emphasis on large families. New Zealand, for instance, expressed their preference that "all children, without discrimination according to size of family" should be given state support.[498] In the subsequent proposals, this emphasis on large families was removed.

Second, the drafters expressed their will not to refine state assistance to the education of the child. The revised Polish draft stated that states should give assistance to parents and guardians "in the performance of their educational function."[499] In the Australian proposal, this was changed to "in the performance of their child-rearing responsibilities."[500]

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[496] See also ACRWC, *supra* note 396, art. 20 (2).

[497] Aoife Nolan, *Art.27 The Right to a Standard of Living Adequate for the Child's Development*, *in* THE UN CONVENTION ON THE RIGHTS OF THE CHILD: A COMMENTARY 1021, 1041 (John Tobin ed., 2019).

[498] *The Report of the Secretary General: Addendum 5, supra* note 482, at 2.

[499] *1981 Report of the Working Group*, *supra* note 457, para. 82.

[500] *Id.*, para. 96.

Third, the assistance to working parents was also narrow at the beginning. The revised Polish draft and the USA proposal stated that working parents should be provided child-care services until children complete their schooling.[501] Upon the proposal of the International Labour Office, the condition of schooling was removed.[502]

Tobin and Seow argue that the supportive role of the state as enshrined in the CRC, and then later in the ACRWC, is somewhere between the liberal conception of family where the state intervenes only if the child is in danger and a collectivist conception according to which the community or the state has direct control over the child's upbringing.[503] During the drafting history of Article 18, the concerns on the privacy of the family and the primary role of the parents indicate that the drafters wanted to keep themselves distant from the collectivist models. It was first France that emphasized that the role of the state was complementary but subsidiary in nature.[504] This was followed by another comment from one delegate that "parents cannot expect the State always to intervene, because the upbringing and development of their child is their primary responsibility."[505] Later, another delegate asked the question of "how the State could be prevented from granting unwanted assistance to parents and guardians in the performance of their duties as well as from interfering in family life."[506]

The state's supportive role is also significant for the state to achieve its protective functions. Article 19 of the CRC shows the willingness to improve the conditions of the child's upbringing by envisaging a proactive role for the state to protect the child from "all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse" during parental care. For that end, it imposes an obligation on states to take "all appropriate legislative, administrative, social and educational measures." As the second paragraph indicates, protective measures shall

[501] *Id*., para. 103-105.

[502] *Id*., para. 106-113.

[503] John Tobin & Florence Seow, *Art 18 Parental Responsibilities and State Assistance*, *in* THE UN CONVENTION ON THE RIGHTS OF THE CHILD: A COMMENTARY 647, 668 (John Tobin ed., 2019).

[504] *The Report of the Secretary General: Addendum, supra* note 360.

[505] *1981 Report of the Working Group*, *supra* note 457, para. 91.

[506] *Id*., para. 98.

include “effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child.”

The drafting history of Article 19 of the CRC shows how the drafters did not wish to confine the state’s role to its reactionary function as imposed by the minimal state idea. When commenting on the USA’s proposal on Article 19, the representative of the Defence for Children International Movement, speaking on behalf of the Informal NGO Ad Hoc Group, suggested including preventive measures and social and educational measures in the text.[507] This suggestion was incorporated in the second USA proposal. However, the Ukrainian delegate still opposed the USA’s proposal by suggesting that it placed too much emphasis on judicial procedures and punitive measures. The US representative defended its second proposal as it included preventive measures.[508]

Thus, while international human rights instruments have gradually endorsed a liberal conception of children’s rights and fiduciary conception of parental rights, the state’s supportive role has also shifted. Individual parents and children have become the direct beneficiaries of state support, and improving child-rearing practices have become the central aim of support.

3.4. Education for Autonomy and Civic Aims

A review of international human rights instruments indicates that they embrace both the autonomy-seeking and civic goals of education. Regarding the first set of goals, although not formulated as “autonomy,” they focus on the development of the child’s personality and the ability to realize her potential. They also embrace the civic aim of instilling political virtues in the child and enabling her to participate fully in society. In the CRC, these civic aims are balanced with respect for parents and the child’s national and cultural identity.

Autonomy-seeking goals of education are first stipulated in Article 26 (2) of the UDHR. It sets out that “education shall be directed to the full development of the human personality.” Article 13 (1) of the ICESCR adds to this aim by declaring that education “shall be directed to the full development of the human personality and the sense of its dignity.” Finally, Article 29 of the CRC lists “the development of the child's personality,

[507] *1984 Report of the Working Group*, *supra* note 447, para. 35.

[508] *Id.*, para. 44.

talents and mental and physical abilities to their fullest potential" as the first aim of education.

Civic goals coexist with the autonomy-related goals of education. Article 26 (2) of the UDHR enshrines that education should aim at "the strengthening of respect for human rights and fundamental freedoms" and it should 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." According to Morsink, the drafters of the UDHR carried out a delicate task with the adoption of this paragraph. On the one hand, they could not impose a specific kind of civic education. On the other hand, given the horrors of the totalitarian regimes, they could not leave education open-ended and let each state decide on its own. Instead, they agreed on a set of guidelines acceptable in diverse cultural settings.[509]

The memories of the totalitarian past were influential in imposing these civic aims. During the drafting process, the representative of the World Jewish Society criticized the focus on technical education in the earlier drafts and emphasized the need to address the spirit of education by reminding that "neglect of this principle in Germany had been the main cause of two catastrophic wars."[510] Likewise, the representative of UNESCO pointed out education in Germany and other fascist countries and how the doctrines imposed by their education systems "had led to two world wars." He warned that "if the Declaration failed to define the spirit in which future generations were to be educated, it would lose its value as a guide for humanity."[511]

The civic aim to promote "understanding, tolerance and friendship" is reiterated with the same words in the subsequent human rights treaties and declarations.[512] Article 13 of the

[509] MORSINK, *supra* note 28, at 215.

[510] *Summary Record of the Eighth Meeting, supra* note 340, at 4.

[511] *Summary Record of the Sixty-Seventh Meeting, supra* note 411, at 13.

[512] Convention against Discrimination in Education, Dec. 14, 1960, 429 U.N.T.S. 93, art. 5; G.A. Res. 18/1904, United Nations Declaration on the Elimination of All Forms of Racial Discrimination (Nov. 20, 1963), art. 8; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, art. 7; ICESCR, *supra* note 338, art. 13(1); G.A. Res. 36/55, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Nov. 25, 1981), art. 5 (3).

ICESCR strengthens the civic nature by adding that "education shall enable all persons to participate effectively in a free society." The aim to secure civic participation is also explicit in Article 13 (1) of the Protocol of San Salvador, which comprises that "education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence."

It is also important to note that civic aims expand upon private education. Article 13 (4) of the ICESCR acknowledges the liberty of private individuals and bodies to establish educational institutions "subject always to the observance of the principles set forth in paragraph 1." During the drafting process of the ICESCR, it was expressed that the aims of education are imposed not only on the state education but also the right of parents to educate their children.[513] Likewise, Article 13 (4) of the Protocol of San Salvador sets out the right of the parents to choose the type of education given to their children provided that it "conforms to the principles set forth above."

The CRC and ACRWC deviate from the earlier human rights instruments on civic aims. First, they extend the civic virtues enlisted in the previous human rights instruments. According to Article 29(1)(d), education should be directed to:

> "(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"

The ACRWC is even broader than the CRC, and it includes certain political aims specific to Africa. As indicated by Article 11, education should seek "the preservation of national independence and territorial integrity" and "the promotion and achievement of African Unity and Solidarity." According to Thompson, these objectives derive from the African countries' political, social, and economic problems following their independence.[514]

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[513] U.N.G.A., 10th Sess., *Draft International Covenants on Human Right: Annotation Prepared by the Secretary-General*, U.N. Doc. A/2929 (July 1, 1955), at 324, para. 47; U.N.G.A., 12th Sess., *Draft International Covenants on Human Rights*, Report of the Third Committee, U.N. Doc. A/3764 (Dec. 5, 1957), at 9, para. 46.

[514] Bankole Thompson, *Africa's Charter on Children's Rights: A Normative Break with Cultural Traditionalism'*, 41 INT. COMP. LAW Q. 432, 436 (1992).

Second, the CRC and ACRWC present a balance between the aim to instill civic virtues in the child and the respect for her parents and cultural and national background. Article 29(1)(c) of the CRC reads as follows:

> "(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, the country from which he or she may originate, and for civilizations different from his or her own"

Similar to the CRC, Article 11 of the ACRWC also includes "the preservation and strengthening of positive African morals, traditional values and cultures." According to Tobin and Lundy, this balance eliminates the accusation that the CRC is based on a Western conception of childhood, which is not mindful of cultural differences.[515] As the drafting history of the CRC shows, the initial purpose of including cultural and national values was to address the difficulties faced by immigrant children in schools.[516] Later, Algeria proposed to include the following paragraph:

> "Children should be educated in a social climate imbued with the national values and the cultural identity of the children, with respect for civilizations different from their own and for the rights of peoples. In no case may children of countries still under colonial domination and foreign occupation or racist regimes be deprived of their cultural and national identity."[517]

Many delegates were content with the addition of the child's cultural identity and national values. Only the Federal Republic of Germany opposed this part because it was unclear "whether it was the child's, the State's or the parents' identity."[518] Subsequently, in the text of the drafting group composed of Canada, Colombia, Italy, Norway, Yugoslavia, the ILO, and UNESCO, while the part on colonial domination and foreign occupation or racist regimes was removed, the "respect for the child's parents" was added, and this formed the final text in the CRC.

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[515] John Tobin & Laura Lundy, *Art.29 The Aims of Education*, *in* THE UN CONVENTION ON THE RIGHTS OF THE CHILD: A COMMENTARY 1116, 1117 (John Tobin ed., 2019).

[516] *The Report of the Secretary General, supra* note 360.

[517] *1987 Report of the Working Group*, *supra* note 367, para. 40.

[518] *Id.*, para. 42.

Hence, international human rights instruments embrace that education should seek the child's autonomy and also the state's interests to maintain civic unity through the virtues like tolerance, understanding, and friendship. The CRC and ACRWC differ from the earlier instruments in balancing these political virtues with respect for the child's familial and cultural background.

3.5. Conclusion

The dual recognition of children's rights and parental rights inevitably shapes the state obligations in the child's upbringing. International human rights instruments embrace the central premise of the minimal state and underline that family environment and parental care have the primary roles in the child's upbringing. The secondary role of the state to intervene is triggered only in exceptional circumstances. The CRC and the ACRWC establish "the best interests of the child" as the threshold for state intervention. This principle, however, is contested for its indeterminate and paternalistic nature.

With the move towards a liberal conception of children's rights and a fiduciary conception of parental rights, the state's supportive role has evolved in IHRL. Previously, international human rights instruments provided childhood and the family general protection that is linked to broader economic and social development. This understanding has changed with a rights-based approach in the CRC that aims at improving the quality of the child's upbringing.

Furthermore, the state's educative roles, as constructed by the international human rights instruments, have sought both autonomy and civic interests. Accordingly, the state has a role in developing the child's personality and instilling political virtues such as tolerance, understanding, and friendship. The CRC and ACRWC keep these aims yet also entails respect for the child's family and cultural or national background.

4. Appraisal: Is Reconciliation Realized?

This chapter aims to discuss whether the changing conceptions of children's rights, parental rights, and the state's role in the legalization process offer reconciliation in the tripartite relationship between the child, the parent, and the state.

The early international efforts in the 20th century, which had developed around the child's victimhood, did not adopt a concept of children's rights. The state's role is limited to protecting the child from tragedies beyond the agency of children and their parents, such as war, exploitation, and trafficking, and this role is not in competition with parental control rights. This changes with the heightened role of the state over the family in the totalitarian practices in Europe.

Table 2: The Legalization of Children's and Parental Rights

Instruments	**Children's Rights**	**Parental Rights**	**State's Roles**	**Models**
UDHR, ECHR, Twin Covenants & 1959 Declaration on the Rights of the Child	Paternalist	Proprietorial or Relational	• Minimal • Supportive • Education for Autonomy • Education for Civic Aims	Model II
CRC & ACRWC	Liberal	Fiduciary	• Minimal (low threshold) • Supportive (rights-based) • Education for Autonomy • Education for Civic Aims (balanced)	Model III

Following WWII, the drafters of the UDHR, ECHR, and the Covenants on Human Rights express their intention to protect the autonomy of parents against collectivist state power as a prerequisite to safeguarding the privacy of the family. Although the drafters of the ECHR showed some signs of a proprietorial conception of parental rights, the drafting histories do not provide a definite answer as to which conception is favored. However, it is evident that they were distant from the fiduciary conception. This is no surprise given the fact that these instruments uphold a paternalist conception of children's rights. The drafters of the post-WWII instruments pictured the family as a unitary form in which children have no autonomous existence. They are entitled to protection due to their physical and cognitive immaturity and their dependence on their families.

In the post-WWII period, there were signs of an intention to limit parental rights. The drafters considered parents opposing compulsory education neglectful and found this practice unacceptable. Likewise, the drafters showed their mistrust towards those parents who are not committed to liberal democratic values. It is notable that they even gave examples of "Nazi" or "communist" parents whose convictions – as they argued – should not be respected. These two limitations suggest that they endorsed the state's role to provide education for the child's autonomy and to maintain the liberal democratic order through education (civic education).

A further characteristic of the post-WWII period is that they embrace the primary responsibility of parents in the child's upbringing. The 1959 Declaration on the Rights of the Child makes it clear that the state's secondary role is exceptional. However, the state is under an obligation to support children and the family in general. In this period, this support is linked to the social and economic development of the countries instead of children's rights.

Thus, in the post-WWII instruments, the paternalist conception of children's rights reconciles with a proprietorial or relational conception and the idea of the minimal state. However, these conceptions of children's rights and parental rights are at odds with civic education. As noted in Part I, the advocates of civic education do not embrace the value of neutrality in education and do not endorse comprehensive parental rights. One possible explanation of this contradiction could be the historical conditions under which these instruments were drafted. It is probable that the drafters feared the recent totalitarian past as much as they feared an undemocratic future.

The drafting of the CRC marks a transformation of the earlier conceptions of children's rights and parental rights. First, it replaces the paternalist conception of children's rights with a liberal conception by recognizing the autonomy interests of children. However, this conception faced certain resistance. Some drafters did not accept that civil and political rights could apply to the parent-child relationship. These rights were further overshadowed by several reservations and the USA's refusal to ratify the CRC.

While the paternalist conception is replaced with a liberal conception (although with certain hesitancies), the previous concern for autonomous parents is substituted with a more fiduciary conception of parental rights. In addition to the terminological change from 'liberty' or 'rights' to 'duties' and 'responsibilities' of parents, the CRC and ACRWC recognize the best interests of the child and the evolving capacities of the child as the guiding principles of the parent-child relationship. Nevertheless, the drafters were cautious about weighing the child's interests with those of the parents. They did not consider parental rights as mere instruments for fulfilling the child's interests.

The child-rights framework of the CRC and ACRWC also modifies the roles of the state. First, it modifies the minimal state by setting the best interests of the child as the threshold for separating the child from the parents. Since the wording of Article 9 of the CRC is not confined to instances of abuse and neglect, this represents that a high threshold is not endorsed. Second, the state's supportive role has shifted to a rights-based approach that is aimed at ensuring children's rights in the family and improving the conditions of the child's upbringing. Third, the CRC and ACRWC differ from the earlier instruments on civic education. The state's role in shaping future citizens is balanced with the recognition of the child's cultural identity and the obligation to respect the child's parents.

PART III – INTERPRETING AND ADJUDICATING ON THE RELATIONSHIP BETWEEN THE CHILD, THE PARENT, AND THE STATE

Having examined the normative perspectives on the child's upbringing and how it has been legalized in IHRL, the third part moves to the interpretive and adjudicatory practice of the IHRL organs. Through a close reading of their decisions on individual applications, general comments/recommendations, and advisory opinions, this part aims to understand to what extent the IHRL practice endorses different conceptions of children's rights, parental control rights, and the state's roles.

This part includes four chapters and an appraisal. The first chapter shows how the IHRL practice follows the legalization phase and endorses the minimal state. The second chapter focuses on the state's supportive and prescriptive roles. While the first is at the front in the case of parents in precarious conditions, the latter is embraced through the mission to create non-violent parents. The third chapter examines the state's role in education. It suggests that the IHRL practice follows the drafters' intention and imposes both autonomy-related and civic aims for education. Finally, the fourth chapter discusses the interplay between children's rights and parental control rights. It indicates that the IHRL organs' normative choices concerning the child's autonomy and fiduciary parenthood are less clear compared to their choices on the state's roles.

1. The State's Secondary Role to Protect: Reinforcing the Minimal State

The aim of this chapter is to analyze how the IHRL organs approach to the state's secondary role in protecting the child. It suggests that the IHRL organs endorse the idea of the minimal state. First, it shows that they converge on considering the best interests of the child as the main justification for state intervention. Second, it highlights that establishing what counts as abuse and neglect is not always possible due to the subsidiary role of the IHRL organs. In that regard, it explains the recent discussions at the ECtHR in a landmark child care case. Third, it discusses the issue of threshold in the idea of the minimal state and shows that so far, the CRC Committee and the ECtHR have had a broad understanding of care and protection not limited to the most serious forms of harm. Fourth, it argues that the IHRL organs reject the idea of the maximal state focusing on parental behavior rather than the harm inflicted on the child. They do not embrace abstract assessments of the child's interests and stereotypical evaluations of parental capabilities.

1.1. Best Interests of the Child as the Main Justification

As noted in the second part, Article 9 of the CRC stipulates that "a child shall not be separated from his or her parents against their will, except when (…) such separation is necessary for the best interests of the child." It continues that separation may be necessary in cases "such as one involving abuse or neglect of the child by the parents." Before the adoption of the CRC, the Human Rights Committee, in its General Comment no 17, noted that states should intervene to restrict parental rights and may separate children from them "in cases where the parents and the family seriously fail in their duties, ill-treat or neglect the child."[519] The absence of the best interests of the child principle is understandable considering the fact that at the time of the General Comment (April 1989), the CRC was at the drafting stage.[520] Subsequently, the Human Rights Committee held that,

[519] Human Rts. Comm., General Comment No. 17: Rights of the child (Art. 24), U.N. Doc. HRI/GEN/1/Rev.7 (May 12, 2004), para. 6.

[520] GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD 76 (1995).

> "[I]n cases of child custody and access, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered, on the one hand, in light of the effective right of a parent and a child to maintain personal relations and regular contact with each other, and on the other hand, in the light of the best interests of the child."[521]

The CRC Committee also combined the serious harm threshold with the best interests of the child when it set out that the serious measures in the parent-child relationship, including separation, "should only proceed when they are regarded both as necessary to protect the child from significant harm and as being in the best interests of the affected child."[522] Later, the CRC Committee explained the best interests of the child in a more detailed manner, and it introduced seven elements to be assessed: i) the child's views, ii) the child's identity, iii) preservation of the family environment and maintaining relations, iv) care, protection and safety of the child, v) situation of vulnerability, vi) the child's right to health, and vii) the child's right to education. Accordingly, the assessment of the child's best interests entails balancing these elements which are relevant to the individual case.[523] Under the third element, it underlined the exceptional nature of the separation of the child from the parent:

> "Given the gravity of the impact on the child of separation from his or her parents, such separation should only occur as a last resort measure, as when the child is in danger of experiencing imminent harm or when otherwise necessary; separation should not take place if less intrusive measures could protect the child."[524]

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[521] Human Rts. Comm., Natalya Tcholatch v. Canada, U.N. Doc. CCPR/C/89/D/1052/2002 (Mar. 20, 2007) [hereinafter *Tcholatch*], para. 8.3.

[522] Comm. on the Rts. of the Child, General Comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment, U.N. Doc. CRC/C/GC/8 (Mar. 2, 2007) [hereinafter *CRC, General Comment No. 8*], para. 41.

[523] Comm. on the Rts. of the Child, General Comment No. 14: The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration, U.N. Doc. CRC/C/GC/14 (May 29, 2013) [hereinafter *CRC, General Comment No. 14*], para. 52-79.

[524] *Id.*, para. 61.

In a similar manner, the IACtHR held that "any decision pertaining to separation of a child from his or her family must be justified by the best interests of the child."[525] It further stated that the authority of the family over the child cannot mean an arbitrary control that "would entail damage to the minor's health and development."[526] According to the IACtHR, even though separation is necessary based on the best interests of the child, it must be exceptional and temporary.[527]

Likewise, the ECtHR consistently elucidates that deprivation of parental rights "is a particularly far-reaching measure" and "should be applied only in exceptional circumstances and can only be justified if they are motivated by an overriding requirement pertaining to the child's best interests."[528] The ECtHR held that the child's interest is composed of two limbs:

> "On the one hand, it dictates that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit. It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to "rebuild" the family. On the other hand, it is clearly also in the child's interest to ensure its development in a sound environment, and a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development."[529]

Although this two-step checklist appeared for the first time in an international abduction case – *Neulinger and Shuruk v Switzerland* – the ECtHR confirmed its applicability in child care cases.[530] As the other IHRL organs, the ECtHR further points out the placement

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[525] Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/2002, Inter-Am. Ct. H.R. (ser. A) No. 17, (Aug. 28, 2002) [hereinafter *IACtHR, Advisory Opinion No. 17*], para. 73.

[526] *Id.*, para. 74.

[527] *Id.*, para. 77.

[528] Johansen v. Norway, App. No. 17383/ 90, Eur. Ct. H.R. (1996); M.D. and others v. Malta, App. No. 64791/10, Eur. Ct. H.R. (2012), para. 76 [hereinafter *M.D. and others*]; N.P. v. the Republic of Moldova, App. no. 58455/13, Eur. Ct. H.R. (2015) [hereinafter *N.P.*], para. 65; S.S. v. Slovenia, App. No. 40938/16, Eur. Ct. H.R. (2018), para. 86.

[529] Neulinger and Shuruk v. Switzerland, 2010-V Eur. Ct. H.R. 193, para. 139 (references are omitted).

[530] See e.g. R. and H. v. United Kingdom, App. No. 35348/06, Eur. Ct. H.R. (2011), para. 74

of children into care – and thereby splitting children from their parents – should be a temporary measure, and states have a duty to seek "the ultimate aim of reuniting the natural parent and the child."[531]

1.2. Establishing "Abuse" and "Neglect": The Limitations of IHRL

As Article 9 of the CRC indicates, state intervention in the parent-child relationship is necessary for the best interests of the child, primarily when children face abuse or neglect. However, as further discussed in the thesis' first part, it is not an easy task to give content to the notions of "abuse" and "neglect." Having exhaustive definitions might not be desirable, given the possibility that they could be based on arbitrary and ethnocentric preferences.[532] Even if it is desirable, the subsidiary role of international courts and quasi-judicial organs impedes their ability to develop substantive limits to the parent-child relationship.

The ECtHR points out the margin of appreciation enjoyed by the state parties in almost all cases concerning taking children into public or alternative care. One reason is the varying understandings of the family and the state's protective role:

> "[T]he Court will have regard to the fact that perceptions as to the appropriateness of intervention by public authorities in the care of children vary from one Contracting State to another, depending on such factors as traditions relating to the role of the family and to State intervention in family affairs and the availability of resources for public measures in this particular area."[533]

The European Court also sets out that "the national authorities have the benefit of direct contact with all the persons concerned," and its task is not to substitute itself for the national authorities.[534] These prevent the European Court from a substantive evaluation

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[531] *R.M.S.*, *supra* note 4, para. 89.

[532] BUEREN, *supra* note 520, at 88.

[533] Strand Lobben and others v. Norway, App. No. 37283/13, Eur. Ct. H.R. (Grand Chamber) (2019) [hereinafter *Strand Lobben (Grand Chamber)*], para. 210.

[534] See Kocherov and Sergeyeva v. Russia, App. No. 16899/13, Eur. Ct. H.R. (2016) [hereinafter *Kocherov and Sergeyeva*], par 93; Mamchur v Ukraine, App. No. 10383/09, Eur. Ct. H.R. (2015) [hereinafter *Mamchur*], para. 99; *N.P.*, *supra* note 528, par 67; Tlapak and others v. Germany, App. No. 11308/16 and 11344/16, Eur. Ct. H.R. (2018) [hereinafter *Tlapak and others*], para. 84.

of the initial reasons for the state to intervene in the parent-child relationship in many cases.[535] While it mostly finds those reasons relevant and sufficient, it pays greater attention to whether the decision-making process meets the procedural guarantees and whether the implementation of the care order respects the parent's right to contact the child. The Human Rights Committee also follows a similar pattern. As Taylor observes, if the procedural requirements are met, it becomes unlikely for the Committee to find a violation.[536]

Strand Lobben and others v. Norway further exemplifies the tension between the subsidiary role of international courts and conducting a substantive review of the reasons for state intervention. In that case, while the applicant and her newborn baby X were voluntarily placed in a parent-child institution, the staff noticed that X had lost weight, and they raised concerns about the applicant's caring skills. Accordingly, she was not able to understand X's behaviors and empathize with his feelings and needs. The reasons, as indicated by the expert reports, were her social and intellectual deficiencies deriving from her long-term epilepsy. Subsequently, the domestic courts withdrew the applicant's parental responsibilities and allowed the foster parents to adopt X.

When the case was taken to Strasbourg, the Chamber reasoned that the domestic courts carefully balanced competing interests, and therefore the case raised no violation of Article 8 of the ECHR.[537] The dissenting judges, however, suggested that the principle of subsidiarity does not "absolve the Court from *a forensic examination of the facts*"[538] and criticized the majority for distancing themselves from the concrete facts of the case.[539]

The Chamber's disagreement on the substantive review of the facts got heated at the Grand Chamber with the third-party involvements. Denmark argued that the ECtHR should not undertake "a forensic examination of the facts" and substitute the assessment

[535] FENTON-GLYNN, *supra* note 29, at 321.

[536] TAYLOR, *supra* note 29, at 643.

[537] Strand Lobben and others v. Norway, App. No. 37283/13, Eur. Ct. H.R. (Fifth Section) (2017), para. 129.

[538] *Id.*, Joint Dissenting Opinion of Judges Grozev, O'leary and Hüseynov, para. 5 (emphasis added).

[539] *Id.*, para. 6.

of domestic courts.[540] Likewise, Italy suggested that the ECtHR lacks "the necessary tools to be a fourth-instance tribunal and carry out a forensic examination of the facts."[541] The United Kingdom also pointed out the minority opinion asked for a "substantive" decision and invited the Grand Chamber to reject this approach since only the domestic authorities can decide on what is in the best interests of the child.[542]

In the end, the Grand Chamber of the ECtHR found a breach of Article 8 for two main reasons: first that the domestic courts did not rely on the most up-to-date expert opinion on the applicant's psychological state and caring skills, and second that they failed to sufficiently explain X's vulnerability.[543] This outcome did not bring a closure to the big debate on the substantive or procedural review of child protection measures. On the one hand, Judges Ranzoni, Yudkivska, Kūris, Harutyunyan, Paczolay, and Chanturia, in their concurring opinion, considered the majority opinion as "an excessively narrow approach, entailing a very limited 'procedural' violation."[544] This is joined by academic commentary suggesting that the case signaled an "organized retreat" from substantive protection for the families affected by the child care measures.[545] On the other hand, the dissenting judges interpreted the majority opinion as a subtle value judgment:

> "[T]his is a case where it is hard to avoid the conclusion that the majority dislike the outcome of the case at the domestic level and have sought to address the

[540] *Strand Lobben (Grand Chamber)*, *supra* note 533, para. 182.

[541] *Id*., para. 186.

[542] *Id*., para. 191.

[543] *Id*., para. 222-224.

[544] *Id.*, Concurring Opinion of Judge Ranzoni, Joined by Judges Yudkivska, Kūris, Harutyunyan, Paczolay and Chanturia, para. 1.

[545] Laurens Lavrysen, *Strand Lobben and Others v. Norway: From Age of Subsidiarity to Age of Redundancy?*, STRASBOURG OBSERVERS (2019), https://strasbourgobservers.com/2019/10/23/strand-lobben-and-others-v-norway-from-age-of-subsidiarity-to-age-of-redundancy/. The author interprets the judgment as an example of the general inclination of the European Court in avoiding substantive review of human rights violations. See also Oddný Mjöll Arnardóttir, Christina Binder & Mario Prost, *Organised Retreat? The Move from "Substantive" to "Procedural" Review in the ECtHR's Case Law on the Margin of Appreciation*, EUR. SOC. INT. LAW CONF. PAP. SER. 10–12 (2015).

substantive objections or misgivings under the guise of procedural shortcomings."[546]

1.3. A Broad Understanding of Care and Protection: Lowering the Threshold

Despite this ongoing debate on subsidiarity, particularly at the ECtHR, the practice shows that the IHRL organs do not impose a high threshold for state intervention that is confined to the most serious forms of harm. Instead, as evidenced in the CRC Committee's general comments and the ECtHR's case-law, they propose a broader understanding of care and protection.

In this regard, a good starting point could be the CRC Committee's interpretation of the terms "protection and care" under Article 3(2) of the CRC. According to the CRC Committee, the entitlement of the child to protection and care should not be understood only in negative terms as meaning protection of the child from parental harm. Rather, it should be understood "in relation to the comprehensive ideal of ensuring the child's "well-being" and development including "their basic material, physical, educational, and emotional needs, as well as needs for affection and safety."[547]

A further indication of the broad understanding is in the CRC Committee's interpretations concerning Article 19 of the CRC. It makes it clear that the term "violence" in this provision is not limited to intentional harm:

> "In common parlance the term violence is often understood to mean only physical harm and/or intentional harm. However, the Committee emphasizes most strongly that the choice of the term violence in the present general comment must not be interpreted in any way to minimize the impact of, and need to address, non-physical and/or non-intentional forms of harm (such as, inter alia, neglect and psychological maltreatment)."[548]

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[546] Joint Dissenting Opinion of Judges Kjølbro, Poláčková, Koskelo and Nordén on the Merits of the Case, para. 18 in *Strand Lobben (Grand Chamber)*, *supra* note 533.

[547] *CRC, General Comment No. 14*, *supra* note 523, para. 71.

[548] Comm. On the Rts. of the Child, General comment No. 13 (2011): The right of the child to freedom from all forms of violence, U.N. Doc. CRC/C/GC/13 (Apr. 18, 2011) [hereinafter *CRC, General Comment No. 13*], para. 4.

The CRC Committee further suggests that severity or intent shall not be determinative in deciding what counts for violence and harm. According to the Committee, the phrase "all forms of physical and mental violence" under Article 19(1) of the CRC does not allow states to exclude low levels of violence from its definition. However, the Committee allows states to refer to severity or intent to achieve proportional intervention strategies on the condition that no form of violence is treated as legally or socially acceptable.[549]

While defining certain categories of violence, the CRC Committee makes it clear that they do not form an exhaustive list.[550] Likewise, the ECtHR avoids a closed list by reasoning that "the circumstances in which it may be necessary to take a child into public care and in which a care decision may fall to be implemented are so variable that it would scarcely be possible to formulate a law to cover every eventuality."[551]

As the CRC Committee put it, the term "neglect" or "negligent treatment" refers to

> "[T]he failure to meet children's physical and psychological needs, protect them from danger, or obtain medical, birth registration or other services when those responsible for children's care have the means, knowledge and access to services to do so." [552]

This can take the form of "physical neglect" when the caregivers fail to protect the child from harm or fail to meet the basic material needs of the child.[553] So far, the ECtHR accepted physical neglect as a relevant reason to intervene in family life. In *R.M.S. v Spain*, the domestic court relied on the following reasons: "Her appearance was very dirty, she wore clothes that were inappropriate for the summer weather and her skin was dry and marked with scars and scratches."[554] In other cases, parents' failure to provide their children with proper food, clothing, and a hygienic home environment was the reason to

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[549] *Id.,* para. 17.

[550] *Id.*, para. 19.

[551] Olsson v. Sweden (No. 1), App. No. 10465/83, Eur. Ct. H.R. (1988) [hereinafter *Olsson*], para. 62.

[552] *CRC, General Comment No. 13*, *supra* note 548, para. 20.

[553] *Id.*, para. 20(a).

[554] *R.M.S.*, *supra* note 4, para. 30.

intervene.[555] Furthermore, the ECtHR found it relevant that the domestic authorities intervened with the doubt that the parents did not protect their children from sexual or physical abuse by others.[556]

Neglect can also be psychological or emotional when the parents do not show emotional support and when they are "psychologically unavailable" for the child's needs.[557] In *Olsson v. Sweden*, the applicants failed to provide stimulation and supervision for the children, which resulted in retardation in their development. The ECtHR found these reasons "clearly relevant" for taking children into care.[558] In a similar vein, in *A.L. and others v. Norway*, the child's development was delayed due to insufficient interaction with her parents.[559]

As further indicated by the CRC Committee, the parents' incompliance with the laws requiring school attendance constitutes "educational neglect."[560] The European Court also found this form of neglect as a relevant ground in interfering with parental rights. In *Achim v. Romania*, the parents refused to enroll the children in a school and restricted their access to outdoor activities and engagement with the community.[561] Likewise, in *Wunderlich v. Germany*, it concluded that it was reasonable for the domestic authorities that children were endangered because they were not sent to school by their parents and were kept in a symbiotic family.[562]

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[555] *N.P.*, *supra* note 528, para. 74; Saviny v. Ukraine, App. No. 39948/06, Eur. Ct. H.R. (2008), para. 12 [hereinafter *Saviny*].

[556] T.P. and K.M. v. United Kingdom, 2001-V Eur. Ct. H.R. 119 [hereinafter *T.P. and K.M.*], para. 74; Covezzi and Morselli v. Italy, App. No. 52763/99 (2003), para. 103-104.

[557] *CRC, General Comment No. 13*, *supra* note 548, para. 20 (b).

[558] *Olsson*, *supra* note 551, para. 72.

[559] A.L. and others v. Norway, App. No. 45889/18, Eur. Ct. H.R. (2022) [hereinafter *A.L. and others*], para. 46.

[560] *CRC, General Comment No. 13*, *supra* note 548, para. 20 (d).

[561] Achim v. Romania, App. No. 45959/11, Eur. Ct. H.R. (2017).

[562] Wunderlich v. Germany, App. No. 18925, Eur. Ct. H.R. (2019) [hereinafter *Wunderlich*], para. 51.

The CRC Committee includes both fatal and non-fatal physical violence under the scope of Article 19.[563] In the ECtHR's jurisprudence, bruises and scars on the child's face and body,[564] shaken baby syndrome,[565] and a fracture in the baby's rib[566] were relevant reasons to intervene. These, of course, might even be above a high threshold for intervention. Yet, including "corporal punishment" under the term of physical violence is a further indication of the CRC Committee's endorsement of a lower threshold. In the words of the CRC Committee, corporal punishment covers

> "[A]ny punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting ("smacking", "slapping", "spanking") children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices)."[567]

It is noteworthy that the CRC Committee does not focus on only the most excessive forms of corporal punishment. And the ECtHR followed a similar approach in *Tlapak and others v. Germany*. In this case, the applicants were members of Twelve Tribes Church, and there was evidence showing that the community members canned many children. The domestic authorities restricted the applicants' parental rights and took their children into foster care, although there were no signs of physical harm. However, the applicants repeatedly indicated that they prefer "corporal disciplining" as a legitimate way of upbringing children. The German authorities argued that there were no alternatives other than intervening in the applicants' parental rights. Since the physical effects of caning were short-lived, unannounced visits and monitoring were not possible. The ECtHR upheld the arguments of the domestic authorities and indicated that alternative measures such as training of the parents would not be effective since "corporally disciplining the

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[563] *CRC, General Comment No. 13*, *supra* note 548, para. 22.

[564] Gnahore v. France, 2000-IX Eur. Ct. H.R. 441, para. 56.

[565] Jovanovic v. Sweden, App. No. 10592/12, Eur. Ct. H.R. (2015), para. 78 and 83.

[566] A.D. and O.D. v. United Kingdom, App. No. 28680/06, Eur. Ct. H.R. (2010), para. 88

[567] *CRC, General Comment No. 8*, *supra* note 522, para. 11.

children was based on their unshakeable dogma."[568] Hence, despite the lack of physical signs of harm, restricting parental rights was found reasonable.

1.4. The Case of "Unfit" Parents: Excluding the Maximal State

As noted in the first part of the thesis, the idea of the maximal state moves the attention from children's experience of harm or neglect to the characteristics of parents or the appropriateness of their behaviors. There is a fine line between minimal state and maximal state when the former imposes a low threshold aiming at prioritizing the child's well-being. And, a lower threshold carries the risk of infringing the rights of parents who do not meet the expected physical, cognitive or moral capabilities. This can easily target those parents who are already marginalized in their communities.

The IHRL practice excludes the maximal state and calls on the states to avoid focusing solely on parents' identities and capabilities. A review of the IHRL practice on religious parents, parents with disabilities, delinquent parents, and LGBT parents demonstrates three important findings: First, the mere possibility of meeting the child's needs in a better environment is not sufficient to justify state intervention. This rejects a strategic allocation of the responsibility of the child's care at the expense of parental rights. Second, abstract and stereotyped assumptions concerning the parents' characteristics are not allowed. Instead, the state's reasons should be grounded in concrete evaluations of the child's interests. Third, the state has a burden to prove the actual harm to the child. The lack of caring skills and social or physical discomfort that would be experienced by children are not sufficient to limit parental rights.

1.4.1. Children in a Better Environment: Rejecting Strategic Allocation

As noted in the first part of the thesis, an important critique of prioritizing the child's welfare over parental rights concerns the fear of strategic allocation. The critique suggests that it would be easier for a state to reallocate children and place them in a better environment at the expense of parental rights. The ECtHR's practice on parents with disabilities discards a strict prioritization of the child's interests and rejects a strategic allocation of the child's care.

Kutzner v. Germany is a notable case where the ECtHR examined the removal of the applicants' parental rights due to their low intellectual capacity. The medical

[568] *Tlapak and others*, *supra* note 534, para. 98.

examinations indicated that the applicants' two daughters had late physical and mental development and received educational assistance from an early age. Upon an application by the District Youth Office, the Guardianship Court withdrew the applicants' parental rights by relying on a psychological report finding that "the applicants were not fit to bring up their children, not through any fault of their own, but because they did not possess the requisite intellectual capacity."[569]

The ECtHR suggested that "the fact that a child could be placed in a more beneficial environment for his or her upbringing will not on its own justify a compulsory measure of removal from the care of the biological parents."[570] Accordingly, there must exist other circumstances indicating the "necessity" of the interference with parental rights under Article 8 of ECHR. Consequently, the ECtHR decided that such a necessity did not exist in the case.[571]

The ECtHR addressed the child's placement in a better environment once again in *Mamchur v. Ukraine,* which concerned a biological parent with walking impairment. Following the death of the applicant's wife, her mother V.K. took the child and moved away without informing the applicant. The domestic authorities appointed V.K. as the tutor of the child, and she became the only person holding custody and authority to make decisions regarding the child's upbringing. The reason was that the applicant "could not take care of [the child's] upbringing because of his state of health."[572] Later, one of the reasons for the domestic court's rejection of the applicant's appeal was that he "had not produced any evidence showing that it would be in A.M.'s best interests to live with the applicant or that it would be contrary to her interests to live with her tutor." The domestic court also relied on the fact that V.K. had fulfilled her duties as the tutor.[573]

The ECtHR found these reasons problematic. First, according to the Court, the applicant's disability did not show that he was unable to take care of the child.[574] Second, it found

[569] Kutzner v. Germany, 2002-I Eur. Ct. H.R. 207, para. 20 [hereinafter *Kutzner*].

[570] *Id*., para. 69.

[571] *Id*., para. 74.

[572] *Mamchur*, *supra* note 534, para. 17.

[573] *Id*., para. 41.

[574] *Id*., para. 107.

that the reasons shown by the domestic courts relate to the considerations about the more or less beneficial environment for the child's upbringing, "which are not sufficient in themselves to justify such an extreme measure as separating the child from her sole parent."[575]

1.4.2. Against Abstract and Stereotyped Assumptions on Child-Rearing

When the focus is on parents' characteristics, there is a further risk that the state's reasons are based on abstract and stereotyped assumptions about those parents' child-rearing practices. The practice of the IHRL organs on religious, delinquent, and LGBT parents show that these are not sufficient to intervene in the parent-child relationship, and they are likely to violate the right to non-discrimination. Rather than presenting abstract and generalized reasons to intervene, states are under a duty to provide a concrete assessment of the child's interests.

The ECtHR's case-law on religious parents indicates the need to refrain from stereotyped assumptions on child-rearing. First, in *Hoffmann v. Austria*, the Supreme Court overturned the decisions of the lower courts giving custody to the applicant, who was a Jehovah's Witness. The Supreme Court mentioned the risk that the applicant would not allow blood transfusion for children and stated that "if the children are educated according to the religious teaching of the Jehovah's Witnesses, they will become social outcasts."[576]

The ECtHR decided that this reasoning relied solely on the difference in religious belief, unlike the decisions of the lower courts, which were based on psychological expert opinions. This was a violation of Article 8 in conjunction with Article 14, according to the ECtHR, since there was not a reasonable relationship of proportionality between the removal of the applicant's parental rights and the aim to secure the interests of the child.[577]

Second, *Palau-Martinez v. France* also concerned a parent who was a Jehovah's Witness. After her divorce, the first instance court decided that the children (aged 8 and 13) would reside with their mother, and the father would have unrestricted visiting rights. At the end of a summer holiday, the children did not return to their mother's home, and the father enrolled them in another school. Upon the appeal of the applicant, the Court of Appeal

[575] *Id*., para. 109.

[576] Hoffmann v. Austria, App. No. 12875/87, Eur. Ct. H.R. (1993), para. 15.

[577] *Id*., para. 36.

decided that the children's place of residence would be their father's house. It referred to the reports expressing the wish of the children to stay with their father and stated that

> "[T]he rules regarding child-rearing imposed by the Jehovah's Witnesses on their followers' children are open to criticism mainly on account of their strictness and intolerance and the obligation on children to proselytise. It is in the children's interests to be free from the constraints and prohibitions imposed by a religion whose structure resembles that of a sect."[578]

According to the ECtHR, this judgment made a distinction between two parents based on religion and included "a harsh analysis" of the principles of child-rearing allegedly imposed by the applicant's religion.[579] Also, it relied on the generalities concerning Jehovah's Witnesses.[580] Such an abstract determination, without a social inquiry report, was not sufficient and gave rise to a violation of Article 8 in conjunction with Article 14.

Third, in *Ismailova v. Russia*, the applicant was also a Jehovah's Witness. After her divorce, her two children had a residence with her. However, the paternal grandparents refused to return the children after one of their visits. In the proceedings before the first instance court granting custody to the father, it is discussed that the applicant was taking her children to religious meetings and that,

> "After attending these meetings, the children became shy and irritable, they perceived the surrounding world and natural phenomena in the way the 'Jehovah's Witnesses' teaching presents it (the children were afraid of the 'Worldwide Flood' whenever it rained, they called the [applicant's] mother-in-law 'Satan', they would not attend their classmates' birthdays or other celebrations because the religion did not permit this."[581]

The ECtHR considered that the domestic courts solely focused on the interests of children. They did not rely only on the applicant's religious beliefs but evaluated the fact that she included them in her religious activities and failed to protect them. The reasoning of domestic courts in assessing the social and psychological effects of religious

[578] Palau-Martinez v. France, 2003-XII Eur. Ct. H.R. 321, para. 13.

[579] *Id*., para. 38.

[580] *Id*., para. 42.

[581] Ismailova v. Russia, App. No. 37614/02, Eur. Ct. H.R. (2007), para. 23.

upbringing, as the ECtHR found, was not arbitrary or unreasonable.[582] These distinguished the present case from the earlier cases *Hoffmann* and *Palau-Martinez,* which included domestic court judgments having abstract generalizations and lacking an analysis of the individual circumstances.

The practice on delinquent parents follows a similar approach and further indicates excluding the idea of the maximal state. In that regard, the interpretation of the African Committee of Experts on the Rights and Welfare of the Child on Article 30 of the ACRWC is notable. This provision sheds light on how to assess the best interests of the child in her relationship with the detained or imprisoned parents. It lays down a set of principles to provide special treatment for expectant mothers and the mothers of infants or very young children, who are accused or found guilty of a crime. Although the title and the text only mention "mothers," the African Committee interprets the provision as covering both parents and other caregivers.[583]

As the African Committee suggests, the best interests of the child should be the primary consideration when a court decides to detain a parent since it "reshapes the child's family just as much as a family law court issuing an order of custody, adoption, or divorce."[584] In assessing the best interests, the African Committee recommends avoiding formalistic approaches providing generalized perceptions of the family environment such as "the child-at-risk" and "the good mother" narratives.[585] In order to avoid such stereotyped and oversimplified determinations, the African Committee recommends a case-by-case basis analysis of the particular parent-child relationship, especially in deciding on alternative care.[586] This is also endorsed by the CRC Committee, which suggests that alternative

[582] *Id*., para. 62.

[583] Afr. Comm. of Experts on the Rts. and Welfare of the Child, General Comment No. 1 (Article 30 of the African Charter on the Rights and Welfare of the Child) on "Children of Incarcerated and Imprisoned Parents and Primary Caregivers" (2003), para. 10.

[584] *Id*., para. 7.

[585] *Id*., para. 14.

[586] *Id*., para. 40.

measures should be available and applied to each case considering the best interests of the affected child.[587]

This consolidates the case-law of the ECtHR opposing the automatic withdrawal of rights of delinquent parents without an individual assessment of the best interests of the child. In *Sabou and Pircalab v. Romania*, the applicants were journalists and were convicted of defamation for publishing articles about a judge. Once the first applicant was sentenced to imprisonment, he was automatically prohibited from exercising his parental rights, even when he was released for family and medical reasons. The first applicant claimed that such a restriction of his parental rights did not serve the interests of children. In response, the Romanian government argued that there could be inevitable consequences of detention to the normal course of family life, and the convicted persons no longer had "the moral authority" to exercise their parental rights.[588]

The ECtHR pointed out that the offense for which the applicant was convicted was not related to the issues of parental authority, and it was not alleged that he neglected or ill-treated his children.[589] Additionally, the ECtHR found it problematic that the prohibition on exercising parental rights applied automatically without any examination by domestic courts and without any consideration of the type of offense and the interests of children. As the Court noted, this was more like a moral condemnation of the convicted persons, not a measure for the protection of children.[590]

M.D. and others v. Malta strengthens the ECtHR's approach on the need to have concrete assessments of the best interests of the child. In this case, the applicant was found guilty of "excessive correction" of her two children and her failure to protect them from the actions of her partner and was sentenced to one-year imprisonment. Under Maltese law, this criminal conviction meant the automatic and total withdrawal of her parental rights until the children attained the age of majority. The ECtHR highlighted that automatic

[587] *CRC, General Comment No. 14*, *supra* note 523, para. 69.

[588] Sabou and Pircalab v. Romania, App. No. 46572/99, Eur. Ct. H.R. (2004), para. 45.

[589] *Id*., para. 48.

[590] *Id*., para. 48.

deprivation of parental rights "without any weighing of the interests of justice and those of the children whose interests are paramount, is of itself problematic."[591]

Finally, the IHRL organs do not uphold stereotypical views on the child-rearing practices of LGBT parents. The Inter-American case *Atala Riffo and Daughters v. Chile* is an important example. Ms. Atala was denied custody of her three daughters because she cohabitated with her female partner. In overturning her appeal, among other reasons, the Supreme Court of Chile referred to

> "The potential confusion over sexual roles that could be caused in them by the absence from the home of a male father and his replacement by another person of the female gender poses a risk to the integral development of the children from which they must be protected."[592]

Additionally, the Supreme Court considered that the lower court ignored "the preferred right of the minors to live and grow within the bosom of a family that is structured normally and appreciated in the social environment, according to the proper traditional model."[593]

The IACtHR found that the Supreme Court paid significant importance to the applicant's sexual orientation, and there was a difference in treatment on the basis of sexual orientation.[594] In assessing whether the difference in treatment constituted discrimination, the IACtHR evaluated whether the best interests of the child and the alleged harm to the children might justify such treatment. In that regard, the IACtHR strongly refuted an abstract assessment of the best interests of the child:

> "[T]he Court finds that the determination of the child's best interest in cases involving the care and custody of minors must be based on an assessment of specific parental behaviors and their negative impact on the well-being and development of the child, or of any real and proven damage or risks to the child's well-being and not those that are speculative or imaginary. Therefore, speculations, assumptions, stereotypes, or generalized considerations regarding

[591] *M.D. and others*, *supra* note 528, para. 77.

[592] *Atala Riffo*, *supra* note 2, para. 56.

[593] *Id.*, para. 57.

[594] *Id.*, para. 97-98.

> the parents' personal characteristics or cultural preferences regarding the family's traditional concepts are not admissible."[595]

As it further suggested, the best interests of the child cannot justify discrimination against parents on the basis of their sexual orientation,[596] and "unfounded and stereotyped assumptions about the parent's capacity and suitability to ensure and promote the child's well-being and development" is not appropriate.[597]

The ECtHR case *X v. Poland* also exemplifies how a lesbian mother was found unfit to have full parental rights for her children. In this case, the applicant X. got divorced from Y and started having a relationship with another woman Z. In the first set of proceedings, the domestic court granted custody of their four children to the father Y. by suggesting that he had better parenting skills. It stated that

> "It would have been possible for the applicant to continue to exercise [her] parental rights, if she had decisively corrected her attitude, excluded Z from family life, and continued psychological therapy aimed at improving her relations with the children."[598]

Three children moved to the father's house, but the applicant refused to return the youngest child, D (aged 6), to the father. In the second set of proceedings concerning the custody of D., the first instance court ordered forceful removal of D. from the applicant's care. The court noted D.'s return to the father is necessary for him to stay with his siblings, and it "is also justified by the current stage of the child's development and the father's larger role in creating [the child's] male role model."[599] The need for a "male role model" for the child's upbringing also appeared in the reasoning of the appeal court: "For any boy from a broken family, a male role model is important, and its importance increases

[595] *Id*., para. 109.

[596] *Id*., para. 110.

[597] *Id*., para. 111.

[598] X v. Poland, App. No. 20741/10, Eur. Ct. H.R. (2021), para. 15.

[599] *Id*., para. 32.

as the child grows older. It is undoubtedly most desirable that this role model be the boy's father."[600]

The ECtHR found that the applicant's sexual orientation and her relationship with Z was at the center of deliberations before the domestic courts, and this constituted a difference in treatment based on her sexual orientation.[601] In questioning whether such a treatment is justified, the ECtHR pointed out that the domestic courts failed to evaluate important factors such as D.'s age and his strong relationship with his mother. Rather, they relied on the stereotypical view that the boy needs a "male role model."[602]

The ECtHR also noted that the domestic courts considered that the improvement of the applicant's parental abilities was dependent on her ending her relationship with Z., and they referred to this relationship as an "excessive involvement." However, there was no evidence suggesting that the presence of Z was harmful to D.'s well-being and development.[603] These, according to the ECtHR, amounted to a violation of Article 14 in conjunction with Article 8.

1.4.3. The State's Burden to Prove Actual Harm

The state bears the burden of proving actual harm inflicted on the child that can justify intervention. In that regard, the lack of caring skills is not sufficient to provide that justification. In *Kocherov and Sergeyeva v. Russia*, the applicant had a mental disability and requested to take his child into his care after he had left the neuropsychological care home where he stayed for 29 years. However, children's home applied to domestic courts to limit the applicant's parental rights with a claim that he could not perform parental responsibilities due to his mental disability.[604] The domestic court paid attention to the fact that the applicant spent most of his life in a neuropsychological care home and doubted his skills and experience in taking care of a child. According to the domestic court, "there was no reliable evidence showing that it would be safe for the girl to live

[600] *Id*., para. 34.

[601] *Id*., para. 79-80.

[602] *Id*., para. 90.

[603] *Id*., para. 91.

[604] *Kocherov and Sergeyeva*, *supra* note 534, para. 17.

with him."[605] His appeal against this decision was denied with the same reasoning. As the domestic court noted, the applicant "had not adduced convincing evidence proving the absence of a real risk to the second applicant's life, health and adequate upbringing."[606]

The ECtHR did not find these reasons sufficient to justify state intervention. First, according to the ECtHR, the lack of skills and experience in rearing a child "in itself can hardly be regarded as a legitimate ground for restricting parental authority, or keeping a child in public care."[607] Second, it pointed out that the domestic authorities did not analyze the applicant's ability to take care of the child but only referred to his long residence in the neuropsychological care home. As the Court suggested, this fact alone cannot justify the restriction of his parental rights.[608]

Furthermore, the child's discomfort with parents' child-rearing practices cannot qualify as a reason for restricting parental rights. In *Vojnity v. Hungary*, the applicant was an adherent of the religious denomination Hit Gyülekezete (Congregation of the Faith), and following his divorce, he was granted access rights. He lodged an application to reclaim custody rights or a re-arrangement of his access. However, this was rejected. Later, the Guardianship Authority placed the child with his older brother and pointed out the applicant's "heavy-handed proselytism vis-à-vis the son."[609] The psychological expert examining the child noted that "the applicant held unrealistic educational ideas hallmarked by religious fanaticism which rendered him unfit to provide the son with a normal upbringing; indeed, he forced his beliefs on his son to an extent that it resulted in the latter's alienation from him."[610]

Based on expert opinion, the first instance court decided that the applicant's access rights endangered the child's development and upbringing. On appeal, the Regional Court also

[605] *Id*., para. 33.

[606] *Id*., para. 43.

[607] *Id*., para. 106.

[608] *Id*., para. 108.

[609] Vojnity v. Hungary, App. No. 29617/07, Eur. Ct. H.R. (2013), para. 8.

[610] *Id*., para. 9.

noted that the applicant caused fear and anxiety to the child and also that his "irrational worldview made him incapable of bringing up his child."[611]

According to the ECtHR, the systematic interpretation of Articles 8 and 9 of the ECHR, together with Article 2 of its First Protocol, shows that these provisions provide parents "the right to communicate and promote their religious convictions."[612] The ECtHR describes such a right as an "uncontested right" even the parents promote their religious ideas to the child "in an insistent or overbearing manner." However, in any case, this should not expose the child to "dangerous practices or to physical or psychological harm."[613]

In the individual circumstances of the case *Vojnity*, the ECtHR was not convinced that there was an "actual harm" going beyond "the mere unease, discomfort or embarrassment which the child may have experienced on account of his father's attempts to transmit his religious beliefs."[614] Given the seriousness of the measure depriving the applicant of any form of contact with the child, the ECtHR concluded that the exceptional circumstances that could justify such a measure did not exist.[615]

Additionally, the allegations that the child's upbringing in a same-sex family would be detrimental to her social development do not find any support from the IHRL organs. The ECtHR case *Salgueiro da Silva Mouta v. Portugal* demonstrates how a gay parent was found unfit to have custody of his child. After his divorce, he started living with his male partner. Although he was initially granted the child's custody, his ex-wife abducted the child and claimed full custody rights. In approving the mother's custody rights, the Court of Appeal reasoned as follows:

> "The child should live in a family environment, a traditional Portuguese family, which is certainly not the set-up her father has decided to enter into, since he is living with another man as if they were man and wife. It is not our task here to determine whether homosexuality is or is not an illness or whether it is a sexual

[611] *Id*., para. 14.

[612] *Id*., para. 37.

[613] *Id*., para. 37.

[614] *Id*., para. 38.

[615] *Id*., para. 41-42.

> orientation towards persons of the same sex. In both cases it is an abnormality and children should not grow up in the shadow of abnormal situations …"[616]

It also added that during his contact with M., the applicant "would be ill- advised to act in any way that would make his daughter realize that her father is living with another man in conditions resembling those of man and wife."[617]

Before the ECtHR, with respect to the Court of Appeal's reference to the applicant's sexual orientation, Portugal argued that "[e]ven if certain passages of the judgment could arguably have been worded differently, clumsy or unfortunate expressions could not in themselves amount to a violation of the Convention."[618] The ECtHR did not favor this argument:

> "It is the Court's view that the above passages from the judgment in question, far from being merely clumsy or unfortunate as the Government maintained, or mere obiter dicta, suggest, quite to the contrary, that the applicant's homosexuality was a factor which was decisive in the final decision. That conclusion is supported by the fact that the Court of Appeal, when ruling on the applicant's right to contact, warned him not to adopt conduct which might make the child realise that her father was living with another man "in conditions resembling those of man and wife."[619]

Thus, the ECtHR concluded that the Court of Appeal made an unacceptable distinction on the basis of the applicant's sexual orientation.[620]

The Inter-American case *Atala Riffo* further demonstrates how the assumptions on the social development of children raised by a same-sex couple do not justify state intervention. The Supreme Court of Chile mentioned that the girls might face social discrimination due to their mother's same-sex relationship. It also referred to the testimony of the housemaids, who argued that the games and attitudes of the girls reflected confusion about the sexuality of their mother.

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[616] Salgueiro da Silva Mouta v. Portugal, 1999-IX Eur. Ct. H.R. 309, para. 14.

[617] *Id*., para. 14.

[618] *Id*., para. 32.

[619] *Id*., para. 35.

[620] *Id*., para. 36.

The IACtHR found that the states cannot use social intolerance as a justificatory ground for their own discriminatory treatment. In fact, they have obligations to combat such intolerance.[621] It further noted that the alleged social problems which might be experienced by the children cannot be regarded as "harm" in determining the best interests.[622] Accordingly, "Ms. Atala had no reason to suffer the consequences of the girls allegedly being discriminated against in their community due to her sexual orientation."[623]

Regarding children's alleged confusion about sexual roles, the IACtHR suggested that the burden of proof lies on the state to show that the judicial decisions were based on "the existence of clear, specific and real harm to the children's development." Otherwise, there is a risk of relying on stereotypes.[624] The IACtHR accepted that the decision of the Supreme Court was not totally abstract. However, it found its reasoning still insufficient as it fails to establish the connection between the applicant's behavior and the alleged impact on the girls' development and to give "sufficiently weighty reasons that would serve to refute that the parents' sexual orientation does not have a negative effect on the child's psychological and emotional wellbeing, development, sexual orientation and social relationships."[625]

1.5. Conclusion

In light of the foregoing, one can conclude that the IHRL organs endorse the idea of the minimal state. This is evidenced first in consideration of the state's secondary role as an exception that needs to be justified by the best interests of the child. The minimal state is also reflected in the case of unfit parents and how the IHRL organs refrain from making abstract determinations on parental capabilities. As opposed to the suggestions of the maximal state, the IHRL organs prefer focusing on the concrete effects of parental control over the child and avoid affirming a system where children can be placed in a better environment.

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[621] *Atala Riffo*, *supra* note 2, para. 119.

[622] *Id*., para. 121.

[623] *Id*., para. 121.

[624] *Id*., para. 125.

[625] *Id*., para. 130.

Another important finding is that the subsidiary role of the IHRL organs can prevent them from evaluating the micro dimensions of the parent-child relationship substantively. Particularly the ECtHR defers to the domestic authorities since abuse and neglect are culturally variable, and the authorities are in a better position to examine the facts. Despite this limitation of IHRL, the CRC Committee's general comments and the ECtHR's case-law demonstrate that the state's secondary role is triggered not only when the most serious forms of harm are at stake but also when the broader emotional and educational needs are endangered.

2. The State's Supplementary Roles: Support and Standard-Setting

Having examined the state's secondary role, this chapter discusses the state's supplementary role in the child's upbringing. In what follows, the first section focuses on supportive measures for parents in precarious conditions. It argues that the IHRL organs converge on the idea that these conditions call for supportive measures which need to be taken before a decision to separate the child from the parent. Thereby, the state's support appears as a proactive measure to protect the child from harm. The second section suggests that, in the IHRL practice, the state has a limited prescriptive role in setting a standard for child-rearing. Coupled with the CRC Committee's recommendations to create positive and non-violent parents, the prohibition on corporal punishment, as endorsed by other IHRL organs, indicates this prescriptive role.

2.1. Precarity and Child Rearing: Support as a Proactive Measure

The state can assume a supplementary role in the child's care and upbringing when the parent fails to meet the material needs of the child – a case which can easily fall under the notion of "neglect." Nonetheless, it does not constitute neglect and require separation when such failure emanates from the parents' precarious conditions, not from their unwillingness or restricted parental capabilities. When it derives from precarity, the IHRL practice emphasizes the complementary relationship between state obligations and parental responsibilities. The IHRL practice converges on treating material conditions as a reason for proactive and supportive measures such as financial assistance or social counseling, not a ground for the separation of the child from the parent. It is remarkable that these measures are considered the less intrusive means that need to be exhausted before the exceptional decision to separate the child from the parent.

The *Guidelines for the Alternative Care of Children* sets out that

> "Financial and material poverty, or conditions directly and uniquely imputable to such poverty, should never be the only justification for the removal of a child from parental care, for receiving a child into alternative care, or for preventing his/her

reintegration, but should be seen as a signal for the need to provide appropriate support to the family."[626]

This statement is endorsed in the general comments of the CRC Committee.[627] Likewise, according to the African Committee, familial poverty should not be considered a sufficient ground for separating children from their families. Instead, states should support "parents who are unable to fulfill their parental responsibilities."[628] The IACtHR also considers that "lack of material resources cannot be the only basis for a judicial or administrative decision that involves separation of the child from his or her family."[629]

The CRC Committee evaluates the precarious conditions such as poverty, unemployment, discrimination, and marginalization among the risk factors that need to be considered in taking proactive and targeted measures to eliminate violence against children.[630] In the context of children in street situations, the CRC Committee recommends states take measures to address the root causes of precarious conditions. These might include:

> "[I]ntroducing tax and expenditure policies that reduce economic inequalities; expanding fair-wage employment and other opportunities for income generation; introducing pro-poor policies for rural and urban development; eliminating corruption; introducing child-focused policies and budgeting; strengthening child-centred poverty alleviation programmes in areas known for high levels of migration; and offering adequate social security and social protection."[631]

The ECtHR case-law also aligns with the global trend in treating the precarious conditions of parents as a ground for the state's supportive measures. In *Moser v. Austria*, the

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[626] G.A. Res. 64/142, Guidelines for the Alternative Care of Children (Dec. 18, 2009), para. 15.

[627] *CRC, General Comment No. 14*, *supra* note 523, para. 62; Comm. on the Rts. of the Child, General Comment No. 21 (2017) on Children in Street Situations, U.N. Doc. CRC/C/GC/21 (June 21, 2017) [hereinafter *CRC, General Comment No. 21*], para. 46.

[628] Afr. Comm. of Experts on the Rts. and Welfare of the Child, General Comment No 5 on "State Party Obligations Under the African Charter on the Rights and Welfare of the Child (Article 1) and Systems Strengthening for Child Protection (2018) [hereinafter *ACERWC, General Comment No. 5*] at 21.

[629] *IACtHR, Advisory Opinion No. 17*, *supra* note 525, para. 76.

[630] *CRC, General Comment No. 13*, *supra* note 548, para. 72 (f).

[631] *CRC, General Comment No. 21*, *supra* note 627, para. 51.

applicant had lost the custody of her child since she did not have a residence permit to stay in Austria and a regular income to meet the material needs of the child. In rejecting her appeal against the decision granting custody to the Youth Welfare Office, the appeal court noted that her personal and financial situation and her incapability to cooperate with the authorities constituted a risk to the child's well-being.[632] The applicant argued, in return, that the authorities did not consider alternative measures such as placing her and the child in a mother-child center. The ECtHR highlighted that the present case differs from other child care cases:

> "The Court observes that, unlike in most child care cases, the reason for the transfer of custody of the second applicant did not lie in the first applicant's incapacity to care for him on account of any physical or mental illness or on account of any violent or abusive conduct. It was based solely on her lack of appropriate accommodation and financial means and her unclear residence status, i.e. her precarious situation which would have made it difficult for her to care for a very young child."[633]

The ECtHR agrees with the applicant that the Austrian authorities did not assess all possible alternatives rather than separating the child from the applicant.[634]

In *Wallova and Walla v. Czech Republic*, the ECtHR ascertained the role of social welfare authorities in more detail. The applicants had five children, and the children were placed in educational care establishment since the family did not have adequate and stable housing. In assessing the legality of this placement, the Constitutional Court ruled that it is primarily incumbent on the parents to provide adequate life and development conditions for the child. The state might intervene and help only when the family confronted a temporary situation that was not a fault of its own.[635] It further added that it was difficult to determine whether the applicants were "irresponsible parents or whether they were unlucky and failed to succeed, despite their efforts."[636]

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[632] Moser v. Austria, App. No. 12643/02, Eur. Ct. H.R. (2006) [hereinafter *Moser*], para. 25.

[633] *Id*., para. 68.

[634] *Id*., para. 70.

[635] Wallová and Walla v. the Czech Republic, App. no. 23848/04, Eur. Ct. H.R. (2006) [hereinafter *Wallova and Walla*], para. 21.

[636] *Id*., para. 21.

Later, the Regional Court ordered placing children in foster care by giving the reason that the applicants lacked a stable flat and a job. Subsequently, although the father found a job and they rented an apartment, the Regional Court rejected their requests by arguing that, despite their efforts, they were not ready to care for the children.[637] In a subsequent decision approving the return of the children into the applicants' care, the Regional Court stated that the applicants' lack of stable housing was due to their financial situation but also to their laxity.[638]

The ECtHR once again emphasized that the possibility of placing children in a more beneficial environment is not a sufficient basis to separate them from their parents.[639] As in *Moser* case, the ECtHR distinguished the present case from other child care cases where neglect, abuse, or mental incapacity was at hand.[640] It found that the domestic courts did not question the applicants' emotional and educational capacities. In fact, they noted their efforts to improve their conditions. In that regard, the ECtHR pointed out that the applicants' situation merely related to a material deficiency that could be fixed by other means than separating children from the applicants' care.[641] The role of the social authorities, according to the ECtHR,

> "is precisely to help people in difficulty who do not have the necessary knowledge of the system, to guide them in their efforts and to advise them, among other things, on the different types of social benefits, the possibilities of obtaining social housing or other means of overcoming their difficulties."[642]

The ECtHR decided that the Czech authorities merely focused on the separation of children as a remedy. They did not re-assess the applicant's situation based on their efforts and had not shown a constructive attitude towards them. [643] Although the reasons put

[637] *Id*., para. 31.

[638] *Id*., para. 35.

[639] *Id*., para. 71.

[640] *Id*., para. 72.

[641] *Id*., para. 73.

[642] *Id*., para. 74.

[643] *Id*., para. 76.

forward by the authorities were relevant, the ECtHR ruled that they were not sufficient to justify the interference into Article 8 rights of the applicants.[644]

Saviny v. Ukraine further confirms the supportive role of the state. The applicants were blind since childhood, and they had seven children. When the domestic authorities visited the applicants' flat, they noted the following:

> "[T]he premises badly needed renovation; they were cold, dirty, full of cob-webs and smelled of human excrement. Clothes and rags were scattered around the floor and on the beds. Dishes were not washed. Bedding, if present, was very dirty. The baby's mattress had rotted in the middle because of large quantities of urine. The baby's cot was unusable. No food was found in the kitchen. The children were dirty and dressed unseasonably."[645]

Between 1998 and 2004, on several dates, the authorities provided them with some material assistance. However, their request to equip the house with natural gas was rejected because the neighbors were concerned about the safety and also because it was not technically feasible.[646] In January 2004, the authorities initiated the proceedings for the placement of three children. According to the court, the living conditions of the children were "dangerous for their lives and health and moral upbringing."[647]

As in the cases of *Moser* and *Wallowa and Walla*, the ECtHR found the reasons of the authorities relevant. Nevertheless, in assessing whether these reasons are also sufficient, the ECtHR was not persuaded by the argument that the living conditions were harmful to the children. It pointed out that between the initiation of the placement proceedings in January 2004 until the removal of the child in June 2006, no actual harm was reported.[648] According to the ECtHR, the assessments of the domestic authorities were flawed, particularly regarding the actual reasons for the children's living conditions:

> "[T]here is no appearance that the judicial authorities analysed in any depth the extent to which the purported inadequacies of the children's upbringing were attributable to

[644] *Id*., para. 78.

[645] *Saviny*, *supra* note 555, para. 12.

[646] *Id*., para. 13-14.

[647] *Id*., para. 24.

[648] *Id*., para. 56.

the applicants' irremediable incapacity to provide requisite care, as opposed to their financial difficulties and objective frustrations, which could have been overcome by targeted financial and social assistance and effective counselling."[649]

Additionally, as the ECtHR noted, no independent evidence was shown as regards the applicants' mental maturity or motivation to overcome their difficulties.[650] Thus, the ECtHR concluded that the reasons of the domestic authorities were not sufficient, and the interference amounted to a violation of Article 8.[651]

It is worth noting that, for some IHRL organs, the supportive role of the state is specific and targeted to parents who are in precarious conditions, and it does not bring along a general obligation to provide social benefits. This is evident in *Wallova and Walla* where the ECtHR did not find it necessary to examine the applicants' claim that the government did not provide them with social housing. The ECtHR limited itself to note that the government did not *inform* about the possibilities of social housing. It refrained from answering the question of whether they failed to *provide* it.[652] This should also be interpreted in light of the consistent practice of the ECtHR and the Human Rights Committee, which indicates that neither the ECHR nor ICCPR imposes an obligation to adopt a particular social security benefit or allowance for the family.[653]

Unlike the HRC and ECtHR, the CRC Committee is able to recommend extensive social security measures to advance parents' child-rearing capacities. This is due to the wide coverage of the CRC including economic and social rights. As required by Article 18 (3), the CRC Committee notes that supportive measures should include

> "the introduction of family- friendly workplace policies, including parental leave; support and facilitate breastfeeding; access to quality child care services; payment of wages sufficient for an adequate standard of living; protection from

[649] *Id*., para. 57.

[650] *Id*., para. 58.

[651] *Id*., para. 60-61.

[652] *Wallova and Walla*, *supra* note 635, para. 77 (emphasis added).

[653] See e.g. Konstantin Markin v. Russia, App. No. 30078/06 Eur. Ct. H.R. (2012), para. 130; Human Rts. Comm., M.S. P-B v. the Netherlands, U.N. Doc. CCPR/C/123/D/2673/2015 (Aug. 2, 2018), para. 7.3.

discrimination and violence in the work place; and, security and safety in the workplace."[654]

Hence, the IHRL organs form a consensus on the state's obligation to support the parents in precarious conditions before implementing a decision to separate the child and the parents. The jurisprudence of the ECtHR sheds light on the necessity to identify the root causes of the deficiencies in the care and upbringing of the child. Once it is established that the main cause is not parents' unwillingness to care or their harmful behavior, the state should take supportive measures to remedy the precarious conditions.

2.2. Creating Positive Parenthood: The Prohibition on Corporal Punishment

The state's supplementary role is not limited to addressing parents' precarious conditions, but it also covers a prescriptive role in setting certain standards for child-rearing. The most notable one is creating positive parents who adopt non-violent child-rearing practices. The CRC Committee uses the terms "positive child-rearing," "good parenting," or "healthy child-rearing" interchangeably to refer to non-violent practices that respect children's rights.[655] However, it does not provide a comprehensive definition of these terms. A working definition can be found in the Recommendation of the Committee of Ministers of the Council of Europe, which uses positive parenting as referring to "parental behaviour based on the best interests of the child that is nurturing, empowering, non-violent and provides recognition and guidance which involves setting of boundaries to enable the full development of the child."[656]

The aim to promote positive parenthood is intrinsically tied to the prohibition of corporal punishment. There is now a consensus among the IHRL organs that corporal punishment requires state intervention in a case-by-case basis and entails legislative, administrative,

[654] Com. on the Rts. of the Child, General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, U.N. Doc. CRC/C/GC/16 (Apr. 17, 2013).

[655] *CRC, General Comment No. 8*, *supra* note 522, para. 48; *CRC, General Comment No. 13*, *supra* note 548, para. 43, 47 and 61; Com. on the Rts. of the Child, General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), U.N. Doc. CRC/C/GC/15, (Apr. 17, 2013); *CRC, General Comment No. 21*, *supra* note 627, para. 48.

[656] Council of Europe Committee of Ministers Recommendation (2006)19 on Policy to Support Positive Parenting (Dec. 13, 2006), para. 1.

and judicial measures to be prohibited and eradicated. According to the African Committee, "legislation must be adopted to outlaw corporal punishment in all settings, that is, as a judicial punishment, in the alternative care system, in schools and in the home."[657] Likewise, as stated by the CRC Committee, "corporal punishment and other cruel or degrading forms of punishment are forms of violence and States must take all appropriate legislative, administrative, social and educational measures to eliminate them."[658]

It is important to note here that the absence of a discussion on corporal punishment during the drafting history of the CRC and the lack of specific mention of the term "corporal punishment" in the CRC did not prevent the CRC Committee from addressing this issue. Accordingly, the CRC "like all human rights instruments, must be regarded as a living instrument, whose interpretation develops over time."[659]

In a similar vein, the Rapporteurship on the Rights of the Child of the Inter-American Commission on Human Rights calls for a legal prohibition of corporal punishment accompanied by other judicial, educational, and financial measures to eradicate it.[660] And lastly, the ECtHR found it "commendable" if states prohibit all forms of corporal punishment "in order to avoid any risk of ill-treatment and degrading treatment of children."[661]

The IHRL organs also agree that corporal punishment can have no justifications. The Inter-American Commission on Human Rights holds that states must avoid using terminology such as "moderation" to define the acceptable discipline of children in their domestic laws and must not remain neutral against widespread social acceptance of corporal punishment based on the idea that it seeks a positive goal of the development of

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[657] *ACERWC, General Comment No. 5*, *supra* note 628, at 20.

[658] *CRC, General Comment No. 8*, *supra* note 522, para. 18.

[659] *Id*., para. 20.

[660] Inter-Am. Comm'n H.R. Rapporteurship on the Rts. of the Child, Report on Corporal Punishment and Human Rights of Children and Adolescents http://www.cidh.oas.org/ninez/castigocorporal2009/CastigoCorporal.2eng.htm [hereinafter *IACmHR, Report on Corporal Punishment*], para. 92.

[661] *Tlapak and others*, *supra* note 534, para. 90.

children.[662] The ECtHR took the same approach in 1998 in *A v. the United Kingdom*. In this case, a nine-year-old child was beaten with a garden cane by his step-father, who was later acquitted of assault. Having noted that the applicant suffered a treatment reaching a level of severity under Article 3 of the Convention, the ECtHR declared that English law allowing the defense of "reasonable chastisement" failed to provide adequate protection to children.[663]

The CRC Committee also adopts a similar line of reasoning. It maintains that it does not reject a "positive concept of discipline," which refers to parental guidance and direction in line with the child's evolving capacities.[664] The CRC Committee accepts that parents might exercise physical actions and restrictions to protect their younger children. However, as the Committee puts it, this is quite different "from the deliberate and punitive use of force to cause some degree of pain, discomfort or humiliation."[665] It further suggests that "[a]s adults, we know for ourselves the difference between a protective physical action and a punitive assault; it is no more difficult to make a distinction in relation to actions involving children."[666] The Committee is also clear on the fact that the best interests of the child cannot be interpreted as giving a justification for corporal punishment, which conflicts with the child's dignity and the right to physical integrity.[667] The phrase "appropriate" direction and guidance in Article 5 of the CRC also confirms that parental rights and responsibilities cannot involve violent forms of discipline.[668]

Despite these calls for prohibiting corporal punishment, IHRL organs call on states to be cautious about taking criminal sanctions against parents. In doing so, they once again affirm the primacy of parental care and the exceptional nature of state intervention. The CRC Committee requires states to accept corporal punishment of children as criminal

[662] *IACmHR, Report on Corporal Punishment*, *supra* note 660, para. 97.

[663] A. v. United Kingdom, 2002-X Eur. Ct. H.R. 119, para. 23-24.

[664] *CRC, General Comment No. 8*, *supra* note 522, para. 13.

[665] *Id*., para. 14.

[666] *Id*., para. 14.

[667] *Id*., para. 26.

[668] *Id*., para. 28.

assault, even in the context of family.[669] However, the Committee adds that this does not mean that all cases of corporal punishment by parents should be prosecuted. In that sense, the Committee accepts that minor assaults can be excluded in accordance with the *de minimis* principle.[670] The CRC Committee suggests that punitive actions against parents are not always compatible with the best interests of the child due to the dependency of children:

> "Children's dependent status and the unique intimacy of family relations demand that decisions to prosecute parents, or to formally intervene in the family in other ways, should be taken with very great care. Prosecuting parents is in most cases unlikely to be in their children's best interests. It is the Committee's view that prosecution and other formal interventions (for example, to remove the child or remove the perpetrator) should only proceed when they are regarded both as necessary to protect the child from significant harm and as being in the best interests of the affected child."[671]

In a similar vein, the Inter-American Commission on Human Rights notes that the prohibition on corporal punishment should not aim at penalizing or sanctioning parents.[672]

2.3. Conclusion

The IHRL practice endorses the state's supportive and prescriptive roles in the child's upbringing. If the deficiencies in the child's upbringing emanate from the parents' precarious conditions, states have a duty to employ supportive measures proactively to prevent harm. Thereby, states are not permitted to separate the child from the parents unless these measures are resorted. Furthermore, according to the interpretations of the CRC Committee, states also need to promote positive parenting styles which avoid violent practices. Other IHRL organs' calls for prohibiting corporal punishment align with this standard-setting role.

As noted in the first part of the thesis, a low threshold for state intervention might be burdensome for some parents. In this regard, the state's supportive role, as endorsed by

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[669] *Id*., para. 34 and 39.

[670] *Id*., para. 40.

[671] *Id*., para. 41.

[672] *IACmHR, Report on Corporal Punishment*, *supra* note 660, para. 82, 98 and 111.

the IHRL organs, is a way to prevent any repercussions that might exist due to the broad understanding of care and protection. Those parents who cannot meet these broad expectations hold a right to receive support from the state.

3. The State's Role in Education: Autonomy-Related and Civic Aims

This chapter aims to understand the IHRL practice on the state's educative role. It demonstrates that it upholds both autonomy-related and civic aims of education. On the autonomy-related aims, as the first section indicates, the IHRL organs do not limit education to the mission of creating self-reliant members but also adopt a broad understanding of autonomy which is reflected under the themes of empowerment and socialization. Moreover, the second section shows that the IHRL practice affirms the state's interest in maintaining a particular form of collective life. Therefore, it accepts the aims of building tolerance towards different cultures, integrating minorities into society, and promoting a shared identity.

The third section discusses that the state has a duty to keep a balance between different religions and moralities. In the ECtHR's case-law, this is reflected further in a prohibition on indoctrination. The fourth section questions whether exemptions are viable remedies in case the state fails to observe that balance. The last section focuses on the state's power to regulate the school environment and discusses whether the display of religious symbols constitutes indoctrination.

3.1. Education for Autonomy: Empowerment and Socialization

Autonomy-related aims of education entail first that children are empowered to act as independent agents and protect themselves from violence or exploitation, and second that they socialize with their peers and confront social influences other than those of their parents.

According to the CRC Committee, education should aim at the core value of the CRC, which is "the human dignity innate in every child and his or her equal and inalienable rights."[673] The child-friendly or child-centered characteristic of education should mean empowering children. This is achieved, as put forward by the CRC Committee, "by developing his or her skills, learning and other capacities, human dignity, self-esteem and

[673] Comm. on the Rts. of the Child, General Comment No. 1 (2001) The Aims of Education, U.N. Doc CRC/GC/2001/1 (Apr. 17, 2001) [hereinafter *CRC, General Comment No. 1*], para. 1.

self-confidence."[674] In that respect, the CRC Committee sets out that education should go beyond teaching numerical and literacy skills and include

> "[L]ife skills such as the ability to make well-balanced decisions; to resolve conflicts in a non-violent manner; and to develop a healthy lifestyle, good social relationships and responsibility, critical thinking, creative talents, and other abilities which give children *the tools needed to pursue their options in life*."[675]

The CRC's interpretation that education should provide "the tools needed to pursue their options in life" indicates that the aim of empowerment has a resonance with the child's right to an open future.

The CESCR Committee joins the CRC Committee in viewing the right to education as an "empowerment right," which is directly linked to equal participation and autonomy of children. This empowerment right, according to the CESCR Committee, is "the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities."[676] In that regard, the CESCR Committee does not confine the aims of education to creating self-reliant members. It highlights that "the importance of education is not just practical: a well-educated, enlightened and active mind, *able to wander freely and widely*, is one of the joys and rewards of human existence."[677] Likewise, the CEDAW Committee considers education as an essential tool to achieve equal participation of women and girls in social, economic, and political spheres. As it recommends, the state should train teachers "to adopt constructivist teaching strategies that equip girls/women with critical thinking skills and a sense of positive self-worth and confidence."[678]

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[674] *Id*., para. 2.

[675] *Id*., para. 9 (emphasis added).

[676] Comm. on Econ. Soc. and Cultural Rts., General Comment No. 13: The Right to Education (Article 13 of the Covenant), U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999) [hereinafter *CESCR, General Comment No. 13*], para. 1.

[677] *Id*., para. 1 (emphasis added).

[678] Comm. on the Elimination of Discrimination against Women, General Recommendation No. 36 (2017) on the right of girls and women to education, U.N. Doc. CEDAW/C/GC/36 (Nov. 16, 2017), para. 81 (a).

Although not explicitly stated as such, empowering children through education is also an aim endorsed by the ECtHR, particularly in the cases concerning sexual education. For instance, in the case *Kjeldsen, Busk Madsen and Pedersen v. Denmark,* the sex education classes in Denmark sought, among others, the aim to "enable the individual pupil independently to arrive at standpoints which harmonise best with his or her personality."[679] While the ECHR organs concentrated on whether the state education had reached the level of indoctrination, Mr. Kellberg of the ECmHR, in his separate concurring opinion, highlighted the importance of preparing the child for an autonomous life:

> "Modern society poses many and grave threats to the integrity of the individual. That applies also and in particular to children. It is impossible to shield a child from what is happening outside the four walls of the family home. To protect a child in today's world does not mean screening him off but making him aware of he often brutal realities of life. A child who has not in this way been equipped with a protective film will later in life be much worse off and lie bare to all kinds of difficulties, perhaps hardships, for want of knowledge."[680]

In a more recent case, in *A.R. and L.R. v. Switzerland*, the ECtHR once again addressed the empowerment function of education. This case also concerned parents' request for exemption from sex education. According to the relevant directive, sex education pursued the aim of strengthening children's self-esteem and emotional development, and thereby preventing sexual violence, exploitation and sexually transmitted diseases.[681] In finding that these are legitimate aims under Article 8 (2) of the ECHR, the ECtHR highlighted that the task of primary education is to prepare children for social realities. According to the ECtHR, children do not live in isolation, and their confrontation with a variety of information might raise legitimate questions that need to be addressed in schools.[682]

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[679] Kjeldsen, Busk Madsen and Pedersen v. Denmark, App. No 5095/71; 5920/72; 5926/72, Eur. Ct. H.R. (1976) [hereinafter *Kjeldsen*], para. 24.

[680] Separate Opinion by Mr. Kellberg, para. 3 in Kjeldsen, Busk Madsen and Pedersen v. Denmark, App. No 5095/71; 5920/72; 5926/72, Eur. Comm'n H.R. (1975) [hereinafter *Kjeldsen (ECmHR)*].

[681] A.R. and L.R. v. Switzerland, App. No. 22338/15, Eur. Ct. H.R. (2017), para. 17.

[682] *Id*., para. 35.

In addition to empowerment, education should provide a social environment for children where they can interact with their peers. The ECHR organs emphasize this social function in cases on home schooling. For instance, in *Leuffen v. Germany*, the Youth Office in Düsseldorf appointed a tutor for the applicant's son since the applicant refused to send him to school and insisted on imparting an education herself at home. The tutor enrolled the child at a Catholic elementary school. Upon her appeal, the domestic court stated that this was an abuse of her right to care, and she endangered the child's mental health and development. Furthermore, according to the court, conventional schools contributed to the child's ability to interact socially.

The applicant had concerns about the way her child would socialize. As she claimed, public schools were in academic and moral decline and that her son would be taught obscenities and be subjected to violent behavior. These arguments did not convince the ECmHR. It noted that the convictions of the parent must not conflict with the fundamental right to education. As the whole Article 2 of the First Protocol is dominated by its first sentence, the parent may not refuse the right to education of the child based on her convictions.[683]

The ECmHR's firm stance regarding the need for compulsory schooling continued in *B.N. and S.N. v. Sweden*. In this case, the applicants' request to home school their children was denied by domestic authorities. The applicants submitted that they maintained homeschooling for their daughters after the sixth grade and provided them social training only within their Christian community. According to the applicants, social training required by the authorities aimed at "destroying their children's Christian faith." The ECmHR rejected this argument by suggesting that social training might only mean the children's interaction with their peers that was inherent in compulsory schooling:

> "As regards the requirement of social training the Commission observes that this only implies an obligation to go to school with other children in order to learn how to establish social contacts. The Commission finds such an obligation inherent in any system of compulsory schooling and considers that the present obligation does not go outside what is common practice in the Contracting States."[684]

[683] Leuffen v. Germany, App. No. 19844/92, Eur. Comm'n H.R. (1992).

[684] B.N. and S.N. v. Sweden, App. No. 17678/91, Eur. Comm'n H.R. (1993).

The weight given to the social function of compulsory schools in the ECHR system was maintained even in the face of more intrusive measures against parental rights, namely the separation of children from parental care. A more recent case *Wunderlich v. Germany* demonstrates the persistence of the jurisprudence, this time under Article 8 of the ECHR. The applicants rejected the State schools and wanted to homeschool their four children. Although the authorities imposed fines and initiated criminal proceedings against them, they did not change their decision. The family court partially removed their parental rights and transferred these rights to the youth office. According to the family court, the applicants were harming the best interests of the child in the long run, and the children were deprived of acquiring social skills. It also emphasized the children's need to be exposed to other influences other than those of their parents.[685] The appeal court upheld this reasoning and decided that keeping children in a "symbiotic" family system was harmful to their best interests.[686] The appeal court noted that the applicants' concern was to form a stronger relationship between them and the children by excluding others. During a meeting with the youth office, Mr. Wunderlich stated that he considered children as "property" of their parents.[687] In the meantime, the applicants did not let the authorities assess the learning level of the children. Finally, the children were removed from the parental home and were placed in a children's home. The reasons leading the authorities to reach such a decision included the concern that the children had no contact with anyone outside the family.[688]

Before the ECtHR, the applicants argued that the domestic decisions had the wrong assumption that homeschooling would lead to social isolation and lack of education.[689] The ECtHR stated that based on the information available to them and given the statement of Mr. Wunderlich about children being the property of their parents, the authorities were reasonable to assume that the children were isolated and kept in a “symbiotic” family.[690]

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[685] Wunderlich, *supra* note 562, para. 12.

[686] *Id*., para. 15.

[687] *Id*., para. 18.

[688] *Id*., para. 23.

[689] *Id*., para. 39.

[690] *Id*., para. 51.

3.2. Civic Aims: Building Toleration, Integration, and Common Identity

The IHRL practice also recognizes the importance of fulfilling civic aims through education. So far, the IHRL organs have endorsed the role of education in fostering understanding, tolerance, and respect for different cultures and traditions. Additionally, in the ECtHR's jurisprudence, education is conceived as a means to achieve the social integration of children with a minority background. Lastly, the IHRL organs accept that education can play a significant role in building a common cultural and political identity.

As already discussed in the second part of the thesis, international human rights instruments provide civic aims of promoting understanding, tolerance, and friendship. In Article 29 of the CRC, these aims coexist with the aim of respecting the child's parents and her cultural or national identity. In this regard, the CRC Committee accepts that at first sight, these aims might look contradictory. Nevertheless, it suggests that this is the unique contribution of this provision as it presents a "balanced approach" to education "which succeeds in reconciling diverse values through dialogue and respect for difference."[691] It further notes that children have a significant role in bridging the differences that have moved groups apart.[692]

The African Committee derives these civic aims from the notion of the child's responsibility in Article 31 of the ACRWC. This provision enshrines that the child also has a duty "to preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society." The African Committee defines tolerance as "the need to accommodate diversity among the heterogeneous members or groups of the African society," and dialogue as referring to "non-confrontational forms of discussion with the pursuit of mutual understanding as the ultimate goal." And lastly consultation means "the need to apply a participatory and inclusive approach in engaging with others."[693] In order to realize these values, "children should be taught and

[691] CRC, General Comment No. 1, *supra* note 673, para. 4.

[692] *Id*., para. 4.

[693] Afr. Comm. of Experts on the Rts. and Welfare of the Child, General Comment on Article 31 of the African Charter on the Rights and Welfare of the Child on "The Responsibilities of the Child" (2017) [hereinafter *ACERWC, General Comment on Article 31*], para. 77.

encouraged to avoid xenophobic, discriminatory and disrespectful attitudes and practices in all settings, as they detract from the moral well-being of society."[694]

These approaches also resonate with the ECtHR's jurisprudence. Two German cases – *Konrad v Germany* and *Appel-Irrang and others v. Germany* – indicate how the European Court embraced the aims of building toleration and mutual respect. In *Konrad*, devout Christian parents considered public education unfit for their beliefs and chose to educate their children at home. The reasoning of the Federal Constitutional Court was remarkable in setting the civic aims of education. It stressed that compulsory education did mean not only the acquisition of knowledge but also the education of responsible citizens to participate in a democratic and pluralistic society. It decided that the interference with the applicants' rights was proportionate considering the general interest of society to prevent the emergence of parallel societies based on different philosophical convictions and the goal of tolerance.[695] The ECtHR found these arguments persuasive and "in accordance with its own case-law on the importance of pluralism for democracy."[696]

The case *Appel-Irrang* followed a similar pattern. In this case, several families of Protestant faith demanded exemption from compulsory ethics classes. Again, in dismissing the applicants' constitutional complaint, the Federal Constitutional Court reasoned as follows:

> "One of the duties of State education could be to teach and experience this coexistence, in practice, in a spirit of tolerance. A pupil's ability to have a tolerant attitude and be willing to enter into dialogue was one of the fundamental requirements for participating in democratic life and coexisting in society with mutual respect for different philosophical beliefs and convictions."[697]

Again, as in *Konrad*, the ECtHR found these aims in line with the principles of pluralism and objectivity under Article 2 of the First Protocol.[698] Despite the lack of further

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[694] *Id*., para. 78.

[695] Konrad v. Germany, 2006-XIII Eur. Ct. H.R. 315, at 317-318.

[696] *Id*., at 321.

[697] Appel-Irrang and others v. Germany, 2009-IV Eur. Ct. H.R. 415 [hereinafter *Appel-Irrang and others*], at 418.

[698] *Id*., at 425.

elaboration, this brief endorsement of the domestic courts' reasoning is notable in recognizing the civic aims of education.

Later in *Osmanoğlu and Kocabaş v. Switzerland*, the ECtHR endorsed the civic aspect of education more strongly in the case of minority groups. In this case, the applicants who were devout Muslims wanted to exempt their daughters from mixed swimming lessons, which were included in the compulsory curriculum. Although the school provided alternatives for their daughters, such as separate changing rooms and showers and the option of wearing a burkini, the applicants were not satisfied. They argued that their daughters were already learning swimming in private courses. Thus, they were fined due to their reluctance to send their daughters to swimming classes.

The Swiss courts dismissed the applicants' arguments by pointing out the importance of integrating children irrespective of their cultural origin or religion. The arguments of the Swiss government before the ECtHR followed the same line of thinking. Accordingly, the increased minority population in the country necessitated more efforts than before to adapt children to "the Swiss way of life."[699] And this adaptation serves the communal interests as well as the interests of children.[700] It further contended that children would see partly dressed bodies in the media or in public places, and it is important for them to encounter this side of communal life from an early age.[701]

The ECtHR was persuaded by these arguments, particularly on the special role of schools in the process of social integration. According to the ECtHR, exemption from compulsory education might be allowed only in exceptional circumstances by considering equality of all religious groups.[702] In the present case, it decided that "the children's interest in an all-round education, facilitating their successful social integration according to local customs and mores, takes precedence over the parents' wish to have their daughters exempted from mixed swimming lessons."[703] It also rejected the applicants' arguments that the children had private swimming lessons. As the ECtHR put forward, the aim of

[699] *Osmanoğlu and Kocabaş*, *supra* note 3, para. 69-70.

[700] *Id*., para. 73.

[701] *Id*., para. 77.

[702] *Id*., para. 96.

[703] *Id*., para. 97.

compulsory swimming lessons was not limited to the physical abilities acquired by them. The children had an interest in participating in these lessons collectively with other pupils without excluding any religious or philosophical convictions.[704]

The emphasis on social integration in *Osmanoğlu and Kocabaş* differs from the function of socialization that was discussed in *B.N. and S.N.*, *Leuffen*, and *Wunderlich*. While socialization represents an opportunity for the child to interact with others and explore other ways of living that might be different from those of parents, social integration entails compliance with the requirements of unity. Therefore, the latter includes a civic aspect.[705]

A further civic aim that can be pursued by public education is building a common identity that is rooted in a shared understanding of history and culture. Article 29 (1) of the CRC includes the development of respect for the child's "cultural identity, language and values, for the national values of the country in which the child is living" among the purposes of education. The CRC Committee suggests that this provision shows that children are not detached or isolated from the values surrounding them and that this, in a way, responds to the criticism that the CRC is culturally exclusive. According to the CRC Committee, "most children's rights, far from being externally imposed, are embedded within the values of local communities."[706]

The ACRWC includes a high expectation from the child "to contribute to the best of his abilities at all times, and at all levels, to the promotion and achievement of African Unity."[707] The African Committee believes that teaching children about the common history and culture has special importance to achieve this end. This is particularly important in the African context, where contemporary challenges are the product of the common colonial history:

> "A shared sense of history and a common heritage are important tools for galvanising future generations into positive action for the emergence of a richer,

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[704] *Id*., para. 98.

[705] See a parallel argument in Sarah Trotter, *'Living Together', 'Learning Together', and 'Swimming Together': Osmanoğlu and Kocabaş v Switzerland (2017) and the Construction of Collective Life*, 18 HUM. RIGHTS LAW REV. 157, 166 (2018).

[706] *CRC, General Comment No. 1*, *supra* note 673, para. 7.

[707] ACRWC, *supra* note 396, art. 31 (1)(f).

stronger and better continent. This is particularly significant in a continent where past experiences reveal a picture of division among communities leading to the breakdown of cultural, socio-economic and political ties among various African peoples."[708]

These societal interests were also recognized by the ECtHR. In *Efstratiou v. Greece*, the applicants were Jehovah's Witnesses, and their daughter was already exempted from religious classes at school and the Orthodox Mass. In October 1993, along with other children in her class, she was asked to attend the celebration of National Day, which was a commemoration of the outbreak of the war between Greece and fascist Italy. Their daughter was suspended from school because she refused to take part in the school parade. The ECtHR was of the view that the school parade did not possess an aim conflicting with the pacifist convictions of the applicant. According to the ECtHR,

> "Such commemorations of national events serve, in their way, both pacifist objectives and the public interest. The presence of military representatives at some of the parades which take place in Greece on the day in question does not in itself alter the nature of the parades."[709]

This permissive approach is also maintained in the case of religious education. One justification for teaching the majority religion, culture, or history is children's interest in knowing and sharing the values that are prevalent in their societies. This has been among the central arguments of the respondent states in cases concerning parental objections to compulsory religious education. *Hartikainen v. Finland* before the Human Rights Committee is a case of that kind. The applicant opposed the classes on the history of religion and ethics by arguing that these are religious in nature. As a response, Finland argued that these classes aimed at giving knowledge of general culture "as part of their basic education in a society in which the overwhelming majority of the population belongs to a religious denomination."[710]

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[708] *ACERWC, General Comment on Article 31*, *supra* note 693, para. 85.

[709] Efstratiou v. Greece, App. No. 24095/94, Eur. Ct. H.R. (1996), para. 32.; See also Valsamis v. Greece, App. No. 21787/93, Eur. Ct. H.R. (1996) [hereinafter *Valsamis*], para. 31.

[710] Human Rts. Comm., Hartikainen et al. v. Finland, Comm. No. 40/1978, U.N. Doc. CCPR/C/OP/1 (Apr. 9, 1981) [hereinafter *Hartikainen*], para. 7.2.

The arguments of the respondent state were also similar in *Leirvag and others v. Norway* before the HRC and *Folgero and others v. Norway* before the ECtHR. In both cases, the applicants (parents and children) who identify themselves as non-religious humanist persons asked for full exemption from the mandatory religious class named "Christianity and General Religious and Moral Education." The Education Act of Norway set out that the class shall "provide a thorough knowledge of the Bible and Christianity both as cultural heritage and Evangelical-Lutheran faith." Norway contended that the objectives were two-fold. On the one hand, the aim was to combat stereotypes and discrimination and promote mutual respect and tolerance towards different religions and cultures. On the other hand, another aim was "to contribute to the enhancement of a collective cultural identity."[711]

The compulsory religious classes in Turkey also followed a similar aim to impart knowledge of general culture and religion. The case *Hasan and Eylem Zengin v. Turkey* before the ECtHR concerned two applicants – a father and his daughter – who were adherents of Alevism. They complained that the classes on religious culture and ethics were taught from a Sunni understanding of Islam and did not cover their own faith.

As the guidelines approved by the Ministry of Education in 2000 showed, the classes in religious culture and ethics sought the aims "to ensure that pupils internalise the principles of love, respect, fraternity and friendship, which strengthen national unity and union, and national concepts and values such as the homeland, the nation, the flag, the martyr" and to "emphasise that religion is one of the important principles of the national culture."[712] Additionally, the Turkish government argued before the ECtHR that it was legitimate to grant more time to the study of Islam than other religions and in a secular state like Turkey, schools were the most appropriate forum for imparting this knowledge.[713] It further justified the compulsory nature of the class with the need "to protect children from myths and erroneous information, which gave rise to fanaticism."[714]

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[711] Human Rts. Comm., Leirvag et al. v. Norway, U.N. Doc. CCPR/C/82/D/1155/2003 (Nov. 23, 2004) [hereinafter *Leirvag et al.*], para. 9.13.

[712] Hasan and Eylem Zengin v. Turkey, App. No 1448/04, Eur. Ct. H.R. (2007) [hereinafter *Hasan and Eylem Zengin*], para. 21.

[713] *Id*., para. 42.

[714] *Id*., para. 44.

In these cases, neither the Human Rights Committee nor the ECtHR expressly dismissed the justifications of the respondent states. On the contrary, the ECtHR considers it within the discretion of state parties. In *Folgero and others*, the ECtHR did not consider the fact that Christianity constituted a greater part of the curriculum as a deviation of the principles of pluralism and objectivity. Accordingly,

> "In view of the place occupied by Christianity in the national history and tradition of the respondent State, this must be regarded as falling within the respondent State's margin of appreciation in planning and setting the curriculum."[715]

In a similar manner, as set out in *Hasan and Eylem Zengin*, giving priority to Islam in itself does not contravene the principles of pluralism and neutrality and amounts to indoctrination, given the fact that the majority of people in Turkey believe in Islam.[716]

Despite this considerable leeway granted to the state parties, the power to promote commonly shared values should not contravene the values of diversity and pluralism. This is a point emphasized by the ECtHR in *Lautsi and others v. Italy*. In its justification of the presence of the crucifix in state schools, Italy suggested that the right of parents to have respect for their own convictions should not eliminate the communal interest in transmitting culture and children's right to receive it.[717] According to the Italian government, the display of the crucifix was a legitimate contribution to make sure that children understand the community into which they should integrate.[718]

While the ECtHR acknowledged this as a permissible aim within the margin of appreciation of the state as in the cases *Folgero and others* and *Hasan and Eylem Zengin*, it nevertheless pointed out that "the reference to a tradition cannot relieve a Contracting State of its obligation to respect the rights and freedoms enshrined in the Convention and its Protocols."[719]

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[715] Folgerø and others v. Norway, 2007-III Eur. Ct. H.R. 51 [hereinafter *Folgero and others*], para. 89.

[716] *Hasan and Eylem Zengin*, *supra* note 712, para. 63.

[717] Lautsi and others v. Italy, 2011-III Eur. Ct. H.R. (Grand Chamber) (2011) [hereinafter *Lautsi and others (Grand Chamber)*], para. 36.

[718] *Id*., para. 39.

[719] *Id*., para. 68.

3.3. Teach, But Do Not Indoctrinate: The Limits on the State Power

The state can pursue civic aims in education, and these aims are endorsed by the IHRL organs. However, the state does not have unlimited power to advance a particular religious or moral belief. According to the Human Rights Committee, Article 18 (4) allows states to teach the general history of religions "in a neutral and objective way."[720] In a similar vein, according to the CESCR Committee, the ICESCR entails those classes to be "given in an unbiased and objective way, respectful of the freedoms of opinion, conscience and expression."[721]

Likewise, the ECtHR requires information to be given "in an objective, critical and pluralistic manner."[722] In the context of religion, these features enable children to develop a critical mind "in a calm atmosphere free of any proselytism."[723] The ECtHR considers that pluralism in education is important to preserve a "democratic society," as expressed in the ECHR.[724] Democracy, as understood by the ECtHR, should guarantee fair treatment of minorities and should not let a majority to abuse its dominant position.[725] In light of this pluralistic understanding of education in relation to the idea of a democratic society, the ECtHR sets a clear boundary: the state cannot indoctrinate children in religious or moral matters. As expressed consistently in the case-law, the state should avoid indoctrination "that might be considered as not respecting parents' religious and philosophical convictions," and this is a limit that should not be exceeded.[726]

It is clear that the prohibition on indoctrination does not entail the state's abstinence from teaching morally or religiously sensitive subjects. Article 2 of the P1, according to the ECtHR, does not prevent states from teaching knowledge having religious or

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[720] Human Rts. Comm., General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), U.N. Doc. CCPR/C/21/Rev.1/Add.4 (July 30, 1993) [hereinafter *HRC, General Comment No. 22*], para. 6.; *Hartikainen*, *supra* note 710, para. 10.4.

[721] *CESCR, General Comment No. 13*, *supra* note 676, para. 28.

[722] *Appel-Irrang and others*, *supra* note 697, at 426.

[723] Perovy v. Russia, App. No. 47429/09, Eur. Ct. H.R. (2020) [hereinafter *Perovy*], para. 57.

[724] *Kjeldsen*, *supra* note 679, para. 50; *Folgero and others*, *supra* note 715, para. 84.

[725] *Valsamis*, *supra* note 709, para. 50; *Folgero and others*, *supra* note 715, para. 84.

[726] *Perovy*, *supra* note 723, para. 57.

philosophical dimensions. The interpretation of that provision in a way granting parents a right to object to such teaching might turn the institutionalized teaching impracticable.[727] Additionally, the ECHR "does not guarantee the right not to be confronted with opinions that are opposed to one's own convictions."[728] This, of course, rejects the broad understanding of parental rights, which grants parents a right to oppose even the child's mere exposure to different worldviews.

Nevertheless, it is less clear when the state action reaches the level of indoctrination. Langlaude highlights that this is a very high threshold that favors state actions against parents and children.[729] Similarly, Henrard suggests that this threshold means an actual indoctrination referring to the most serious instances and fails to address potential or risky situations.[730]

The landmark case *Kjeldsen, Busk Madsen and Pedersen,* which involved the objections of religious parents to compulsory sex education, shows that indoctrination is considered the state's active and deliberate direction into a specific moral stance. In this case, first, the ECmHR considered that sex education conducted in Danish state schools was not aiming at "imposing a certain morality," though it might have raised ethical questions. It concluded that the Danish legislation did not indicate that the children were being indoctrinated.[731] Later, the ECtHR also reached the same conclusion. The Court found that Danish sex education did not exceed the limits of public interest and explained that it was not indoctrination in the following words:

> "Examination of the legislation in dispute establishes in fact that it in no way amounts to an attempt at indoctrination aimed at advocating a specific kind of sexual behaviour. It does not make a point of exalting sex or inciting pupils to

[727] *Hasan and Eylem Zengin*, *supra* note 712, para. 51.

[728] Dojan and Others v. Germany, App. No. 319/08, 2455/08, 7908/10, 8152/10 and 8155/10, Eur. Ct. H.R. (2011), at 15-16; *Appel-Irrang and others*, *supra* note 697, at 457.

[729] Sylvie Langlaude, *Indoctrination, Secularism, Religious Liberty, and the ECHR*, 55 INT. COMP. LAW Q. 929, 933 (2006).

[730] Kristin Henrard, *Shifting Visions about Indoctrination and the Margin of Appreciation Left to States*, 6 RELIG. HUM. RIGHTS 245, 247 (2011).

[731] *Kjeldsen (ECmHR)*, *supra* note 680, para. 164.

> indulge precociously in practices that are dangerous for their stability, health or future or that many parents consider reprehensible."[732]

Hence, the case *Kjeldsen, Busk Madsen and Pedersen* suggests the existence of indoctrination requires active and deliberate teaching to advocate a particular sexual behavior.

Subsequently, the cases *Folgero* and *Hasan and Eylem Zengin* indicated that the mere quantitative difference between the majority and minority religions does not amount to indoctrination.[733] Nevertheless, a qualitative difference between those religions creates an imbalance that needs to be remedied by an opt-out mechanism. In these cases, the ECtHR rigorously examined those differences. First, in *Folgero*, it pointed out several textual differences in the Education Act of Norway in the references to the knowledge of Christianity and the knowledge of other religions and faiths. Accordingly, the Education Act set out that religious education aimed to "transmit *thorough* knowledge of the Bible and Christianity in the form of cultural heritage and the Evangelical Lutheran Faith." However, the requirement thoroughness did not apply to the knowledge of other religions.[734] Likewise, the ECtHR drew attention to the difference between "thorough" and "sound" in the introductory part of the Curriculum:

> "The study of the subject is intended to give pupils a *thorough insight* into Christianity and what the Christian view of life implies, as well as *sound* knowledge of other world religions and philosophies."[735]

It also noted that children were required to undertake religious activities, including prayers, psalms, and the learning of religious texts.[736] Participation in any of these activities, for the ECtHR, "especially in the case of young children," would affect their minds and raise a question under Article 2 of the P1.[737] In the ECtHR's view, these

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[732] *Kjeldsen*, *supra* note 679, para. 54.

[733] *Folgero and others*, *supra* note 715, para. 89; *Hasan and Eylem Zengin*, *supra* note 712, para. 63.

[734] *Folgero and others*, *supra* note 715, para. 92 (emphasis in original).

[735] *Id*. (emphasis in original).

[736] *Id*., para. 94.

[737] *Id*., para. 94.

indicated a qualitative difference between the teaching of the Christian faith and other religious beliefs.

The ECtHR highlighted a similar imbalance between the majority and the minority religions in *Hasan and Eylem Zengin*. The "religious culture and ethics" class in Turkey included the Alevi faith only in the 9th grade by introducing its major figures. The ECtHR held that without the instruction of the basic tenets of the Alevi faith in primary and secondary school, the teaching of the important Alevi figures was insufficient to remedy the imbalance between Alevism and Sunni Islam.[738]

The findings of the ECtHR in *Folgero* and *Hasan and Eylem Zengin* pose another question on whether the increasing representation of the minority religion in the design of religious education classes would help to avoid a breach of Article 2 of the P1. This was indeed the step taken by Turkish authorities when they revised the curriculum of the "religious culture and ethics" class to cover more information about the Alevi faith in 2010 (which was introduced for the 2011-2012 school year).

The ECtHR examined this revised curriculum in *Mansur Yalçın and others v. Turkey*. The applicants claimed that these classes were still incapable of meeting the ECHR criteria as the teaching was shaped by the Sunni understanding of Islam. They were particularly discontent with *how* the Alevi faith was taught. As they suggested, contrary to their convictions, Alevism was presented as a sub-category rather than as an independent branch of Islam. As an indication of this, the religious elements of the Alevi faith, such as cem (the prayer), cemevi (the place of worship), semah (a ritual prayer), and the Muharram fast, were taught as mere folkloric or cultural elements.

The ECtHR was persuaded by these arguments and held that the teaching of major religions followed a Sunni perspective which exposed Alevi children to a conflict of allegiance between the state curriculum and their parents' convictions.[739] In that regard, the ECtHR emphasized the positive obligation of states "to avoid a situation where pupils

[738] *Hasan and Eylem Zengin*, *supra* note 712, para. 67.

[739] Mansur Yalçın and others v Turkey, App. No. 21163/11, Eur. Ct. H.R. (2014) [hereinafter *Mansur Yalçın and others*], para. 68 and 71.

face a conflict between the religious instruction given by the school and the religious or philosophical convictions of their parents."[740]

3.4. Opt-Out Mechanisms: A Viable Remedy?

An imbalance in the teaching of religiously and morally sensitive subjects might be remedied by opt-out mechanisms which are provided to parents and children. Both the Human Rights Committee and the Committee on Economic, Social and Cultural Rights set out that instruction in a particular religion or belief would be consistent with the Covenants if "provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians."[741] Similarly, the ECtHR notes the state's duty to "avoid a situation where pupils face a conflict between the religious education give by the school and the religious or philosophical convictions of their parents." And making religious education optional or providing exemptions are ways to fulfill this duty.[742]

Nevertheless, there is room for doubt as to whether exemptions are viable remedies. The practice of the Human Rights Committee and the ECtHR illustrated certain drawbacks of exemption procedures. Accordingly, they might create an undue burden for parents, force parents to disclose their religious beliefs, and pose a conflict of loyalty for children.

The Human Rights Committee and the ECtHR had evaluated the partial exemption scheme in Norway in *Leirvag* and *Folgero*. At the time of the applications, in Norway, 1998 Education act did not allow for a full exemption from religious education. Instead, the parents could exempt their children from the parts which they perceived as a practice of another religion or devotion to another philosophical belief. According to the simplified procedure brought by the Norwegian authorities, the parent could exempt children from the pre-determined activities by ticking boxes in the form, and they were not required to submit any reasons. Nevertheless, if they found other activities as practices of a religion or philosophy other than their own, they should have provided brief reasons.

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[740] *Id*., para. 72.

[741] *CESCR General Comment No. 13*, *supra* note 676, para. 28; *HRC, General Comment No. 22*, *supra* note 720, para. 6.

[742] *Hasan and Eylem Zengin*, *supra* note 712, para. 71.

This partial exemption procedure, according to the applicants in *Leirvag*, was against the ICCPR for two main reasons. First, it entailed communication between parents and school authorities in which children also had to take a junior role. The fact that the authorities evaluated whether there were sufficient grounds for exemption left children in a conflict of loyalty between their parents and the state. Second, this put non-Christian parents under a heavy burden which was not the case for Christian parents. The non-Christian parents had to follow the content and methodology of religious classes closely and had to reveal what they found problematic in those classes. This created practical problems and risk of stigmatization for those parents since they diverge from the belief followed by the majority.

In *Folgero* – a similar case against Norway before the ECtHR – the applicants contended that it was practically impossible to separate normative knowledge from descriptive one. Accordingly, children could be exempted from the practice of religion, such as reciting from the Bible or singing prayers, yet they could have the knowledge of what was recited and sung. As the applicants argued, the difficulty of securing a mental separation between knowledge and participation showed the dysfunctionality of partial exemption.[743] They also suggested making the distinction between knowledge and practice and providing sufficient grounds for exemption were more difficult for immigrant parents with limited knowledge of the Norwegian school system.[744]

In these cases, both the ECtHR and the Human Rights Committee found that the Norwegian system violated parental rights in education. The Human Rights Committee concluded that the partial exemption imposed "a considerable burden" on the applicants. Although asking for exemption was simple as ticking a box in a form, according to the Committee, the partial exemption scheme did not ensure that the teaching of religious knowledge and religious practice are easily differentiated in practice.[745] It also held that this caused a conflict of loyalty for children whose parents wished them not to be exposed to religious ideas.[746]

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[743] *Folgero and others*, *supra* note 715, para. 62.

[744] *Id*., para. 65.

[745] *Leirvag et al.*, *supra* note 711, para. 14.6.

[746] *Id*., para. 14.7.

The ECtHR, on the other hand, focused more on the disclosure of personal and religious information and the possibility that the reasons of parents might not be found reasonable. In the ECtHR's view, it was "inherent in the condition to give reasonable grounds was a risk that the parents might feel compelled to disclose to the school authorities intimate aspects of their own religious and philosophical convictions" and the question of whether the reasons were reasonable was a "potential breeding ground for conflict" which could discourage them from applying for exemption.[747]

Later, in *Mansur Yalçın*, the ECtHR was more explicit in the state's duty to avoid a conflict that children could face between religious instruction and the parents' religious and philosophical convictions.[748] Since the Turkish system allowed exemption only for the Jewish and Christian faiths, the ECtHR stated that it had "difficulty discerning" how it was possible to avoid a conflict between the state's religious instruction, which is predominantly based on the Sunni Islam and religious convictions of parents having Alevi faith.[749]

The case *Papageorgiou and others v. Greece* also points out the drawbacks of the exemption procedure. In Greece, only non-Orthodox Christian students could be exempted from the "Orthodox Christian Instruction," which was mandatory in primary and secondary schools. For exemption, the student or his/her parents had to provide a solemn declaration stating that the student was not an Orthodox Christian. According to the circular of the Ministry of Education, Research and Religious Affairs, some steps need to be taken to avoid abuse of this exemption procedure:

> "[T]he attention of school principals is drawn to the need to verify the documentation [in support of] the grounds relied on by those seeking exemption, cautioning them about the seriousness of the solemn declaration they have filed, before granting the legal exemption to the student concerned, always within the prescribed time-limits. It is necessary for the teacher to countersign the solemn declaration, so that he or she knows which students will be attending the religious education course."[750]

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[747] *Folgero and others*, *supra* note 715, para. 98.

[748] *Mansur Yalçın and others*, *supra* note 739, para. 72.

[749] *Id*., para. 75.

[750] Papageorgiou and others v. Greece, App. No. 4762/18 and 6140/18, Eur. Ct. H.R. (2019), para. 27.

The ECtHR took into account the seriousness of making such a declaration evidenced by the fact that the veracity of the declaration was checked by the school principal, and it was a criminal offense to give a false declaration. According to the ECtHR, these were sufficient grounds to deter the applicants from making an application for exemption. The undue burden created for the parents was heavier considering the communities they lived in:

> "The Court considers that the current system of exemption of children from the religious education course is capable of placing an undue burden on parents with a risk of exposure of sensitive aspects of their private life and that the potential for conflict is likely to deter them from making such a request, especially if they live in a small and religiously compact society, as is the case with the islands of Sifnos and Milos, where the risk of stigmatisation is much higher than in big cities."[751]

3.5. Exposure to Religious Symbols: An Act of Indoctrination?

The discussion on the limits on the state's power to educate has focused on teaching religion or other morally sensitive subjects. Yet, the state also has the power to regulate the school environment, which might sometimes conflict with children's or parents' wishes. The ECtHR addressed the question of whether mere exposure to religious symbols in the school environment constitutes an act of indoctrination and gives rise to a violation of parental rights in *Lautsi and others* and *Perovy v. Russia*.

In *Lautsi and others*, the applicant had two children aged 11 and 13. She argued that the display of the crucifix in state school contravenes her wishes to raise her children according to the principle of secularism. The crucifix, according to the applicant, exerts pressure on children by creating the feeling that the state does not have equal distance toward all religions. Her request for the removal of the crucifix was denied. The Administrative Court denied the applicant's complaint on the grounds that the crucifix had strong connections with the foundations of the democratic and secular state:

> "It can therefore be contended that in the present-day social reality the crucifix should be regarded not only as a symbol of a historical and cultural development, and therefore of the identity of our people, but also as a symbol of a value system:

[751] *Id*., para. 87.

liberty, equality, human dignity and religious toleration, and accordingly also of the secular nature of the State – principles which underpin our Constitution."[752]

The Supreme Administrative Court upheld this judgment by indicating similar reasons. It also pointed out that the crucifix "should be seen as a symbol capable of reflecting the remarkable sources of the civil values," which define the secular character of the Italian state.[753]

This case resulted in a divergence between the Chamber and the Grand Chamber of the ECtHR. The Chamber held that the crucifix had predominantly religious meaning, which might have different effects on children having Christian faith and those children of other religions or those who do not believe in any religions.[754] It indicated that the negative aspect of freedom of religion extends to "practices and symbols expressing, in particular or in general, a belief, a religion or atheism."[755] And it held that the display of a symbol that is associated with Christianity could not achieve pluralism in education and therefore violated both the rights of the applicant to raise her children in conformity with her convictions and the rights of children "to believe or not believe."[756]

On the other hand, the Grand Chamber held that "a crucifix on a wall is an essentially passive symbol," which cannot create an impact on children compared to "a didactic speech or participation in religious activities."[757] There were several justifications brought by the Grand Chamber about how this case differed from *Hasan and Eylem Zengin,* where it found that there was an imbalance between different religions.

First, the presence of a crucifix did not correspond to the compulsory teaching of Christianity. Second, the school environment in Italy was open to expressions of other religious beliefs. There was no evidence of any intolerance towards other religious or non-religious convictions. Third, the applicants did not argue that the presence of a

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[752] *Lautsi and others (Grand Chamber)*, *supra* note 717, para. 15.

[753] *Id*., para. 16.

[754] Lautsi and others v. Italy, App. No. 30814/06, Eur. Ct. H.R. (Second Section) (2009), para. 51 and 55.

[755] *Id*., para. 55.

[756] *Id*., para. 56 and 57.

[757] *Lautsi and others (Grand Chamber)*, *supra* note 717, para. 72.

crucifix encouraged proselytizing teaching practices.[758] These indicate that the mere display of the crucifix, which is not coupled with compulsory religious teaching or an intolerant school atmosphere for other convictions, does not amount to an act of indoctrination.

The ECtHR maintained this high threshold in *Perovy*. In this case, the applicants – a married couple and their 7-year-old son – were adherents of the Church of the Community of Christ. On the first day of school, during the parent-teacher meeting, which the first two applicants did not attend, other parents decided to invite Fr. M., who was a priest of the Russian Orthodox Church, to perform a rite of blessing. Two days later, Fr M. began the rite of blessing, which was described as follows:

> "Fr M., who was wearing a cassock, distributed small paper icons among the children and sang prayers in Church Slavonic. Candles were lit; Fr M. used a censer to burn incense and sprinkled the classroom with holy water. Certain children and adults made the sign of the cross as per the Russian Orthodox tradition. Fr M. then invited the children to kiss a crucifix; they did so in turns."[759]

Before he started the rite of blessing, the teacher informed him that one child did not belong to the Russian Orthodox faith. The third applicant did not kiss a crucifix but took the paper icon with him. The first two applicants submitted that the rite of blessing caused him stress, and he was later assaulted by his classmates for his failure to make the sign of a cross. The applicants' complaints were rejected by domestic courts, which considered that the rite of blessing had a general nature and was not connected to a specific individual. And the child was not coerced to perform any action.[760] The Russian government reiterated these arguments before the ECtHR and also emphasized the "impersonal" nature of the ceremony.[761]

The ECtHR was not persuaded by the applicants' submissions. In the ECtHR's view, it was not possible to ascertain whether the rite of blessing had an impact on the convictions of the third applicant, and it was "an isolated incident" in his upbringing which was

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[758] *Id*., para. 74.

[759] *Perovy*, *supra* note 723, para. 12.

[760] *Id*., para. 23.

[761] *Id*., para. 34.

"limited in scope and duration."[762] Therefore, it held that there was no evidence indicating that "the third applicant's experience of the ceremony was marked by any indoctrination or coercion."[763] As noted by the ECtHR,

> "Without casting any doubt on the subjective significance of the events for the applicants, the Court notes that neither in the present proceedings nor before the domestic courts did the first and second applicants adduce any proof capable of demonstrating any effects of the rite (be it psychological or other effects) on the rearing of their child in accordance with the teachings of their faith. The first and second applicants alleged that the ceremony had caused profound distress to their son; however, they did not provide any evidence in this regard, such as, for example, a clinical psychological or social assessment report."[764]

This finding indicates a separate angle to the question of what constitutes indoctrination. While *Lautsi* showed that indoctrination goes beyond the display of passive symbols in a school environment, *Perovy* added that its effects need to be observable to the child. It introduced an additional element for the threshold of indoctrination which had been already high. In that regard, *Perovy* differed from *Folgero* and other freedom of religion cases where the ECtHR acted on the strong presumption that the minds of young children are easily affected.[765]

3.6. Conclusion

In the IHRL practice, the state's role in education is broader compared to its secondary role in caring for the child. While the state exercises its role to protect only in exceptional circumstances if it is for the best interests of the child, the state's educative role coexists with parental control rights. In education, the state has both autonomy-related and civic aims to realize. First, according to the CRC Committee and CESCR Committee, education is not limited to turning children into self-reliant members. They adopt a broad understanding of autonomy as in the child's right to an open future, which suggests an

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[762] *Id*., para. 65-66.

[763] *Id*., para. 66.

[764] *Id*., para. 67.

[765] *Folgero and others*, *supra* note 715, para. 94; Dahlab v. Switzerland, 2001-V Eur. Ct. H.R. 447, at 459; Çiftçi v. Turkey, 2004-VI Eur. Ct. H.R. 339, at 341.

education maximizing the options of the child. The social function of education also aligns with this understanding. As reflected in the case-law of the ECtHR, children should not live in closed families and should be able to encounter and interact with others. Accordingly, parental control should not be the only social influence over children.

Second, the state is also given wide powers to pursue civic aims through education. As explicitly provided in international human rights instruments, according to the CRC Committee, African Committee, and the ECtHR, education should instill political virtues of tolerance, understanding, and respect. This indicates that the IHRL practice endorses multicultural education. The IHRL practice further shows that education has the function of integrating minorities into the broader community and promoting a shared identity. This aim to sustain a collective life aligns with the normative accounts of civic education with one difference. As noted in the first part of the thesis, the advocates of civic education propose a civic unity based on liberal democratic principles. However, the IHRL organs endorse a collective life that is also grounded in a shared culture and history.

When the state has given such wide powers in education, there need to be certain safeguards. Therefore, education should not be conveyed in an indoctrinating manner, and the parents should be given an opportunity to opt-out of those parts of education that are against their moral convictions. Nevertheless, the ECtHR keeps a high threshold for a particular form of teaching to constitute indoctrination. This need to keep a balance between different moral stances and limit state power that directs children into a particular stance diverges from civic education. The advocates of civic education suggest that liberal education does not need to be neutral and have equal distance to all moralities. This approach does not resonate with the IHRL practice.

4. The Child's Autonomy and Fiduciary Parenthood: False Promises?

As discussed in the second part of the thesis, the legalization phase indicated a move towards the child's autonomy and a fiduciary conception of parental rights. This chapter aims to analyze the IHRL organs' practice to explore to what extent it embraces the child's autonomy and fiduciary parenthood. The first section discusses the notion of progressive autonomy and how it applies to adolescents and young children in the interpretations of the CRC Committee. The second section focuses on the link between the progressive autonomy of children and the scope of parental rights. It suggests that the dynamic understanding of parental rights developed by the CRC Committee has not influenced the work of other IHRL organs. The third section shows that, in the adjudicatory practice, the IHRL organs act with a presumption that parents' and children's interests align. The fourth section discusses how the child's right to be heard has informed the IHRL practice on the child's upbringing and its greater potential to identify distinctive claims of children.

4.1. Progressive Autonomy, Adolescents and Young Children

Unlike the liberationist conception of children's rights, the IHRL organs contend that adults and children have qualitative differences. For instance, the CRC Committee suggests that "[c]hildren differ from adults in their physical and psychological development, and their emotional and educational needs."[766] While these differences justify a more beneficial treatment for children in criminal justice systems, it does not alter the fact that they are entitled to rights. In this regard, the IHRL organs avoid drawing distinctions between children based on their age or their proximity to adulthood. The ECtHR holds that the scope of personal autonomy is different in the case of children. While children do not possess full autonomy as adults do, they are still entitled to rights.

[766] Comm. on the Rts. of the Child, General Comment No. 10 (2007): Children's Rights in Juvenile Justice, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007), para. 10. See also Human Rts. Comm., N.K. v. Netherlands, U.N. Doc. CCPR/C/120/D/2326/2013 (July 18, 2017).

This "circumscribed autonomy," according to the ECtHR, "gradually increases with their evolving maturity."[767]

In a similar manner, according to the IACtHR, adults have a capacity to act, which refers to the person's ability to "exercise his or her subjective rights personally and directly, as well as fully undertake legal obligations and conduct other personal or patrimonial acts."[768] It suggests that children either totally lack that capacity or only have it in a limited sense. Yet, it adds, "they are all subjects of rights, entitled to inalienable and inherent rights of the human person."[769] As the ECtHR, it also suggests that "children exercise their rights progressively, as they develop a greater degree of independence."[770] Likewise, the CRC Committee holds that all children below the age of 18 "are entitled to special protection measures and, according to their evolving capacities, they can progressively exercise their rights" whether they are adolescents or younger children.[771]

The view that children progressively exercise their rights according to their evolving capacities rules out drawing rigid differences between adolescents and younger children. This has become a contested issue once at the IACtHR. In its *Advisory Opinion on Juridical Condition and Human Rights of the Child*, the IACtHR refused to make a distinction between the terms "child" and "minor" [772] and decided that the former encompasses any person under the age of 18 including adolescents.[773] However, Judge Sergio García Ramírez, in his concurring opinion, argued that the terms "minor" and "child" have distinct meanings, and the latter might contrast with the terms "adolescent" and "youth":

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[767] M and M v. Croatia, 2015-V Eur. Ct. H.R. 351, para. 171.

[768] *IACtHR, Advisory Opinion No. 17*, *supra* note 525, para. 41.

[769] *Id*., para. 41.

[770] *Atala Riffo*, *supra* note 2, para. 68.

[771] Comm. on the Rts. of the Child, General Comment No. 7 (2005): Implementing Child Rights in Early Childhood, U.N. Doc. CRC/C/GC/7/Rev.1 (Sep. 20, 2006) [hereinafter *CRC, General Comment No. 7*], para. 3; Comm. on the Rts. of the Child, General Comment No. 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child, U.N. Doc. CRC/GC/2003/4 (July 1, 2003) [hereinafter *CRC, General Comment No. 4*], para. 1.

[772] *IACtHR, Advisory Opinion No. 17*, *supra* note 525, para. 40.

[773] *Id*., para. 42.

> "The word "minor", widely used at a national level, refers to a person who has not yet reached the age at which full –or broad- exercise of his or her rights has been established there, together with the respective duties and responsibilities (...) The meaning of the word "child", in turn, has in principle been more biological or biopsychological than juridical, and this meaning, that is in line with popular usage of the term, contrasts with adolescent, youth, adult, or elderly persons."[774]

Yet, he also admitted that two terms coincide when both are juridicized and create the same legal consequences.[775]

The usage of the single term "child" did not preclude the CRC Committee from addressing the distinctive features and needs of different stages of childhood. Its general comments on the rights of adolescents and young children reveal two important findings. One is that the CRC Committee deviates from the developmental model endorsed by the paternalist conception of children's rights. The second is that it does not assign the image of dependence only to young children and the image of autonomy only to adolescents. Instead, it shows that the relationship between these images and stages of childhood is more complex. This diverges from the paternalist and liberationist conceptions of children's rights which tend to understand children's rights from a single lens: protection or liberation. The interpretations of the CRC Committee do not employ the liberal conception either, which draws a distinction between young and older children in terms of their autonomy interests.

First, the child's development is not an entirely biologically determined process and is not free from environmental factors. While trying to reach a working definition for adolescence, the CRC Committee argues that this is not a simple task since "individual children reach maturity at different ages" and "[t]he process of transitioning from childhood to adulthood is influenced by context and environment."[776] Also, for the

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[774] Concurring Opinion of Judge Sergio García Ramírez on Advisory Opinion OC-17, Regarding The "Legal Status and Human Rights of Children," of August 28, 2002, para. 3 in *IACtHR, Advisory Opinion No. 17*, *supra* note 525.

[775] *Id*., para. 4.

[776] Comm. on the Rts. of the Child, General Comment No. 20 (2016) on the Implementation of the Rights of the Child During Adolescence, U.N. Doc. CRC/C/GC/20 (Dec. 6, 2016) [hereinafter *CRC, General Comment No. 20*], para. 5.

development of young children, the CRC Committee notes that it varies "according to their individual nature, as well as their gender, living conditions, family organization, care arrangements and education systems."[777]

Second, vulnerability/dependence and autonomy are not attributed to a specific stage of childhood. In this regard, the CRC Committee calls for a "positive agenda for early childhood," which entails "a shift away from traditional beliefs that regard early childhood mainly as a period for the socialization of the immature human being towards mature adult status."[778] This requires an approach considering them as "persons in their own right" and as "active members of families, communities and societies, with their own concerns, interests and points of view."[779]

Additionally, adolescence is not only marked by the growing interest in independence and autonomy. The CRC Committee describes adolescence as "a unique defining stage of human development characterized by rapid brain development and physical growth, enhanced cognitive ability, the onset of puberty and sexual awareness and newly emerging abilities, strengths and skills." Yet, this rapid development also creates new challenges due to "their relative vulnerability and pressure from society, including peers, to adopt risky health behaviour."[780] They face a wide range of risks including "substance use and addiction, violence and abuse, sexual or economic exploitation, trafficking, migration, radicalization or recruitment into gangs or militias."[781] Gender inequalities and stereotypes also intensify and leave girls exposed to serious violations of human rights.[782] Also, for boys, traditional conceptions of masculinity and the denial of their vulnerability impede their ability to seek and receive protective measures.[783] Therefore, the CRC

[777] *CRC, General Comment No. 7*, *supra* note 771, para. 6(f).

[778] *Id*., para. 5.

[779] *Id*., para. 5.

[780] *CRC, General Comment No. 4*, *supra* note 771, para. 2.

[781] *CRC, General Comment No.* 20, *supra* note 776, para. 12.

[782] *Id*., para. 27.

[783] *Id*., para. 29.

Committee holds that the states have a continuing obligation to protect all children from exploitation and abuse.[784]

4.2. Progressive Autonomy and Parental Rights: A Mixed Practice

As the second part of the thesis noted, the principle of the evolving capacities of the child is an indication of a fiduciary conception of parental rights. While this principle guides the interpretations of the CRC Committee on parental rights, it is not widely employed by other IHRL organs. The ECtHR had opportunities to address the link between the child's autonomy and parental rights in the cases concerning children leaving parents. However, it was distant from a fiduciary conception of parental rights.

The CRC Committee accepts that all children are "in the care of someone, or should be."[785] This corresponds to a specific right for children: "the right to be directed and guided in the exercise of their rights by caregivers, parents and community members, in line with children's evolving capacities."[786] Parental care and guidance are obviously essential for young children. As the CRC Committee notes, young children are "social actors whose survival, well-being and development are dependent on and built around close relationships," particularly with their parents.[787] Accordingly, young children form strong relationships with their parents, which not only provide physical and emotional security but also help them to construct personal identity and receive cultural skills and knowledge. Therefore, the CRC Committee suggests that parents are "the major conduit through which young children are able to realize their rights."[788]

The strong attachment of young children to their parents does not mean a complete denial of their autonomy. In that regard, the CRC Committee considers the evolving capacities of the child as "a positive and enabling process, not an excuse for authoritarian practices that restrict children's autonomy and self-expression."[789] It is highly possible that the views of young are not heard due to their age and immaturity. The CRC Committee makes

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[784] *Id*., para. 40.

[785] *CRC, General Comment No. 13*, *supra* note 548, para. 33.

[786] *Id*., para. 59.

[787] *CRC, General Comment No. 7*, *supra* note 771, para. 8.

[788] *Id*., para. 16.

[789] *Id*., para. 17.

it clear that age cannot be the sole factor in determining the weight given to the child's views, and the child's level of understanding is not necessarily linked to the child's biological age.[790] It holds that even the youngest children are entitled to the rights protected under Article 12 and highlights that they express their feelings, ideas, and wishes in many ways "long before they are able to communicate through the conventions of spoken or written language."[791] The CRC Committee has already confirmed in an individual communication that a 5-year-old child was capable of forming her views for the purposes of Article 12.[792]

The evolving capacities of the child further indicate that the more the child knows, experiences, and understands, parental direction and guidance should be transformed into "reminders and advice and later to an exchange on an equal footing."[793] The "dynamic" nature of parental guidance primarily means that its transformation "will not take place at a fixed point in a child's development, but will steadily increase as the child is encouraged to contribute her or his views."[794]

The dynamic understanding of parental rights is particularly important for adolescents as they acquire cognitive and social skills to express their own views. In the context of freedom of religion, the CRC Committee emphasizes that it is the child who exercises this freedom, not the parent, and "the parental role necessarily diminishes as the child acquires an increasingly active role in exercising choice throughout adolescence."[795] This is similar to the rights of children in digital settings. Accordingly, with the guidance of states, parents should maintain a balance between protection and autonomy, and "mutual

[790] Comm. on the Rts. of the Child, General Comment No 12 (2009): The Right of the Child to be Heard, U.N. Doc. CRC/C/GC/12 (July 20, 2009) [hereinafter *CRC, General Comment No. 12*], para. 29.

[791] *CRC, General Comment No. 7*, *supra* note 771, para. 14.

[792] Comm. on the Rts. of the Child, Y.B. and N.S. v. Belgium, U.N. Doc. CRC/C/79/D/12/2017 (Nov. 5, 2018), para. 8.8.

[793] *CRC, General Comment No. 12*, *supra* note 790, para. 84.; See also *CRC, General Comment No. 20*, *supra* note 776, para. 18, and *CRC, General Comment No. 21*, *supra* note 627, para. 35.

[794] *Id.*

[795] *CRC, General Comment No. 20*, *supra* note 776, para. 43.

respect and empathy" should be preferred over prohibition or control.[796] In some areas, parental guidance diminishes, and children can make autonomous decisions themselves. In terms of health services, according to the CRC Committee, informed consent can be obtained directly from adolescents.[797]

This dynamic nature of parental rights does not resonate with the practice of other IHRL organs. The ECtHR examined cases where children were direct applicants complaining about the state's endorsement of parental control rights over them. Before the adoption of the CRC, the ECmHR reviewed two cases concerning children who had left their parents. In *X and Y v Netherlands*, a 14-year-old girl left her home to live with her boyfriend, and later the authorities sent her back to her parents. She alleged that the authorities gave priority to the parents' rights and breached her rights under Article 8 of the ECHR. The ECmHR held that,

> "As a general proposition, and in the absence of any special circumstances, the obligation of children to reside with their parents and to be otherwise subjected to a particular control is *necessary for the protection of children's health and morals*, although it might constitute, from a particular child's point of view, an interference with his or her own private life."[798]

The ECmHR's statement that parental control is "necessary for the protection of children's health and morals" is remarkable, and it, in a way, grounded parental rights in the child's needs. However, it referred neither to the evolving capacities nor to the weight of the child's views. This is, of course, not surprising considering the fact that the CRC was not in force at the time of the decision.

The subsequent case *Nielsen v. Denmark* demonstrated a change in the ECmHR's approach. This case concerned a 12-year-old boy whose parents got separated. His mother held full parental rights over him, but he left her several times to live with his father. The mother was advised by doctors that he could be placed in the State Hospital's Child

[796] Comm. on the Rts. of the Child, General Comment No. 25 (2021) on Children's Rights in relation to the Digital Environment, U.N. Doc. CRC/C/GC/25 (Mar. 2, 2021), para. 86.

[797] *CRC, General Comment No. 4*, *supra* note 771, para. 32.; *CRC, General Comment No. 20*, *supra* note 776, para. 39.

[798] X and Y v. Netherlands, App. No. 6753/74, Eur. Comm'n H.R. (1974), at 118-119 (emphasis added).

Psychiatric Ward. The father, on behalf of the applicant, challenged the applicant's detention in the hospital. This was dismissed by the Copenhagen City Court on the grounds that this was an exercise of parental rights by the mother, and this was not administrative detention. When he was discharged from the hospital, he was first placed in the care of a family not known to the father. Later, the father was granted his custody. In the application before the ECtHR, he alleged that his rights under Article 5 were violated. In finding a violation, the ECmHR highlighted the importance of the child's views:

> "[T]he Commission finds that an individual assessment of the applicant leads to the conclusion that the case concerned a normally developed 12-year-old child who was capable of understanding his situation and to express his opinion clearly. As the protection under Article 5 (Art. 5) of the Convention also applies to minors the consent from the holder of the parental rights is not decisive in these circumstances."[799]

The ECtHR did not follow this finding on the importance of the child's independent views. It held that as required by the care and upbringing of the child, "the parents or an only parent decide where the child must reside and also impose, or authorize others to impose, various restrictions on the child's liberty" and this aspect of parental authority was protected under Article 8 of the ECHR.[800] Since the mother got advice from the doctors in giving her consent to the placement of the applicant child in the hospital, the ECtHR considered it as a legitimate exercise of parental rights.[801] Concerning the child's views, the ECtHR diverged from the findings of the ECmHR:

> "[T]he Court considers that he was still of an age at which it would be normal for a decision to be made by the parent even against the wishes of the child. There is no evidence of bad faith on the part of the mother. Hospitalisation was decided upon by her in accordance with expert medical advice. It must be possible for a child like the applicant to be admitted to hospital at the request of the holder of parental rights, a case which clearly is not covered by paragraph 1 of Article 5 (art. 5-1)."

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[799] Nielsen v. Denmark, App. No. 10929/ 84, Eur. Comm'n H.R. (1987), para. 128.

[800] Nielsen v. Denmark, App. No. 10929/ 84, Eur. Ct. H.R. (1988), para. 61.

[801] *Id*., para. 69.

In a more recent case – *Osman v. Denmark* – which had been decided after the adoption of the CRC, the ECtHR slightly diverged from *Nielsen* by its emphasis on the child's right to private life. In this case, the applicant was born in 1987, and from 1991 to 1995, she lived in Kenya. In 1995, she moved to Denmark with her family. Several years after the divorce of her parents, in May 2003, when she was fourteen years old, her father decided to take her to Kenya to take care of her paternal grandmother. The applicant believed that she was going on a short trip to visit her grand-mother.

In July 2004, the age limit for reunification was reduced from eighteen years to fifteen years. According to the explanatory notes of that legal amendment, "a residence permit will still have to be issued to children over 15 years of age based on an application for family reunification if a refusal would be contrary to article 8 of the Convention."[802] In August 2005, she contacted Danish Embassy in Nairobi to return to Denmark to live with her mother and siblings. The Immigration Office decided that her residence permit had lapsed because she had been absent from Denmark for twelve consecutive months.

The ECtHR reiterated the wide interpretation it adopted in *Nielsen* on the scope of parental control rights. However, this time, it also pointed out the child's right to private life:

> "The Court agrees that the exercise of parental rights constitutes a fundamental element of family life, and that the care and upbringing of children normally and necessarily require that the parents decide where the child must reside and also impose, or authorise others to impose, various restrictions on the child's liberty. Nevertheless, in respecting parental rights, the authorities cannot ignore the child's interest including its own right to respect for private and family life."[803]

While the reference to the child's substantive right is considered a progressive step for the ECtHR moving in line with the CRC,[804] the Court's wording features an important ambiguity. The child's interest as covering her right to private and family life is not presented as a normative threshold over the exercise of parental rights or a competing

[802] Osman v. Denmark, App. No. 38058/ 09, Eur. Ct. H.R. (2011), para. 28.

[803] *Id*., para. 69 (references are omitted).

[804] FENTON-GLYNN, *supra* note 29, at 263.

right that needs to be balanced with the parent's right. Instead, it is referred to as a side factor that "the authorities cannot ignore."

4.3. Parental Rights and Children's Rights: A Presumption of Harmony?

The adjudicatory practice of IHRL organs does not sufficiently address the interplay between the child's evolving capacities and the scope of parental control rights. This is mostly due to the fact that many cases concerning the child's upbringing are brought up by parents. This is not surprising given the structural and procedural barriers children might face in domestic jurisdictions and the dependence of very young children on adult guidance and assistance. The barriers might not be remedied or even get intensified at international proceedings. These disable children's own rights to be expressed separately from those of the parents and the state.

A critical shortcoming in the representation of children's rights is that parental rights overshadow children's substantive rights. When the IHRL organs do not find it necessary to examine children's rights separately, they fail to address their substantive differences from parental claims. This problem is most evident in the cases where the child's freedom of religion is subsumed under parental rights to have respect for their religious and moral convictions.

In *Leirvag*, both parents and children were applicants, and they alleged that religious education in Norway also violated children's right to choose religion or life stance of their own.[805] However, the Human Rights Committee's examination was confined to parental rights under Article 18(4) of the ICCPR. Similar claims on children's freedom of religion were not examined in the ECtHR jurisprudence either. Although the ECtHR accepts children as holders of freedom of religion in principle,[806] this right is not sufficiently discussed in cases concerning Article 2 of P1. In *Valsamis*, the child applicant – Victoria – informed the school authorities that her religious beliefs did not let her participate in the school parade. The applicants' claims covered a violation of her freedom of religion and parental rights. The ECtHR reasoned that since the school parade was not against

[805] *Leirvag et al.*, *supra* note 711, para. 7.7.

[806] Dogru v. France, App. No. 27058/05, Eur. Ct. H.R. (2008); Kervanci v. France, App. No. 31645/04, Eur. Ct. H.R. (2008); Grzelak v. Poland, App. No. 7710/02, Eur. Ct. H.R. (2010).

parental convictions and revealed no breach of Article 2 of P1, there was no interference into her rights under Article 9.[807] Likewise, in *Lautsi and others*, the same reasoning led the Grand Chamber of ECtHR not to find a violation of Article 9 concerning children. However, the ECtHR at least accepted that Article 2 of P1 also has implications for the child's right to believe or not to believe:

> "The Court considers that, when read as it should be in the light of Article 9 of the Convention and the second sentence of Article 2 of Protocol No. 1, the first sentence of that provision guarantees schoolchildren the right to education in a form which respects their right to believe or not to believe. It therefore understands why pupils who are in favour of secularism may see in the presence of crucifixes in the classrooms of the State school they attend an infringement of the rights they derive from those provisions."[808]

Later, the ECtHR were more explicit in *Perovy* on the causal relationship between parental rights under the second sentence of Article 2 of P1 and the child's freedom of religion:

> "[T]he Court will examine the third applicant's complaint under Article 9 of the Convention. However, any such examination will be guided by the findings in respect of the first and second applicants' complaints under the second sentence of Article 2 of Protocol No. 1."[809]

Unsurprisingly, since parental rights were considered not to be violated, the ECtHR did not find a violation of Article 9 for the child applicant either.[810] However, Judges Keller, Serghides, and Poláčková disagreed with this interpretation of the relationship between the child's freedom of religion and parental rights. By following the interpretation provided by the CRC Committee on Article 14 of the CRC, they contended that it would also be "in the best interests of the child for the Court to consider his or her individual rights rather than ignoring them in favour of the rights of the parents." As they further

[807] *Valsamis*, *supra* note 709, para. 37.

[808] *Lautsi and others (Grand Chamber), supra* note 717, para. 78.

[809] *Perovy*, *supra* note 723, para. 51.

[810] *Id.*, para. 76.

suggested, although they might be in harmony, children's rights and parental rights are not identical.[811]

A further indication of the presumption of harmony between children's and parents' rights is the rules on standing and/or representation when the parent acts on behalf of the child. This is a particularly challenging issue in child protection cases where parental rights are withdrawn or restricted due to an alleged act of neglect or abuse. In principle, non-custodial parents are allowed to claim violations of children's rights without explicit authorization from the child.

For the individual applications to the CRC Committee, the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (OPCRC-CP) sets out that it would include in its Rules of Procedures certain "safeguards to prevent the manipulation of the child by those acting on his or her behalf" and may decline those communications which are not serving the child's best interests.[812] Additionally, it allows individual communications on behalf of victims without their express consent if the representative "can justify acting on their behalf without such consent."[813] In the Committee's Rules of Procedure, such an application on behalf of the victims without their consent also depends on the Committee's consideration that it would be in line with the child's best interests.[814] In a similar vein, the African Committee requires the applicant to "show that her/his action is taken in the supreme interest of the child."[815]

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[811] Joint Dissenting Opinion of Judges Keller, Serghides and Poláčková, para. 11 in *Perovy*, *supra* note 723.

[812] Optional Protocol to the Convention on the Rights of the Child on a communications procedure, Dec. 19, 2011, U.N. Doc. A/RES/66/138 [hereinafter *OPCRC-CP*], art. 3(2).

[813] *Id*., art. 5(2). For similar rules see Rules of Procedure of the Committee on the Elimination of Discrimination against Women, Report of the Committee on the Elimination of Discrimination against Women, at 86-115, U.N. Doc. A/56/38 (SUPP) (2001), Rule 68(2); Human Rts. Comm., Rules of Procedure of the Human Rights Committee, U.N. Doc. CCPR/C/3/Rev.12 (Jan. 4, 2021), Rule 91.

[814] Comm. on the Rts. of the Child, Rules of Procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, U.N. Doc. CRC/C/62/3 (Apr. 16, 2013) [hereinafter *Rules of Procedure of the CRC Committee*], Rule 13(3), See also Comm. on the Rts. of the Child, L.H.L. and A.H.L. v. Spain, U.N. Doc. CRC/C/81/D/13/2017 (June 17, 2019), para. 9.2.

[815] Afr. Comm. of Experts on the Rts. and Welfare of the Child, Revised Guidelines for the Receipt of Communications (Oct. 2014) [hereinafter *ACERWC, Revised Guidelines*], Section I (3).

Several cases indicate that a potential conflict of interest is not adequately discussed in the practice of IHRL organs. In *Buckle v. New Zealand* before the Human Rights Committee, for instance, the respondent state opposed the applicant's standing by indicating that in order to make a complaint on behalf of children under Article 24 of the ICCPR, she should have demonstrated "why it is impossible for her children to complain themselves" pursuant to Rule 90(I)(b).[816] However, the Human Rights Committee found the claim admissible without discussing the applicant's standing.

Later, in *Natalya Tcholatch v. Canada*, the Human Rights Committee highlighted "the bond existing between a mother and her child" and also noted her attempts to get authorization from the child, who was 14 years old at the date of the decision.[817] Likewise, the ECtHR adopts a permissive approach towards the natural parents to represent children. In *M.D. and others v. Malta*, the ECtHR justified the mother's standing on the basis that children's interests would be more visible:

> "In the event of a conflict over a minor's interests between a natural parent and a person appointed by the authorities to act as the child's guardian, there is a danger that some of those interests will never be brought to the Court's attention and that the minor will be deprived of effective protection of his or her rights under the Convention. Consequently, even where a mother has been deprived of parental rights - and indeed that is one of the causes of the dispute which she has referred to the Court - her standing as the natural mother suffices to afford her the necessary power to apply to the Court on the child's behalf too, in order to protect his or her interests." [818]

In these cases, the Human Rights Committee or the ECtHR did not discuss whether there exists a possible conflict of interests between the parent and the child. However, there is a potential for change in the case-law of the ECtHR. In *Strand Lobben*, the ECtHR accepted the conflict of interests as a bar to admissibility of parental right claims:

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[816] Human Rts. Comm., Buckle v. New Zealand, U.N. Doc. CCPR/C/70/D/858/1999 (Oct. 25, 2000), para. 4.4.

[817] *Tcholatch*, *supra* note 521, para. 7.4.

[818] *M.D. and others*, *supra* note 528, para. 27; *Moser*, *supra* note 632, para. 60; Scozzari and Giunta v. Italy, 2000-VIII Eur. Ct. H.R. 471, para. 138; Diamante and Pelliccioni v. San Marino, App. No. 32250/08, Eur. Ct. H.R. (2011), para. 146-147.

> "Where an application has been lodged before it by a biological parent on behalf of his or her child, the situation may nonetheless be that the Court identifies conflicting interests between parent and child. A conflict of interest is relevant to the question of whether an application lodged by one person on behalf of another is admissible."[819]

Nevertheless, it decided that such a conflict requiring the application to be declared inadmissible did not exist in the specific case – where the biological mother was considered unsympathetic towards the needs of a newborn baby.[820] In a subsequent case, however, where the applicant mother failed to protect children from sexual abuse in their home, the ECtHR found a conflict of interest.[821]

4.4. The Child's Right to be Heard: A Gateway to Independence?

Given the presumption of harmony between children's and parents' interests, it is difficult to identify children's distinctive interests, which sometimes diverge from those of parents. One important tool towards that end is the child's right to be heard, which has already informed the IHRL practice in three ways. One is establishing the link between the best interests of the child principle and the child's views. The second is securing the independent representation of the child when there is a potential conflict of interest between the applicant parent and the child. The third is hearing the child directly at the international proceedings.

As elaborated in the second part of this thesis, the drafters of the CRC omitted the link between the best interests of the child and the right to be heard when they separated the latter from Article 3. This was a missed opportunity for the drafters to move beyond the paternalist implications of the best interests of the child principle. Fortunately, the CRC Committee revived that link through its consistent interpretations, pointing out the complementary relationship between Article 3 and Article 12. Notably, in the case of abuse and neglect, when the authorities decide to separate the child from the family, they

[819] *Strand Lobben (Grand Chamber)*, *supra* note 533, para. 158.

[820] *Id.*, para. 159. See the same conclusion in *A.L. and others*, *supra* note 559, para. 29; Pedersen and others v Norway, App. No. 39710/15, Eur. Ct. H.R. (2020), para. 45.

[821] E.M. and others v Norway, App. No. 53471/17, Eur. Ct. H.R. (2022), para. 64.

must take the child's views into account.[822] It further suggests that the right to be heard is a "mandatory step" and a preventive tool against all forms of violence in the family.[823] Accordingly, the best interests principle cannot be applied properly without respecting the components of Article 12 of the CRC.[824]

The link between the best interests of the child and the right to be heard is further elaborated in *Atala Riffo*. The IACtHR indicated that children hold the right to be heard under Article 8(1) of the American Convention, which must be interpreted in light of Article 12 of the CRC.[825] It pointed out that the children were heard in custody proceedings at the lower court, but their views were not consulted again by the Supreme Court of Justice of Chile.[826] Nonetheless, the mere fact that they were not heard again was not a problem for the IACtHR. In fact, it highlighted possible drawbacks of interviewing children more than necessary since it might pose traumatic effects on children.[827] The problem in the domestic proceedings, according to the IACtHR, was the failure of the Supreme Court to justify its ruling, which contradicted the children's expressed wishes:

> "[T]he Supreme Court simply based its decision on the alleged best interest of the three minors without giving reasons for why it considered it legitimate to contradict the wishes expressed by the girls during the custody proceeding, particularly given the connection between a child's right to participate and the goal of complying with the principle of the child's best interest."[828]

While the CRC Committee and the IACtHR rely on that link between the best interests and the child's views, the ECtHR has not yet addressed that link in strong terms. Nolan and Kilkelly argue that in the jurisprudence of the European Court, the child's participation is not considered a right of the child. Rather, it was left to the discretion of

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[822] *CRC, General Comment No. 12*, *supra* note 790, para. 53.

[823] *CRC, General Comment No. 13*, *supra* note 548, para. 63.

[824] *CRC, General Comment No. 12*, *supra* note 790, para. 74.

[825] *Atala Riffo*, *supra* note 2, para. 196.

[826] *Id*., para. 204.

[827] *Id*., para. 205.

[828] *Id*., para. 208.

national authorities.[829] Although parents' right to be heard is an essential component of the protection under Article 8,[830] Kilkelly suggests that such a procedural right does not directly apply to children.[831] Nonetheless, in some cases on the child's upbringing, the ECtHR held the failure of the national authorities to hear children as an additional factor giving rise to a violation of Article. 8.[832]

Children can also exercise their rights to be heard indirectly through representatives. Article 12(2) of the CRC sets out that the child shall be provided with an opportunity to be heard in judicial and administrative proceedings "either directly, or through a representative or an appropriate body." The CRC Committee considers parents as potential representatives of the child; however, it cautions against the risk of conflict of interest.[833] One way to overcome a potential conflict of interest between the parent and the child is to appoint an independent representative for the child. Indeed, the Council of Europe treaties already regulate appointing a special representative as a general means of protection[834] and also a right of the child.[835]

Can an international organ order appointment of a special representative for the child? This is a controversial issue for the ECtHR. As argued by Judges Koskelo and Nordén,

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[829] Aoife Nolan & Ursula Kilkelly, *Children's Rights under Regional Human Rights Law – A Tale of Harmonisation?*, *in* TOWARDS CONVERGENCE IN INTERNATIONAL HUMAN RIGHTS LAW APPROACHES OF REGIONAL AND INTERNATIONAL SYSTEMS 296, 314 (Carla M. Buckley, Alice Donald, & Philip Leach eds., 2016).

[830] See e.g. W. v. the United Kingdom, App. No. 9749/82, Eur. Ct. H.R. (1987), para. 64; *T.P. and K.M., supra* note 556, para. 72.

[831] Ursula Kilkelly, *The CRC and the ECHR: The Contribution of the European Court of Human Rights to the Implementation of Article 12 of the CRC*, *in* LITIGATING THE RIGHTS OF THE CHILD THE UN CONVENTION ON THE RIGHTS OF THE CHILD IN DOMESTIC AND INTERNATIONAL JURISPRUDENCE 193, 195 (Ton Liefaard & Jaap E Doek eds., 2015).

[832] Havelka and others v. the Czech Republic, App. no. 23499/06, Eur. Ct. H.R. (2007), para. 62; *Saviny*, *supra* note 555, para. 56; *Kutzner*, *supra* note 569, para. 77.

[833] *CRC, General Comment No. 12*, *supra* note 790, para. 37.

[834] Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Oct. 25, 2007, 201 E.T.S., art. 31 (4); European Convention on the Exercise of Children's Rights, Jan. 25, 1996, 160 E.T.S. [hereinafter *European Convention on the Exercise of Children's Rights*], art. 9.

[835] *European Convention on the Exercise of Children's Rights*, *supra* note 834, art. 4.

in their joint dissenting opinion in *Strand Lobben*, in the cases of child protection, the perspectives of the child and the parent differ. For the child, the issue is whether the state exercised its positive obligations to protect the child and also respected the child's family life.[836] According to the judges, an independent representation must be appointed to reflect the child-centered perspective.[837] As they suggested, if the ECtHR pursues "the idea of children as subjects of distinct individual rights and the need to regard the best interests of the child as a primary consideration," it must take the necessary procedural steps.[838]

The appointment of a special representative for the child, as proposed by the dissenting judges in *Strand Lobben*, is not something new to the European Court. Once, it requested the Croatian Bar Association to appoint an independent representative for the child "due to the nature of the relationship between the first applicant and the alleged perpetrator and a potential conflict of interest between the applicants."[839] Indeed, Rule 36 (4) (a) of the Rules of Court allows a person "approved by the President of the Chamber" to be the representative of the applicant in exceptional circumstances.[840] However, in this particular case, this action of the ECtHR had been criticized for replacing competent domestic authorities.[841] Furthermore, the ECtHR was invited to amend its Rules of the Court to set detailed criteria for the appointment of a representative for children.[842] Acconciamessa argues that a broad interpretation of this procedural rule can be an opportunity for the European Court to achieve children's access to justice.[843]

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[836] Joint Dissenting Opinion of Judges Koskelo and Nordén, para. 6 in *Strand Lobben (Grand Chamber)*, *supra* note 533.

[837] *Id*., para. 7.

[838] *Id*., para. 17.

[839] A and B. v Croatia, App. No. 7144/15, Eur. Ct. H.R. (2019), para. 3.

[840] European Court of Human Rights, Rules of Court (June 3, 2022).

[841] *Id*., Concurring Opinion of Judge Wojtyczek, para. 5.

[842] *Id*., Joint Dissenting Opinion of Judges Sicilianos, Turković and Pejchal, para. 28.

[843] Acconciamessa Lorenzo, *Bringing The Child's Procedural Rights Before The ECtHR Through Interpretative Tools Access to Justice, Participation and Representation*, *in* EUROPEAN YEARBOOK ON HUMAN RIGHTS 2020 49, 64 (Philip Czech et al. eds., 2020).

Finally, one crucial way to achieve effective representation of children's rights is through making procedural adjustments to invite children to participate in the international proceedings concerning them. The OPCRC-CP does not include provisions allowing children to express themselves in the oral hearings before the CRC Committee. Some considered adopting such a procedure unlikely due to the scarcity of resources.[844] However, the CRC Committee adopted its rules of procedures providing opportunities to hear the views of the child. When the communication is made on behalf of children, the CRC Committee shall inform them about the communication and give due weight to their views in accordance with their age and maturity.[845] Children also hold an opportunity to directly attend the hearings before the CRC Committee, which guarantees "child-sensitive procedures" and giving due weight to children's views.[846] Likewise, the ACERWC ensures that children are informed about the applications made on their behalf[847] and guarantees children's participation in the hearings:

> "The Committee shall take measures to ensure the effective and meaningful participation of the child or children concerned by the consideration of the Communications.
>
> When the child is capable of expressing his opinions, he should be heard by the Committee through a child friendly process."[848]

The implementation of these opportunities for children's participation is yet to be seen. So far, the CRC Committee invited child applicants to present their claims through videoconference only in a high a profile case filed against five state parties: *Saachi et al*.[849]

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[844] Suzanne Egan, *The New Complaints Mechanism for the Convention on the Rights of the Child: A Mini Step Forward for Children?*, 22 INT. J. CHILD. RIGHTS 205, 220 (2014).

[845] *Rules of Procedure of the CRC Committee*, *supra* note 814, Rule 13(3).

[846] *Id*., Rule 19(1).

[847] *ACERWC, Revised Guidelines*, *supra* note 815, Section I (3).

[848] *Id*., Section XI (6).

[849] Comm. on the Rts. of the Child, Chiara Saachi et al. v. Turkey, U.N. Doc. CRC/C/88/D/108/2019 (Sep. 22, 2021).

Until this date, *Atala Riffo* exemplifies the best practice on how children's participation could be achieved before an international court in a case with a potential conflict of interests. First, the IACtHR identified that the case file contained no statement from the children about whether they agreed to be represented by either of their parents and appear as alleged victims in the case. It did not find the statements made by the parents sufficient since "the position of the mother and the father did not necessarily represent the girls' best interests."[850]

Having differentiated children's interests from those of their parents, the Inter-American Court pointed out the progressive development of children's capacities. It showed that their age and maturity were taken into account:

> "Clearly, the level of physical and intellectual development, experience and information varies widely among children … the three girls were then aged 12, 13 and 17 years of age and that there might be differences in their views and in the level of personal independence for each of the girls to exercise her rights."[851]

During the hearing, the Secretariat of the IACtHR was accompanied by a psychiatrist to ensure that the information was accessible and appropriate for the children. The statements of the children were taken separately without the presence of their parents, and their identities were kept confidential.[852]

4.5. Conclusion

The normative choices of the IHRL organs on the child's autonomy and the scope and bases of parental rights are not as clear as their choices on the state's roles. It is common for the IHRL organs to consider that children possess progressive autonomy. The CRC Committee's interpretations on adolescents and young children do not fit neatly into the three conceptions of children's rights (liberationist, paternalist, and liberal). In parallel with the understanding of progressive autonomy, the CRC Committee describes parental control as a dynamic process that needs to be adjusted to the evolving capacities of the child. This view aligns with the fiduciary conception of parental rights. The ECHR organs

[850] *Atala Riffo*, *supra* note 2, para. 67.

[851] *Id*., para. 68 (references omitted).

[852] *Id*., para. 69.

had chances to discuss this conception in the cases concerning children who wanted to leave parental control but failed to do so.

In general, the adjudicatory practice on the child's upbringing holds a presumption of harmony between children's and parents' interests, and this is in parallel with the proprietorial and relational conceptions of parental rights. Three findings support this conclusion. When parents and children are both applicants, the ECtHR and the Human Rights Committee did not examine children's rights separately. Additionally, the rules on standing before the IHRL organs allow natural parents to act on behalf of the child without her explicit authorization. Lastly, when the parents are the sole applicants, except for the IACtHR and the ECtHR's recent case-law, the conflict of interests between the child and the parent is not sufficiently examined.

One essential way to address children's distinctive claims and fulfill the promise of the child's autonomy is the child's right to be heard. This has had a limited application in the IHRL practice in three ways: the link between the best interests of the child and the right to be heard, independent representation of the child, and the child's direct participation in the international proceedings.

5. Appraisal: Is Reconciliation Realized?

As noted earlier in the first part of the thesis, the paternalist conception of children's rights aligns with the premises of the proprietorial and relational conceptions of parental rights. And this alignment leads to a minimal state with a high threshold for intervention in the family. It can also reconcile with a supportive state to secure the child's material needs and maintain a narrow understanding of autonomy and multicultural aims in education (see Model II in Table 1). Alternatively, the liberal conception of children's rights is in parallel with the fiduciary conception of parental rights. This combination necessitates lowering the threshold for state intervention in the minimal state idea and endorsing a more prescriptive role for the state. Additionally, it leads to a broad understanding of autonomy and full endorsement of civic interests in education (see Model III in Table 1).

The second part of the thesis showed that there had been a move from Model II to Model III with the adoption of the CRC and ACRWC (see Table 2). Unlike the post-WWII instruments, the CRC has moved towards the liberal conception of children's rights and the fiduciary conception of parental rights. The CRC has also introduced the best interests of the child as the threshold for state intervention and provided a more rights-based approach to the state's supportive role. One contradiction in this move was the recognition of civic interests in education. While the early human rights instruments affirmed civic education, the CRC and ACERWC balanced it with respect for the child's parents and cultural and national identity.

This part aimed to analyze the IHRL organs' practice on the child's upbringing and its resonance with the normative models on the child's upbringing. It is important to note that there have been certain challenges in identifying whether and how the practice reflects these models. One challenge is that, given the existence of different IHRL organs with different mandates, it is often difficult to speak of a unified practice. However, as shown throughout this part, the IHRL organs mostly converge on certain normative ideals regarding the tripartite relationship between the child, the parent, and the state. Another challenge is that the practice of a single IHRL organ changes over time. This is most often the case for the ECHR organs, which famously develop a dynamic interpretation of a "living instrument." Despite these challenges, this part indicated which conceptions better reflect the work of the IHRL organs without neglecting the nuances there might exist in their interpretive and adjudicatory practice.

This part showed that the IHRL practice had maintained the elements of Model III on the state's role in the child's upbringing. First, the practice endorses the idea of the minimal state. Accordingly, state intervention is exceptional in nature and justified only by the best interests of the child. Although the subsidiary role of the IHRL organs might preclude them from making normative determinations as to which instances should qualify as abuse or neglect, the interpretations of the CRC Committee and case-law of the ECtHR demonstrate that states have relevant reasons to intervene not only to secure children's survival and their most basic physical needs but also when their emotional and educational needs are at stake. This indicates that the IHRL practice does not impose a high threshold for state intervention.

The minimal state model is also prevalent when it comes to the case of "unfit" parents when the parents are not endowed with the child's care due to their failure to meet physical, cognitive, or moral capabilities. An analysis of the IHRL practice on religious parents, parents with disabilities, delinquent parents, and LGBT parents shows that the IHRL organs avoid abstract generalizations on parents' characteristics. Rather, they focus on the specific impact of parental conduct on the child. In the absence of harm, the mere possibility that the child can be placed in a more beneficial environment does not justify state intervention. This means the rejection of a strategic allocation of the child's care at the expense of parental rights.

Second, the practice has sustained the state's supportive and prescriptive roles. The family is not considered a natural entity that functions without any state involvement. The state should cooperate with parents when they face precarious conditions. These conditions, as held by the IHRL organs, call for supportive measures that need to be employed before a strict intervention into the parent-child relationship. In addition to this supportive role, the IHRL organs also endorse a prescriptive role for the state to create positive parents that are not violent towards their children. This is linked with the IHRL's call for a wider prohibition on corporal punishment.

Third, the practice aligns with the drafting processes in endorsing both autonomy-related and civic interests of education. Compulsory education is not considered as a mere medium providing basic skills and knowledge that can be substituted by home education. So, the aim is not only to create self-reliant members who can be economically and socially independent. According to the IHRL organs, education should aim to empower children and help them realize their full potential. Moreover, compulsory education is a

sphere for children to socialize with others and encounter social influences other than their parents. The IHRL organs, while embracing these autonomy-related aims, seem to have endorsed the broad understanding of autonomy as in the child's right to an open future.

The IHRL organs also uphold civic aims. Education is believed to play a significant role in turning children into tolerant and respectful citizens and integrating children of minority background into the broader community. Furthermore, the IHRL affirms state actions to build a common identity through education. These civic aims, however, have a limitation. The IHRL organs require particularly religious and moral education to comply with the principles of objectivity and pluralism. For the ECtHR, the state is forbidden to pursue an aim of indoctrination. When an imbalance exists in how the state teaches religion or any other morally sensitive subject, it has a duty to provide an opt-out mechanism. The HRC and the ECtHR treat these mechanisms with caution and point out the risks of discrimination or stigmatization against children and parents and the conflict of loyalty experienced by children.

While the IHRL practice reflects the elements of Model III on the state's roles, it is more fragmented when it comes to the conceptions of children's and parental rights, and there are certain deviations from that model. First, not all the IHRL organs seem to adopt a fiduciary conception of parental rights. While the CRC imposes certain restrictions on the exercise of parental control, this is not visible in the work of other organs. For instance, the ECtHR did not determine a limit on the parental right to determine the child's residence. Second, the IHRL organs presume a harmony between children's and parents' interests as in the proprietorial and relational conceptions of parental rights. They do not separately examine children's rights when the case already features a parental right claim. This is apparent, for instance, in the ECtHR's jurisprudence on education. Additionally, a possible conflict of interests between the child and the parent is not always evaluated, and the natural parents act on behalf of the child without the child's authorization. Third, although it presents a great potential to identify children's independent interests, the child's right to be heard has had limited appeal in the practice. These deviations from Model III make it difficult to reconcile the state's wide powers in protection and education with children's rights and parental control rights.

CONCLUSION

The tripartite relationship between the child, the parent, and the state comprises competing rights and interests. Any normative model proposing a just allocation of authority on the child's upbringing between these agents needs to reconcile those rights or interests. This thesis's mission was to present normative models on how to reconcile different conceptions of children's rights, parental rights, and the state's roles and understand their reflections in the IHRL practice. In this regard, two models informed the IHRL practice more than others. One model suggests a combination of the paternalist conception of children's rights, the proprietorial or relational conception of parental rights, and the minimal state with a high threshold. These indicate that children should not hold autonomy rights, and state intervention should be an exception that is triggered to protect the child from serious forms of harm. This high threshold also constitutes the only limit on the exercise of parental rights. Under this model, the state can also have a supplementary role in providing material sources for the family and can also assume an educative role in turning children into self-reliant members and tolerant citizens.

The drafting processes of the post-WWII instruments (the UDHR, ECHR, ICCPR, ICESCR, and the 1959 Declaration on the Rights of the Child) reflected some elements of this model. First, children were only given protective rights. Second, parental rights were recognized in strong terms as a reaction to the totalitarian practices of the recent past. Except for the refusal of compulsory schooling and being hostile to democratic values, the drafters did not foresee any other instance that might necessitate putting limits on parental rights. The intra-familial relationship between the child and the parent was not the main concern. Third, these instruments endorsed the idea of the minimal state by affirming the primary role of the family in the child's upbringing.

This model also had reflections on interpretive and adjudicatory practice. The IHRL practice sometimes presumed a harmony between children's and parents' interests. When the case already includes parental rights claim, the IHRL organs do not find it necessary to examine children's rights claims separately. They also accept the standing of natural parents, although the case might include a potential conflict of interests. Additionally, despite the CRC's interpretations of dynamic parental rights, a fiduciary conception of parental rights is not visible in the work of other IHRL organs.

Another model comprises a combination of the liberal conception of children's rights, the fiduciary conception of parental rights, and the idea of a minimal state with a low threshold. This model suggests that children should also possess autonomy rights, and parental rights should be grounded in parents' duties towards children. Since parents are under the duty to promote the rights of the child, the state should impose a low threshold for intervention to increase the standards of child-rearing. Under this model, the state's supplementary roles are not limited to providing material sources but also include a prescriptive role in increasing the quality of the parent-child relationship. In education, the state has given broader powers to maximize the options of the child and maintain the liberal democratic order.

The post-war instruments reflected this model partly regarding the state's role in education. The aims of education as stipulated in the UDHR and ICESCR contain the full development of the child's personality. Furthermore, the concerns of the drafters concerning undemocratic parents indicated their endorsement of civic education directed at the protection of liberal democratic principles.

The reflections of this model are more visible in the CRC. Unlike the earlier instruments, the CRC also recognized the civil and political rights of children (Articles 13-17) and adopted a liberal conception of children's rights. During the discussions on those civil and political rights, the idea of an autonomous child faced resistance, and some compromises were made (e.g., Article 14 (2)). Also, the CRC accepted that parents hold duties and responsibilities, and they should be guided by the best interests and evolving capacities of the child (Articles 5, 14, and 18). These align with the fiduciary conception of parental rights. However, the drafters did not consider that the child's interests should always prevail over parental interests, thereby avoided an instrumental understanding of parental rights.

While affirming parents' primary role in the child's upbringing, the CRC has introduced the best interests of the child as the threshold for separating the child from parental care and showed that the state's secondary role should not be limited to the most serious forms of harm (Article 9). Furthermore, the state's secondary role is not entirely reactionary as it imposes obligations to take social measures to support the child's caretakers (Article 19). The CRC has also provided a rights-based approach to the state's supportive role. Unlike the early human rights instruments, which consider the family and childhood as

recipients of support in general, the CRC aims at improving the conditions of the child's upbringing to secure her rights (Articles 18 and 27).

This model has a strong resonance with the IHRL organs' interpretive and adjudicatory practice as well. The CRC Committee has a broad understanding of care and protection that is marked by the child's well-being. While leaving a wide margin of appreciation to states, the ECtHR also upheld that the reasons for intervention can extend to the child's emotional and educational needs. Additionally, the IHRL organs embraced the state's supportive role, particularly for parents in precarious conditions. They converged on the idea that supportive measures should precede the decision to separate the child from the parent. And the quality of the parent-child relationship is also a concern. Coupled with the CRC Committee's recommendations to create positive parents, other IHRL organs' calls for outlawing corporal punishment indicate the state's prescriptive role.

The interpretive and adjudicatory practice on education also confirms this model. The CRC Committee, the CESCR Committee, and the CEDAW Committee interpret the right to education as an "empowerment" right that can realize the child's full potential. Likewise, the ECtHR's jurisprudence on homeschooling (*B.N. and S.N.*, *Leuffen*, and *Wunderlich*) stresses children's need to interact with social influences other than their parents. These indicate that the IHRL organs have a broad understanding of autonomy that needs to be pursued in education.

Moreover, the IHRL organs endorse the state's power to seek civic ends in education. The CRC Committee and the African Committee highlight the role of education in promoting understanding, tolerance, and friendship among different groups. The ECtHR also confirmed this role in *Konrad* and *Appel-Irrang*. The ECtHR's decision on *Osmanoğlu and Kocabaş* further confirmed the function of education to integrate minority children into the broader community. The CRC Committee, the African Committee, and the ECtHR also embrace the aim to transmit a shared understanding of culture and history through education. These civic aims, of course, should not lead to the dominance of the majority culture and the state's indoctrination of a particular morality.

Whilst these two models have a considerable reflection in IHRL, some normative ideas do not get similar support in legal practice. This is the case for the liberationist conception of children's rights. The IHRL practice diverges from this conception by accepting that children and adults have qualitative differences and endorsing parental control for the

child's healthy development. The IHRL organs are distant from the view that families and schools are oppressive mechanisms. Furthermore, the idea of the maximal state does not have a resonance with the IHRL practice either. The IHRL organs avoid making abstract and a priori evaluations of the child's interests and relying on parents' characteristics without a discernible impact on the child.

One significant contribution of this thesis is demonstrating that IHRL does not adhere to a single normative model on the child's upbringing. This shows the legal practice might take a functionalist approach to combine normative ideas that are seemingly contradictory. This finding might be relevant for similar studies investigating the interaction between the normative theories on human rights and international human rights legal practice.

The findings of the thesis can hopefully provide insights for other areas of international law focusing on the tripartite relationship between the child, the parent, and the state. The normative conceptions of parental rights and their resonance with IHRL can be insightful for the discussions on the growing phenomenon of anti-vaccination and its effects on global health. The findings on the supportive and prescriptive roles of the state can also inform the international efforts to eradicate hazardous child labor and decrease school dropout rates as these issues are closely related to the precarious conditions of children and their parents. Finally, the findings on the child's status within the family – as understood through the lenses of autonomy, dependency, or responsibility – can guide the debates of international migration law on unaccompanied minors and family reunification.

Lastly, this thesis can contribute to the judicial practice examining the triangular relationship between the child, the parent and the state by providing an evaluation of their normative choices. The ECtHR has received the highest number of cases concerning the child's upbringing and the CRC Committee is potentially another important venue for similar cases with its burgeoning case-law. It is essential for the legitimacy of these organs that they base their decisions on coherent and persuasive normative grounds.

Currently, as this thesis demonstrates, it is contradictory that the adjudicatory practices are not strongly committed to the child's autonomy and the fiduciary conception of parental rights. Without sufficient weight given to the child's substantive rights and their views, IHRL's aim to foster the child's autonomy in education or to impose high standard

of child-rearing has a paternalistic look. In order to avoid such an appearance, the state's roles in education and protection of the child should be accompanied with choices that appreciate the growing significance of children's rights and the quality of the parent-child relationship.

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