

## *The Many Faces of the Right to Education*

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I think by far the most important bill in our whole code is that for the diffusion of knowledge among the people. No other sure foundation can be devised for the preservation of freedom and happiness... preach, my dear sir, a crusade against ignorance; establish and improve the law for educating the common people.<sup>1</sup>

### I INTRODUCTION: THE RIGHT TO EDUCATION IN COMPARISON WITH OTHER SOCIAL RIGHTS

In this chapter we deconstruct the constitutional right to education into its various components in order to discuss its character and the problematics related to its application. We do so for the purpose of delineating the dilemmas associated with the realisation of this right. Some of those dilemmas are rooted in the right's definition as a social right while others flow from unique issues related to the right per se; the latter issues are thus dissociated from the conceptual issues surrounding social rights as a distinct, inclusive category. We likewise stress the specific reasons that justify the protection granted to the right to education in many constitutional documents.

Prior to formulating a model capable of contributing to our understanding of the nature of the right to education, we begin by elaborating several of the characteristics that differentiate education from other socio-economic rights. First, contrary to some other welfare rights such as the right to social security, it is impossible to isolate the issue of funding

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<sup>1</sup> See F Volio, 'The Child's Right to Education: A Survey' in G Mialaret (ed), *The Child's Right to Education* (Paris, UNESCO, 1979) 19, 22.

from the issue of educational curricula. When individuals demand that the state fund education services for their children, they usually refer not simply to the demand for budgetary support but also to the funding of a specific type of education (educational stream), one reflecting their individual convictions and beliefs. Second, due to the fact that the primary beneficiaries of rights to education are children, the realisation of those rights entails (in most cases) the participation of three parties: the state, the parents and the child. This fact demands that a position be taken not only with respect to the relationships maintained between public authorities and the individual, as with the application of other social rights, but also regarding relationships between parents and children. Indeed, in many cases, parental interests clash with those of the child. Third, the right to education, contrary to other social rights, includes an element of duty and compulsion. That is, although in the majority of cases an individual can refuse to accept state-provided public services, the same does not apply to education.<sup>2</sup>

The right to education is the socio-economic right most commonly acknowledged throughout the world. Rights to education are protected in the constitutions of more than 140 countries<sup>3</sup> and a large number of international covenants.<sup>4</sup> In general, divergent aspects of education are subsumed under the inclusive heading 'education' or 'the right to education'.<sup>5</sup> The prevalence of this heading continues, even today, to be the source of conceptual confusion. A careful reading of the articles referring to education in constitutions and conventions leads to the conclusion that the right to education encompasses three basic rights that should be distinguished from one another: the right to receive education, the right to choose (a stream of) education and the right to equal education. These

<sup>2</sup> Compulsion is also an element related to the right to health, such as the obligation to inoculate children and the absence of parental right of refusal to do so.

<sup>3</sup> A survey conducted for the purposes of this chapter found that rights in the sphere of education are protected in the constitutions of 148 countries. A number of new constitutions have yet to appear in official English language versions, and other constitutions are still in process of ratification. Therefore, it appears that the final number will be even higher. On the right to education as stipulated in national constitutions throughout the world, see, among others: K Tomasevski, *Free and Compulsory Education for All Children: The Gap between Promise and Performance* (Gothenburg, 2001), 18–19, available at <<http://www.right-to-education.org>>. For comparative details on constitutional guarantees of the right to education see R Marlow-Ferguson and C Lopez (eds), *The World Education Encyclopedia* 2nd edn (Farmington Hills MI / London, Thomson Gale, 2001).

<sup>4</sup> The most famous of these covenants is the UN's Universal Declaration of Human Rights 1948 (Art 26), and the UN International Convention on Economic, Social and Cultural Rights 1966 (Art 13).

<sup>5</sup> In recent years, several books published have been dedicated to elaboration of the right to education in international law as well as in national constitutional rights; see: K Dieter Beiter, *The Protection of the Right to Education by International Law* (Leiden, Martinus Nijhoff Publishers, 2006); K Tomasevski, *Education Denied* (London, Zed Books, 2003); J Spring, *The Universal Right to Education* (Mahwah, NJ, Lawrence Erlbaum Associates, 2000); D Hodgson, *The Human Right to Education* (Aldershot, Ashgate Publishing, 1998).

rights can either complement or clash, depending on the context. It is therefore incumbent upon us to elaborate quite precisely the conceptual foundations of what we call *the* right to education. Each of the three rights is worthy of a separate discussion.<sup>6</sup>

## II THE DIFFERENT FACETS OF THE RIGHT TO EDUCATION

### A The Right to Receive Education

The right to receive education is precisely that—the individual’s right to receive education and educational services that are funded by the state. This right is a positive right; it assigns to the state the ‘duty to perform’, to provide and fund education. This positive aspect associates the right to receive education with an entire family of second-generation social rights. The right to receive education thus encompasses three possible avenues of implementation: primary education, secondary education and higher education. The majority of covenants<sup>7</sup> and national constitutions<sup>8</sup> protect the right to receive free basic education (primary and secondary education). In several Western welfare states as well as in those subscribing to the socialist-communist tradition, the right to receive education also includes the right to higher education.<sup>9</sup>

Several justifications for recognising the right to receive education can be listed.<sup>10</sup> The first is that education provides the foundations for individual autonomy, liberty and human dignity. According to this

<sup>6</sup> The expression ‘the right to education’ hereinafter relates to the numerous rights to education subsumed under this title.

<sup>7</sup> See, eg: Art 13(2)(a) (a right to primary education) and Art 13(2)(b) (a right to secondary education), UN Convention on Economic, Social and Cultural Rights 1966.

<sup>8</sup> For examples of national constitutions that grant free elementary and high school education see: Art 29(1), South Africa’s Constitution; Art 42(4), Ireland’s Constitution; Art 27(4), Spain’s Constitution; Art 19, Switzerland’s Constitution; Art 24(1), Belgium’s Constitution; Art 34(2), Italy’s Constitution; Art 16(1), Finland’s Constitution; Art 26(3), Japan’s Constitution; Art 70(2), Poland’s Constitution; Art 23(1), Luxembourg’s Constitution; Art 160(1), Taiwan’s Constitution.

<sup>9</sup> For examples of constitutions that guarantee free higher education see: Art 13 of the Preamble to France’s fourth Constitution 1946; Art 16(4), Greece’s Constitution; Art 74, Portugal’s Constitution; Art 43(3), Russia’s Constitution, 1993; Art 53(4), the Ukraine’s Constitution; Art 35, Armenia’s Constitution; Art 208, Haiti’s Constitution.

<sup>10</sup> Considerations for non-recognition of the right to education also exist, but they lie beyond the scope of this discussion because they emanate from general considerations as opposed to the recognition of social rights; ie, they are not based on criteria for the non-recognition of the right to education per se. For a discussion of this issue see R Gavison, ‘On the Relationships between Civil and Political Rights and Social and Economic Rights’ in JM Coicaud, MW Doyle and AM Gardner (eds), *The Globalization of Human Rights* (New York, United Nations University Press, 2003) 23.

argument, strong and well-defined interests<sup>11</sup> motivate an individual's right to receive state-provided education because, in modern society, education is essential for the existence of liberty and for its realisation. Without education, liberty declines in value.<sup>12</sup> Education likewise meets two conditions for human dignity. On one level, the right to education relates to human dignity in its extrinsic sense. In meritocracies, such as those found in Western societies, a person's extrinsic dignity is considerably affected by their accomplishments in the field of education because the amount of education obtained represents the primary measure for an assessment of their worth, capabilities and potential to succeed in numerous areas of daily life. The place of education in the construction of a person's status in contemporary society follows from this condition. Moreover, education—and especially the acquisition of higher education—is often the sole hope a person has to leap the barriers of the lowly economic status to which they were born; stated simply, education is a fundamental instrument of social mobility.<sup>13</sup> On the second level, the right to education relates to human dignity in its intrinsic sense. We cannot ignore the decisive contribution of education to personal development and individual self-esteem, to a sense of inner value in addition to individual worth.<sup>14</sup>

The second justification for the right to education is that education is essential to the realisation of basic civil and political rights. This argument has often been raised in US judicial decisions,<sup>15</sup> as it was in a

<sup>11</sup> In my attempts to designate rights as interests, I follow in the footsteps of the well-known definition proposed by Raz: 'To give rise to a right an interest must be sufficient to justify the existence of a duty on another person to behave in a way which serves the interest of the right holder' (J Raz, *Ethics in the Public Domain* (Oxford, Oxford University Press, 1994) 35).

<sup>12</sup> I Berlin, *Four Essays on Liberty* (Oxford, Oxford University Press, 1969), at liii, presented a pristine description of this idea: 'If a man is too poor or too ignorant or too feeble to make use of his legal rights, the liberty that these rights confer upon him is nothing to him, but it is not thereby annihilated. The obligation to promote education... is not made less stringent because it is not necessarily directed to the promotion of liberty itself, but to conditions in which alone its possession is of value, or to values which may be independent of it'.

<sup>13</sup> Prof Friedman provides a succinct explication of this idea; see L Friedman, 'Education as a Form of Welfare – Legal and Social Problems' in S Goldstein (ed), *Law and Equality in Education* (Jerusalem, The Van Leer Institution, 1980) 167, 172: 'In a society which rejects distinctions of birth and status, and which only recognizes "merit", it is education which stamps people with the stamp of merit; it is a grading system that affects the life-chances of virtually every child in it'.

<sup>14</sup> J Rawls, *A Theory of Justice* (Cambridge, Belknap Press, 1971) 101; J Rawls, 'Distributive Justice: Some Addenda' in S Freeman (ed), *Collected Papers* (Cambridge Mass / London, Harvard University Press, 1999) 154, 166.

<sup>15</sup> See the following judicial decisions: *School District of Abington Township, Pennsylvania v Schempp* (1963) 374 US 203, 230: 'Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government'; *Wisconsin v Yoder* (1972) 406 US 205, 221 (hereinafter, the *Yoder* case): 'Some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence'; *San Antonio Independent School District v Rodriguez*, (1973) 411 US 1, 63 (hereinafter, the *Rodriguez* case): 'There can be no doubt that education is

crucial decision passed down in Israel on the same subject.<sup>16</sup> For instance, a person has an interest in receiving education because education is necessary to achieve the freedom of expression, another right due them. If freedom of expression is necessary for democracy, the furtherance of truth and the exchange of ideas in ‘the free marketplace of ideas’, education is a necessary condition for the realisation of all these rights. Education is, after all, the main vehicle for the accumulation of knowledge and the formation of ideas. Without education, the marketplace of ideas characterising democratic regimes would be emptied of its goods.<sup>17</sup> A similar argument can be made with respect to the right to vote: an individual has a strong interest in receiving education because it represents one of the conditions essential to realisation of the basic right to vote. Although it has been suggested that we can train a monkey to drop a slip of paper into the ballot box, the monkey’s action has no relationship to the political issues at stake or the issues on the public agenda.<sup>18</sup> Hence, as an essential precondition of the universal right of citizens to vote, we must recognise the citizens’ universal right to receive education.

The third justification is embedded in utilitarian considerations: education benefits the individual but also society at large. Considered from this perspective, allocation of funds to education represents an investment in the human resources that promote the nation’s economic prosperity as well as its general social well-being, expressed in rising levels of culture, decreased crime rates, prevention of sexually transmitted diseases, such as AIDS, and promotion of the war on poverty, among other social goals. These outputs, despite their diversity, touch the lives of each and every individual. This position has won support among adherents of classical economics who support the model of a free market economy with its ‘invisible hand’ as propounded by Adam Smith,<sup>19</sup> as well as proponents of

inextricably linked to the right to participate in the electoral process’; *Plyler v Doe* (1982) 457 US 202, 221 (hereinafter, the *Plyler* case): ‘as... pointed out early in our history... some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence’.

<sup>16</sup> See Justice Or on HCJ 1554/95, *Friends of GILAT Association v Minister of Education, Culture and Sport* 50(3) PD 2, at 22–3 (hereinafter, the *Friends of GILAT* case): ‘Education is fundamental to the existence of a free, active and functioning democratic society... Education is, without doubt, an important instrument for guaranteeing the rights and freedoms of each and every individual and the realization of fundamental political rights, including the freedom of expression as well as the right to vote and be elected’.

<sup>17</sup> See SH Bitensky, ‘Theoretical Foundations for a Right to Education under the US Constitution: A Beginning to the End of the National Education Crisis’ (1992) 86 *Northwestern University Law Review* 550, 600–1.

<sup>18</sup> *Ibid* 603–4.

<sup>19</sup> See A Smith, *The Wealth of Nations* (New York, 1991), books 1 (p 90), 2 (p 247) and 5 (ch II).

‘The Third Way’<sup>20</sup> and outright social democrats. The assumption shared by this plethora of positions is that an individual without an education not only deprives themselves of their own rights and humanity, but they also jeopardise their community’s legitimate interests.

Finally, we can justify the recognition of social rights, especially the right to receive education, based on other, not necessarily liberal perspectives. These entail primarily neo-Aristotelian and communitarian approaches. In order to be part of a community and influence the character of that community, each person must recognise their own inherent capabilities, such as the skills acquired in the course of primary and secondary education. Communitarian approaches express an integrated perspective holding that community membership rests on three levels of rights—civil rights, political rights and socio-economic and cultural rights (especially the right to education)—that are conceived of as complementary.

However, because of the strains it places on the nation’s coffers, the right to receive education also raises problems related to eligibility for these rights. We now propose a preliminary delineation of the scope of eligibility for the rights in question.

### *I Education: A Human or a Civic Right?*

Modern theories of the state argue that governments ought to guarantee some basic freedoms to those who enjoy state protection. Regarding the right to receive education, the respective question concerns the appropriateness of making this right available exclusively to a country’s citizens. Might not additional groups be considered eligible, too? This question is especially relevant with respect to children of refugees, immigrants or foreign workers. Yet because education is a pre-condition for the exercise of basic human rights—individual autonomy, human dignity and freedom—the right to receive education is a universal human right, not limited to citizens.

The right to receive education consigns to the state certain ‘positive duties’, specifically, the obligation to bear the cost of each additional person (or student) partaking of the system’s services. The courts in many countries have recognised that the right to education is intrinsic, part of the individual’s humanity; this right is therefore to be granted to all citizens (especially the poor, prisoners or other persons living on the margins of society) as well as to non-citizens (eg, the children of illegal

<sup>20</sup> See A Giddens, *The Third Way – The Renewal of Social Democracy* (Cambridge, Polity Press, 1998) 102–3, 109–11, 125–6. Within the framework of the comprehensive programme that Giddens terms ‘the social investment state’, investment in education, especially among the poor, plays a central role.

immigrants).<sup>21</sup> We should note here that residents who are not citizens also carry the economic burden of financing the right to education, even if indirectly (eg, by paying taxes). In contrast, occasional tourists, even if they are ‘human beings’, are not entitled to enjoy the right to education in its positive sense. Eligibility for the right to education hinges, therefore, on a long-term relationship between the state and the individual.

### *ii The Child’s Right to Receive Education*

International as well as comparative law has determined that any person can be eligible to receive education. However, the person eligible for this right is usually a child. A recently evolving trend defines the child’s right to education within the broader framework of ‘children’s rights’.<sup>22</sup> A child’s right to receive education can thus be conceived as autonomous and self-contained.

### *iii The Adult’s Right to Receive Education*

As stated previously, children are generally considered the main parties eligible to receive education; in reality, however, this is not always the case. Recognition of the enduring interest in education and training and the permanent need to update knowledge in order to keep pace with life’s changes justify extending eligibility for the right to receive education to adults.<sup>23</sup> A person’s interest in receiving the basic education that provides people with the fundamental capacities to survive in modern society is quite powerful, particularly among adults, who, as breadwinners, carry the weight of the responsibility for caring for themselves and their families.

In general, we should differentiate between the two main instances in which an adult (a person more than 18 years of age) is eligible to receive education. The first instance involves adults who were prevented from receiving a basic education when they were children, for example, due to conditions of incarceration.<sup>24</sup> An additional example is that of adults who

<sup>21</sup> In a famous case, the US Supreme Court invalidated a law that denied children of illegal immigrants the right to education in the public school system. See the *Plyler* case, above n 15.

<sup>22</sup> JM Eekelaar, ‘The Emergence of Children’s Rights’ (1986) 6 *Oxford Journal of Legal Studies* 161, 172–3.

<sup>23</sup> On the right of adults to receive education in international law see Hodgson, above n 5, 179–81.

<sup>24</sup> See, eg, Art 160(2) of Taiwan’s Constitution: ‘All citizens above school age who have not received elementary education shall receive supplementary education free of charge and shall also be supplied with books by the Government’.

emigrated from a country that does not provide appropriate basic education.

The second instance of adult eligibility for receiving education arises when adults who did not take advantage of the right to receive a basic education (primary and secondary school) later become interested in receiving state-funded university or other forms of higher education (particularly training beyond vocational high school).<sup>25</sup> Higher education is the key to social integration. Several modern Western states have found access to higher education worthy of inclusion among other constitutional rights to education. This right often includes free higher education.<sup>26</sup> Yet, exceptions notwithstanding, the majority of countries throughout the world are unwilling to recognise the right to subsidised or fully funded higher education.

#### *iv Group Rights*

An additional aspect of the right to receive education from the state involves the support given to private schools in general and to private schools run by minority groups in particular. The right to receive support for these schools rests on the right of individuals or groups to influence the educational content transmitted to their children. This feature links the positive right to receive education with the negative right to select and influence the curriculum. The ensuing linkage results from the fact that major aspects of the right to influence the curriculum (dealt with below) are ineffective without state assistance in their implementation. Thus, for example, the right to establish private schools is rarely realised without state financial support. Rights to education granted by law to minority groups on the basis of culture, religion, language or nationality are similarly often meaningless without state support.<sup>27</sup>

<sup>25</sup> See, eg, Art XIV, s 2(5) of the Philippines' Constitution: '[The state shall] Provide adult citizens, the disabled, and out-of-school youth with training in civics, vocational efficiency, and other skills'.

<sup>26</sup> See above n 9. However, due to the high costs, opposing trends can also be observed in nations shifting from the model of full state funding of higher education to the model of funding higher education privately or by means of state loans. The state loan model is appropriate to the funding of professions such as law, a field whose graduates are expected to eventually earn high incomes.

<sup>27</sup> See Y Tamir, 'The Chronicle of a Preordained Failure' in D Chen (ed) *Education Towards the 21st Century* (Tel Aviv, Ramot, 1995) 425, 434-5, where the author analyses the relationship between multiculturalism and the requirement that the state defend and support educational institutions run by minority groups.

## B The Right to Choose Education

Provisions devoted to education in international covenants<sup>28</sup> and national constitutions<sup>29</sup> include, among other things, arrangements meant to guarantee the individual's right to choose education. This right, negative in essence, belongs to the first-generation family of rights—civil and political rights. That is, whenever the right to choose education is made available to a person (a child or their parents), their exercise of that right denies other entities the power to intervene with that choice or to influence the respective curriculum. Under the broad umbrella of the right to choose education can be found:

- The parental right to choose a school or recognised educational stream available within the state-run public school system.<sup>30</sup>
- The parental right to send their children to private schools and to establish new private schools as alternatives to the state-run public school system.<sup>31</sup>
- The parental right to teach their children at home (home schooling).<sup>32</sup>
- The person's right to obtain higher education (usually resting on capabilities and skills).<sup>33</sup>
- The right to academic freedom in institutions of higher learning.<sup>34</sup> Academic freedom is important because it ensures the variety that expands the individual's range of options within education.

<sup>28</sup> See Art 26(3), UN Universal Declaration of Human Rights 1948; and Arts 13(3) and 13(4), UN International Convention on Economic, Social and Cultural Rights 1966.

<sup>29</sup> See, eg: Art 29(2), 29(3), South Africa's Constitution; Art 27(3), 27(6), Spain's Constitution; Art 42(2), Ireland's Constitution; Art 7(2), 7(4), Germany's Basic Law; Art 70(3), Poland's Constitution.

<sup>30</sup> See, eg: Art 27(3), 27(6), Spain's Constitution; Art 37(3), Estonia's Constitution.

<sup>31</sup> For examples of constitutions that guarantee the right to establish private schools, see: Art 7(4), Germany's Basic Law; Art 27(6), Spain's Constitution; Art 45, Macedonia's Constitution; Art 66, Croatia's Constitution; Art 70(3), Poland's Constitution; Art 25(2), Ghana's Constitution.

<sup>32</sup> This right has already been recognised as a constitutional right; see, eg: Art 42(2), Ireland's Constitution of 1990; Art 76, Denmark's Constitution. On the right to home schooling in the US see CJ Klicka, *The Right to Home School* 2nd edn (Durham, Carolina Academic Press, 1998); CJ Klicka, *The Right Choice: The Incredible Failure of Public Education and the Rising Hope of Home Schooling* (Gresham Oregon, Noble Publishing, 1992). On the right to home schooling in Israel see T Meisels, 'Home-schooling: The Right to Choose' (2004) 10 *Israel Affairs* 110. On the right to home schooling in international and comparative law see Hodgson, above n 5, at 181–3.

<sup>33</sup> See, eg: Art 49(3), the Belarus Constitution; Art 70F(2), Hungary's Constitution; Art 35(7), Moldova's Constitution.

<sup>34</sup> See, eg: Art 27(10), Spain's Constitution; Art 70(5), Poland's Constitution; Art 16(3), Finland's Constitution; Art 46(1), Macedonia's Constitution; Art 32(6), Romania's Constitution; Art 79(2), Paraguay's Constitution; Art XIV, s 5(2) of the Constitution of the Philippines.

The right to choose education or influence its curriculum is generally discussed whenever the law fails to establish a duty to provide education. Alternatively, such mention also occurs whenever the law permits flexibility in the application of compulsory education—that is, the duty to send a child to school is stipulated but not the specific educational content to be transmitted. Two major rationales underlie the right to choose education. The first is derived from the centrality of individual autonomy, liberty and human dignity. When dealing with the right to receive education, we indicated that a person has a powerful interest in receiving education. This contention was supported by the argument that, in modern society, education is a major factor in the realisation of individual autonomy, liberty and human dignity. Anyone having a powerful interest in receiving education will also have a powerful interest in determining the curriculum taught. By exercising influence on the curriculum, an individual takes advantage of the opportunity to affect their cultural, linguistic (what languages will be spoken in their community), professional (what profession they will practise in the future) and other environments. This right to affect one of the core mechanisms which construct one's self-identity, prospects and personality, among other things, flows from the constitutional rights of individual autonomy and freedom.

The second rationale for recognising the right to choose education rests on the fact that education is a condition for the perpetuation of those aspects of culture considered necessary for an individual's realisation of their freedom, human dignity and self-identity. The right to choose an educational stream is therefore crucial for a minority group's (eg, religious, linguistic or other) preservation of its culture and uniqueness.

Like other rights, the right to choose education raises issues of eligibility, to which we briefly turn next.

#### *i The Child's Right to Choose Education*

The child is the primary subject eligible to enjoy the benefits of education; hence, the child has the strongest natural interest in choosing the type of education they will receive. The right to choose an educational stream and curriculum is nonetheless delegated to parents because children are generally incapable of foreseeing the long-term implications of their decisions. True choice is therefore considered to lie beyond the child's reach. Only in later life will the child be capable of making a forthright account of their own inclinations and wishes. This situation warrants placing the right to choose an educational stream and curriculum with the parents. However, should the child be adamant in their position, parents are obliged to consider their thoughts and preferences.<sup>35</sup> Considering these

<sup>35</sup> For an elaboration of the issue see the minority opinion presented by Justice Douglas in the well-known *Yoder* case, above n 15, 241–6.

limitations and the need to maintain educational oversight, the scope of the maturing child's rights is narrower than that of the rights enjoyed by adults. It thus appears appropriate to assign the responsibility for making decisions regarding the educational stream and the curriculum to parents and children in tandem, within the context of mutual consultation and persuasion.

### *ii The Adult's Right to Choose Education*

An adult eligible to receive education, whether basic education which they had never previously obtained or higher education, is assumed to be interested in the type of education they will receive and the curriculum they will be required to learn. After all, education is meant to contribute to the development of the individual. When the person eligible to receive education is an adult and capable of rational decision-making (even if they lack formal education), it is appropriate to grant them the exclusive right to influence the educational curriculum.

### *iii The Parental Right to Choose Education*

Parents' functions as guardians of their children endow them with specific rights and duties. We may nonetheless ask whether any justification exists for awarding parents the right to choose education for their children as opposed to relegating it to the state's purview. The arguments supporting a liberal stance can be presented on two levels.

The first level relates to the child's interests. The child has a powerful interest in obtaining appropriate education, and thus the child also has a strong interest in determining the educational stream and curriculum. However, in the absence of any real capacity to make decisions concerning their own status and future—and thus their educational needs—another entity must take on such tasks. Following the liberal tradition, among all the possible bodies, the child's family (ie, parents) is considered most suitable to fulfil these obligations.<sup>36</sup>

The natural ties of love and concern that exist between parents and children motivate parents to want the best for their children; consequently they are prepared to do their utmost to attain that goal. Parents are not simply stakeholders who see their children as instruments to promote their own objectives (even if those objectives are ideological, such as knowledge, religion or social justice). Stated differently, parents, more than any other persons, will probably be guided by their perception of their children's best interests when choosing an educational framework. This is the position,

<sup>36</sup> B Barry, *Culture and Equality – An Egalitarian Critique of Multiculturalism* (Cambridge, Polity Press, 2001) 202. See also the comments made by John Locke in his classic (originally published in 1690) *The Second Treatise of Government* (Indianapolis, Bobbs-Merrill, 1952) 33.

and perhaps the only position, that is commensurate with the basic assumptions at the foundation of the concept of human dignity. Until proven otherwise, this line of argument legitimates awarding this power to parents in the course of their guardianship duties. Freedom of action itself embraces the right of parents to exercise their judgement in all matters pertaining to the child's education: what school to attend, the educational philosophy applied (ie, educational stream) and what will be taught.

The second level addresses the interests of parents. Parents have strong interests, distinct from those of their children, in retaining the right to influence the curriculum taught. The parental right to choose education for their children may be based on the human and material capital they invested when rearing their children. This awards them the right to determine their children's education as they see fit. The extent of this argument is, however, limited because, within the context of the modern welfare state, the public's parallel right to determine the content and structure of education may be recognised on the basis of the public's alleged (economic) contribution—often not less than that of parents—to raising children.

The other factor inspiring this parental right is the need to protect children from state arbitrariness: that is, the parental right to determine their child's future weighed against the dangers arising from the use of education by the state as a medium for indoctrination. Parental rights therefore also reinforce pluralism.

In sum, from a liberal perspective, dividing the obligation to take responsibility for a child's education between parents and the formal state-run education system can be seen as justified. The various arguments we have discussed corroborate the position that parental responsibility for their children's education should be accompanied by the right to choose an educational stream or at least to influence the system's impact through the exercise of influence on the curriculum. From this perspective, the state's role is limited to preventing parental abuse of their power over their children, captured in the prohibition against corporal punishment or the prohibition against choosing an educational stream that will impede the child's integration into the larger society.

#### *iv The Right of (Religious, Ethnic or Cultural) Minority Groups to Influence Curricula*

We have shown that the right to choose a child's education generally rests with parents. However, in some instances, realisation of this right is determined by the relationship between parents and the national, religious or cultural minority to which they belong. Minority groups are known to have an interest in establishing private schools in which

a curriculum focusing on the group's distinguishing characteristics—religion, language, culture, customs and so forth—is taught. This justification for setting up such schools also hinges on the group's desire to preserve those characteristics. However, from a liberal perspective, a group has no legal right to act in place of parents with respect to the decision to send children to these special or any other (public or private) schools. For this right to be transferred, agreement must be obtained from the parents. That is, considered from a formal perspective, minority group rights do not contradict parental rights because parents alone are entitled to have the last word on the subject. However, formal parental rights have limited practical impact when confronted with minority group practices or beliefs. In the majority of cases where parental preferences contradict those of the group, no genuine choices are available if parents wish to remain within their natural environment and familiar cultural framework. In many instances, the only genuine option available is that of being able to opt out of the group, a costly act from the standpoint of the family and the individual. Considered in this light, it soon becomes clear that in the majority of such cases, the effective balance of power regarding the choice of educational curricula swings towards the minority group rather than towards the legal-formal rights of the parents.<sup>37</sup>

### C The Right to Equal Education

The right to equal education is derived from the general principle of equality. Many constitutions stipulate the 'right to equal education' in addition to universal equality.<sup>38</sup> The reason for this targeted, formal protection of the right to equal education is that inequality is demonstrably one of the most common problems to surface within the sphere of education.<sup>39</sup> The right to equal education—like the principle of universal equality—is not a mechanical but rather a substantive right. In order to achieve the goal of equal education, variance must be accepted as a governing constraint, meaning that more resources should be allocated to underprivileged, children with special needs requiring special types of

<sup>37</sup> In connection with this argument see Barry, *ibid.*, 207.

<sup>38</sup> See, eg: Art 29 of South Africa's Constitution; Art 44(2) of Macedonia's Constitution; Art 26 of Japan's Constitution; Art 70(4) of Poland's Constitution; Art 24(4) of Belgium's Constitution; Art 16(1) of Singapore's Constitution; Art 159 of Taiwan's Constitution.

<sup>39</sup> C De La Vega 'The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?' (1994) 11 *Harvard Blackletter Law Journal* 37.

education<sup>40</sup> and groups formerly suffering historic discrimination in educational institutions.<sup>41</sup>

Substantive equality in education is manifested in the practices employed to award special rights to minority groups for the purpose of preserving their culture and traditions (eg, the study of the minority's language in addition to the study of a country's official language or allocation of additional hours for the study of the minority's traditions).<sup>42</sup> Especially important in this context are the special schemes resulting from a federal structure in which different levels of government award either special/supplemental rights or educational autonomy to specified regions.<sup>43</sup> This phenomenon raises the question of whether the award of supplemental rights to minorities discriminates against the majority culture. This situation may seem paradoxical: democratic states are expected to take a neutral stance towards the majority culture, yet the same authorities are mandated to intervene for the purpose of assisting minorities. The special/supplemental rights awarded to minorities, rights that allegedly introduce inequality, can, however, be justified by the majority culture's capacity—based on its being the majority culture—to sustain a fairly homogeneous environment even without the benefit of special/ supplemental rights. We should recall, however, that in many cases the majority maintains its homogeneity by recourse to other mechanisms, such as immigration and citizenship laws. The outcome of these laws is a situation of inequality that can be rectified, at least partially, through the award of special/supplemental rights to minorities.<sup>44</sup>

<sup>40</sup> Regarding the right to special education for those with special needs, see, eg: Art 16(2) of Finland's Constitution; Art 74(2) of Portugal's Constitution; Art 59(1) of Albania's Constitution; Art 45(3) of China's Constitution; Art 63 of Croatia's Constitution; Art 38(3) of Italy's Constitution; Art 81 of Venezuela's Constitution; Art 17(3) of Malta's Constitution; Art 52(2) of Slovenia's Constitution.

<sup>41</sup> See, eg, Art 29(2)(c) of the South African Constitution: 'the state must consider all reasonable educational alternatives, including single medium institutions, taking into account... the need to redress the results of past racially discriminatory laws and practices'.

<sup>42</sup> For constitutions that grant special education rights to linguistic or religious minorities, see, eg: Art 53(5) of the Ukraine's Constitution; Art 26(2) of Russia's Constitution; Art 16(2) of Singapore's Constitution; Art 37(4) of Estonia's Constitution; Art 34(2) of Slovenia's Constitution; Art 30(1) of India's Constitution; Art 75(17) of Argentina's Constitution; Art 77(2) of Paraguay's Constitution.

<sup>43</sup> See, eg: s 23 of the Canadian Charter of Rights and Freedoms, 1982; D Reaume and L Green 'Education and Linguistic Security in the Charter' (1989) 34 *McGill Law Journal* 777.

<sup>44</sup> The famous decision passed down in 1935 by the Permanent Court of International Justice with respect to the schools maintained by the Greek minority in Albania (*Advisory Opinion on Minority Schools in Albania*, PCIJ (1935) Series A/B no 64) should be seen in this light. The Albanian government had closed the special private schools run by the Greek minority, claiming that closing all the country's private schools was egalitarian as it applied to both the Greek minority and the Albanian majority. The court rejected this position by a majority vote and decreed that the closing of all private schools discriminated against the Greek minority, which could continue to study in the Greek language only in private schools. It was also decreed

## D Compulsory Education—The Obligation to Attend School

Compulsory education generally refers to two dimensions: first, school attendance for the purpose of receiving education over a fixed period of time (number of years)<sup>45</sup>; second, the specific curriculum determined by the state<sup>46</sup> or other requirements introduced by the educational framework, such as the obligation to wear a school uniform.<sup>47</sup>

Compulsory education allegedly hinders the exercise of individual rights (in this case, the right to receive and the right to choose education). From this perspective, laws that mandate compulsory primary or secondary school education violate the rights of parents (or children) uninterested in school attendance for a stipulated or indeed any period of time. Moreover, compulsory education obliges the individual to learn designated subjects at

that even if schools were not crucial to the Albanian majority, they were essential to the Greek minority. Hence, the closing of all private schools operating in the country represented discrimination against the minority. For a discussion of the decision see P Keller, 'Re-thinking Ethnic and Cultural Rights in Europe' (1998) 18 *Oxford Journal of Legal Studies* 29, 50.

<sup>45</sup> See, eg: Art 13(2)(a), the International Covenant on Economic, Social and Cultural Rights 1966; Art 26(1), the Universal Declaration of Human Rights 1948. For national constitutions that have enacted compulsory education, usually primary school education, see, eg: Art 112 of Latvia's Constitution; Art 44(3) of Macedonia's Constitution; Art 27(7) of Spain's Constitution; Art 34(2) of Italy's Constitution; Art 16(3) of the Greek Constitution. We should note here that among all the countries known to us, where compulsory education is not expressly decreed in the constitution, it is mandated within the framework of regular education laws.

<sup>46</sup> International covenants, like various constitutions, do not relate to specific school subjects. Instead, they relate to the curriculum in indirect and general terms. See, eg, Art 13(1) of the International Covenant on Economic, Social and Cultural Rights 1966: 'The States Parties to the present Covenant... agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace'. See also Art XIV s 3 of the Philippines' Constitution.

<sup>47</sup> For instance, in France, it was questioned whether the prohibition enacted by the government against wearing traditional Muslim dress (headscarves or *hija'ab*) when attending public schools does not contradict the constitution and represent discrimination against Muslims in comparison to Christians and Jews. For a discussion see CD Baines, 'L'Affaire des Foulards – Discrimination or the Price of a Secular Public Education System?' (1996) 29 *Vanderbilt Journal of Transnational Law* 303; E Steiner, 'The Muslim Scarf and the French Republic' (1995–96) 6 *King's College Law Journal* 146; see also, in Great Britain: *R (on the application of Begum (by her litigation friend, Rahman)) (Respondent) v Headteacher and Governors of Denbigh High School (Appellants)* House of Lords [2006] UKHL 15. In this case, given in March 2006, the House of Lords decided to allow a maintained secondary school to insist on the wearing of school uniform and to disallow the wearing of the Moslem *hija'ab* (as requested by a pupil at the school, represented by herself and her brother, on the grounds that it concealed to a greater extent the contours of the maturing female body). See also the last important decision on this issue of the European Court of Human Rights: App No 44774/98 *Leyla Sahin v Turkey* (November 2005).

the same time as it limits their freedom to choose the curriculum to be learned.

Compulsory education, however, has become a cornerstone of present attitudes toward education internationally, as indicated by its incorporation into the national traditions of the majority of the world's countries. This worldwide understanding should inform our search for the grounds to explain the phenomenon. It can be argued that compulsory education is rationalised by reasons of the *general welfare*. We have shown that general welfare can be employed as a reason to award the right to education because, beyond the benefits gained by any particular individual, education benefits all of a nation's citizens and residents. Similarly, the public good also provides grounds for the imposition of compulsory education. To meet society's needs, skills and professions must be inculcated; the same can be said for the common values essential to the creation of social cohesion. In democratic societies, awareness of common values contributes to the maintenance of a democratic régime. Yet, compulsory education contains the potential to violate individual freedom in general and rights to education in particular; it is therefore incumbent upon us to examine this issue from the perspective of *human rights*.

With respect to the right to receive education, compulsory education can be defended on two grounds; the first is paternalism. The right to receive education is so crucial that it justifies imposition of compulsory education. Paternalism is more persuasive as a motive when the subject is a child still unable to make vital decisions. Yet, the paternalism argument dwindles in salience when the person taking advantage of the right to receive education is an adult capable of making decisions.

Second, imposition of compulsory education is also grounded in the need to protect the child from her parents. This argument recognises the child as an autonomous entity, independent of her parents. Viewed from this perspective, compulsory education is meant to protect the child's right to receive education in the presence of shortsighted parents or guardian, who wish to deny the child enjoyment of that right. In other words, recognition of the child's autonomy makes it plain that compulsory education is not targeted at the child, the right's holder, but at her parents (and in some cases, her guardians or employers). By imposing compulsory education, the state institutionalises the parents' duty to guarantee that their child attends school even if doing so contradicts the parents' wishes. Such legislation is therefore positive in character as it ascribes the responsibility to realise the right to specific entities, in this case, a child's parents.

### III CHALLENGES TO THE RIGHT TO EDUCATION—FROM OUTSIDE AND WITHIN

Violations of the various educational rights may originate in the behaviour of three main bodies: the state, parents and minority groups. Although the mechanisms of these violation may vary, we briefly focus on those most commonly observed; we likewise illustrate how the courts have confronted them.

#### A Infringements by the State

The state is the major entity liable to violate the various rights to education, given the dependence of schools, children and parents on the state and its budget. The most common violations inflicted by the state's refusal to budget for education are: first, infringement of an individual's (usually a child's) right to receive appropriate education in a system supported by the state, and, second, violation of an individual's (or a group's) right to equal education. The high costs of education inevitably generate conflict between the need to fund education—which represents only one of society's many needs (such as health, security and so forth)—and attempts to reduce the costs involved.

In response to such political and economic constraints, recognition of the right to receive education (and that right's protection in a constitution or international covenant to which the state is a party) may culminate in the formation of minimal standards. Deviations from those standards are subsequently subject to judicial review. For similar reasons, institutionalisation of the right to equal education can support court attempts to cope with discrimination in education. Recognition of the right to receive education as well as the right to equal education may thus shift education to a higher place on the public agenda.

A notable example of the importance of recognising the right to receive education and the right to equal education in the face of contradictory government policy is provided by an Israeli case decided in 2002–2003.<sup>48</sup> According to the Compulsory Education Law 1949, primary and secondary education in Israel is free. This law has been supplemented by the Special Education Law 1988, which provides for free education in special schools for children with special needs. However, neither law directly addresses the following issue: if parents of children with special needs wish to enrol their children in mainstream schools in the hope that this will facilitate their children's integration into society (following the

<sup>48</sup> HCJ 2599/00, *YATED – Association for Parents of Downs Syndrome Children v Minister of Education*, [2002] 56(5) PD 834.

approach of ‘inclusion’), who is to incur the additional costs (primarily, individual teaching assistance hours)—the parents or the State? Until 2002, Israel’s Ministry of Education required parents of children with special needs to cover some or all of these costs, a policy that resulted in the de facto exclusion from regular schools of children with special needs from families that were not affluent. This policy was the subject of a petition brought before the Supreme Court by a group of parents of children suffering from Down’s syndrome who sought to shift the costs of integrating their children in regular schools to the government.

Justice Dalia Dorner, writing for the Supreme Court in the 2002 *YATED* case, accepted the petition and ordered the Ministry of Education to cover the costs of inclusion. The decision is particularly important due to its argumentation. Despite the fact that Israel’s basic laws (which are part of the Israeli Constitution in the making) do not specifically mention the right to education, Justice Dorner held that Israeli law does recognise this right. The existence of this right is independent of any basic law and ought to be viewed as part of Israel’s (still unwritten) bill of rights.<sup>49</sup> She based this conclusion on a variety of legal sources—international law, comparative law (citing provisions in the Belgian, South African, Spanish, Irish, German and US Constitutions), Jewish law, education legislation and judicial dicta regarding education’s importance. Justice Dorner also noted in this regard that the right to education is linked to the principle of equality, given education’s potential to close social gaps. After establishing the fundamental right to education, Justice Dorner proceeded to argue that the right to special education derives from this as well as from the right to equality.<sup>50</sup>

In the second part of her decision, Justice Dorner held that the Special Education Law 1988 must be construed in light of the Israeli legal system’s fundamental values—the right to education, the principle of equality and the right to special education deriving from both.<sup>51</sup> She further held that the law ought to be construed in accordance with international obligations accepted by the state of Israel—enumerated in Article 13 of the ICESCR and Articles 23, 28 and 29 of the Convention on the Rights of the Child—that specifically deal with the right to education and obligations to address the special needs of disabled children. The Ministry of Education’s interpretation of Special Education Law (1988) was thus found to be unlawful.

Violations of a third type concern state infringement of the individual’s right to choose education. In general, such events transpire in the absence of any legitimate grounds (eg, arbitrary behaviour or political motives) or due to strict enforcement of standard compulsory education regulations.

<sup>49</sup> *Ibid* 843.

<sup>50</sup> *Ibid* 845.

<sup>51</sup> *Ibid* 846.

The ensuing conundrum rests on the fact that strict enforcement of compulsory education can obviate the parental right to choose education for their children. The well-known decision passed down by the European Court of Human Rights regarding sex education in Denmark offers an appropriate illustration of this type of violation.<sup>52</sup>

In the past, public schools in Denmark had offered sex education in special classes; parents who objected to this type of education were entitled to request that their children not participate. In 1970 a compulsory sex education curriculum was introduced into Danish schools. According to the new policy, sex education was to be introduced as early as the third grade within the framework of the compulsory education programme, which included subjects such as the Danish language, religious studies, biology, history and so forth. Three Danish couples presented a petition stating that Denmark's sex education policy violated Article 2 of Protocol No 1 of the European Convention on Human Rights 1950, which protects freedom of education and, among other things, compels the state to respect parental convictions regarding education. The government argued that, in the present circumstances, it had not failed to respect the religious or philosophical convictions of the parents because an alternative educational option existed in Denmark, the system of private schools that enjoyed considerable financial support from the state.

The European Commission, as well as the European Court on Human Rights, rejected the Danish government's argument, which was based on a differentiation between the public and the private school systems. It held that with respect to all practices pertaining to teaching and education, the relevant clause of Article 2 stated that all nation parties to the convention were obliged to guarantee respect for the parents' religious and philosophical convictions in public as well as private schools. A decision was demanded as to whether the sex education curriculum transmitted in Danish public schools violated the parents' beliefs. The European Court responded negatively and rejected the petition. A crucial principle was put forward in the judgment according to which the role of the state was to provide education, whether by directly teaching or otherwise transmitting educational information. This role, the court explained, involves, directly or indirectly, the provision of information that necessarily touches on philosophical views or religion. Furthermore, the court ruled, the mandated respect for the parents' convictions can be employed to limit the state's power to provide objective or pluralistic information only in cases when the intent behind transmission of that information is indoctrination:

<sup>52</sup> Application No 5095/71 *Kjeldsen, Busk Madsen and Pedersen v Denmark (Danish Sex Education)*, judgment of 7 December 1976, Series A, No 23, p 50.

The state, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical, and pluralistic manner. The state is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded.<sup>53</sup>

Because Denmark's sex education law was meant to provide Danish children with important information (for example, information regarding abortion, illegitimacy and birth outside marriage as well as contagious sexually transmitted diseases), the curriculum, according to the court's opinion, was acceptable, accurate and scientifically objective. The court stressed that although issues pertaining to sex inevitably penetrate the sphere of values and beliefs, spheres in which the evaluation of facts can readily be transformed into moral judgments, Denmark's sex education curriculum was not intended to indoctrinate or direct students towards any specific types of sexual behaviour. Application of liberal democratic principles, it continued, would lead to the same conclusion.

In sum, this case relates to the fragile balance holding between two contradictory principles: the entitlement of parents to respect for their convictions and state responsibility to provide education appropriate to promoting the general welfare. The same principle, which implies the need to balance state responsibility and authority regarding transmission of education with parental rights, with prohibitions against state indoctrination, also provides the foundations for the negation of those parental rights that prevent the state from imparting indispensable knowledge (in this case, sex education) to the public. At the same time, education authorities are required to act with extreme caution when implementing compulsory education policy without, however, abandoning the objectives of compulsory education. In maintaining the equilibrium between the individual's right to choose education and compulsory education, a certain margin of error must be accepted in order to minimise the likelihood of compulsory education becoming a vehicle for dissemination of the regime's version of the truth. Parents should therefore be granted the option of complying with compulsory education requirements in alternative frameworks, such as private schools or home schooling. At the same time, it should be understood that these frameworks are not amenable to maintaining the same level of state supervision applied in the public school system. Yet such absence of supervision is desirable. If the same degree of oversight were to be applied in private schools and home schooling (both options are very common in the United States), this might lead to duplication of the public school system.

<sup>53</sup> *Ibid* 53.

## B Infringements by Parents and Minority Groups

The main right enjoyed by parents in the sphere of education is the right to choose education for their children in conformity with their own convictions. Nonetheless, realisation of this right contains the potential to violate the child's right to receive education, on two levels: first, parental choices may deny education (partially or fully) to the child; second, parental choices may expose the child to an inappropriate, inadequate or worthless curriculum. In a similar vein, realisation of minority group rights to educate children according to the group's culture may violate the right of individual members (usually children) to receive an appropriate or liberal education.

One well-publicised case that illustrates the conflict between the rights of parents and those of children is that of *Wisconsin v Yoder*, decided by the United States Supreme Court.<sup>54</sup> The respondents were members of the Amish Christian community, residing in the state of Wisconsin. Wisconsin's education legislation stipulated that parents were obliged to send their children to recognised public or private schools until they reached the age of 16; it also imposed criminal penalties on parents who failed to comply. In this case, the respondents had refused to send their children, aged 14 and 15, to school beyond the eighth grade, contending that additional education (secondary or high school education) was superfluous for their traditional way of life and would, in addition, expose them to the ills of secular society.<sup>55</sup> The respondents were charged and convicted of transgressing Wisconsin's compulsory education law and fined \$5.00.

A review of the evidence presented in the criminal case indicates that the respondents, following traditional Amish strictures,<sup>56</sup> believed that sending their children to secondary school, whether public or private, contradicted their religion and way of life. Attendance at a public high school, they felt, would expose Amish youngsters to spiritually dangerous environments and distance them physically as well as emotionally from the community at a critical stage in their development. Furthermore, such a practice would

<sup>54</sup> *Yoder* case, above n 15.

<sup>55</sup> *Ibid*, 210–12. The respondents did not object to their children attending primary school because they believed that their children needed to acquire certain basic fundamental skills, such as the ability to read the Bible, be good farmers and citizens and be capable of negotiating with individuals who did not belong to the Amish community to the degree that this was required in the course of their daily lives. Yet the respondents were convinced that secondary education was undesirable because it contributed to the development of values that distanced individuals from their Creator.

<sup>56</sup> *Ibid* 209–10. The decision in the *Yoder* case sketches the background necessary to understand the community. The Amish arrived in the United States during the eighteenth century from Switzerland. Members of the cult believe in the return to simplicity and early Christianity. According to their traditions, the Amish believe that personal salvation requires a life lived in isolation from materialistic modern industrial society, far from its detrimental influences. The idea of a life antagonistic to modernity and its values lies at the core of its beliefs.

expose their parents to church censure at the same time as it would endanger the spiritual salvation of the respondents and their children. The majority opinion accepted the respondents' position and ruled that the First Amendment of the Constitution, which protects freedom of religion, allows granting the children an exemption from secondary school education. The court also ruled that because the community's objections to formal compulsory education were profoundly anchored in their religious beliefs, compulsory secular secondary education illegally violates parental rights to determine their children's upbringing.<sup>57</sup>

Justice Douglas, representing the minority opinion, opposed the view expressed by the majority opinion. According to Justice Douglas, in cases such as these, the child's rights to receive appropriate education must be considered.<sup>58</sup> In such circumstances, the justice asked, what is the appropriate balance to be achieved between the three parties or stakeholders: the state, parents and children? Justice Douglas was convinced that, in such circumstances, children are entitled to express their own opinions and reveal their views before the court.<sup>59</sup> Thus, Justice Douglas joined the majority in respect of one of the respondents, whose daughter testified to her objections to secondary education but did not agree with the majority's opinion in respect of the other two respondents, in the absence of the opportunity to hear the children express their own views and desires regarding the issue before the court.

The position taken by the court in this case favoured the group (the group's right to freedom of religion) at the expense of the individual (the right of a person—the child—to form their own opinions).<sup>60</sup> Considered

<sup>57</sup> *Ibid* 216. In the majority opinion, Justice Berger stated: 'The record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living'. And see *ibid*, 218-19: 'The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with... their religious beliefs... enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs'.

<sup>58</sup> *Ibid*. As expressed in the minority opinion: 'Our opinions are full of talk about the power of the parents over the child's education... And we have in the past analyzed similar conflicts between parent and State with little regard for the views of the child... Recent cases, however, have clearly held that the children themselves have a constitutionally protectable interest. These children are 'persons' within the meaning of the Bill of Rights'.

<sup>59</sup> *Ibid* 244-5: 'While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an oceanographer. To do so he will have to break from the Amish tradition. It is the future of the student, not the future of the parents that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that is the preferred course, or he may rebel'.

<sup>60</sup> Again, it should be noted that the right to enjoy the exemption from compulsory secondary education was awarded to the parents and not the Amish as a group. Nevertheless, due to the

from a liberal stance, the court's argument is problematic because it ignored the impact of the decision on the capacity to make real choices, a right granted to minority group members. This point requires clarification: liberal tolerance of minority group positions rests on respect for individual rather than group freedoms. In consequence, liberalism cannot sanction any limitation that violates the right to education, freedom of conscience or other freedoms granted to individual members of minority groups.

Importantly, this critique concurs with international law. Various international covenants recognise the rights of minority groups to establish their own school systems but qualify this right with the requirement that its exercise not violate the rights of the group's individual members. Thus, for example, Article 5(1)(c) of the Convention Against Discrimination in Education, 1960, recognises the right of national minorities to maintain and administer their own school systems under the condition that they do not employ this right as a means to prevent their members from understanding the culture and language of the majority or from participating in public activities, or as a means to violate national sovereignty.

#### IV CONCLUSION

Within the complex of socio-economic rights, the right to education (in its broadest sense) has won greatest protection in national constitutions, a protection well warranted. This chapter has indicated the importance of education and the justifications for its protection. Constitutional protection endows rights to education with a firm normative status that reinforces the status of education within national political agendas and strengthens its position relative to other competing interests. However, the laconic wording that characterises constitutions cannot release the courts from the necessity of balancing rights in those cases where rights to

ties binding the parents to the community, it was rightly decided to view the exemption as awarded to the Amish as a group (although the right would be exercised on an individual basis by the parents of each child) because the parents accept the group's traditions and beliefs. This stance is expressed in the following statement: Barry, above n 36, 208–209: 'In practice, no doubt, any Amish parents who aspired to something better for their children than a one-room schoolhouse with an unqualified teacher educating them for 'farm and domestic work' would pack up and leave. But if they stayed and sought to enroll their children in the local high school they would unquestionably be censured and, if they remain obdurate, excommunicated... Regardless of the answer, however, it still remains true that *Yoder* attributed rights to individual parents and not to Amish communities... Although it is the parents who sign up to exercise the right to keep their children out of school after the eighth grade, we may say – rather more appositely than in the case of most of the biblical tags with which the Amish lard their petitions and declarations – 'The voice is Jacob's voice, but the hands are the hands of Esau'.

education either conflict with other constitutional interests or contradict one another. Within this context, the decisions presented here represent crucial illustrations of the range of conflicts arising in the practice of these rights.