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John Warwick Montgomery

The Justification of Homeschooling Vis-A-Vis the European Human Rights System

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Edited by:
Goethe University Frankfurt am Main
Department of Law
Grüneburgplatz 1
60629 Frankfurt am Main
Tel.: [+49] (0)69 - 798 34341
Fax: [+49] (0)69 - 798 34523

John Warwick Montgomery, Ph.D., D. Théol., LL.D., Purcellville, Virginia / USA

The Justification of Homeschooling Vis-A-Vis the European Human Rights System

Abstract: The very idea of the European Convention on Human Rights is to bring the laws of contracting states into line with fundamental human rights principles. Where the Convention is not explicit, the Court should never rule restrictively so as to reduce the scope of a general right. In the case of homeschooling, the Convention sets forth the general principle that "the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions." It must not, therefore, allow a contracting state to eliminate a means of achieving this desired by parents—unless the state can show that the means in question is ineffective.
Keywords: Homeschooling, home education, human rights, European Court, ECHR, parental rights, educational freedom

I. Introduction

The European Court of Human Rights has taken no official position on the legitimacy of homeschooling, so it may appear premature to raise the question in that context. However, a related case, brought by parents to the Strasbourg Court in 2003 against the German government was declared inadmissible in 2006, and the unpublished opinion suggests that Strasbourg does not view the choice of homeschooling as a parental or a children's right. The opinion reads in part:

> The Court observes . . . that there appears to be no consensus among the Contracting States with regard to compulsory attendance of primary schools. While some countries permit home education, other States provide for compulsory attendance of its State or private schools.

In the present case, the Court notes that the German authorities and courts have carefully reasoned their decisions and mainly stressed the fact that not only the acquisition of knowledge, but also the integration into and first experience with society are important goals in primary school education. The German courts found that those objectives cannot be equally met by home education even if it allowed children to acquire the same standard of knowledge as provided for

by primary school education. The Court considers this presumption as not being erroneous and as falling within the Contracting States' margin of appreciation which they enjoy in setting up and interpreting rules for their education systems. The Federal Constitutional Court stressed the general interest of society to avoid the emergence of parallel societies based on separate philosophical convictions and the importance of integrating minorities into society.[1]

Even though these remarks create no precedent for subsequent cases before the Strasbourg Court, and even though the waters were clearly muddied in this application by applicants' arguments based on their opposition to "sex education [and] the appearance of mythical creatures such as witches and dwarfs in fairytales during school lessons,"[2] it is clear that the issue of homeschooling will not go away in the European context—especially owing to the almost fanatical opposition to it on the part of governmental authorities in Germany and Sweden. We therefore see the matter as worthy of treatment here.

Let us begin with larger—more abstract and philosophical—aspects of the problem before analyzing the issue in the European human rights context.

II. Philosophical Considerations and Their Relevance to Homeschooling

There are three major positions possible in justifying homeschooling or in opposing it. One may take the *libertarian* view: the State has no right (or a very minimal right) to determine the conduct of its citizenry, and therefore parents or children desiring homeschooling should be allowed to practice that educational method if they so desire.

At the opposite end of the spectrum, there is the *statist* view: the State knows best and freedom of individual decision is allowable only where the State does not legislate. If, therefore, the State prohibits homeschooling, that is its right and the end of the matter.

Over against these two philosophies of individual-versus-State action, one encounters the approach of John Locke: there are "certain inalienable rights" possessed by individuals which neither the State, nor even the person herself, should be allowed to take away. Locke's viewpoint, based on historic Christian belief and biblical teaching concerning the creation of man in God's

[1] *Konrad and Others v.Germany,* Application No. 35504/03 (11 September 2006), 7–8. It must be emphasised that this is an unpublished opinion, not appearing in the HUDOC database, and therefore does not constitute any kind of legal precedent, internationally or nationally. No homeschooling case appears in the authoritative list of cases dealing with "Le Droit à l'Instruction (Article 2 du Protocole no. 1)" in Vincent Berger, *Jurisprudence de la Cour Européenne des Droits de l'Homme* (11th ed.; Paris: Sirey/Dalloz, 2009), 625–43.

[2] Ibid, 2.

image, deeply influenced the American founding documents (especially the Declaration of Independence) and served as background for the modern human rights movement.[3]

If, however, the Lockean position is seen as superior to the libertarian and the statist philosophies, the question immediately arises: *what is the specific content* of those rights deserving to be protected as inalienable? In terms of homeschooling, does the State's concern for the education of the citizenry constitute the right to prohibit homeschooling? Or does a parent's concern to ensure the best education for his offspring justify homeschooling as an inalienable right? And suppose the child wishes to be homeschooled: does the child have an absolute right to decide on the education she should have?

As for the State's right to educate, an important distinction needs to be made. One may well be able to argue that a properly educated populace is essential to a functioning State—particularly if one is thinking in terms of modern, representative democracies. But even if that right is conceded, it does not follow that the State has the right (a) to indoctrinate or (b) to determine and delimit the methods of educational instruction. As for indoctrination,

> In matters of educational instruction the state must respect the philosophical and religious opinions of each person and this obligation applies equally in public and in private education. This requirement was included in the Protocol [No. 1 to the European Convention on Human Rights] as a result of clear evidence that during the Second World War totalitarian regimes had a powerful tendency to impose their ideological propaganda on the young, notably through cutting them off from the influence of their parents. Article 2 [of Protocol 1] therefore prohibits all forms of indoctrination of the young in the educational system and the parents themselves have the responsibility to see that this prohibition is carried out. It follows that the state's obligation to respect the philosophical and religious convictions of the parents prohibits all forms of indoctrination by the state.[4]

The Protocol referred to here reads as follows:

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

It is worth pointing out that "indoctrination" need not (and in our modern, secular era, often is not) limited to sectarian religious ideas. Thus, were a state to impose "civil religion" (to employ

[3] Cf. John Warwick Montgomery, *Human Rights and Human Dignity*, 2d ed. (Calgary, Alberta: Canadian Institute for Law, Theology and Public Policy, 1995), *passim.*

[4] Jean-Loup Charrier (ed.), *Code de la Convention Européenne des Droits de l'Homme* (Paris: Litec, 2005), 229 (our translation). Cited authority: *Graeme v. United Kingdom,* Application No. 13887/88 (5 February 1990, before the Commission), *DR* 64/158.

sociologist Robert Bellah's expression) on its populace, this should be seen to run contrary to the European Convention—examples: teaching only an atheistic cosmology by refusing to present intelligent design as a legitimate alternative; teaching only Darwinian evolutionary theory as if it were scientific fact and not subject to serious scientific criticism. A religion of secularism is as capable of indoctrination as traditional religious and denominational views—indeed, even more so today in our officially pluralist, but in fact very conformist times.

The Convention Protocol just quoted appears to defer to parental authority in the matter of education. Does this suggest that the parent has the inalienable right to determine the educational content and method for the instruction of her children? Surely not. Parents with anti-scientific convictions relating to the care of the body (e.g. Christian Scientists who oppose ordinary medical treatment, Jehovah's Witnesses who will not allow blood transfusion) are not able legally to keep their children from essential medical help. Likewise, the State has the right to establish minimal educational standards and to insist that all children conform to them. A parent who believes that his child will be hurt by mathematical instruction—or who wants him taught only the color blue—will not receive any support from the law.

And the child himself? Does the child, as subject of the educational process, have an inalienable right to determine the content and nature of that process? One might suppose so on the basis of a superficial application of the fundamental theme of the United Kingdom (U.K.) Children Act 1989 and the United Nations Declaration of the Rights of the Child—that "the best interests of the child" must be determinative. But those instruments clearly recognize that the child's wishes are not always equivalent to the child's best interests.[5] On the one hand, a child, owing to her immaturity, is not necessarily in a position to make reasonable or the best choices.[6]

Moreover, it is noteworthy that in the mature legal systems of today, adults, no less than children, are limited in their choice of conduct: they cannot do anything and everything they wish—even when the desired action would not harm others. Two examples are pertinent, one in the French, the other in the U.K. legal system. The "midget tossing" (*lancer de nains*) case in

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[5] Cf. Andrew Bainham, *Children: The Modern Law,* 3d. rev. ed. (Bristol, England: Jordan Publishing/Family Law, 2005), especially 37 ff. and 70–72.

[6] A short but stimulating discussion of the philosophical issues pertaining to children's rights, including a treatment of "will theory" vs. MacCormick's sophisticated version of the "interest theory" of rights, may be found in Samuel Stoljar's *An Analysis of Rights* (London: Macmillan, 1984), 117–20. Stoljar suggests that the best justification of children's rights lies in "our human endeavour to replenish the human community." The inadequacy of this notion becomes immediately evident when we think of societies suffering from overpopulation or from inadequate natural resources: would we favor, for example, China's "one-child policy"—or a state's effort to control population by giving more rights to male children than to female children?

France involved a recreational pursuit in which dwarfs were competitively thrown into nets; the dwarfs were paid, were not injured, and wished to continue doing this. The highest French administrative court (*Conseil d'Etat*) ruled that the activity was an affront to the dignity of the human person and considered it irrelevant that the dwarfs did not themselves believe that their dignity was compromised.[7] The case was then taken to Strasbourg, but the Court declared it inadmissible, upholding the *Conseil d'Etat* judgment.[8] In the U.K., the famous "sado-masochist" case was decided along the same lines. The court ruled that sado-masochistic homosexual encounters occasioning actual bodily harm, even when consensual, were contrary to public morals and human values, and would not be permitted.[9] This case was also unsuccessfully brought to the European Court of Human Rights.[10]

Our conclusion at this point must be that neither the State, nor the parent, nor even the child has an unfettered right to determine educational content or method of instruction.

III. The European Court and Homeschooling

It is of more than passing interest that many of the articles of the European Convention are organized in two parts: Paragraph 1 sets forth the given right and Paragraph 2 allows limited qualification of that right by the State. Thus Article 9 (on religious freedom) states in Paragraph 1 that "everyone has the right to freedom of thought, conscience and religion"—and thus the right to worship, engage in public and private religious practices, and to change one's religion. This is followed by Paragraph 2 which indicates possible but limited exceptions: those "necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

The important point here is that *the right precedes the limitations*. In other words, the Court should on principle uphold the right *unless and until* it can be shown that a legitimate limitation exists to qualify that right. The limitations must never be allowed to swallow up the rights themselves.

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[7] *Commune de Morsang-sur-Orge,* arrêt de 27 octobre 1995 (*Rec. Lebon,* p. 372). The case is particularly important because it established in French law that the dignity of the human person must be classed within the very concept of the *Ordre public.*

[8] *Wackenheim v. France*, Application No. 29961/96 (16 October 1996, before the Commission); the inadmissibility decision was unanimous.

[9] *R v. Brown* [1993] 2 All ER 75.

[10] *Laskey, Jaggard and Brown v.United Kingdom* [1997], Case No. 109/1995/615/703–705.

There is no question that the Convention-guaranteed right of education is to be exercised by the State—in the sense that the State has the responsibility to establish minimal educational standards and to see that they are maintained. But does this mean that the State has the right to determine—and limit—the permissible *methods* by which such educational goals can be achieved? We argue that this is *not* the case.

The State has the right to insist on proper safety standards for travel. But who would argue that the State could therefore properly limit the means of transportation the public can use—monocycles, not bicycles; three-wheeled vehicles, not four-wheeled vehicles, etc.? The State can (and should) establish minimum standards for safe vehicles on the road, and owners should have to have their means of transport tested against those standards, but it is hardly appropriate for the State to tell the populace what kind of vehicle they can or cannot use.

In the case of homeschooling, the State has every right to insist that the child reach minimum educational levels through the schooling he or she receives. Thus, examinations or other objective evidences of intellectual attainment need to be required of all children at the appropriate educational levels. But the *means* by which the educational level is attained should not be a concern of the State. Where it is, the State clearly goes beyond its proper sphere and unnecessarily restricts the freedom of action of its citizenry.

In the *Family H. v. United Kingdom* case, Strasbourg significantly concluded:

> That to require the applicant parents to cooperate in the assessment of their children's educational standards by an education authority in order to ensure a certain level of literacy and numeracy, whilst, nevertheless, allowing them to educate their children at home, cannot be said to constitute a lack of respect for the applicant's rights under Article 2 of Protocol No. 1.[11]

Comments a specialist: "It is interesting to note that the Commission does not attach so much weight to the form of the [primary] education, but rather to the responsibility of the State for its quality; a certain level of literacy and numeracy, leaving the rights of the parents unimpaired as much as possible."[12]

A state, however, may well claim (and, as we have seen in the *Konrad* matter, has claimed) that homeschooling is *socially* deleterious: that the homeschooled child is socially deprived. The State goes on to argue that the child needs to be integrated into a pluralistic society and its values.

[11] *Family H. v. United Kingdom,* Application No. 10233/83 (before the Commission), *D&R* 37 (1984), 106.
[12] P. van Dijk and G. J. H. van Hoof (eds.), *Theory and Practice of the European Convention on Human Rights,* 3rd ed. (The Hague, Netherlands: Kluwer Law International, 1998), 646.

But as to alleged "social deprivation," the burden surely rests on the State to show that this is the case—a very difficult burden to discharge in light of the strong evidence of superior social skills on the part of homeschooled students in countries where homeschooling is permitted.

As for "the general interest of society to avoid the emergence of parallel societies based on separate philosophical convictions and the importance of integrating minorities into society" (to employ the language of the *Konrad* inadmissibility opinion), this surely smacks of political correctness—not education—and appears to fall squarely under the axe of indoctrination—which, as we have seen, is unqualifiedly condemned by Protocol 1, Article 2 of the European Convention. The function of an educational system is to bring the students to a proper level of knowledge, not to force them into a particular conception of society. To be sure, if homeschooling could be shown to contradict or denigrate the values of a democratic society, that would be sufficient reason to oppose it in that form, but, again, the burden of proof in demonstrating this should rest on the State, not on the student or his or her parents.

It is also worth emphasizing that "pluralism" must not deprive the citizens of the right to oppose viewpoints (even popular viewpoints) that are in fact false or evil. Cannibalism as a pluralistic option would not be a good idea, even on the ground of tolerance. Slavery was a contested idea before the American Civil War and, fortunately, the solution, as represented by the Emancipation Proclamation and amendments to the United States Constitution, was not to continue to tolerate both a slavery and an antislavery position on the question. A society must not become conformist to the point of not allowing homeschooling because the students are presented with values which may not jibe with what is regarded as officially *kosher*—so long as, one hastens to add, the students are confronted with the variety of value systems characteristic of the modern world and are given the opportunity to make their own decisions as to the value system they prefer.

What we have here is not—though it may superficially appear to be such—an issue of "conflicting human rights norms": the State versus the individual.[13] There is nothing inherently in opposition between homeschooling and State interests—or between the rights of the child and the rights of the State. Potentially, if the State attempts to impose a "pluralistic" value system (whatever that means) on the family, or if the homeschooling is a covert attempt to undermine the society in which the child lives, there would indeed be an intolerable conflict. But there is no

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[13] No mention of the homeschooling problem appears in Eva Brems (ed.), *Conflicts Between Fundamental Rights* (Antwerp, Belgium: Intersentia, 2008).

reason to suppose *a priori* that such conflicts exist, and if the State sticks to setting minimal educational standards—its proper function in this realm—and the homeschooling is educationally and socially responsible, there is no reason legally to refuse to allow it. And if the State believes that there is a problem, it is the State's burden to demonstrate it.

So, how should the European Court of Human Rights rule if and when a homeschooling case (uncontaminated by extrinsic considerations)[14] comes before it?

The starting point must surely be the Strasbourg Court's existing acquaintance with and commitment to the notion of a "law above the law," i.e., constitutional law and international law on a plane above ordinary legislation. The European Convention on Human Rights sets forth just such a higher law: a law taking precedence over ordinary, national legislation.

But the European Convention establishes only the right to education; it does not specify or limit the means to achieve it. What, then? Should the Strasbourg Court give untrammeled control to the State to limit educational methodology? Surely, not. The State has the responsibility to ensure that, however children are educated, they reach the proper level—and any schooling that does not attain that result must certainly be improved, or if that is not possible, abolished (for example, substandard public or private schools or incompetent homeschooling). But the burden rests on the State to show that there is the need to do this. Assuming *a priori* that a particular method of education is faulty is a meritless solution and flies in the face of democratic values.

Dr. Matthew Weait is undoubtedly correct when he writes:

> Contracting states [to the European Convention on Human Rights] are given a wide margin of appreciation to administer and finance their own systems of education. Successful challenges are likely to be scarce provided the system is both efficient *and sufficiently flexible to permit a reasonable measure of parental choice (through, for example, a diverse independent sector).*[15]

That is precisely the problem. When homeschooling is denied, the system may be said to lack the proper degree of flexibility; a reasonable measure of parental choice is denied; and a diverse independent educational sector ceases to have realistic meaning.

In spite of the great advances made by the European Court of Human Rights in bringing national law into conformity with first-generation human rights principles, there has been a

[14] Cases must not be taken to Strasbourg that muddy the issue of the legitimacy of home schooling *per se*. Thus it is a great error to go to Strasbourg with cases where homeschooling is intermixed with sincere but off-the-wall religious, ethical, and philosophical viewpoints; alleged procedural failings by local educational, social work, or police authorities; disciplinary, marital, and family problems; etc.

[15] Matthew Weait, "Right to Education," *Human Rights Law and Practice,* ed. Lord Lester of Herne Hill and David Pannick, 2d ed. (London: LexisNexis UK, 2004), sec. 4.20, 471. Italics ours.

pusillanimous tendency on the Court's part to defer to national legal systems where particularly controversial issues are at stake—for example, in the case of abortion, where the Court has left restrictions in place in conservative states but refused to mandate a right-to-life position in liberal countries.[16] Such an approach may be comprehensible on the ground that the Court needs to retain the confidence of the contracting states. However, the very idea of the Convention is to bring the laws of contracting states into line with fundamental human rights principles. Where the Convention is not explicit, the Court should never rule restrictively so as to reduce the scope of a general right. In the case of homeschooling, the Convention (as we have seen) sets forth the general principle that "the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions." It must not, therefore, allow a contracting state to eliminate a means of achieving this desired by parents—unless the state can show that the means in question is ineffective.

At the deepest level culturally, increasing secularism in modern society— particularly as manifested in Europe—poses special difficulties. The secular mindset can (as in the *Konrad* opinion) lead courts to an unconscious acceptance of politically correct notions of educational "integration."[17] Sadly, this also means that where constitutions and international human rights instruments are silent on an issue, the law will not appeal, as in the past, to the "higher law" as set out in the Holy Scriptures—the inalienable dignity of the human person, his family, and his personal decision-making, as John Locke derived these rights principally from biblical revelation—but will tend to defer to State power and bureaucracy, infused by prevailing pluralistic viewpoints. Where this occurs, the tragic result will be, not an increase in human rights protections but just the opposite. In that respect, the homeschooling issue may serve as a litmus test to discerning jurists.

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[16] "No consensus exists across Europe on the issue of abortion, and given the difficult moral and ethical issues involved, the Strasbourg organs have been understandably reluctant to pronounce substantively on whether the protection in art 2 [of the European Convention on Human Rights] for 'everyone' extends to the unborn child. In light of the differing national laws, a state will have a broad margin of appreciation with regard to the Convention on the issue of abortion" (Kay Taylor, "Right To Life," *ibid.,* sec. 4.2.17, 112).

[17] Michael Farris, chancellor of Patrick Henry College, has noted in a recent interview that a new wave of opposition to homeschooling seems to be on the horizon in the United States, based on the secular assumption that "Christian homeschooling parents are effectively transmitting values to their children that the elitists believe are dangerous to the well-being of both these very children and society as a whole." In this connection, Farris cites law professors from Northwestern University, George Washington University, and Emory University who have called for a ban on religious education in both private and homeschooling contexts (*Baptist Press,* 23 February 2011: http://www.bpnews.net [accessed 23 February 2011]). Also, in the United States—and in Europe as well—the refusal in many quarters to allow intelligent design to be offered as an alternative theory to Darwinian evolutionary models bespeaks of political correctness and ideological orthodoxy replacing educational openness and curricular flexibility (cf. *University of Montana Law Review*, April 2007).

Address: John Warwick Montgomery, Patrick Henry College, Ten Patrick Henry Circle, Purcellville, VA 20132 / USA.