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Home Education: A Human Right?¹

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The right of parents to home educate is sometimes described as a 'human right'. Underlying this 'rights claim' is the perception that attempts to restrict home education are both unnecessary and dangerous. 'Unnecessary', because home education does not harm children or deprive them of the right to education and 'dangerous', because parental freedom with regard to education is fundamental in a liberal democracy. However, in the case of *Leuffen v Germany*, the European Commission of Human Rights held that a policy of compulsory schooling, which in effect 'outlaws' home education, was lawful and did not violate the rights of parents under the European Convention of Human Rights. There is clearly an irreconcilable conflict between the rights claims of home educators and the decision of the Commission. This article presents a critical reading of *Leuffen*. While it argues that the Commission's arguments are problematic, at the same time it highlights alternative rights-based challenges to home education. It concludes by questioning the ability of the Convention, and civil rights claims in general, to incorporate some of the broader political and collectivist concerns about home education.

Introduction

The parental option to home educate can, and often is, described as or understood be a 'human right'. Advocates consequently speak of the 'right to home educate' and this 'rights claim' represents a powerful moral and strategic argument against those who would seek to restrict or challenge home educators. Underlying the claim are two distinct arguments: first, that intervention or interference with the right is unnecessary and secondly that it is potentially dangerous. 'Unnecessary', because home education does not harm children educated in this way, in other words the parental right does not interfere with the child's independent right to education, and 'dangerous', because parental freedom of choice in the context of education is perceived as fundamental in a liberal democracy.

For home educators and their supporters, the right is unproblematic and attempts to restrict parents in exercising what they perceive to be their 'right' are fiercely challenged and closely monitored both at a local and international level (Petrie, 1995, 2001; Stevens, 2001). This article attempts to explore the right more critically and takes as its starting point the case of *Leuffen v Germany* that came before the European Commission of Human Rights² in 1992. The Commission held here that a policy of compulsory schooling was compatible with the European Convention of Human Rights. Consequently, by effectively legitimising a ban on home education, the case represents an explicit challenge to the human rights claims of home educators. The aim here is not to examine the individual or particular details of the case, or the practical impact of the case on home education in Germany (Petrie, 1998, 2001) but, rather, to use the case as a basis for exploring how the practice of home

education is framed, understood and spoken of in the context and language of law and human rights doctrine.³ Moreover, while the intention is not to defend the decision in *Leuffen* – indeed it will be argued that the Commission's arguments are flawed in a number of respects – this article does, however, seek to argue that the right to home educate is not as straightforward or as basic and inviolable a right as supporters might wish or claim. By acknowledging the complexity of the human rights claim, it endeavours to locate conflicts about home education within a broader political context.

***Leuffen v Germany* and the European Convention on Human Rights**

The facts of the case, at least for the purposes of this article, are relatively straightforward. Renate Leuffen wished to educate her son at home. According to the case report, her reasons were that she believed that God had given her the exclusive responsibility and authority to educate her child; that it would be a sin to send her son to a traditional school because of the academic and moral decline in public schools (which would cause her son to be taught obscenities and become a victim of violent behaviour and negative socialisation pressures); and, that formal schooling amounts to child abuse and would be a disaster for her son's mental and physical health. She was opposed by the Youth Office of the City of Dusseldorf, which appointed a tutor for her son to ensure his attendance at school and threatened to remove the child from his mother by force if necessary. She attempted to challenge their decision through the courts in Germany but was unsuccessful at every level. At the European Commission of Human Rights her central allegation was a violation of her rights under Article 2 of the First Protocol of the European Convention on Human Rights. This is the key provision in the Convention relating to education and it states that:

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.

In deeming her application inadmissible, the Commission held that the German authorities were justified in their actions as they had established, with the help of expert opinion, that Leuffen was not able to ensure the education of her son. In reaching this conclusion it relied on previous decisions of the European Court of Human Rights, which had established that the child's right to education in the article takes precedence over any parental right. In particular it relied on the judgment in *Campbell Cosans v UK* (1982), a case relating to physical punishment, that, 'the convictions of parents must not conflict with the fundamental right of the child to education, the whole of Article 2 of the First protocol being dominated by its first sentence'. Thus far the decision of the Commission is uncontroversial. Whether or not Leuffen was capable of educating her child is of course a matter of debate (Petrie, 1995) and in practice, determining what counts as adequate education is complex

and controversial. But placing the issue of form or content of education aside, the finding that the parental right to home educate is a *conditional* as opposed to an *absolute* right, and, one dependent on the parent being able to provide the child with education, is itself unproblematic. For it establishes that education is an aspect of parental responsibility, in other words a duty more than a right. However this formulation immediately raises the possibility of some parents being denied the right to home educate.

Having established that in this case the mother was not able to ensure the education of her son, the Commission could have stopped there. However, it went on to hold that, 'Article 2 of the First Protocol does not prevent the State from establishing compulsory *schooling*' (emphasis added). This is significant, for while the article is clear in establishing a right to *education* it makes no reference to *schooling* and the distinction between the two is crucial in the case for home education.

The Commission reached this conclusion by making two arguments. First, it argued that the first sentence of Article 2 of the First Protocol, 'by its very nature calls for regulation by the State'. This interpretation, which emphasises a positive role for the State, is problematic as the article is framed in negative terms. The unusual negative formulation of the right to education in the article was a result of concern by states that a positive formulation (i.e. 'everyone shall have a right to education') would enable individuals to require the State to provide educational services; this possibility was curtailed by the negative formulation and this approach has been confirmed in a number of cases where attempts to claim educational services have been unsuccessful (Mountfield, 2000). The Commission's argument here is also problematic because the positive duty of the State to protect a child's right to education could, arguably, be adequately performed by monitoring the content and nature of home education. This is the approach adopted in the UK and the right of LEAs to verify and enforce educational standards in relation to home education was upheld by the European Court of Human Rights in *H v United Kingdom*. However, while this case is referred to in *Leuffen*, the right to monitor home education is referred to as an 'integral part' of the right to establish compulsory schooling. The argument of the Commission here is confusing; for while the crux of the decision is based on accepting the finding of the German authorities that *Leuffen* was incapable of educating her child, a finding that implicitly supports the right to monitor, had they found otherwise, under German law she would still not have been entitled to home educate. Consequently, far from being 'integral' to the right to impose compulsory schooling, such a policy makes the right to monitor home education redundant.

The Commission's second argument focused on the second sentence of Article 2 of the First Protocol. In applying this provision the Commission quotes the following from the decision of the Court in *Kjeldsen* which held that this sentence:

aims at safeguarding pluralism in education, which is essential for the preservation of the 'democratic society' as conceived by the

Convention. In view of the power of the modern state, it is above all through State teaching that this aim must be realised.

In *Kjeldsen* the Court held that the Danish government was justified in making sex education compulsory in state-maintained primary schools, against the wishes of parents. However there are a number of important distinctions between *Kjeldsen* and *Leuffen* that the Commission does not acknowledge and it is not clear how the statement above from *Kjeldsen* is applied in *Leuffen*. In *Kjeldsen* the statement was made, not to support the right of the state to impose compulsory lessons but, rather, to support the finding that Article 2 of the First Protocol applies to teaching in state schools, a point that the Danish government had attempted to challenge. The importance of this for *Leuffen* is that the statement was not made in order to argue that the power of the modern state justifies using compulsory education as a means of ensuring pluralism; indeed it is precisely the power of the modern state that forms the basis of the home educators' rights claims. In *Kjeldsen* the Court held that the state is 'forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions'. This statement is referred to in *Leuffen* and reading the two statements from *Kjeldsen* together, the implication appears to be that as, according to the second sentence of the first protocol, state education is required to respect parental convictions, a parent cannot claim that compulsory schooling violates their rights under that provision where the state has complied with this restriction on its power. In *Leuffen* the authorities had enrolled Leuffen's son in a state Catholic school, as a result the state was able to argue with some strength that her religious convictions had indeed been respected. While there is an element of logic in the approach adopted by the Commission, the extensive reliance on *Kjeldsen* is problematic, for the Court in that case, while upholding the lawfulness of compulsory sex education stated that:

the Danish State preserves an important expedient for parents who, in the name of their creed or opinions, wish to dissociate their children from integrated sex education; it allows parents either to entrust their children to private schools which are bound by less strict obligations and moreover heavily subsidized by the State *or to educate them or have them educated at home.* (emphasis added)

While *Leuffen* remains a significant challenge to the claims of home educators, it is important to acknowledge its weaknesses. The emphasis placed on both the inability of Leuffen to educate her child and the importance of the child's right to education, gives credence to the possibility that the Commission simply 'confused' schooling with education. As Petrie demonstrates in a survey of comparative literature in this area, this confusion is frequently made (Petrie, 1995). However, had the Commission acknowledged this distinction, it could still have reached the same conclusion, as there are a number of alternative ways in which the jurisdiction of the ECHR could have been applied by the Commission in order to legitimise the policy of compulsory schooling. These fall into two categories, first those that relate to the child's

right to education, and, secondly, those that relate to the interests of society more generally.

A Child's Right to School Life?

Andrew Bainham, one of the leading family and child legal academics in the UK, has argued that 'to deprive a child of the experience of school life would, in itself, be a denial of children's rights and a failure to discharge parental responsibility' (Bainham, 1999: 542). Yet, as noted above, the Convention only mentions a right to education, it is silent about schooling, as a result there is no explicit right to school life. However there are two ways in which such a right could be deemed to exist under the Convention. First by means of Article 8 and secondly by a broad definition of education in Article 2 of the first protocol.

Article 8 is the right to respect for private and family life, home and correspondence. In practice this right has been held to apply to a wide range of circumstances (Fenwick, 2001). Significantly, it is a *qualified* right, which means that it is limited so far as is 'necessary in a democratic society' for various purposes including the rights of others. The Commission rejected Leuffen's claim that her right to privacy under Article 8 of the ECHR had been violated, on the basis that to uphold her right here would have violated the right of another, in this case her son's right to education. An alternative and converse use of Article 8 would be to argue that denying a child the right to attend school would be a violation of the *child's* right to privacy. This speculative argument draws on the creative interpretations of 'private life' that have been accepted by the European Court of Human Rights; and in particular that in *Niemetz v Germany* where it was deemed to incorporate 'a right to develop a personality in conjunction with others' (para 29). It should be noted however, that in the UK case of *The Queen on the Application of B v Head Teacher of Alperton Community School and Others*, the courts resisted the application of this right to pupils.

Moreover, even if the courts were minded to accept this approach in the context of *Leuffen*, this approach would be of limited value as that case concerned the lawfulness of the State imposing a policy of compulsory schooling and there are two important distinctions between this and attempting to establish a child's right to school life. First, the former concerns a power of the State and does not attempt to impose a duty; secondly, in the context of *Leuffen*, claiming the right to a school life is not in effect against the State, or a public authority, but against the parent wishing to home educate. To resist this it would be necessary to emphasise the responsibility of the State to secure the rights protected by the ECHR to everyone in its jurisdiction; such an approach was used in the case of *Costello-Roberts v UK* against an independent school's policy of corporal punishment. In addition it would be necessary to establish that the parental decision to home educate is a statutory duty and a 'public function' as private matters are generally beyond the remit of the Convention, the focus being primarily on the relationship between individuals and the State (Mountfield, 2000).

Central to the argument above is the controversial issue of 'socialisation', for the underlying assumption of the Article 8 approach is that a consequence of being home educated is a denial of the possibility of developing one's personality in conjunction with others. This view is similarly key to attempts to interpret 'education' in such a way as to require school attendance. For if the socialisation benefits of school attendance, such as social skills and interpersonal development, are understood to form part of the right to education under Article 2 of the First Protocol then it can be argued that *no* parent is capable of ensuring the education of his or her child at home and that in effect school attendance is essential for 'education'. From the case report it appears that this view influenced the German authorities in *Leuffen* where the benefits of school attendance *per se* were emphasised. The Dusseldorf Court of Appeal argued that Leuffen's, 'refusal to send her son to school was an abuse of her right to care for her son and *gravely endangered his mental and emotional health and development*', and that, 'Compared to the education provided by a single person, conventional schools had the advantage of contributing to the child's *ability to interact successfully on a social level*'. Similarly, the Federal Constitutional Court stressed 'the importance for children to have school certificates and *learn social behaviour*'.

Establishing a right to school life is dependent on two assumptions. First, that social and developmental benefits form part of the right to education, and secondly, that only school attendance can provide this form of education.

Authority for a broad definition of education can be found in a number of sources. Most importantly the second sentence of Article 2 of the First Protocol refers to both 'education' and 'teaching' and in the case of *Campbell and Cosans* the two words were given distinct meanings. The Court argued that 'education' included 'the development and moulding of the character and mental powers of its pupils' and referred to 'the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas "teaching" or instruction refers in particular to the transmission of knowledge and to intellectual development'. Support can also be found in the United Nations Convention on Children's Rights 1989. Article 29 of the Convention states that 'the education of the child shall be directed to the development of the child's personality, talents and mental and physical abilities to their fullest potential'.

While there is strong support for a definition of education that incorporates 'socialisation', the second assumption, that it is through school attendance and not home education that can best provide for this broad form of education, is far more problematic and has been strongly contested (Fortune-Wood, 2000; Medlin, 2000; Meighan, 1997; Thomas, 1998). Assumptions about socialisation, consequently, not only dominate popular concerns about home education, but are central to attempts to establish that school life is part of the right to education.

The Public Interest in Schooling: Necessary for Democracy?

In *Leuffen* the basis of the Commission's decision related to the child's right to education; it was this interest that was held to take precedence over that of

the rights of the parent. In relation to Article 2 to the First Protocol it is only the child's right that has this precedence. The fact that the parental right in Article 2 of the First Protocol is restricted only by the right of the child to education, is significant as it means that in relation to education, the possibility of articulating the varied collective or public interest arguments against home education are effectively excluded from the legal discourse. This is regrettable because the reasons for legitimately restricting the rights to privacy and freedom of expression under Articles 8 and 10, such as the 'economic well being of the country', and the 'rights and freedoms of others' are in reality both historically and now the more compelling motivations behind the provision of public education (Finch, 1984). Consequently, it is arguable that in *Leuffen* the Commission's failure to acknowledge the German state's public interest in compulsory schooling, reflects the construction of education within the convention as an individual right and the individualistic paradigm of the convention as a whole.

However, in relation to Article 8, the parents' rights are qualified more generally if held to be 'necessary in a democratic society... for the protection of... morals or for the rights and freedoms of others'. The Commission chose to focus on the rights of the child but it would have been possible for them to focus instead on the rights and freedoms of others. This alternative approach would have broadened the discussion to incorporate an acknowledgment of the public interest in education, that it is not simply a private matter (Reich, 2002).

It is regrettable that the Commission failed to address this issue for one of the key underlying justifications for compulsory schooling in Germany is that it is considered necessary for democracy; for the right to home educate potentially permits parents to bring up their children as anti-democratic and it is through compulsory schooling that liberal democratic values of tolerance and pluralism are to be transmitted and inculcated. This perception of the role of the state in relation to education has particular resonance in Germany, where, 'since the gradual introduction of compulsory schooling in Germany in the 18th century, schools have always been perceived as the most important agencies for the socialization of the young' and that 'the educational responsibility of the state within the school is considered to be not of minor, but of equal rank to this parental right' (Avenarius, 2002: 83–84).

The public interest in education is, however, equally applicable to other states. In particular in the USA, espousal of home education by the Christian Right is intimately connected to their opposition to what they perceive as secular, liberal and pluralistic indoctrination in public schools (Buss & Herman, 2003; Herman, 1997; Stevens, 2001). From their perspective, 'children's rights' discourses are often understood to represent thinly veiled attempts to undermine the authority of the family and a means for justifying increased state intervention, particularly by federal government (Buss, 2000). In the UK, the recent introduction of citizenship as a compulsory subject within the National Curriculum is an explicit acknowledgement of the linkage between education and concerns about democracy, and the debate concerning the role and meaning(s) of citizenship serve to reflect the inevitable political nature of the concept (Monk, 2002; Roche, 1999; Wyness, 1999).

An alternative public interest critique of home education is made by Lubienski who argues that its increase reflects a 'general trend of elevating private goods over public goods' and that the withdrawal of children from schools is also a withdrawal of social capital that undermines the ability of public education to improve and to 'serve the common good in a vibrant democracy' (Lubienski, 2000: 207). Similarly, Stevens (2001) argues that the dramatic increase in home education in the USA can in part be explained by the fact that its advocates draw on resonant chords in the national culture such as a celebration of individuality, distrust of intrusive government and privileging of market values.

Under the Convention the 'necessary in a democratic society' standard must be attached to one of the specific grounds for restriction listed in the relevant article and in theory it is possible therefore to argue that compulsory schooling in democratic values is necessary for the protection of... 'morals' or for the 'protection of the rights and freedoms of others'. Support for this approach can be found in cases such as *Vogt v Germany* where a teacher's right of freedom of expression under Article 10 was held to be legitimately restricted on the basis that pupils have a right to information that is conveyed in an objective, critical and pluralistic manner. If adults who choose to be teachers must accept restrictions on their rights it could be argued that parents who take on the role of teachers should similarly be restricted.

There is a potential for conflict between the state and parents in relation to the state's interest in civic education. Civic education is a complex term and can relate to a particular set of ideological values or be interpreted more narrowly to refer to simply knowledge of political structures; the potential for conflict increases the broader the definition. In attempting to balance the competing demands of cultural pluralism with individual autonomy, Reich argues that a child has a valid interest in becoming 'minimally autonomous'. He defines this as a person who possesses 'a capacity to develop and pursue their own interests' and to be 'able, if they so choose, to participate ably as equal citizens in democratic deliberation about the exercise of political power' (Reich, 2002: 20). Reich argues that this interest is the minimal necessary 'to surpass the threshold of ethical servility'. While recognising the difficulties in monitoring educational provision, he argues that the state is justified in intervening to prevent homeschooling where there is a risk that the child might become ethically servile to the parent by parental attempts to 'install inerrant beliefs in their own worldview or unquestioning obedience to their own or others' authority' (p. 28). Kymlicka similarly emphasises the importance of civic education enabling people to question authority. However, he goes further and suggests that public schooling is essential and that we can never rely on the family and parents, or religious bodies or the market as 'people will not automatically learn to engage in public discourse, or to question authority, in any of these spheres, since these spheres are often held together by private discourse and respect for authority' (Kymlicka, 1999: 88).

Conclusion

Education is a complex human right. Indeed it is more accurate to talk of rights in the plural in this context to fully reflect the variety and frequently competing interests at stake here. Human rights are often divided between civil and political rights on one hand and social and economic rights on the other; a dichotomy that to a certain extent reflects ideological tensions between demands for a minimal state and individual liberty and an interventionist state that protects and supports individuals. Education however is both a civil and political right and a social and, arguably, an economic right; consequently the role of the state in this area is inherently controversial. At the same time tensions arise even if one focuses solely on the civil and political rights; for while these rights traditionally refer to liberty rights which cohere with parental and familial claims against state intervention, it is civil and political concerns that at the same time legitimise state intervention. To a certain extent, concerns about 'socialisation' and the child's right to education have overshadowed these broader concerns and yet they are the more critical issues if one is to determine the validity of attempts to assert a human right to home educate. For while Petrie (1998: 134) argues that home education is 'essential for democracy', at the same time concerns about home education are informed by democratic principles. Consequently home education and the conflicting responses to it represent a key site for exploring the meanings of democracy and the purpose of education.

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Notes

1. An extended version of this paper is published in *Legal Studies* 24 (4), 568–598.
2. The role of the Commission was to conduct a preliminary screening of applications under the convention prior to a case being heard before the European Court of Human Rights. It was abolished by Protocol 11 of the Convention in November 1998.
3. The focus is inevitably on the European Convention of Human Rights but similar issues are raised within other jurisdictions, in particular that of the USA Supreme Court.

Cases

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Costello-Roberts v UK [1994] ELR 1.

Belgian Linguistics 1968; Appls Nos 6853/74 and 7782/77.

H v United Kingdom (1984) Application No 10233/83 DR 105.

Kjeldsen, Busk, Madsen and Pedersen v Denmark (1976) 1 EHRR 711, ECHR.

Leuffen v Federal Republic of Germany ECHR Application No: 00019844/92.

Niemetz v Germany (1992) 16 EHRR 97.

The Queen on the Application of B v Head Teacher of Alperton Community School and Others; The Queen on the Application of T v Head Teacher of Wembley High School

and Others; *The Queen on the Application of C v Governing Body of Cardinal Newman High School and Others* [2001] EWHC Admin 229; [2001] ELR 359.
Vogt v Germany (1995) 21 EHRR 205.

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