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EDUCATION AND PLURALISM: TOWARDS A DEMOCRATIC THEORY OF EDUCATION IN EUROPE

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I. The Necessity of a Democratic Theory of Education in a Multicultural Society

One of the greatest challenges, which modern European states face nowadays, is the rising advance of multiculturalism and diversity within their societies. This situation has broken one of the foundations that inspire the traditional notion of the state: the existence of a culturally homogeneous people. During the last decades, states have implemented different policies directed to achieve the social integration of multiculturalism and, therefore, to guarantee a peaceful coexistence. Nevertheless, how officials of different countries have recently recognized, models of integration adopted hitherto (such as integration contracts) have failed. It is likely, in this context, that an effective social integration of multiculturalism just can be reached through education.

How to educate has been the subject of debate and analysis in all the scientific disciplines in which the individual is regarded as the main object of study. Medicine and psychiatry in the realm of the

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natural sciences, as well as, politics, religion, or law, as social science subjects, have traditionally aimed to educate the individual in order to facilitate his or her successful integration with the political or social reality around him or her.¹ Aristotelian and Platonic theories from the classical period² such as the “Mirrors for Princes” from European medieval literature—especially, *De Principatibus* by Niccolo Machiavelli³—or the *Arcana Imperii* from the 16th and 17th centuries are good examples of this.⁴

Nevertheless, the use of education as a policy of integration – that appears already in the most classical academic literature– faces nowadays with new challenges, as a consequence of the growing religious and cultural complexity of societies.⁵ Demands by students and teachers to be allowed to wear Islamic veils or chadors in the classroom, attempts by students to exempt themselves from classes such as religion or physical education, or their refusal to be educated before a crucifix have recently generated some controversy all over Europe.⁶

¹ See SIGMUND FREUD, *La Aflicción y La Melancolia*, in OBRAS COMPLETAS 1076 (Editorial Biblioteca Nueva 1967).

² See generally ARISTOTLE, POLITICS, BOOK V, 1307^a, 15-16 (David Keyt trans., Clarendon Press Oxford 1999). See also PLATO, LAS LEYES 258 (Jose Manuel Pabon & Manuel Fernandez-Galiano eds & trans., Instituto De Estudios Politicos 1960) (360 B.C.).

³ Niccolo Machiavelli, *The Prince* (Penguin Books 2003) (1532).

⁴ Michael Stolleis, *Rechtspublizistik-Politik-Naturrecht im 17. und 18. Jahrhundert*, in STAATSDENKER IM 17. UND 18. JAHRHUNDERT 14 (1987); ROMAN SCHNUR, STAATSRÄSON: STUDIEN ZUR GESCHICHTE EINES POLITISCHEN BEGRIFFS 75, 84 (1975).

⁵ See DOMINIC MCGOLDRICK, HUMAN RIGHTS AND RELIGION: THE ISLAMIC HEADSCARF DEBATE (2006).

⁶ This has served to show that, regarding education, the content of the subjects being taught is not necessarily more important than the context in which the learning is carried out, the latter being capable of generating what in the field of pedagogy has been called a “hidden curriculum.” See Philip W. Jackson, *Life In Classrooms* 12-29 (Teachers College Press, ed. 1990) (1968), James A. Banks, *Multicultural Education: Characteristics and Goals*, in MULTICULTURAL EDUCATION: ISSUES AND PERSPECTIVES 24, 27 (James A. Banks & Sherry A. McGee eds., 7th ed. 2010).

As a solution to cases such as the ones mentioned above, European constitutional courts, as well as the European Court of Human Rights (Eur. Ct. H. R.), had to raise again the traditional question formulated by classical theories of education – and now applied to a multicultural society: in which values and principles must we educate? But, above all, both courts have pondered what the limits should be for any state to educate its citizens, thus raising the issue of indoctrination in the field of education, a problem that appears mainly in the context of a democratic state.

However, as in this essay will be shown, the doctrinal and judicial answers to these conflicts have not always escaped the influence of the so-called “liberal theories of education.”⁷ The solutions contributed by these liberal theories of education may have been useful for the European societies of the 19th century, or even for those in the opening third of the 20th century, as they were relatively homogeneous from a religious, political or cultural perspective. However, and given the plurality of our European societies, we cannot concede their validity nowadays. It is therefore necessary to construct a democratic theory of education in Europe.⁸

II. Democratic Theory of Education and the Construction of Fundamental Rights

For this purpose, it is really useful to question oneself about what the aims of a democratic education should be, as from this questioning we must infer in which content and in what manner individuals must be educated, who must take on the task of educating these individuals, and what are the limits of education. Nevertheless, constitutions of European states scarcely include fixed regulations on the aims of education.⁹ Education appears in these documents just

⁷ See JOHN STUART MILL, ON LIBERTY 61 (1859), William Galston, *Civic Education in the Liberal State*, in LIBERALISM AND THE MORAL LIFE 85 (Nancy L. Rosenblum ed., 1989).

⁸ This has been proposed in the field of political theory. See e.g. AMY GUTMANN, DEMOCRATIC EDUCATION 41-42 (1987).

⁹ Only the Constitutions of Greece, Spain, and Portugal regulate the aims of the democratic education. See 1975 SYNTAGMA [SYN.] [CONSTITUTION] 16.2

like a sphere of relation between fundamental rights of different subjects: students, parents, teachers and state. This conception of education as a “relationship” between rights and liberties can be seen in article 2 of the First Protocol to the European Convention on Human Rights and in article 14 of the Charter of Fundamental Rights of the European Union.¹⁰

This abovementioned conception of education as an area of confluence of different rights and liberties has sometimes tried to solve controversies in schools using categories developed by the European theory of Fundamental Rights.¹¹ Nevertheless, all these categories have shown their flaws and inadequacies in order to solve definitely conflicts that appear in schools. European Courts approaches on topics like crucifix or veil¹² have shown that a construction of fundamental rights, strictly derived from classical principles, does not always provide a coherent theoretical premise or instrument to face with all practical educational problems. In other words, the application of these categories - developed by the European theory of fundamental rights- as a starting point of legal reasoning has produced, in some cases, paradoxical and contradictory solutions.

In order to precise the object, content, and limits that define fundamental rights in the educational sphere it is crucial to build a theory that – recognizing the goals that education must satisfy in a

(Greece); CONSTITUCIÓN ESPAÑOLA [C.E.], B.O.E. n. 27.2, Aug. 27, 1992 (Spain); and CONSTITUÇÃO [CONSTITUTION]. art. 73 (2) (Portugal).

¹⁰ See Art. 2 First Protocol Eur. Conv. on H. R. (Mar. 20, 1952) (“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions”); Charter of Fundamental Rts. (EU) art. 14 (“Everyone has the right to education and to have access to vocational and continuing training. 2. This right includes the possibility to receive free, compulsory education”); GISELLA GORI, TOWARDS AN EU RIGHT TO EDUCATION 371-374 (2001).

¹¹ See Hans Peter Schneider, *Prinzipien der Verfassungsinterpretation*, 20 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRICHTSLEHRER 125 (1963).

¹² For a case dealing with a crucifix, see *Case of Lautsi and Others v. Italy* (no. 30814/06) Eur. Ct. H. R. (Mar. 18, 2011). For a case dealing with a veil, see *Dahlab v Switzerland* (no. 42393/98) Eur. Ct. H. R. (Feb. 15, 2001).

democracy – determines *who* and *how* must educate. For the construction of the very much needed democratic theory of education in Europe, it would be useful to resort to the extensive set of regulations established in different international agreements such as the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. It is quite true that courts and academics in Europe have never got around the central question of which democratic roles must play the education.¹³ Nevertheless, in their approach to this problem, they do not begin drawing the guidelines of a democratic theory that could be subsequently applied in order to deal with the interpretation of fundamental rights. Their methodology has been just the opposite one. The starting point is the definition of the object, content and limits of fundamental rights and, since this information, they infer a democratic theory of education. Methodological behaviour that leads inevitably, how can be easily understood, to obvious contradictions.

A. Education on Human Dignity

1. Models of Human Dignity and the Assimilationist and Integrationist Functions of Education

The first goal of education is the “full development of the human personality.”¹⁴ These provisions fulfill one of the most important demands associated with the concept of education, both in the field of the social and the natural sciences. The main function of education is to enable the individual to make his own decisions and interact with the social or natural reality around him or her.¹⁵ By de-

¹³ See Kjeldsen, Busk Madsen and Pedersen v. Denmark, 23 Eur. Ct. H. R. (ser. A) (1976). For the literature, see Michael Bothe, *Erziehungsauftrag und Erziehungsmaßstab der Schule im freiheitliche Verfassungsstaat*, 54 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRICHTS-LEHRER 30 (1995).

¹⁴ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at 76 (Dec. 10, 1948); G.A. Res. 2200A (XXI) ¶ 13.1, U.N. Doc. A/6316 (Dec. 16, 1966).

¹⁵ See NIKLAS LUHMANN, DAS ERZIEHUNGSSYSTEM DER GESELLSCHAFT 27-31 (2002); See also IMMANUEL KANT, ÜBER PÄDAGOGIK (1803), available at

finition, to educate is to teach the individual how to attain freedom and self-sufficiency,¹⁶ that is, how to develop his or her *human dignity*.¹⁷

This explains why in the Universal Declaration of Human Rights and the Covenant of Economic, Social and Cultural Rights the norms that direct education towards the full development of the human personality have ultimately been implicitly recognized by the Eur. Ct. H. R.¹⁸ and by constitutional courts of European states.¹⁹ However, in the European legal tradition we find, at least, two different models of human dignity with a great impact to the aims of education, which has had decisive consequences for the solution of conflicts in the classroom, have been classically developed.

<http://ia700402.us.archive.org/11/items/berpdagogik00kant/berpdagogik00kant.pdf>.

¹⁶ See JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (New York, Free Press 1973); see also ÉMILE DURKHEIM, *EDUCACIÓN Y SOCIOLOGÍA* 53 (1975).

¹⁷ See Implementation of the International Covenant on Economic, Social, and Cultural Rights, Comm. on Economic, Social, and Cultural Rights, 21st Sess., Nov. 15 – Dec. 3, 1999, ¶ 4, U.N. Doc. E/C.12/1999/10 (Dec. 8. 1999).

¹⁸ Luzius Wildhaber, *Right to Education and Parental Rights*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 531 & 535 (Ronald St. J. Macdonald, Franz Matscher & Herbert Petzold eds., 1993). This is the case, for instance, of the BUNDES-VERFASSUNGSESETZ [B-VG] [CONSTITUTION] BGBl No. 1/1930, as last amended by Bundesverfassungsgesetz [BVG] BGBl I No. 127/2009, art. 14 ¶ 6 (Austria); see Theo Öhlinger, *Die Österreichische Verfassung und die Europäische Integration*, in *PARADIGMENWECHSEL IM EUROPARECHT ZUR JAHRTAUSENDWENDE* 67, 69 (Waldemar Hummer ed., 2004); see Campbell and Cosans v. United Kingdom, 48 Eur. Ct. H. R. (ser. A) ¶ 33 (1982).

¹⁹ Verfassungsgerichtshof [VfGH] [Constitutional Court], Jan 1, 1979, SAMMLUNG DER ERKENNTNISSE UND WICHTIGSTEN BESCHLÜSSE DES VERFASSUNGSGERICHTSHOFES [VfSLG] 12578/1999 (Austria); Bundesverfassungsgericht [BVerfG] [Constitutional Court], Sept. 26, 1972, 34 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 165 (Ger.) *reprinted in* ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS: HERAUSGEGEBEN VON DEN MITGLIEDERN DES BUNDESVERFASSUNGSGERICHTS (J.C.B. Mohr (Paul Siebeck) Tübingen ed., 1973); see also WALTER BERKA, *LEHRBUCH VERFASSUNGSRECHT: GRUNDZÜGE DES ÖSTERREICHISCHEN VERFASSUNGSRECHTS FÜR DAS JURISTISCHE STUDIUM* 418-20 (Taschenbuch 1st ed. 2005); EKKEHART STEIN, *DAS RECHT DES KINDES AUF SELBSTENTFALTUNG IN DER SCHULE* (Hermann Luchterhand Verlag ed., 1967); see also CE Ass., Nov. 27, 1989, Rec. Lebon 346.893.

The first of these definitions proposes that human dignity must be regarded as a principle or value imbued with a content which is both different than and superior to that of individual rights. This conception has been used by courts in Europe – and even by European public opinion²⁰ – to refer to the Islamic veil or chador in the educational context as a symbol that, due to its religious content, attempts against the dignity of women by giving expression to their submission to men.²¹ In spite of the irrelevance of whether the Islamic veil or chador is worn voluntarily by a woman,²² the veil or chador is forbidden as it violates the content of human dignity as an absolute value.

The second of these definitions regards human dignity as a principle or value devoid of any autonomous content. On the contrary, its content is identified with that of individual rights,²³ so that human dignity can only be violated when individual rights are violated. From this perspective, the Islamic veil or chador in the context of the classroom can only be regarded as incompatible with human dignity if, for example, it is an imposition by parents on their daughter, and thus a violation of her rights as an individual. This

²⁰ For the different positions in the European debate, see MCGOLDRICK, *supra* note 5. See also Adrien Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifts the Veil?: Muslim Women, France and the Headscarf Ban*, 39 U.C. DAVIS L. REV. 743, 767-70 (2006).

²¹ See Conseil d'Etat [CE] decision No. 286798, June 27, 2008, available at http://www.halde.fr/spip.php?page=article&id_article=13421 (follow “Télécharger 3794.PDF” hyperlink); see also Dahlab v. Switzerland, 98 Eur. Ct. H. R. at ¶¶ 108-113 (2001).

²² This conception of human dignity in Europe was originally constructed by the German Federal Constitutional Court and developed by scholars. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 17, 1979, 50 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 166 (175); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], July 2, 1980, 54 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 341 (357); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Oct. 19, 1971, 32 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 98 (¶ 21). For an interesting assessment, see Günter Dürig, *Der Grundrechtssatz von der Menschenwürde*, 81 ARCHIV DES ÖFFENTLICHEN RECHTS (AöR) at 9 (1956).

²³ See Implementation of the International Covenant on Economic, Social, and Cultural Rights, Comm. on Economic, Social, and Cultural Rights, 21st Sess, Nov. 15 – Dec. 3, 1999, ¶ 4, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999).

conception of human dignity can be observed in the majority of the jurisprudence emanating from the Eur. Ct. H. R.,²⁴ and from some European constitutional courts.²⁵

These different ways of conceiving human dignity assign different functions to education (assimilationist/integrationist). The first of these models of dignity is typical of liberal thought for which the function of education is to perpetuate the values of the majority, standing also for the political and cultural unity of the nation.²⁶ Education does not enable the individual to decide freely and autonomously, but to preserve the nations' political and cultural values, these being superior to the rights of the individuals.²⁷

Such theory could be identified in some positions that currently, and very recently in Italy, have tried to defend the legality of displaying crucifixes (besides justifying the prohibition of the Islamic veil in the classroom) in public schools as they are part and parcel of the common patrimony of all Western culture.²⁸ The problem is

²⁴ See *Campbell and Cosans v. United Kingdom*, 48 Eur. Ct. H. R. (ser. A) ¶ 33 (1982).

²⁵ Such as Spain and Austria. See FRANCISCO J. BASTIDA FREIJEDO ET AL., *TEORÍA GENERAL DE LOS DERECHOS FUNDAMENTALES EN LA CONSTITUCIÓN ESPAÑOLA DE 1978* 38 (2004); DR. H.C. FELIX ERMACORA, *GRUNDRISSE DER MENSCHENRECHTE IN ÖSTERREICH* 66, 203 (1988).

²⁶ Stephen Castels, *Migration, Citizenship and Education*, in *DIVERSITY AND CITIZENSHIP EDUCATION* 29-42 (James A. Banks ed., 2004).

²⁷ See GUTMANN, *supra* note 8, at 40-41 for a critical analysis of the role of political and cultural values in education.

²⁸ This argument was put forward by the Italian government in 2009 before the Eur. Ct. H. R. to justify its refusal to take down crucifixes from public schools, an imposition derived from provisions established by the fascist regime which still had validity. See *Lautsi v. Italy*, 2 Eur. Ct. H. R. at ¶¶ 34-44 (2009). The *Lautsi* decision was recently overturned, see *Case of Lautsi and Others v. Italy* (no. 30814/06) Eur. Ct. H. R. (Mar. 18, 2011). For an interesting doctrinal debate on the matter of the crucifix in Italian public schools, see ROBERTO BIN ET AL., *LA LAICITÀ CROCIFISSA?: IL NODO COSTITUZIONALE DEI SIMBOLI RELIGIOSI NEI LUOGHI PUBBLICI* (G. Giappichelli ed., 2004). The conception of the crucifix as an expression of Western culture also appears in the particular vote cast by the magistrates Seidl, Sölner and Haas against the crucifix sentence passed by the BVerfG [German Constitutional Court]. See *Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court] May 16, 1995, 93 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1*, at 32-33.

that the (liberal) conception of dignity has brought about an anti-democratic consequence: the suppression of the rights of (religious) minorities in the classroom,²⁹ by imposing on them the assimilation of the values represented by the majority.³⁰ This criticism also applies to Art. 2 b) 1) of the Religionsunterrichtsgesetz [RUG]³¹ which imposes the display of crucifixes in those classrooms where there is a majority of students who profess the Christian religion.

A democratic theory of education, that defines liberty and equality as its fundamental principles, is more compatible with the theory that identifies human dignity (as an educational goal) with the rights of the individuals.³² According to this approach, the main goal of education must be to teach individuals how to exert their rights freely and autonomously. This goal of education—coherent with the democratic ideal, as well as compatible with the concept of education itself³³—is established in article 3 of the Convention on the Rights of the Child.³⁴ Here, the invocation of superior values that may justify the subordination of the rights of minorities, now endowed with a value equal to those of the majority, is totally absent.

The main goal of a democratic theory of education, which trains individuals, so that they can exert their rights, is to project all the diversity one can find in society into the classroom. This has been proposed by the classic pedagogical conception of the school as a “social microcosm,” completely assumed by the Eur. Ct. H. R.,³⁵ a

²⁹ GUTMANN, *supra* note 8, at 41 (critiquing liberal educational constructs).

³⁰ See Galston, *supra* note 7, at 85 (discussing the assimilationist function of liberal education).

³¹ RELIGIONSUNTERRICHTSGESETZ [RUG] [RELIGIOUS EDUCATION ACT] BGBl No. 190/1949 (Austria). A recent decision of the Austrian Constitutional Court stated that the display of crucifixes in nurseries, whose users are mostly Christian, does not violate the free exercise of religion of atheist children; see *Crucifix ban leaves most Austrians cross*, AUSTRIAN TIMES, Mar. 25, 2011, available at http://www.austriantimes.at/news/General_News/2011-03-25/31758/Crucifix_ban_option_leaves_most_Austrians_cross (last visited Apr. 21, 2011).

³² GUTMANN, *supra* note 8, at 44.

³³ LUHMANN, *supra* note 15, at 27.

³⁴ See SHARON DETRICK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 86-88 (1999).

³⁵ Folgero v. Norway [GC] (No. 15472/02), Eur. Ct. H. R. at ¶ 49 (2007),

fact that illustrates the integrationist function of the democratic education.³⁶ From this perspective, the display of religious symbols at schools must be permitted, in principle, for constituting an expression of social pluralism. At this point of the exposition, the evident problem that arises is how to conciliate in the school, at the same time, the rights of majority and the rights of minority. And this is a question that as we will discuss later, can be answered using other essential notions that constitute a democratic theory of education.

2. Human Dignity and the Confusion between Teaching and Education

A careful reading of the regulation of the aims of education in article 26.2 of the Universal Declaration of Human Rights, and article 13.1 of the Covenant of Economic, Social and Cultural Rights, allows us to see how the right to education is not completely satisfied just with any schooling that allows the individual to exert his rights and maintain his dignity (see also the Clause I of the Article 1 of the World Declaration Education for all).³⁷ The provisions mentioned above also demand that this education must lead to a full development of the personality and dignity of the individual.³⁸ The aim is to

available at <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=6862387&skin=hudoc-fr&action=request> (follow "Folgero v. Norway" hyperlink). On the classic pedagogical conception of the school as a microcosm, see LAWRENCE KOHLBERG, *ESSAYS ON MORAL DEVELOPMENT* 498-500 (2nd ed. 1984). As regards the integrationist function of the democratic educational model—opposed to the liberal assimilationist function—, see EAMONN CALLAN, *CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY*, 13 (1997) and James A. Banks, *Citizenship Education and Diversity*, 52 *J. TEACHER EDUCATION* 1, 6-8 (2001).

³⁶ See United Nations, Econ. & Soc. Council, Comm. on Econ., Soc. and Cultural Rights, Plans of Action for Primary Education, Art. 14, General Comment 11, 2, U.N. Doc. E/C.12/1999/4 (1999); see also United Nations, Educ., Scientific & Cultural Organization, Convention Against Discrimination in Education, 6-8, 429 U.N.T.S. 93 (1960).

³⁷ See Manfred Nowak, *The Right to Education*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 189 (Asbjørn Eide et al. eds., 1995).

³⁸ See JOEL H. SPRING, *THE UNIVERSAL RIGHT TO EDUCATION* 4-6 (2000).

guarantee an all-round education which allows the individual to develop all the possible angles of his or her personality.³⁹

The principle behind an all-round education, that constitutes the first of the premises of a democratic education, has led to the reconsideration of the traditional distinction between the categories of education and teaching⁴⁰ (also established in the field of pedagogy) as the transmission of values and knowledge, respectively.⁴¹ Although this traditional dichotomy should be overcome, it is a certain fact that the same still plays an essential role in the educational debate nowadays. A legal support can be, for example, found in International Law, which sometimes distinguishes explicitly between education and teaching (see art. 2 of the first protocol to the European Convention on Human Rights).⁴² This distinction has sometimes been used to ascribe the competence to educate children to parents and the competence to provide schooling to the state,⁴³ thus, mirroring what the doctrine of home schooling advocates.⁴⁴

³⁹ Universal Declaration of Human Rights, G.A. Res. 217A (III), Art. 26 (2) (Dec. 10, 1948). See United Nations, Convention on the Rights of the Child, Committee on the Rights of the Child, The Aims of Education, General Comment No. 1, Article 29 ¶ 2, U.N. Doc. CRC/GC/2001/1 (2001), available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2001.1.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2001.1.En?OpenDocument).

⁴⁰ See ALBERT O. HIRSCHMAN, THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH 14-15 (1977).

⁴¹ Campbell and Cosans v. the United Kingdom, 48 Eur. Ct. H. R. 33 (1982); see HANS Kelsen, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 24 (7th ed. 2000).

⁴² See Art. 2, First Protocol Eur. Conv. on H.R. (Mar. 20, 1952) ("In the exercise of any functions which it assumes in relation to *education* and to *teaching*, the State shall respect the right of parents to ensure such *education* and *teaching* in conformity with their own religions and philosophical convictions") (*emphasis added*).

⁴³ Judicial systems often prefer the educational role attributed to parents. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc A/RES/217(III), at Art. 26 (Dec. 10, 1948); Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, May 18, 1954, 213 U.N.T.S. 262 available at <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf> (describing parents prior right). See also GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I at art. 6 (Ger.) (describing the

This has also been the basis for some current positions adopted by parents who defend their right to conscientiously object to some subjects included in the national curriculum, such as sexual education, ethics, or education for citizenship.⁴⁵ Such parents argue that these subjects transmit values and, therefore, interfere with their right to educate their children.

The principle behind an all-round education adopted in the Universal Declaration of Human Rights and in the Covenant of Economic, Social and Cultural Rights is incompatible with a strict distinction between education and teaching. An all-round education not only calls for the teaching of values, but also for the transmission of the type of knowledge the individual will need in order to effectively interact with reality (the latter being traditionally the object of teaching). This explains why the principle behind an all-round education contained in international normative leads to a (democratic) confusion between education and teaching.⁴⁶

natural right of parents). There are still some current instances of this approach. See HERMANN VON MANGOLDT AND FRIEDRICH KLEIN, *DAS BONNER GRUNDGESETZ*, VOL. 1, 273 (2nd ed. 1957). However, this theory has systematically been rejected in the courts after a sentence passed by the Bundesverfassungsgericht [BVerfG] [Constitutional Court], Sept. 26, 1972, 34 *ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS* [BVERFGE] 165 at ¶ 114 (Ger).

⁴⁴ See Jeff Spinner-Halev, *Extending Diversity: Religion in Public and Private Education*, in *CITIZENSHIP IN DIVERSE SOCIETIES* 72 (Will Kymlicka & Wayne Norman eds., 2003); KEVIN McDONOUGH ET AL., *CITIZENSHIP AND EDUCATION IN LIBERAL-DEMOCRATIC SOCIETIES passim* (2003); THOMAS SPEIGLER, *HOME EDUCATION IN DEUTSCHLAND: HINTERGRÜNDE – PRAXIS – ENTWICKLUNG* 253-255 (2008).

⁴⁵ *Kjeldsen v. Denmark*, 1 Eur. Ct. H. R. (ser. A) 737 ¶ 52-54 (1976); *Zengin v. Turkey*, App. No. 1448/04 ECtHR at ¶ 47-51 (2007), available at <http://strasbourgconsortium.org/document.php?DocumentID=4224>. On conscientious objection to the subject of sexual education in Germany, See BVerfGE [Constitutional Court], Dec. 21, 1977, 47 *ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS* [BVERFGE] 46-85 (Ger). As regards conscientious objection to the subject of education for citizenship in Spain, see the recent sentence passed by Tribunal Supremo T.S., Nov. 2, 2009, (J.T.S. No. 905/2008) (Spain). On the literature about the Spanish case, see Antonio Embid Irujo, *La Educación Para la Ciudadanía en el Sistema Educativo Español. Reflexiones Jurídicas*, 83 *REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL* 11, 26-28 (2008).

⁴⁶ See Manfred Nowak, *The Right to Education*, in *ECONOMIC, SOCIAL AND*

Therefore, to educate, not only involves the transmission of (democratic) values such as equality, pluralism, or tolerance, as proposed in the subject of education for citizenship both by the European Union and by the different states.⁴⁷ Education also demands the transmission of other competences traditionally associated with teaching such as, language,⁴⁸ or physical education, the latter having been the subject of a recent ruling by the German Federal Administrative Court, that declares the formative effects and consequences of teaching sports.⁴⁹

Consequently, in a democratic theory of education it is not possible to postulate two different rights (education and teaching) to justify a distribution of competences between different subjects (parents and the state). We can only speak of a unique right: education. All the duties that international law and the constitutions of particular states have ascribed to parents and the state have a bearing on the education of minors.⁵⁰ The problem is, again, how to conciliate private/public competences in education. This question, as the already

CULTURAL RIGHTS, 197-98 (Asbjørn Eide, Catarina Krause y Allan Rosas eds., 1995). Be that as it may, different studies mainly carried out in the field of pedagogy, have demonstrated how some competences traditionally associated with the sphere of schooling incorporate contents that are clearly educational. Some already classic works have illustrated, for instance, the formative value of Mathematics. Jean Piaget, *Comments on Mathematical Education*, 47 CONTEMPORARY EDUCATION 1, 5-10 (1975).

⁴⁷ See DIVERSITY AND CITIZENSHIP EDUCATION: GLOBAL PERSPECTIVES *passim* (James A. Banks, ed., 2004) [hereinafter DIVERSITY AND CITIZENSHIP].

⁴⁸ Relating to Certain Aspects of the Laws on the Use of Languages In Educ. in Belgium v. Belgium, 1 Eur. Ct. H. R. 252, 260 (1968) [hereinafter *Belgian Linguistics Case*].

⁴⁹ See Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], Aug. 25, 1993, 94 ENTSCHEIDUNGEN DES BUNDESVERWALTUNGSGERICHTS [BVERWGE] 82-94 (Ger.); see also Robert J. Brustad, *Parental and Peer Influence on Children's Psychological Development through Sport*, in CHILDREN AND YOUTH IN SPORT: A BIOPSYCHOSOCIAL PERSPECTIVE 112-24 (Frank L. Smoll & Robert E. Smith eds., 1995) (discussing the formative component of physical education).

⁵⁰ Universal Declaration of Human Rights, G.A. Res. 217(III) A, U.N. Doc. A/RES/217 (III) at art. 26 ¶ 3, (Dec. 10, 1948); International Covenant on Civil and Political Rights, G.A. Res 2200A (XXI). 999 U.N.T.S. 407, at art 18 ¶ 4, March 23, 1976; see Wildhaber, *supra* note 18.

abovementioned one of how to balance minority/majority rights in the school, can be answered using one of the premises that constitutes a democratic theory of education. This will be expounded below.

3. An Educational Paradox: Indoctrinate to Secure Liberty

The notion that education must be at the service of the full freedom and autonomy of the individual—which, as we have seen, often leads to the confusion between education and schooling—has traditionally been used as the cornerstone for what has become known as the principle of neutrality in education,⁵¹ which in our days has been unanimously recognized by the Eur. Ct. H. R. as well as by individual European constitutional courts.⁵²

The main objective of this principle is to proscribe any possible indoctrination in the sphere of education,⁵³ assuming that this indoctrination would supposedly restrict the freedom and the full capacity of the individual to choose in the future, considered basic aims in education.⁵⁴ The prohibition to indoctrinate in education also underlies the aforementioned doctrine of home schooling.

Nevertheless, the necessity that education serves to the full development of human beings⁵⁵ may eventually be guaranteed re-

⁵¹ See BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 141-43 (1980).

⁵² *Lautsi v. Italy*, 2 Eur. Ct. H. R. at ¶ 56 (2009); *Kjeldsen v. Denmark*, 1 Eur. Ct. H. R. (ser. A) 737 ¶ 53 (1976); see also Bundesverfassungsgericht [BVerfG] [Constitutional Court], Dec. 17, 1975, 41 *ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS* [BVERFGE] 29, 50 (Ger). [German Constitutional Court]; BVerfG, Oct. 16, 1979, 52 *BVERFGE* 223, 233; BVerfG, Jun. 3, 2003, 108 *BVERFGE* 282; Verfassungsgerichtshof [VfGH] [Constitutional Court], May 16, 1927, *ERKENNTNISSE UND BESCHLÜSSE DES VERFASSUNGSGERICHTSHOTES* [VfSLG] No. 800/1927 (Austria).

⁵³ *Larissis v. Greece*, Eur. Ct. H. R. ¶ 45 (1998) available at http://www.iidh.ed.cr/comunidades/libertadexpresion/docs/le_europeo/larissis%20and%20others%20v.%20greece.htm.

⁵⁴ See STUART MILL, note 7, at 63 and EAMONN CALLAN, *AUTONOMY AND SCHOOLING*, 25-26 (1988).

⁵⁵ Universal Declaration on Human Rights, art. 26 ¶ 2 GA res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

sorting to a misunderstood principle of neutrality (in its most radical liberal sense) as the refusal to transmit any value whatsoever in the educational process.⁵⁶ Truly speaking, the fact that education must lead to the full development of the personality of the individual should in itself justify the proscription of any educational doctrine that may be deemed contrary to the exertion of freedom.⁵⁷

When talking about education, one must necessarily ponder about its aims, as facts show that in those legal systems which recognize just one “right to education”—without alluding specifically to the aims this must meet (i.e. German and Austrian constitutions)—this matter had to be dealt with interpretively.⁵⁸ The transmission of values, and therefore indoctrination, is consubstantial with the concept of education, and this is not only true about a democratic theory of education.

In any case, the consubstantiality of education with its aims is not the only argument in favor of the acceptance of educational indoctrination. Of similar relevance is the fact that the receiver of education is an individual whose personality is still being formed, which implies that practically any content being transmitted to him may be susceptible of generating indoctrination or, at least, the assumption of value on the part of the receptor.⁵⁹ This has been the basis for al-

⁵⁶ See STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY 26 (2000); see also JOHN RAWLS, POLITICAL LIBERALISM 193 (Columbia Univ. Press 1996) (1993). Strictly speaking, not even the liberal educational model—the basis for the construction of the principle of neutrality in educational matters—or its alter ego (the prohibition to indoctrinate) is founded on a valuable nihilism. As some works have managed to demonstrate, the main function behind these principles has been to ultimately perpetuate the values of the liberal state. This consequence has been admitted even by those who still uphold educational values close to those of the liberal doctrine.

⁵⁷ Kjeldsen v. Denmark, 1 Eur. Ct. H. R. (ser. A) 737 ¶ 52 (1976).

⁵⁸ E.g., KARL SPIELBÜCHLER, EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT, 675, 686 (1981) (describing Austrian legal ordering); see, e.g., MICHAEL BOTHE & JOHANNES HENGSTSCHLÄGER, *Erziehungsauftrag und Erziehungsmaßstab der Schule im freiheitlichen Verfassungsstaat*, in 54 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 7, 30 (1995) (detailing German legal ordering).

⁵⁹ See Lawrence Kohlberg, *Stage and Sequence: The Cognitive Developmental Approach to Socialization*, in HANDBOOK OF SOCIALIZATION THEORY AND

ready classic statements that have characterized education as the best instrument to defend the Constitution.⁶⁰

The German Constitutional Court has shown how the display of crucifixes in the classroom may indoctrinate individuals because they are still minors.⁶¹ And this is a crucial detail that likely the Eur. Ct. H. R. has not properly noticed when in its recent ruling in the Case of *Lautsi and Others v. Italy* concluded that a crucifix is not an indoctrinatory symbol.⁶² The Court argued that a crucifix is just a passive symbol, in opposition to the active components that are present, and define a didactic lesson or the participation in religious activities.⁶³ Really, the indoctrinatory character of a symbol does not depend on its content, but essentially on its addressee or audience. Therefore, in education, a crucifix may be as indoctrinatory as a religious speech.

Consequently, the goal of any form of education, be it within or without a democratic theory, is to indoctrinate; despite the clearly pejorative connotation of the term due to the influence of liberal thought. What must be considered, is not whether education brings about indoctrination, but under what conditions indoctrination is possible. Or, drawing from educational political theory, to what extent and under what conditions the freedom and the capacity to choose of the individual may be restricted so as to guarantee them in the future.⁶⁴ The resolution of this dilemma is just the expression of

RESEARCH, 368–373 (David A. Goslin, ed., 1969) (explaining Kohlberg's work in the field of pedagogy, and on the different stages of educational development and its relationship to the social milieu of the learner); see also ROBERT L. SELMAN, THE GROWTH OF INTERPERSONAL UNDERSTANDING: DEVELOPMENTAL AND CLINICAL ANALYSES 35–37, 44–45, 183, 218, 271 (1980) (discussing Selman's work about social development).

⁶⁰ See generally ARISTOTLE, POLITICS, bk. V, 1307^a, 15–16 (David Keyt trans., Clarendon Press Oxford 1999).

⁶¹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 12, 1987, 93 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1 (Ger.).

⁶² Case of *Lautsi and Others v. Italy* (no. 30814/06) Eur. Ct. H. R. (Mar. 18, 2011).

⁶³ *Id.* At ¶ 72.

⁶⁴ See CALLAN, *supra* note 35, at 13.

the “paradox” on which the concept of education rests: we must indoctrinate the individual in order to secure his freedom. As we will see in what follows, only a democratic theory of education, whose premises I will outline below, will manage to solve the aforementioned paradox posed by educational indoctrination which liberal doctrine has been unable to explain. And this because liberal theories, invoking liberty, reject that indoctrination could be an inherent element to education. The problem with these theories is not, therefore, that they do not offer a satisfactory solution to the analyzed paradox. The problem is simply that these theories do not face this paradox.

B. Education and Democracy. The Democratic Theory of Education

1. The Democratic Education as a Closed Circle that Serves Democratic Values

The Universal Declaration of Human Rights in its article 26.2, and the International Covenant of Economic, Social and Cultural Rights in its article 13.1 state that, besides contributing to the full development of the personality of the individual, education must be oriented towards democracy. As previously stated, these provisions also fulfill one of the demands of a democratic system: to educate for democracy.⁶⁵ This means that besides satisfying one of the elements consubstantial with the concept of education, which is to educate for the freedom and autonomy of the individual, it seeks to educate for democracy. No democratic system, as opposed to the liberal doctrine, can work effectively if individuals are not educated in the proceedings that regulate their participation in society.⁶⁶

As expressed in article 13.1 of the International Covenant of Economic, Social and Cultural Rights, *participation* in society is

⁶⁵ HANS KELSEN, VOM WESEN UND WERT DER DEMOKRATIE 18 (1981).

⁶⁶ This opposes a liberal educational model which, based on statics premises, aims to perpetuate the social values of the majority. This explains why liberal doctrine has gone so far as to admit that the state can work flawlessly even without education. Democracy, on the contrary, is based on the dynamic premises of changing laws. If education does not encourage individuals to participate in this process, the democracy project will not be simply possible. See HIRSCHMAN, *supra* note 40, at 14.

what a democratic theory of education advances, and this constitutes a fundamental unifying force in contemporary societies that are progressively becoming more multicultural.⁶⁷ A democratic education must first educate for freedom, and then project such freedom on the individual's participation in society and in the state, a goal also shared by the subject of education for citizenship in the European Union and in the different member states.⁶⁸

Be it as it may, in and of itself this generic participative ideal does not suffice to demonstrate the essence of a democratic theory of education. If what characterizes democracy is its adaptation of the content of the law to the will of those submitted to it,⁶⁹ the truly democratic function of education must be found in the need to educate individuals so that they can participate in the definition of the educational model to which future individuals will have to adhere.⁷⁰ This democratic reinterpretation of these rights, which is recognized

⁶⁷ Democracy is probably the most decisive unifying force in contemporary societies. Nowadays, this function cannot be carried out - at least not so intensely as before - by a common language or culture, the cohesive factors of the liberal state. In our days, multicultural societies can only come together via the participation of all their members in collective decision making. See CALLAN, *supra* note 35, at 13-19.

⁶⁸ See Eur. Consult. Ass., *Recommendation Rec (2002)12 of the Committee of Ministers to Member States on Education for Democratic Citizenship*, 20th Sess., Rec. No. 12E (Oct. 16, 2002) [hereinafter *Recommendation*] ("[T]he role of education in promoting the active participation of all individuals in political, civic, social and cultural life."). See also International Covenant on Economic, Social and Cultural Rights art. 13, Dec. 16, 1966, 6 I.L.M. 360, 993 U.N.T.S. 3 (agreeing to terms that were similarly applied in the Recommendation 12 of the Committee of Ministers to member states on education for democratic citizenship); Final Declaration of the Second Summit of Heads of State and Government of the Council of Europe, Strasbourg, 37 I.L.M. 433 (Oct. 11, 1997) (agreeing to launch a plan promoting the participation of young people in civil society). See generally DIVERSITY AND CITIZENSHIP, *supra* note 47 (analyzing the configuration of the education for citizenship including European states).

⁶⁹ KELSEN, *supra* note 65, at 19.

⁷⁰ GUTMANN, *supra* note 8, at 41-43; See also AMERICAN FEDERATION OF TEACHERS, EDUCATIONAL EXCELLENCE NETWORK & FREEDOM HOUSE, EDUCATION FOR DEMOCRACY: A STATEMENT OF PRINCIPLES. GUIDELINES FOR STRENGTHENING THE TEACHING OF DEMOCRATIC PRINCIPLES 8 (1987), available at <http://www.eric.ed.gov/PDFS/ED313271.pdf>.

in practically all European constitutions,⁷¹ provides the right to education with what we may call a circular function according to which individuals are educated first so that they can decide how to educate future generations later on.⁷² The right to a democratic education means the creation of a permanent link between all its former, present and future holders.

In any case, the true meaning of the circular function of the democratic theory of education not only consists of simply submitting individuals to an educational process democratically defined by the will of the former subjects of education. If the emphasis was to be placed exclusively on the idea of process, we would be forced to accept—at least, on a theoretical basis—that any doctrine (even anti-democratic) democratically agreed upon (i.e. voted by the majority) by the individuals who participate in the educational process⁷³ could inspire the education of a minor. We would be forced to admit, in principle, that parents or any other individuals in charge of creating educational centers should be entitled to educate in any kind of value.

According to international covenants,⁷⁴ this is far from being the authentic function of the democratic education. What these international regulations aspire to is, first, to educate in democratic values so as to guarantee that these same values will be present in the future

⁷¹ E.g., GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. 1 at art. 6, ¶ 2 (Ger.); Art. 33 ¶ 3 LA COSTITUZIONE DELLA REPUBBLICA ITALIANA [Const.] (It.); LA CONSTITUCIÓN ESPAÑOLA [C.E.], Dec. 29, 1978, at art. 27, ¶¶ 3, 6 (Spain) (recognizing the right of parents to have their children receive an education that agrees with their religious and moral convictions, and the right to create educational institutions).

⁷² See GUTMANN, *supra* note 8, at 3 (describing this ideal of a democratic education).

⁷³ See, e.g., International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 18 ¶ 4, GA res. 2200A, U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).

⁷⁴ See generally Universal Declaration on Human Rights, art. 26 ¶ 2 GA res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); International Covenant on Economic, Social and Cultural Rights art. 13 ¶ 4, Dec. 16, 1966, 6 I.L.M. 360, 993 U.N.T.S. 3.

process to define the educational model. In other words, parents and those in charge of educational centers must educate minors in democratic values in order to guarantee that, in the future, these same individuals, parents as well as those persons in charge of educational centers will also educate in democratic values. The circular function of the democratic education rests precisely on this continuous exchange of roles. The democratic function consists in educating democrats, with the aim that they, in their turn, follow the task of educating more democrats.

In the European Union, these are the premises that inspire the education for citizenship, which appeals to the responsibility of present and future generations in the upholding of democratic societies.⁷⁵ This turns a democratic theory of education into a mechanism of militant democracy aimed to secure the permanence of democracy.⁷⁶ Contrary to what happens with other rights such as the right to organize political parties, the right to freedom of expression, and the right to religious freedom, the right to education escapes definition within the premises of a procedural democracy.⁷⁷ If the function of any education is the indoctrination, as we suggested previously, any democracy becomes a militant one as soon as the legal system regulates the right of education. Therefore, as it was stated at the beginning of this manuscript, cohesion in multicultural societies depends

⁷⁵ This function in which education is put at the service of the perpetuation of democratic values—and in which one can see an almost militant aspiration to the right to education—is stated in international legislation via the long enumeration of the aims that the educational process should promote: understanding, tolerance, friendship, pluralism, equality, justice. See *Recommendation supra* note 68.

⁷⁶ JOHANNES LAMEYER, *DIE STREITBARE DEMOKRATIE*, 31 (1978); Education Law of Niedersächsisches Schulgesetz [NSchG] [Lower Saxony Education Act], March 3, 1998, NDS.GVBL. at ¶ 137, art. 2 ¶ 1 (Ger.); Schulgesetz für das Land Nordrhein-Westfalen [NRW SchulG] [Education Act for the Country North Rhine], Feb. 15, 2005, GV.NRW. at ¶ 102, art. 5 ¶ 5 (Ger.); ARMIN SCHERB, *DER BÜRGER IN DER STREITBAREN DEMOKRATIE: ÜBER DIE NORMATIVEN GRUNDLAGEN POLITISCHER BILDUNG*, 96 (2008).

⁷⁷ See Leonardo Álvarez, *Die spanische Dogmatik der Verfassungstreue: Geschichte einer fehlgeschlagenen Rezeption des deutschen Verfassungsdenkens*, in 70 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* [ZAÖRV], 440-447 (A. von Bogdandy & R. Wolfrum eds., 2010).

basically nowadays on using education to create more willing democrats.

2. Pluralism as a Principle of Distribution of Educational Competences: Parents' Fundamental Rights and Powers of the State

One of the elements whose absence would deprive the democratic theory of education of any sense is the principle of pluralism, specifically recognized in article 26.2 of the Universal Declaration of Human Rights and article 13.1 of the International Covenant of Economic, Social and Cultural Rights,⁷⁸ and in article 27.2 of the Constitución Española (CE) [Spanish Constitution],⁷⁹ the latter being a unique case in European constitutionalism. The recognition of parents' right to have their children receive a religious and moral education that agrees with their personal convictions, and the right to create educational institutions rests on the principle of pluralism as one of the fundamental requirements of democracy. With the recognition of these rights, different legal systems aim to have individuals submit themselves to a plural educational process in which they may compare and contrast diverse political, religious, or moral options.⁸⁰

Some contemporary authors have tried to explain the guarantee of pluralism in education following the "principle of the distribution of educational competences" proposes a certain interpretation about the rights and powers that a legal system should confer to parents and to the state in education.⁸¹ This principle, the inspiration of

⁷⁸ With a general character, *see* Nowak, *supra* note 37.

⁷⁹ C.E., Art. 27.2, Dec. 29, 1978 (Spain).

⁸⁰ *Kjeldsen v. Denmark*, 1 Eur. Ct. H. R. (ser. A) 737 ¶ 53 (1976).

⁸¹ In the current debate on education, this principle of the distribution of educational competences has been blamed for the creation of the so called "parallel societies." The existence of parallel societies must be regarded within the context of the debate which, mainly during the first years of the German Constitution, defended that parents had a preeminent right to educate their children. *See* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. 1, art. 6, ¶ 2 (Ger.) (stating, "the care and education of children is their parents' natural right as well as a duty primarily assigned to them."). Some vestiges of this theory, in which parents become the main

the American doctrine known as home schooling,⁸² ascribes parents full educational competence as regards religion and morals, leaving for the state the competence to educate in everything else. This would probably be the most proper construction of Article 2 of the First Protocol to the European Convention on Human Rights, which states: "In the exercise of any functions which it assumes in relation to education and to teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical conviction." According to this interpretation, pluralism in education would find its expression in the comparison among different authorities and educational competences. However, it seems unlikely that this method can guarantee a truly plural education.

All democratic systems recognize for individuals a series of rights whose function is to guarantee their self-determination and their self-differentiation against the rest of individuals in society.⁸³ In this manner, and exercising his religious freedom, any individual can profess the Catholic faith and, therefore, only accept heterosexual marriages. This is a consequence of pluralism, but, logically, it is not a plural option as it rejects any option contrary to his beliefs.

For this reason, if pluralism and diversity, besides liberty, are the two principles that international covenants want to guarantee in the realm of education, this task cannot be made to rest totally or partially on the individuals. This explains why parents cannot be considered as educational authorities, such as the theory of the distribution of educational authorities advocates. Only the state, as the non-titular subject of rights that lead to social inequality, can guarantee effectively pluralism in the educational process, ensuring that it contains all the diversity one can find in society.⁸⁴ To educate for pluralism

educational authority, can still be found nowadays. See VON MANGOLDT & KLEIN, *supra* note 43, at 273.

⁸² See *Wisconsin v. Yoder*, 406 U.S. 205, 219-229, 234-236 (1972).

⁸³ See WILL KYMLICKA, *POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM AND CITIZENSHIP* 291-293 (2001).

⁸⁴ THEODOR LITT, *DIE FREIHEIT DES MENSCHEN UND DER STAAT* 8-11 (1953).

will only have sense if the state is considered as the mainly educational authority.⁸⁵

This is why the state, even against the will of the parents, can educate in contents such as sexuality or religion and thus guarantee pluralism by exposing learners to diverse social expectations⁸⁶. In an already classic case in educational theory, the U.S. Supreme Court rejected the petition of fundamentalist Christian parents who wanted to have their children exempt from reading classes in which the achievements of women outside the home were praised, thus presenting an inversion of sexual roles that was incompatible with their Christian beliefs.⁸⁷ The court's negative ruling can be appropriately explained within a democratic function in education according to which, in the educational process, children need to be exposed to the kind of plural social reality in which they will be forced to live.⁸⁸

What parents can demand in the organization of the educational system, is that the state takes into consideration their religious and moral convictions in order to set them against other diverse options and thus guarantee pluralism. For instance, Muslim parents can request a state that educates in Christianity to also refer to the existence of their Muslim religion in society. This is why the state only violates the rights of parents and minors to education when it assigns absolute value to certain social, political, or ideological conceptions in the sphere of education. And this is what sets the limits of educa-

⁸⁵ See Amy Gutmann, *Undemocratic Education*, in LIBERALISM AND THE MORAL LIFE 82-86 (Nancy L. Rosenblum ed., 1989).

⁸⁶ *Kjeldsen v. Denmark*, 1 Eur. Ct. H. R. (ser. A) 737 ¶ 53 (1976).

⁸⁷ *Mozert v. Hawkins Board of Education*, 827 F.2d 1058, 1062-65 (6th Cir. 1987). *Contra* *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (authorizing parents to reject the educational function of the state as far as this affected religious and moral convictions that were incompatible with the preservation of the Amish community). Cf. Richard J. Arneson and Ian Shapiro, *Democratic Autonomy and Religious Freedom: A Critique of Wisconsin v. Yoder*, in POLITICAL ORDER: NOMOS XXXVIII 365-410 (Ian Shapiro & Russel Hardin eds., 1993). See JEFF SPINNER-HALEV, *SURVIVING DIVERSITY: RELIGION AND DEMOCRATIC CITIZENSHIP* 47 (2000).

⁸⁸ See Stephen Macedo, *Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls?*, 105 ETHICS 468, 473-477 (1995).

tional indoctrination in a democratic theory of education.⁸⁹ This explains the prohibition on the display of crucifixes in public schools imposed by the German Constitutional Court as it implies an absolutization of values that belong to Christianity.⁹⁰

How could it be stated, as the Eur. Ct. H. R. recently held in the *Case of Lautsi and Others v. Italy*, that the display of crucifixes in public schools does not produce the absolutization of a religion? Moreover, this symbolic-religious absolutization hardly can be understood reduced, as the Eur. Ct. H. R. proposes, just allowing alumni to wear characteristic clothes of their own religions.⁹¹ That would lead to an unacceptable conclusion in a democratic theory: that responsibilities and competences of the state in education could

⁸⁹ Folgerø and Others v. Norway, App. No. 15472/02, Eur. Ct. H. R. at ¶ 35 (2007), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=15472/02&sessionid=62520457&skin=hudoc-en;> Yanasik v. Turkey, App. No. 14524/89, 74 Eur. Comm'n H.R. Dec. & Rep. 13-14 (1993); See also Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986); See Edwards v. Aguillard, 482 U.S. 578 (1987), which ruled unconstitutional the law of the State of Louisiana which, in theory, tried to confer an equal status to evolutionary and creationist doctrines, thus satisfying the principle of relativity demanded by the democratic theory of education. However, the Supreme Court held the unconstitutionality of the State Statute on the basis that it only allowed to teach the doctrine of evolutionism if, at the same time, it explained the creationist doctrine, thus generating inequality towards the evolutionary theory. *Id.* at 589-594. See Sherri Schaeffer, *Edwards v. Aguillard: Creation Science and Evolution - the Fall of Balanced Treatment Acts in the Public Schools*, 25 SAN DIEGO LAW REV. 829, 842-843 (1988); BRIAN J. ALTERS & SANDRA ALTERS, DEFENDING EVOLUTION IN THE CLASSROOM: A GUIDE TO THE CREATION/EVOLUTION CONTROVERSY 213 (2001) for an analysis of this sentence, and particularly for what has been called relativism at the service of absolutism.

⁹⁰ The German Constitutional Court ruled on the constitutionality of displaying crucifixes in Bavarian public schools. The Court declared displaying crucifixes in this context unconstitutional, not due to the mere display of the crucifix but, rather, due to the manner in which such display took place. *Id.* The fact that students were being exposed to this religious symbol throughout their education made it impossible for them to ignore its presence and this provoked in the student—precisely for being an individual still being formed—the impression that the religion evoked by the crucifix was being absolutized.

⁹¹ Case of Lautsi and Others v. Italy (no. 30814/06) Eur. Ct. H. R. ¶ 74 (Mar. 18, 2011).

be the conferred to individuals through the exercise of their fundamental rights.

In any case, in a democratic system the state has a degree of autonomy to decide how pluralism in education must be guaranteed,⁹² thus also preserving the rights of parents and minors to education. Such guarantee of pluralism in education can be done in different ways, such as:

- 1) In the educational contents, imposing the dissemination of values linked to pluralism such as tolerance, respect, equality or diversity, as it happens with the education for citizenship in the European Union.⁹³
- 2) In the manner in which contents are transmitted—for example, sexual education—stating that diverse sexual options co-exist in society.⁹⁴
- 3) Exempt students, at their own request or at their parents' (depending on the students' maturity), from attending specific classes—such as religion.⁹⁵
- 4) Exempt students, at their own request or at their parents', from some activities carried out in class—for example, the voluntary nature of school prayer.⁹⁶

⁹² Belgian Linguistics Case, *supra*, note 48; *Efstratiou v. Greece*, App. No. 24095/ 94, 27 Eur. Ct. H. R. 696 (1996).

⁹³ See *Recommendation*, *supra* note 68; Eur. Comm'n, Directorate-General for Education and Culture, Study on Active Citizenship Education, (Feb. 2007), http://ec.europa.eu/education/pdf/doc248_en.pdf.

⁹⁴ *Kjeldsen v. Denmark*, 1 Eur. Ct. H. R. (ser. A) 737 ¶ 53 (1976).

⁹⁵ *Hasan and Eylem Zengin v. Turkey*, Eur. Ct. H. R. 14-15; See Bundesverwaltungsgericht (BVerwG) (Federal Administrative Court), Aug. 25, 1993, 94 ENTSCHEIDUNGEN DES BUNDESVERWALTUNGSGERICHTS [BVERWGE] 82, 94 (Ger.). In this case, the European Court of Human Rights allowed parents of Alevi religion to educate their children in their own religious faith, exempting them from attending a class of religion taught from a Sunnite perspective; See also Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court) Oct. 16, 1979, 52 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 233 (Ger.). This case dealt with the voluntary nature of school prayer.

⁹⁶ *E.g.* Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court) Oct. 16, 1979, 52 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS

According with all these previous ideas, we are ready to solve the problem known as the “paradox of the education” that appears by the confluence of two cumulative causes. On the one hand, there is the inherent element of indoctrination that characterizes any education (as a consequence of the minority of students). On the other hand, there is the use of the education as an instrument to guarantee the freedom of the students. A democratic education is able to solve the paradox of the education – indoctrinate to guarantee freedom – when it educates in and for pluralism. In other words, a solution to the dilemma can be found when education faces students with different cultural and religious alternatives that possess an equal social value.

When this happens, students are vested with the necessary tools in order to decide in the future freely their own ideological positions, and they can confirm or even question the convictions of their parents. This is the reason that explains why in a democratic education it is not a crucial issue to prohibit women wearing muslin veils in schools as an expression of inequality between genders. The essential challenge is offering these girls a plural education that allows them to decide in the future if they really wish to wear veils or if they would rather want to change their clothes, and their lifestyle.

3. Pluralism as a Cause of a “Social Microcosm” within School: Distribution of Fundamental Rights in School and Pluralism

The right of parents to have their children receive a religious and moral education that agrees with their personal convictions, and the right to create educational institutions are not the only modes of expressing pluralism that international covenants recognize. The exigency that education must respect human rights, imposed generically in 26.2 of the Universal Declaration on Human Rights and article 13.1 of the International Covenant of Economic, Social and Cultural Rights, also includes the rights of teachers and students,

[BVERFGE] 233 at ¶¶ 50-55 (Ger.); *Engel v. Vitale*, 370 U.S. 421 (1962); *Lee v. Weisman* 505 U.S. 577 (1992) (discussing the sentences passed by the Supreme Court of the United States on the possibility of exempting students from school prayer).

who are the traditional protagonists of the educational exchange.⁹⁷ Such rights also express pluralism in school and create what has been called “social microcosm.”⁹⁸ It reproduces in schools the cultural and religious pluralism that naturally originates the daily reality.

In this exchange, and regarding rights, we must differentiate between two categories. First, we must consider certain rights (freedom of thought, religious freedom and freedom of worship, or freedom of expression) equally shared by teachers and students. These are precisely the rights supposedly violated in cases dealing with the use of the Islamic veil at schools which different European juridical systems have been forced to rule on.⁹⁹ Secondly, we must also take into account those rights (such as academic freedom) which, exclusively belonging to teachers, are recognized as a means to guarantee the quality of teaching.¹⁰⁰

As a consequence, at school rights of parents, rights equally shared by students and teachers, and other rights pertaining exclusively to students (right to education) or to teachers (academic freedom) converge.¹⁰¹ This generates a complex web of rights absent in

⁹⁷ See generally PETER HÄBERLE, *ERZIEHUNGSZIELE UND ORIENTIERUNGSWERTE IM VERFASSUNGSSTAAT* 25-28 (1981) (discussing the educational relationship from the perspective of the rights of students and teachers.)

⁹⁸ See again KOHLBERG, *supra* note 35, at 498-500.

⁹⁹ Sahin v. Turkey, App. No. 44774/98, 44 Eur. Ct. H. R. 5 (2005); Schweizerisches Bundesgericht [BGer] [Federal Court] Nov. 12, 1997, 123 *ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS* [BGE] 296 (Switz); Regina (SB) v. Governors of Denbigh High School [2006] UKHL 15, [2006] 2 W.L. 719, 722 (appeal taken from Eng.) (U.K.).

¹⁰⁰ See generally BARBARA GARTNER, *DER ISLAM IM RELIGIONSNEUTRALEN STAAT: DIE PROBLEMATIK DES MUSLIMISCHEN KOPFTUCHS IN DER SCHULE, DES KOEDUKATIVEN SPORT- UND SCHWIMMUNTERRICHTS, DES GEBETSRUFS DES MUEZZINS, DES SCHÄCHTENS NACH ISLAMISCHEM RITUS, DES ISLAMISCHEN RELIGIONSUNTERRICHTS UND DES MUSLIMISCHEN BESTATTUNGSWESENS IN ÖSTERREICH UND DEUTSCHLAND* (2006).

¹⁰¹ See e.g. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); Art. 17(1) Costituzione [Const.] (It.); BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBl No. 1/1930, art. 17, ¶ 1 (Austria); GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [Basic Law], May 23, 1949, art. 5(3) (Ger.).

other spheres of reality.¹⁰² Nevertheless, identifying which rights are applicable at school is not less crucial than establishing which criteria must guide the resolution of potential conflicts. At this point, it is the resource to interpretative principles formulated by the European theory of fundamental rights that could be useful, and particularly if the application of these principles is directed to guarantee the democratic function of the education.¹⁰³

The first of these criteria is the principle of practical concordance, that is, to guarantee that all rights that coalesce at school are equally effective without making some rights preeminent over the rest.¹⁰⁴ This principle seems to be infringed by the permission to display crucifixes in public schools.¹⁰⁵ That implies the subordination of minority rights to majority rights. The second principle is the effectiveness one. According to this principle, rights could be limited in

¹⁰² See ERNST-WOLFGANG BÖCKENFÖRDE, *STATE, SOCIETY AND LIBERTY: STUDIES IN POLITICAL THEORY AND CONSTITUTIONAL LAW*, 179 (J. A. Underwood trans., 1991). Less complexity exists in the display of crucifixes in courtrooms. In these kinds of cases there is not a conflict between rights of parents and rights of students. Apart from that, there is another qualitative difference that makes schools cases and courtroom cases non-comparable. In schools, the main character, the target of the education, is a subject whose personality is not fully developed. The law must, thus, consider if indoctrination is positive or negative. This problem does not appear in the display of crucifixes in courtrooms.

¹⁰³ It should be remembered – as we explained earlier in this essay – that classical interpretative principles of fundamental rights do not offer themselves a proper and coherent theoretic solution to conflicts between rights in schools. Nevertheless, these principles are very valuable and useful in the context of the democratic educational theory that this paper proposes.

¹⁰⁴ See generally, KONRAD HESSE, *GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND* 27-28 (17th ed. 1990), construed in Peter Schneider, *Prinzipien der Verfassungsinterpretation*, in 20 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 1, 125 (1963) (Ger.). (discussing this principle of paramount importance for the interpretation of many European constitutions). We have already seen how the democratic theory of education imposes an equal status between the rights of the majority and those of the minority. This is why the effectiveness of all these rights must be equally guaranteed to all, not placing some at a superior level than the rest. And this is the main objective of the principle of practical concordance.

¹⁰⁵ See *Case of Lautsi and Others v. Italy* (no. 30814/06) Eur. Ct. H. R. (Mar. 18, 2011); *Crucifix ban leaves most Austrians cross*, *supra* note 31.

order to guarantee the educational process. This explains why the Eur. Ct. H. R. and constitutional courts of European states have allowed, in certain and strict circumstances, laws to forbid students to wear the Islamic veil or chador at school when it jeopardizes the effectiveness of the educational process. Values such as the necessary preservation of peace at school¹⁰⁶ or the effective development of sports classes¹⁰⁷ have been used to prohibit religious symbols or religious attire in schools.

But the rights of teachers—even more intensely than in the case of students—can also be limited for the sake of the effectiveness of the educational process, because it is through these rights that the state exerts its function to educate its citizens. This is why the educational demands of the democratic theory of education imposed on the state are applicable to teachers, to wit: the responsibility to provide a democratic education in a context of pluralism. Thus, teachers can be prohibited from wearing the Islamic veil in the classroom if this action, by making some religious convictions absolute, brings about the indoctrination of students.¹⁰⁸ Also, limits can be imposed on teach-

¹⁰⁶ Sahin v. Turkey, App. No. 44774/98, 44 Eur. Ct. H. R. 5 (2005); Conseil d'Etat [CE] [Council of State], decision No. 346893, Nov. 27, 1989, D.P. III 1989 (Fr.).

¹⁰⁷ Dogru v. France, 2008 Eur. Ct. H. R. 1579 (2008). In this case, the Court exempted a Muslim student from attending a sports class because it contradicted her religious convictions in an irresolvable manner. *Id.* The Court concluded that this exemption did not jeopardize the democratic values of the educational process as these were fully guaranteed by all the other classes in which the student took part. *Id.* But see Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court of Germany] Aug. 23, 1993, 94 ENTSCHEIDUNGEN DES BUNDESVERWALTUNGSGERICHTS [BVERWGE] 82-94 (Ger.).

¹⁰⁸ Dahlab v. Switzerland, App. No. 42393/98, 2001-V Eur. Ct. H. R. at 108 (2001). See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 3, 2003 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 108 ¶ 138 (Ger.) (ruling on whether the fact that a teacher wore a veil in the classroom was constitutional or not.) In this case, the German Federal Court considered that, as students were being exposed to other convictions embodied by the rest of their teachers, this specific teacher's exertion of her right to religious freedom did not jeopardize the democratic function of education and pluralism remained a guarantee in the school. *Id.* See also Ulrich Battis & Peter F. Bultmann, *Was folgt für den Gesetzgeber aus dem Kopftuchurteil des BVerfG?*, in 59 JURISTENZEITUNG, 581, 582-584 (2004) (Ger.) (regarding the conflict between different rights, and

ers' rights to freedom of expression and academic freedom based on the need to transmit knowledge in a plural manner.¹⁰⁹

III. Conclusion

After this long argument, we can safely conclude that the democratic theory of education proposes an education in democratic values that will prepare citizens in the present to democratically define the educational model to be applied to future generations. The state must be the guarantor of the democratic function of education—the mainly educational function in a democratic system—in a plural educational context where parents' ideological, religious, and moral convictions, as well as those held by teachers and students, are fully respected. That is to say that individuals must be educated for democracy in a context of pluralism. These premises, easily identifiable both in international agreements and in several sections of the decisions made by the European Court of Human Rights as well as by European constitutional courts, must necessarily preside over the construction of a democratic theory of education in Europe.

paying special attention to the operative margins of the legislator).

¹⁰⁹ *Kjeldsen v. Denmark*, 1 Eur. Ct. H. R. (ser. A) 737 ¶ 53 (1976).