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**THE CONTENT OF THE RIGHT TO EDUCATION—THEORETICAL
FOUNDATIONS**

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THE CONTENT OF THE RIGHT TO EDUCATION—THEORETICAL FOUNDATIONS

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The Center for Human Rights and Global Justice was established in 2002 to stimulate cutting edge scholarship and to make original and constructive contributions to on-going policy debates in the field of human rights. By emphasizing interdisciplinary analyses, the Center's programs seek to situate international human rights law in the broader context of the political, jurisprudential, economic, sociological, historical, anthropological and other influences that shape it and determine its impact. The Center's Faculty Director is Philip Alston, its Executive Director is Smita Narula, and its Research Director is Margaret Satterthwaite. CHRJ thanks Stephanie Welch for copyediting and formatting this paper.

Abstract

Several international conventions and numerous writings and reports by UN bodies stress the importance of the fundamental right to education. However, very little attention is paid to the content of education. The language of tolerance and diversity permeates most if not all international covenants dealing with education. But beyond the vague standards of tolerance and pluralism, little guidance as to the content of education can be found in international documents codifying the right to education. I thus propose to uncover the principled theory that underlies international law on the right to education. Once uncovered, such theory can be used as an interpretive tool that can guide our determination of whether a curriculum like the NCFSE complies with or violates international law. I argue that embodied in the right to education is the right to acquire skills and attitudes necessary for the individual to deliberate in a democratic society (“deliberation theory”). The first part of the paper lays out international statutory provisions and other guidance on the right to education. The second part of the paper examines the deliberative education theory and its relation to international law. The second part of the paper also looks at the approaches to education by various regional courts. For this purpose, I present a sample of cases from the European Court of Human Rights, American courts, and Canadian courts. I argue that the theory of deliberative education is not inconsistent with judicial approaches to education and, in some instances, would have provided a more persuasive basis for the courts’ decisions. Without requiring a major overhaul of judicial thought on this issue, deliberative education theory provides a clear framework within which education controversies could be resolved. The third part of the paper will demonstrate how a deliberative education theory can be applied to resolve a sample of conflicts that frequently arise in the context of school curricula.

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INTRODUCTION

I have come here to confirm—Charles Darwin is still alive.
Milan Brdar, Serbian deputy Minister of Education.¹

On September 9, 2004, Serbian deputy Minister of Education announced that Darwin's theory of evolution would return to schools across the country. His statement had followed widespread criticism of the government's original directive to prohibit teaching of Darwinism. Bowing to public pressure, the deputy Minister of Education announced that the government "has decided to return the theory of evolution to the curriculum of the eighth grade."²

However, as Darwin's theory was making its return to school curricula in Serbia, the theory's exclusive place within American curriculum was being questioned as a school board in Dover Area, Pennsylvania, was considering purchasing a book, "Of Pandas and People," designed to teach an alternate theory to evolution.³ To be precise, the Dover Area school board was not excluding Darwin from the curriculum. In fact, in August, after two votes and a heated discussion, the divided school board of Dover Area, Pennsylvania, had approved the 2004 edition of "Prentice Hall Biology," despite the fact that book apparently offended several board members because it teaches evolution without reference to creationism.⁴ Subsequently to the approval of "Prentice Hall Biology," however, member William Buckingham proposed that the district also purchase "Of Pandas and People," saying it would balance the curriculum and teach an alternate theory to evolution.⁵ According to Buckingham, the book, originally published by the Foundation for Thought and Ethics in 1989, presents the theory of "intelligent design"⁶ and questions the science behind Darwin's theory of evolution.⁷ At the time of this writing, no decision on the inclusion of "Of Pandas and People" into the school curriculum has been reached.

While Serbian and American schools debated the merits of evolution and creationism, the confrontation between religion and education took a different form in Europe. After months of deliberation and amidst widespread opposition, the French government enacted a ban on *hijab* and other religious symbols in public schools, which took effect in September 2004. Officially, the ban is aimed at maintaining secularism in French schools.⁸ However, Chirac and other leaders have said openly that its main purpose is to ban the Muslim headscarf, seen by many as a symbol of growing fundamentalism. To date, an estimated 100 Muslim girls have refused to obey the ban.

¹ "After ridicule, government reinstates evolution theory," *Reuters*, September 9, 2004.

² *Id.*

³ Heidi Bernhard-Bubb, "Biology Issue Lingers," *The York Dispatch*, September 8, 2004.

⁴ *Id.*

⁵ *Id.*

⁶ Buckingham distinguished between the concept of creationism and intelligent design on the grounds that intelligent design is not specific to one religion. *Id.*

⁷ *Id.*

⁸ Eva Cahen, "France Votes to Ban Religious Symbols in Schools," *CNSNews.com*, February 10, 2004.

The debate over what schools teach children, both directly through the curriculum and indirectly, for example, through regulation of religious displays, is not a new phenomenon. In 2000, India's federal government, then led by the Bharatiya Janata Party (BJP), faced heavy criticism both nationally and internationally when the Indian National Council for Educational Research and Training (NCERT) unveiled the new *National Curriculum Framework for School Education* (NCFSE). Parents, teachers, historians, journalists, NGOs and politicians voiced their objections to what some termed as "saffronization" of education⁹ and others described as a revision of history.¹⁰ Critics of the NCFSE alleged that the new textbooks were filled with promotions of Hindu-exclusivism and historical revision designed to reinforce the image of Hindu supremacy.¹¹ Despite the promises of the newly-elected Congress Party to replace the curriculum and despite the fact that the panel of historians directed to review the books found them to be "so full of errors and substandard" that they found it "impossible to recommend [the books'] continuation," NCERT decided not to withdraw the flawed books for the 2004-2005 year, but instead provided an "advisory" to school teachers on how to deal with flawed books.¹²

The debate over what schools must teach children is not new. States and parents have been debating this question for decades, if not longer. What is surprising, however, is how little attention to this debate has been paid by international law. Several international conventions and numerous writings and reports by UN bodies stress the importance of the fundamental right to education. However, very little attention is paid to the content of education. The language of tolerance and diversity permeates most if not all of international covenants dealing with education. But beyond the vague standards of tolerance and pluralism, little guidance as to the content of education can be found in international documents codifying the right to education. Thus, I believe international conventions dealing with the right to education alone are insufficient tools in assessing whether school curriculums comply with the standards of international law. This, however, is nothing more than stating the obvious. Surely, in deciding whether a particular action of the state violates a constitutional provision nobody would attempt to rely solely on the provisions of the Constitution without also looking at the surrounding caselaw, and perhaps also legislative history.

⁹ Smt. Sonia Gandhi, Congress President, Leader of Opposition. "Saffronization of Education will be Resisted," speech in the Lok Sabha (16th August, 2001), at <http://www.congresssandesh.com/august-2001/speech-3.html>. Saffron color is often associated with Hindu fundamentalism.

¹⁰ See, e.g., Praful Bidwai, "Major Conflict in India on Education—Row Brewing on Pro-Hindu Slant in Textbooks," at http://www.satribune.com/archives/sep23_29_02/opinion_bidwai.htm; Kai Friese, "Hijacking India's History," *New York Times* (December 30, 2002), at <http://www.nytimes.com/2002/12/30/opinion/30FRIE.html>; Statement of Parents and Teachers on the National Curriculum Framework for School Education (September 15, 2002), at <http://mail.sarai.net/pipermail/readerlist/2002-September/001797.html>; Kumkum Roy, "India's National Textbooks for the Future?" *Economic and Political Weekly* (December 21, 2002); *Combat Communalism—Hate Hurts, Harmony Works*, Sabrang, at <http://www.sabrang.com/cc/comold/oct99/index.html>; "Vedic Astrology in Indian Universities," *The Hindu*, April 10, 2001; "Why are we encouraging people to blame everything on the stars?" *The Indian Express*, April 4, 2001; "Say No to the Quacks," *The Hindustan Times*, Editorial, May 1, 2001; "Losing Sight of Tenets of Science," in "Against Communalisation of Education" Safdar Hasmi Memorial Trust (March 2002), p. 88.

¹¹ The curriculum was challenged before the Supreme Court of India on the grounds that it was anti-secular and against the constitutional mandate, and that the decision to implement the NCFSE was taken without consultation with the Central Advisory Board of Education (CABE). The Supreme Court, however, disagreed, holding that the NCFSE did not violate the Indian Constitution.

¹² National Council of Educational Research and Training, *An Advisory for History Teachers*, available at <http://www.ncert.nic.in/>.

Nevertheless, using caselaw in the instant case is of little help. The right to education is codified in the *Universal Declaration of Human Rights* (UDHR),¹³ *Convention on the Rights of the Child* (CRC),¹⁴ *International Covenant on Economic, Social and Cultural Rights* (ICESCR),¹⁵ and is mentioned in the *International Covenant on Civil and Political Rights* (ICCPR).¹⁶ I have been unable to find any relevant jurisprudence focusing on the interpretation of education-related provisions of any of these documents. The European Convention for the Protection of Human Rights also contains a provision codifying the right to education and some caselaw interpreting this provision is available. Similarly, courts in various countries have engaged in setting the scope of the right. The use of such regional and national jurisprudence is helpful and even illustrative of the international community's engagement with the right to education. However its use in determining whether a particular country is complying with its obligation under international law is very limited because neither the European Convention nor decisions of courts of other jurisdictions would be directly applicable (except in cases of European Union countries). It is true that commentaries, position papers, and reports of the Special Rapporteur on Education are all valuable interpretive tools, but, as will be illustrated, guidance emerging from such documents is often vague and unclear. I thus propose to uncover the principled theory that underlies international law on the right to education. Once uncovered, such theory can be used as an interpretive tool that can guide our determination of whether a curriculum like the NCFSE complies with or violates international law.

In attempting to identify the theory of education in international law I propose to borrow from the theory of democratic education advocated by Professor Gutmann. I will argue that embodied in the right to education is the right to acquire skills and attitudes necessary for the individual to deliberate in a democratic society ("deliberative education theory"). Although I believe that the deliberative education theory should be applicable both to private and public education, due to space constraints, this paper will focus solely on the state/public education.

The first part of the paper will lay out international statutory provisions and other guidance on the right to education. The second part of the paper will examine the deliberative education theory and its relation to international law. The second part of the paper will also look at the approaches to education by various regional courts. For this purpose, I will present a sample of cases from the European Court of Human Rights, American courts, and Canadian courts.¹⁷ I will argue that the courts in the selected jurisdictions approach education in a manner that is generally consistent with the deliberative education theory proposed in this paper, thus lending support to the argument that deliberative education theory can be easily integrated into judicial reasoning.

¹³ Adopted and proclaimed by United Nations General Assembly Resolution 217A (III) on 10 December 1948.

¹⁴ Adopted by the United Nations General Assembly on 20 November 1989; entered into force on 2 September 1990.

¹⁵ Adopted and opened for signature, ratification and accession by United Nations General Assembly Resolution 2200 A (XXI) of 16 December 1966; entered into force on 3 January 1976.

¹⁶ Adopted and opened for signature, ratification and accession by United Nations General Assembly Resolution 2200 A (XXI) of 16 December 1966; entered into force on 23 March 1976.

¹⁷ I recognize that this selection excludes African, Asian and Middle-Eastern countries and I do not mean to minimize the importance of the contribution of the jurisprudence of these countries to the international law. I chose to focus on the European, Canadian, and American jurisprudence mainly because of the ease of accessibility to the jurisprudence.

The third part of the paper will apply the deliberative education theory to resolve sample conflicts of school curricula.

PART I—CONVENTIONS AND GUIDANCE

(a) Conventions

In this part I will emphasize those provisions that most closely speak to the content of education.

Article 26 of the UDHR provides that

Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.... *Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among ... racial or religious groups....*¹⁸

The CRC requires the states parties to agree 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; the development of respect for human rights...; the development of respect for the child's parents, his or her own cultural identity, language and value,... the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin....¹⁹

The ICESCR similarly provides that “[e]ducation shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among ... racial, ethnic or religious groups....”²⁰ Article 18 of the ICCPR requires states “to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”

(b) Guidance

In light of the many documents dealing with education issued by UNICEF, UNESCO and other organizations, I restrict my summary here to the guidance that most specifically deals with the content of education.

The General Comment to Article 29 of the CRC expands on the scope of Article 29:

¹⁸ Emphasis added.

¹⁹ Articles 28, 29; emphasis added.

²⁰ Article 13, emphasis added.

...Article 29(1) states that the States parties agree that education should be directed to a wide range of values. This agreement overcomes the boundaries of religion, nation and culture built across many parts of the world. At first sight, some of the diverse values expressed in article 29(1) might be thought to be in conflict with one another in certain situations....But in fact, part of the importance of this provision lies precisely in its recognition of the need for a balanced approach to education and one which succeeds in reconciling diverse values through dialogue and respect for difference....²¹

The General Comment further states that Article 29 “emphasizes the message of child-centered education: that the key goal of education is the development of the individual child’s personality, talents and abilities, in recognition of the fact that every child has unique characteristics, interests, abilities, and learning needs.”²² Thus, the General Comment concludes, “the curriculum must be of direct relevance to the child’s social, cultural, environmental and economic context and to his or her present and future needs and take full account of the child’s evolving capacities; teaching methods should be tailored to the different needs of different children.”²³ The General Comment rightfully acknowledges that “[a] child’s capacity to participate fully and responsibly in a free society can be impaired or undermined not only by outright denial of access to education but also by a failure to promote an understanding of the values recognized in [Article 29].”²⁴

General Comment 13, on the right to education under the IESCR, specifically speaks to the relationship between the right to education, and religion.²⁵ Referring to Article 13(3),²⁶ the General Comment takes the position that the obligation of the State to respect the liberty of parents and guardians to ensure religious and moral education of their children in conformity with their own convictions permits public school instruction in subjects such as the general history of religions and ethics “if it is given in an unbiased and objective way, respectful of the freedoms of opinion, conscience and expression.”²⁷ On the other hand, public education that

²¹ Committee on the Rights of the Child, General Comment No. 1 (2000), *The Aims of Education, (Article 29)*, U.N. Doc. CRC/GC/2001/1 (2001).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 13, *The Right to Education (Article 13)*, U.N. Doc. E/C.12/1999/10 (1999).

²⁶ Article 13(3) provides that “The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.” Article 13(4) states that “No part of this Article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this Article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.”

²⁷ Committee on Economic, Social and Cultural Rights, General Comment 13, *The Right to Education (Article 13)*, U.N. Doc. E/C.12/1999/10 (1999), para. 28. Similarly, the Human Rights Committee stated that “article 18(4) [of the ICCPR] permits public school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way.” Human Rights Committee, General Comment 22, *Article 18*, (Forty-eighth sess., 1993) in *Compilation of General Comments and General Recommendations*, adopted by Human Rights Treaty

includes instruction in a particular religion or belief is inconsistent with Article 13(3) “unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.” The General Comment goes on to say that

States parties are required to ensure that curricula, for all levels of the educational system, are directed to the objective identified in article 13(1) [and] are also obliged to establish and maintain a transparent and effective system which monitors whether or not education is, in fact, directed to the educational objectives set out in article 13(1).²⁸

In addressing the education in most general terms, the Special Rapporteur on the Right to Education has said that

[e]ducation is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.²⁹

Moreover, the Special Rapporteur on the Right to Education has repeatedly stressed the importance of education, identifying the right to education as a right that “straddles the division of human rights into civil and political, on the one hand, and economic, social and cultural, on the other hand. It embodies them all”³⁰ and stressing that education should prepare learners “for parenthood or political participation, enhance social cohesion and tolerance.”³¹

Within such a framework, the content is of utmost importance. The Special Rapporteur recognized this, noting:

Mere access to school does not suffice and *all* human rights in education need to be integrated so as to make schooling human rights friendly. Studies of school textbooks have often revealed that women are portrayed as staying at home while

Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994). The Committee also noted that “public education that includes instruction in a particular religion or belief is inconsistent with article 18(4) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents or guardians.” *Id.*

²⁸ Committee on Economic, Social and Cultural Rights, General Comment 13, *The Right to Education (Art. 13)*, U.N. Doc. E/C.12/1999/10 (1999), para. 49.

²⁹ Committee on Economic, Social and Cultural Rights, General Comment 13, *The Right to Education (Art. 13)*, U.N. Doc. E/C.12/1999/10 (1999), para 1.

³⁰ K. Tomasevski, “Annual report of the Special Rapportuer on the right to education,” submitted in accordance with Commission on Human Rights Resolution 2000/9, E/CN.4/2001/52 (11 January 2001), para. 6.

³¹ K. Tomasevski, “Progress report of the Special Rapportuer on the right to education,” submitted in accordance with Commission on Human Rights resolution 1999/25, E/CN.4/2000/6 (1 February 2000) at para. 67.

men are out in the public making history. ... Alongside the orientation and contents of education, methods of teaching and protection of girls' safety and dignity have become important topics of study and policy-making. Moreover, the interrelatedness of human rights has further broadened inquiry into girls' prospects after schooling.³²

Moreover, the Special Rapporteur rightly recognizes that "...education constitutes the key for the child's perception of human rights" and that an "important educational experience of any child between the ages of three and five is being taught to perceive a viewpoint different from the child's own, because small children perceive only one side of everything: their own."³³ The underlying principle expressed herein is that one of the goals of education is to socialize children into understanding and accepting views different from their own.³⁴ Inculcation of knowledge, recognition, and understanding of human rights is another important principle of education.³⁵

Another role of education emphasized by the Special Rapporteur concerns the creation and reflection of values and attitudes. The Special Rapporteur rightly noted that "schools reflect the surrounding setting and may reinforce prejudicial portrayals of victims of discrimination" and that education is not only embedded in the existing values but also helps create new values and attitudes.³⁶ The Special Rapporteur takes the view that education must be employed to eliminate discrimination and inequality.³⁷

The Madrid Conference on School Education in Relation with Freedom of Religion and Belief, Tolerance and Non-Discrimination has pointed out the need to tackle "school curricula, textbooks and teaching methods" in order to ensure elimination of discrimination.³⁸ Thus, for example, school textbooks in Croatia have been found to have included descriptions of "Serbian

³² K. Tomasevski, "Annual report of the Special Rapporteur on the right to education," submitted in accordance with Commission on Human Rights Resolution 2000/9, E/CN.4/2001/52 (11 January 2001), para. 8.

³³ K. Tomasevski, "Annual report of the Special Rapporteur on the right to education," submitted in accordance with Commission on Human Rights Resolution 2000/9, E/CN.4/2001/52 (11 January 2001), para. 13.

³⁴ K. Tomasevski, "Annual report of the Special Rapporteur on the right to education," submitted in accordance with Commission on Human Rights Resolution 2000/9, E/CN.4/2001/52 (11 January 2001), para. 13.

³⁵ K. Tomasevski, "Annual report of the Special Rapporteur on the right to education," submitted in accordance with Commission on Human Rights Resolution 2000/9, E/CN.4/2001/52 (11 January 2001), para. 73.

³⁶ K. Tomasevski, "Annual report of the Special Rapporteur on the right to education," submitted pursuant to Commission on Human Rights resolution 2001/29, E/CN.4/2002/60 (7 January 2002), para. 33.

³⁷ K. Tomasevski, "Annual report of the Special Rapporteur on the right to education," submitted pursuant to Commission on Human Rights resolution 2001/29, E/CN.4/2002/60 (7 January 2002), para. 33.

³⁸ Similarly, see Commission against Racism and Intolerance, Second Report on Denmark adopted on June 16 2000, CRI (2001) 4, 3 April 2001, Section F—para. 17, at http://www.coe.int/T/E/human%5Frights/Ecri/1%20DECRI/2%20Country%2Dby%2Dcountry%5FApproach/Denmark/PDF_CBC2%20Denmark.pdf ("In its general policy recommendation No 1 on combating racism, xenophobia, antisemitism and intolerance, ECRI recommends member states 'to ensure that school-curricula, for example in the field of history teaching, are set up in such a way to enhance the appreciation of cultural diversity.' For instance, ECRI considers that it would be extremely beneficial to develop within the teaching of history in Denmark, a section devoted to the input brought by the immigrant population to Danish society. ECRI is aware that the Danish school system is highly decentralised, placing a primary value upon the freedom of organization at the local level and that the national authorities do not wish to exert strict control over the local curricula and textbooks. ECRI hopes that the Danish authorities, local and national, will nonetheless find a way to incorporate such material into the education system at all levels.").

aggressors” as “merciless barbarians who ran amok” in Croatia. In Serbia, the same historical period was described as “Enforced expulsion of the Serbian population,” reminiscent of the “genocide 50 years earlier.”³⁹ Similarly, history books of Northern Ireland often present contradictory views, depending on the political, social and religious affiliation of the author. The Special Rapporteur noted that while there is a common curriculum for history, few schoolchildren learn contradictory versions of history, reasons for divergent facts and conflicting interpretations.⁴⁰ The Special Rapporteur noted that

...too much of the curriculum may be hidden and the past continues, unfinished, cloaked behind an official silence and unofficial, divergent and contested accounts. As long as the past continues unfinished, it cannot be rejected so as to clear the way for a different future. ...Experiences in other countries have shown that the past can become history once there is a shared, agreed version of the history that was, in fact, shared. Proposals for a truth commission have been made and have remained unheeded. And yet, it would be easy to collate different versions of that shared history, it is abundantly written up and documented. This would necessitate affirming that history is subjective, that different perceptions of the same event or personality are equally true in the eyes of their beholders.⁴¹

The Special Rapporteur astutely recognized that “true” does not necessarily mean justified or even tolerable and that the international community is yet to define the scope of tolerance, despite it being the most often used word in recent resolutions of the Commission on Human Rights and in most of the UNICEF and UNESCO documents addressing the objective of education.⁴²

Even once the parameters of tolerance are defined, the Special Rapporteur believes that the governments have a responsibility to go beyond mere promotion of tolerance and instead have an affirmative obligation to ensure preservation and promotion of cultural diversity.⁴³ Similarly, the Sub-Commission on the Promotion and Protection of Human Rights stressed the importance of inclusion of minority groups in society as one of the key factors that would contribute to successful policies in the area of multicultural (i.e., policies and practices which meet the separate educational needs of groups in society which belong to different cultural traditions) and intercultural (i.e., policies and practices by which the members of different cultures learn to interact constructively with each other) education:

³⁹ K. Tomasevski, “Annual report of the Special Rapporteur on the right to education,” submitted pursuant to Commission on Human Rights resolution 2001/29, E/CN.4/2002/60 (7 January 2002), para. 58 onward.

⁴⁰ K. Tomasevski, “The Right to Education—Mission to the United Kingdom (Northern Ireland),” report submitted by the Special Rapporteur in accordance with the Commission resolution 2002/23, E/CN.4/2003/9/Add.2, para. 44-46.

⁴¹ *Id.*

⁴² K. Tomasevski, “Annual report of the Special Rapporteur on the right to education,” submitted pursuant to Commission on Human Rights resolution 2001/29, E/CN.4/2002/60 (7 January 2002), para. 58 onward; K. Tomasevski, “The Right to Education—Mission to the United Kingdom (Northern Ireland),” report submitted by the Special Rapporteur in accordance with the Commission resolution 2002/23, E/CN.4/2003/9/Add.2, para. 44-46.

⁴³ K. Tomasevski, “Report of the Special Rapporteur,” submitted pursuant to Commission on Human Rights resolution 2002/23, E/CN.4/2003/9 (21 January 2003), para. 34.

[T]his implies the promotion of social cohesion by encouraging the participation of minorities in public life and democratic society. The participants pointed to a number of challenges that Governments need to address in this context. These include the quality of treatment of religious minorities, the recognition of historical and contemporary diversities, the need to ensure pluralism in education, the inclusion of “the other” in national society, the need to develop non-centric and inclusive curricula which validates knowledge from different cultures and civilizations, and the need for minorities to speak for themselves and to articulate their cultures and histories.⁴⁴

An example of a common curriculum development given by the Sub-Commission is an educational framework for social science in Western Canada created through a close collaboration between the Anglophone majority and Francophone and Aboriginal minority communities. The purpose of this framework was to reflect the Aboriginal, English language, Francophone and multiple cultural perspectives in a curriculum on social studies. The main themes identified for this framework included issues such as citizenship and governance; identity; culture; the land; and time, continuity and change.⁴⁵

One means of ensuring pluralism that encompasses the willingness to accord equal respect to the civil, political, economic, social and cultural rights of all individuals, without distinction based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status⁴⁶ is through public policy implemented by the government. However, parents also play an important role. As the Special Rapporteur noted:

The right to education involves three key actors: the Government as the provider and/or funder of public schooling, the child as the principal bearer of the right to education and of the duty to comply with compulsory-education requirements, and the child’s parents who are “the first educators.” The guaranteed freedom and the corollary responsibility of parents to choose education for their children constitutes one pillar of the right to education; another is embodied in the human rights obligations of the State. The rationale behind parental choice is not to legitimize their denial of their children’s right to education; in the case of a conflict between parental choice and the best interests of the child, the latter prevail. Rather, parental choice prevents a State monopoly over education and

⁴⁴ Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Montreal International Seminar on Intercultural and Multicultural Education*, U.N. Doc. E/CN.4/Sub.2/AC.5/2000/WP.4 (31 March 2000).

⁴⁵ Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Montreal International Seminar on Intercultural and Multicultural Education*, U.N. Doc. E/CN.4/Sub.2/AC.5/2000/WP.4 (31 March 2000). Conspicuously, religion was not identified as a theme. Language, on the other hand, often becomes the focal point in discussing multicultural education. As pointed out by the Special Rapporteur on the right to education, one important reason for the linguistic focus is that “intergenerational transmission through institutionalized schooling is crucial for the survival of any culture.” K. Tomasevski, “Report of the Special Rapporteur,” submitted pursuant to Commission on Human Rights resolution 2002/23, E/CN.4/2003/9 (21 January 2003), para. 16, 17.

⁴⁶ United Nations High Commissioner for Human Rights, *Tolerance and pluralism as indivisible elements in the promotion and protection of human rights*, Commission on Human Rights Resolution 2000/50, adopted 25 April 2000.

protects pluralism.⁴⁷

The Special Rapporteur, however, cautioned against unfettered prioritization of parental rights:

The extent to which education is designed to reflect or obliterate societal fault-lines is a political choice made by adults and imposed upon children. The rights of the child represent an indispensable corrective for such adult choices. The contents and methods of teaching have been profoundly altered with the advent of the rights of the child. The introduction of sex education or the prohibition of corporal punishment generated precedent-setting international human rights jurisprudence under the European Convention on Human Rights, which neither did nor could include the rights of the child when it was adopted 40 years ago. These changes would not have been possible through electoral or parental choice, and they highlight the importance of government human rights obligations owed to children. Government human rights obligations encompass guaranteeing the right to education, safeguarding human rights in education, and enhancing human rights through education. The right of the State to regulate education gains heightened importance in the current emphasis on the values underpinning education in measuring its quality. Education policy is operationalization of values since public education creates a public.⁴⁸

Thus, the Special Rapporteur effectively read in the right of the child to be a citizen in a diverse, tolerant and respectful society into the right to education. Government has the primary obligation to ensure the fulfillment of the right to education within that framework with parents acting as an added safeguard of pluralism. Although in discussing pluralism the Special Rapporteur likely intended to address all forms of pluralism, her reports focus mainly on cultural diversity.

Religious diversity was specifically addressed at the International Consultative Conference on School Education in relation with Freedom of Religion and Belief, Tolerance and Non-discrimination, organized by the Office of the High Commissioner for Human Rights (OHCHR). At this conference, Professor Abdelfattah Amor presented a study on the role of religious education in the pursuit of tolerance and non-discrimination. The study was based on replies received from 77 states to a questionnaire on the contents of school curricula and manuals in the field of education in religion and conviction. Reminiscent of Justice Dharmadhikari's opinion, the study defines religious education as "a tool to transmit knowledge and values pertaining to all religious trends, in an inclusive way, so that individuals realize their being part of the same community and learn to create their own identity in harmony with identities different from their own."⁴⁹ Professor Amor specifically distinguishes religious education from catechism or

⁴⁷ K. Tomasevski, "Report of the Special Rapporteur," submitted pursuant to Commission on Human Rights resolution 2002/23, E/CN.4/2003/9 (21 January 2003), para. 16, 17.

⁴⁸ K. Tomasevski, "The Right to Education—Mission to the United Kingdom (Northern Ireland)," report submitted by the Special Rapporteur in accordance with the Commission resolution 2002/23, E/CN.4/2003/9/Add.2, para. 40-42.

⁴⁹ *The role of religious education in the pursuit of tolerance and non-discrimination*, Study prepared under the guidance of Professor Abdelfattah Amor, Special Rapporteur of the Commission on Human Rights on the question of religious intolerance, International Consultative Conference on School Education in relation with Freedom of Religion and Belief, Tolerance and Non-discrimination (Madrid, 23-25 November 2001), para. 3.

theology, defining the latter as the formal study of the nature of God and of the foundations of religious belief. Professor Amor goes on to echo Justice Dharmadhikari:

Religious education is a contributing factor to the shaping up of one's identity and may play a key role in multi-cultural societies—and in the pursuit of a thorough globalization—as long as it promotes values of tolerance and non-discrimination. This implies that wider perspectives need to be offered, which besides contributing to self-awareness and developing one's own identity, also help in the understanding of other wider perspectives, thus responding to a logic of inclusion and feeling part of the same, global community. Teaching of religions and convictions based on these criteria would indeed favour the development of balanced individuals, aware of their own identity, including at the religious level, but also open, curious and respectful vis-à-vis different identities, thus contributing to the creation of a conducive environment for the promotion and protection of human rights.⁵⁰

Professor Amor thus concluded that “[p]rovision of religious education, provided it is neutral and objective, can make a real contribution to the prevention of intolerance and discrimination by helping pupils realize their own individual and communal cultural identity and provide ethical guidance.”⁵¹ Professor Amor, however, cautioned that

...whenever education in the field of religion and conviction is part of the curriculum in state and/or private schools, provisions should be envisaged for it to be optional, at least in terms of allowing for a conscientious right of withdrawal to be exercised by the parents, guardians or mature pupils. Or else, alternative syllabi should be foreseen offering education in another religion(s), particularly in multi-cultural contexts, hence the need to use or develop audio-visual and correspondence courses so that pupils without access to education in the field of religion and conviction in a particular tradition are not deprived of this.⁵²

(c) Summary

International conventions and guidance prescribe an educational framework that focuses on fostering diversity, understanding and tolerance through dialogues and teaching of respect for differences. Curricula are required to be non-centric (i.e., not constrained to the knowledge of and information about the dominant group) and inclusive, validating knowledge from different cultures and civilizations. Parental participation in education is encouraged in order to protect pluralism in education. Religious and moral education may form part of the curriculum, provided religious and moral views are presented in an unbiased, objective way and are respectful of freedom of opinion, conscience, and expression. However, no instruction in any particular

⁵⁰ *The role of religious education in the pursuit of tolerance and non-discrimination*, Study prepared under the guidance of Professor Abdelfattah Amor, Special Rapporteur of the Commission on Human Rights on the question of religious intolerance, International Consultative Conference on School Education in relation with Freedom of Religion and Belief, Tolerance and Non-discrimination (Madrid, 23-25 November 2001).

⁵¹ *Id.*

⁵² *Id.*

religion is allowed in public schools, unless exemptions and alternatives are provided for those not willing to partake in religious learning. The goal of this educational framework is to develop in the child a capacity to participate fully and responsibly in a free society.

In the upcoming sections, I will argue that the educational framework that emerges from the analysis of international conventions and guidance is generally consistent with the theory of deliberative education that I propose in this paper.

PART II—THEORY OF DELIBERATIVE EDUCATION

Because the theory of deliberative education is derived from and heavily relies on Gutmann's theory of democratic education, it is necessary to examine the key elements of Gutmann's theory before proceeding to the discussion of the theory of deliberative education itself.

(a) *Gutmann's Theory of Democratic Education*

Given spatial and contextual constraints, a comprehensive presentation of the complexities of Professor Gutmann's theory is beyond the scope of this paper. Nonetheless, I will attempt to summarize what I believe to be the most salient (and the most relevant for purposes of this paper) points of the theories.

(A) *Deliberation as the main virtue of democratic education*

Gutmann takes the position that the guiding principle of deliberative democracy is the reciprocity among free and equal individuals: "A democracy is deliberative to the extent that citizens and their accountable representatives offer one another morally defensible reasons for mutually binding laws in an ongoing process of mutual justification."⁵³ Education must then be aimed at developing the capacity to deliberate among children as future free and equal citizens and must, therefore, cultivate skills and virtues of deliberation.⁵⁴

(B) *Control over education must be shared among parents, citizens and professional educators. Principles of nonrepression and nondiscrimination are the guiding principles in limiting political and parental authority over education.*

Gutmann's democratic theory of education argues that education should remain within the shared authority of the state, parents, and educators. In federal systems, broad parameters must be set at the federal level to ensure cultivation of common culture and inculcation of essential democratic values nation-wide.⁵⁵ On the other hand, states which serve not only as mediators of federal regulations but as democratic communities in their own right, may add their additional requirements such as state holidays or inclusion of state history. Local school boards in turn remain free to set their own standards within the constraints set by national and state standards

⁵³ A. Gutmann, "Democratic Education," Princeton University Press (1987; preface and epilogue: 1999), p. xii.

⁵⁴ A. Gutmann, "Democratic Education," Princeton University Press (1987; preface and epilogue: 1999), p. xii-xiii.

⁵⁵ A. Gutmann, "Democratic Education," Princeton University Press (1987; preface and epilogue: 1999), p. 74. Gutmann's theory is framed within the context of the U.S. political system. Accordingly, it deals with division of authority among federal, state, and local levels.

and can use their discretion in deciding how to implement federal and state standards.⁵⁶ Local school boards, Gutmann argues, must retain substantial control and freedom to exercise their discretion over education because it allows for possibility of diversity of public schooling. Requiring that local boards' actions operate within the framework of national and state guidance ensures the preservation of moral unity of a democratic society. Gutmann rightly recognizes that the picture of educational authority divided among federal, state, and local levels of government is too simplistic because without challenge to political authority, government control over schooling could easily establish "despotism over the mind."⁵⁷ Gutmann, however, argues that the best suited actors for challenge to the political authorities are teachers, "whose professional responsibility is to uphold the principle of nonrepression by cultivating the capacity for democratic deliberation."⁵⁸

Principles of nonrepression and nondiscrimination are guiding principles for limiting not only the state's authority, but the authority of any particular group.⁵⁹ The principle of nonrepression prevents the state, and any group within it, from using education to restrict *rational* deliberation of competing ideas of the good life and the good society.⁶⁰ Gutmann defends the principle of rational deliberation on the grounds that it is "the form of freedom most suitable to a democratic society in which adults must be free to deliberate and disagree but constrained to secure the intellectual grounds for deliberation and disagreement among children."⁶¹ On this basis, she argues, adults must be prevented from using their present deliberative freedom to undermine the future deliberative freedom of children.⁶² Thus, Gutmann concludes, defense of the principle of nonrepression is derived from the primary value of democratic education: "Because *conscious* social reproduction is the primary ideal of democratic education, communities must be prevented from using education to stifle rational deliberation of competing conceptions of the good life and the good society."⁶³

The principle of nondiscrimination is in some ways an extension of the principle of nonrepression because discrimination involves a repression of a particular group in the deliberative forum. The principle of nondiscrimination thus prevents the state, and all groups within it, from denying anyone an educational good on grounds irrelevant to the legitimate social purpose of that good.⁶⁴

Gutmann argues that this model is democratic for the following reasons. Democratic citizens, according to Gutmann,

are persons partially constituted by subcommunities (such as their family, their work, play, civic, and religious groups), yet free to choose a way of life compatible with their larger communal identity because no single subcommunity commands absolute authority

⁵⁶ *Id.*

⁵⁷ *Id.* at p. 76.

⁵⁸ *Id.*

⁵⁹ *Id.* at p. 44-45.

⁶⁰ *Id.* at p. 44.

⁶¹ *Id.* at p. 45.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

over their education, and because the larger community has equipped them for deliberating and thereby participating in the democratic processes by which choice among good lives and the chance to pursue them are politically structured.⁶⁵

The principles of nonrepression and nondiscrimination ensure that all citizens are educated so as to have a chance to share in the shaping of the structure of their society.⁶⁶ Democratic education, thus, is not neutral but “is bound to restrict pursuit, although not conscious consideration, of ways of life dependent on the suppression of politically relevant knowledge.”⁶⁷ In this manner, democratic education supports choice among those ways of life that are compatible with conscious social reproduction.⁶⁸

Gutmann also recognizes the role of parental choice in education and suggests that there are two reasons for permitting communities to use education to predispose children toward some ways of life and away from others. One reason is grounded on the value of moral freedom. Another is that the good of children includes not just freedom of choice, but also identification with and participation in the good of their family and the politics of their society.⁶⁹

(C) Democratic education is not neutral. Nor does democratic education support (or ensure the survival of) specific cultures. Democratic education does require teaching of appreciation of various cultures and experiences of the groups that constitute society.

Gutmann argues that democratic education requires teachings of appreciation of social contributions and life experiences of various groups that constitute the society.⁷⁰ Moreover, democracy requires recognizing that all persons, regardless of the accomplishments of their ancestors, are entitled to equal political and civil liberties and fair equality of opportunity to live a good life.⁷¹ Recognizing a potential tension between some cultures and liberal ways of life, Gutmann asserts that under democratic theory of education, cultures do not have rights to survival.⁷² Thus, democratic education should not support any cultural way of life on its own terms. In the same vein, the right to religious freedom has principled limits, among which is the right of children to be educated for full citizenship.⁷³ Accordingly, the responsibility of publicly-supported schools to secure that right for the student must trump the religious commitments of their parents when they come into conflict.⁷⁴

On a global, or multinational, level however, Gutmann takes a slightly different approach. There she argues that education should not aim at global citizenship because the world polity does not

⁶⁵ *Id.* at p. 45-46.

⁶⁶ *Id.* at p. 46.

⁶⁷ *Id.* at p. 45-46.

⁶⁸ *Id.*

⁶⁹ *Id.* at p. 43.

⁷⁰ A. Gutmann, “Challenges of Multiculturalism in Democratic Education,” *Philosophy of Education* 1995, at http://www.ed.uiuc.edu/EPS/PES-Yearbook/95_docs/gutmann.html.

⁷¹ *Id.* at p. 3.

⁷² *Id.* at p. 11.

⁷³ *Id.*

⁷⁴ *Id.*

exist.⁷⁵ Instead, she advocates educating children within sovereign societies wherein the teachings of the history and citizenship of the sovereign state would be concomitant with the development of shared sense of humanity.⁷⁶ Patriotism and cosmopolitanism, Gutmann argues, complement each other:

Multicultural societies whose citizens care for each other establish the kind of social security that encourages citizens to care about people who live beyond their borders. Multicultural societies whose citizens care about people who live beyond their borders support the kind of patriotism that eschews parochialism and injustice.⁷⁷

She argues that

Teaching respect for basic human rights is necessary, but insufficient to satisfy the democratic ideal because democratic education also requires teaching the virtues and skills of citizenship among people who share the same sovereign society. But teaching the virtues and skills of a shared citizenship is also insufficient if schools do not count among those virtues moral responsibility toward, and intellectual curiosity about, people who happen to live in other societies.⁷⁸

(b) *Deliberative Theory of Education*

(A) *Overview*

International law, in its original incarnation, governed solely the relationships between states. However, with the advent of international human rights law, international law increasingly regulates and protects the lives of individuals as well as other non-state actors. The optimal role and the scope of international law is heavily disputed among scholars, in large part because, unlike national law in democratic states, international law is rarely if ever the product of citizen participation. In the context of education, I adopt Gutmann's view that at the national level, democratic education is most desirable because it "recognizes the importance of empowering citizens to make educational policy and also of constraining their choices among policies in accordance with those principles—of nonrepression and nondiscrimination—that preserve the intellectual and social foundations of democratic deliberations."⁷⁹ However, just like a state must be empowered to legislate the broad framework of education to ensure cultivation of common culture and inculcation of essential democratic values nation-wide,⁸⁰ so must international law be empowered to establish the broad framework of education in order to establish and maintain a shared humanity. I argue that this broad framework requires that, apart from developing literacy skills, education should foster the skills and attitudes that are necessary for a child to acquire the

⁷⁵ *Id.* at p. 13.

⁷⁶ *Id.* at p. 14.

⁷⁷ *Id.*

⁷⁸ *Id.* at p. 15.

⁷⁹ A. Gutmann, "Democratic Education," Princeton University Press (1987; preface and epilogue: 1999), p. 14.

⁸⁰ *Id.* at p. 74.

ability to deliberate. (I call this the deliberative education theory.) The ability to deliberate thus can be viewed as the fundamental ability that, like the ability to read and write, should be possessed by all individuals from the perspective of international law. Beyond these parameters, however, the content of education must be left to the authorities of the sovereign state, parents, students, and communities. Thus, for example, states should be free to place greater focus in the educational curriculum on national history, culture and politics, provided, however, that they do not impede or undermine the development of the ability to deliberate. Similarly, parents should be free to insist on educating their children according to their religious, philosophical and cultural convictions provided that those are not inconsistent with attitudes necessary to fostering the ability of the child to deliberate in a democratic society.

Broadly speaking, in order to develop the ability to deliberate, children must be taught to analyze critically and to reason. However, they must also be taught the values of tolerance and respect for others; they must be exposed to a diversity of cultures, religions and viewpoints as well as to a diversity of the languages of deliberation. Education should ensure that the views and perspectives of minority cultures are well represented so as to enable minority students to become equal participants in deliberations. This does not require the state to adopt a neutral stance towards all cultures. However, the starting point for evaluating a cultural practice must be a presumption that “all human cultures that have animated whole societies over some considerable stretch of time have something important to say to all human beings.”⁸¹ It is only through acquisition of new vocabularies of comparisons that values can be ascribed to particular cultural or religious practice through a process of deliberation.

The following section will examine in more detail the concept of deliberation as well as the languages of deliberation.

(B) *What is deliberation?*

I borrow here the concept of deliberation from the model of a deliberative democracy. Although there are numerous variations on and incarnations of deliberative democracy model, broadly speaking deliberative democracy could be understood to be a form of democracy in which citizens come together in public forums to deliberate about problems with the goal of developing mutually acceptable solutions to the problems. Deliberative democrats argue that policies developed through deliberative process are preferable to, e.g., those developed in the aggregate model, because such policies are more enlightened in that the diversity of presented opinions and requirement of justification of such opinion increases everybody’s understanding of the issues.⁸² Moreover, deliberative democrats argue that policies developed through deliberative forms are

⁸¹ C. Taylor, *The Politics of Recognition* in “Multiculturalism: Examining the Politics of Recognition,” A. Gutmann ed., Princeton University Press (1994), p. 66.

⁸² J. Cohen, *Procedure and Substance of Deliberative Democracy*, in ed. S. Benhabib, “Democracy and Difference,” (Princeton University Press, 1996); see also A. Gutmann, “Democratic Education,” Princeton University Press (1987; preface and epilogue: 1999), p. 11. Defending a democratic model of education, Gutmann argues that people can publicly debate educational problems in a way that increases everybody’s understanding of education and even though policies that result from democratic deliberations will not always be the right ones, they will be “more enlightened—by the values and concerns of the many communities that constitute a democracy—than those that would be made by unaccountable educational experts.”

more public than those developed under interest-based politics.⁸³

Various aspects of the theory of deliberative democracy have been criticized⁸⁴ and a detailed account of the theory is beyond the scope of this paper. However, the adoption of a deliberative theory of education does not necessitate the adoption of any particular model of deliberative democracy (or even the acknowledgement that deliberation is the optimal means of reaching decisions in a democratic society). To be sure, public deliberation (in the sense of a decision-making process in a democratic society) is not the only procedure for arriving at decisions within the state. For example, decisions can be reached through nondeliberative preference measurement, such as a public opinion poll, or by relying on expert decision-making.⁸⁵ Yet all three decision-making processes entail some form of deliberation, although perhaps not a public one. For example, public opinion polls are usually both preceded and accompanied by extensive debates and discussions, both in private and public arenas. Similarly, information provided by experts is often the subject of debate and analysis. What I am concerned with for purposes of deliberative education theory is not *public deliberation* as the sole (or the best) tool of democratic decision-making,⁸⁶ but rather *deliberation* as a process of public communication, analysis, and decision making in a democratic society, for even if deliberation is not always the best way for resolving political controversies, it will nonetheless leave participants in the deliberation better informed about the issues than they would have been otherwise. Deliberation will also allow individuals to judge and evaluate better decisions reached through processes other than public deliberation.

In classical deliberative democracy models, deliberation usually entails justification through argument and reasoning.⁸⁷ For purposes of the deliberative education theory, however, I adopt Iris Marion Young's modification to this definition. Young argues that reliance solely on pure reason as the language of deliberation inevitably excludes those whose language of deliberation and social perspectives are different. Young posits that gender, class and ethnicity produce different speech cultures:

The speech culture of white middle-class men tends to be more controlled, without significant gesture and expression of emotion. The speech culture of women and racial minorities, on the other, tends to be more excited and embodied, more valuing the expression of emotion, the use of figurative language, modulation in tone of voice, and wide gesture.⁸⁸

⁸³ I. M. Young, "Activist Challenges to Deliberative Democracy," *Political Theory*, vo. 29, No. 5, October 2001.

⁸⁴ See e.g., J.S. Dryzek, "Discursive Democracy: Politics, Policy, and Political Science," (Cambridge University Press, 1990); Ed. S. Benhabib, "Democracy and Difference: Contesting the Boundaries of the Political," (Princeton University Press, 1996); Ed. S. Macedo, "Deliberative Politics: Essays on *Democracy and Disagreement*," (Oxford University Press, 1999).

⁸⁵ F. Schauer, *Talking as a Decision Procedure*, in ed. S. Macedo, "Deliberative Politics: Essays on *Democracy and Disagreement*," (Oxford University Press, 1999), p. 18.

⁸⁶ See A. Gutmann, D. Thompson, "Democracy and Disagreement," (The Belknap Press of Harvard University Press, 1996).

⁸⁷ See, e.g., A. Gutmann, D. Thompson, "Democracy and Disagreement," (The Belknap Press of Harvard University Press, 1996). For an in-depth description of "ideal deliberation," see J. Cohen, *Deliberation and Democratic Legitimacy*, in ed. D. Estlund, "Democracy," (Blackwell Publishers Ltd. 2002), p. 92.

⁸⁸ I. M. Young, *Communication and the Other: Beyond Deliberative Democracy*, in ed. S. Benhabib, "Democracy and Difference," (Princeton University Press, 1996), p. 124.

On this basis, she argues that deliberative procedures that assume that “deliberation is both culturally neutral and universal” is empirically inaccurate. Instead, “the norms of deliberation are culturally specific and often operate as forms of power that silence or devalue the speech of some people.”⁸⁹ Despite her criticisms, however, Young argues that it is nonetheless possible to develop solutions to shared problems through a process of public deliberation, provided that traditional deliberative conceptions are replaced with “communicative democracy.”⁹⁰ Young believes that communication across speech cultures and social perspective is possible, and, given the existence of differences in the society, a desirable form of public decision-making.⁹¹

With respect to communication across speech cultures, Young argues for the need to broaden the conception of the forms and styles of speaking. She argues for inclusion of rhetoric, storytelling, use of metaphor, and other forms of communication in the acceptable methods of deliberation. Young asserts that while reasoned argument is necessary, it “is not the only mode of political communication, and argument can be expressed in a plurality of ways, interspersed with or alongside other communicative forms.”⁹²

With respect to communication across social perspectives, Young bases her argument on the importance of diversity of experiences of individuals that form the bases for individuals’ perspectives. She relies also on the notion of multiple positioning—that is, the ability of individuals to shift perspectives depending upon who are their partners in interaction and on the particular issue at hand.⁹³ Perspectives thus are not fixed and the availability of multiple perspectives is conducive to finding commonalities that would be sufficient for communication with others.⁹⁴ On this view, diversity is an asset that enables creation of a public policy that is both more public and more intelligent.⁹⁵ Each participant brings to the deliberations a perspective and insight that is “particular and partial with respect to the whole social field.”⁹⁶ When individuals communicate their insights to other participants, each gains a more comprehensive view of the reality, thus increasing the “wisdom” of solutions.⁹⁷ Young argues that public critical discussion “that includes the expression of and exchange between all relevant differentiated social perspectives transforms the partial and parochial interests and ideas of each into more reflective and objective judgment.”⁹⁸ By objective, Young does not mean “neutral” but rather “a

⁸⁹ *Id.* at p. 123.

⁹⁰ *Id.* at p. 120.

⁹¹ I. M. Young, *Communication and the Other: Beyond Deliberative Democracy*, in ed. S. Benhabib, “Democracy and Difference,” (Princeton University Press, 1996).

⁹² *Id.* at p. 125; see also I.M. Young, “Activist Challenges to Deliberative Democracy,” *Political Theory*, Vol. 29, No. 5, October 2001.

⁹³ I.M. Young, *Difference as a Resource for Democratic Communication*, in ed. D. Estlund, “Democracy” (Blackwell Publishers Inc. 2002), p. 225.

⁹⁴ *Id.*

⁹⁵ H. M. Voke, “Public Deliberation, Communication across Difference, and Issues-Based Service Learning,” *Philosophy of Education Yearbook 2001*, 261-9 (2001), available at http://vnweb.hwwilsonweb.com/hww/results/results_single.jhtml?nn=25, p. 3.

⁹⁶ I.M. Young, *Difference as a Resource for Democratic Communication*, in ed. D. Estlund, “Democracy” (Blackwell Publishers Inc. 2002), p. 222.

⁹⁷ *Id.* at p. 230.

⁹⁸ *Id.* at p. 229.

reflective stance and substantive understanding that is not merely self-regarding.”⁹⁹ Objectivity, thus, in this sense means judgment, which has taken account of the experience, knowledge, and interests of others.¹⁰⁰

Such a formulation of deliberation is particularly relevant in the context of globalization, the increased interdependence of states, and growing numbers of cross-border migrations. If an individual is to be educated for participation in the world forum, the ability to communicate across difference is crucial. States today find themselves increasingly faced with infusions of different cultures, languages and religions. In some cases, the “arriving” cultures will be minorities, but even in cases where migrants bear the same ethnicity, language, or religion as the majority in the host state, they may nonetheless bear their own distinctive migrant perspectives. As Iris Marion Young recognizes, individuals’ experiences contribute to the formation of individual’s identity, and, as Charles Taylor points out, public recognition forges the identity.¹⁰¹ Thus, exclusion of those whose perspectives diverge from the majoritarian view from public deliberation (either because their language of deliberation is not “acceptable” or because other participants are not accustomed to deliberative across social difference) negatively affects the excluded individuals’ self-esteem (because such exclusion effectively amounts to failure of recognition), impoverishes the deliberation through homogenization of the perspectives, and risks turning the deliberative process into an exclusive dialogue among the majority.

(C) *Why deliberation?*

Deliberation both requires and fosters the values of tolerance, multicultural awareness, and diversity. It enables individuals to communicate to each other their views and perspectives, in the hopes of arriving at a common solution, but in the process acquiring better understanding of issues as well as of one’s own and alternative positions. However, more than anything, deliberation is inextricably associated with democracy.¹⁰² Some even argue that public deliberation is the optimal decision-making tool in a democratic society.¹⁰³ Gutmann and Thompson identify four principal benefits of deliberative democracy. First, deliberative democracy promotes the legitimacy of collective decisions. The assurance that different claims at least have been fairly considered reconciles those who lose out to the legitimacy of collective decisions better than if the decisions were reached simply through interest group bargaining.¹⁰⁴ Second, deliberation creates forums in which citizens are encouraged to take a broader perspective on questions of public policy than they would have in a process in which assertions of political power prevail.¹⁰⁵ Third, deliberation can promote mutually respectful decision-

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ C. Taylor, *The Politics of Recognition* in ed. A. Gutmann, “Multiculturalism: Examining the Politics of Recognition,” (Princeton University Press (1994)).

¹⁰² See e.g., J. Cohen, *Deliberation and Democratic Legitimacy*, in ed. D. Estlund, “Democracy,” (Blackwell Publishers Ltd, 2002).

¹⁰³ See A. Gutmann, D. Thompson, “Democracy and Disagreement,” (The Belknap Press of Harvard University Press, 1996).

¹⁰⁴ *Id.* at p. 41; S. Macedo, *Introduction*, in ed. S. Macedo, “Deliberative Politics: Essays on *Democracy and Disagreement*,” (Oxford University Press, 1999).

¹⁰⁵ A. Gutmann, D. Thompson, “Democracy and Disagreement,” (The Belknap Press of Harvard University Press, 1996), p. 42; S. Macedo, *Introduction*, in ed. S. Macedo, “Deliberative Politics: Essays on *Democracy and Disagreement*,” (Oxford University Press, 1999).

making. Through deliberations, citizens can isolate conflicts, sort out self-interested claims from public-spirited ones, may discover that a conflict is the result of misunderstanding or lack of information, and/or may discover ways to settle conflicts through bargaining, negotiation, compromise or other peaceful means.¹⁰⁶ Fourth, deliberation has the potential of correcting previously committed errors. As Stephen Macedo points out,

[g]iven that our understanding of complex issues of public policy are bound to be incomplete, it is crucial that the channels of critical scrutiny and reexamination be kept open....Maintaining conditions of mutual respect and civility should make it easier to acknowledge mistakes and should increase our willingness to correct them.¹⁰⁷

Although disagreements exist among scholars about the scope and boundaries of deliberation as well as about whether public deliberation actually is the most optimal tool for democratic decision-making, few critics doubt the value of deliberation itself in democratic society.

What about a non-democratic society? One may wonder why deliberation should be such a prized virtue within the international sphere, given that the political systems of many state-subjects of international law are not democracies. In response to such query, it is necessary to point out that the importance of participating in national democracy has been recognized and promoted by international organizations. For example, the United Nations Commission on Human Rights has concluded that the creation of the conditions for a democratic system of government are “essential for the prevention of discrimination and for the protection of minorities: ways and means of overcoming obstacles to the establishment of a democratic society and requirements for the maintenance of democracy.”¹⁰⁸ The United Nations Commission on Human Rights also states that at the national level, “the widest participation in the democratic dialogue by all sectors and actors of society must be promoted in order to come to agreements on appropriate solutions...”¹⁰⁹ Similarly, the World Bank reports that “[i]ncreasing opportunities for voice and participation can improve state capability...,”¹¹⁰ and the Organization for Economic Co-operation and Development highlights the virtue of “active participation” at the national level in which there is “a role for citizens in proposing policy options and shaping the policy dialogue—although the responsibility for the final decision or policy formulation rests with government.”¹¹¹

¹⁰⁶ A. Gutmann, D. Thompson, “Democracy and Disagreement,” (The Belknap Press of Harvard University Press, 1996), p. 43; S. Macedo, *Introduction*, in ed. S. Macedo, “Deliberative Politics: Essays on *Democracy and Disagreement*,” (Oxford University Press, 1999).

¹⁰⁷ S. Macedo, *Introduction*, in ed. S. Macedo, “Deliberative Politics: Essays on *Democracy and Disagreement*,” (Oxford University Press, 1999), p. 10; A. Gutmann, D. Thompson, “Democracy and Disagreement,” (The Belknap Press of Harvard University Press, 1996), p. 43.

¹⁰⁸ United Nations Commission on Human Rights Resolution, adopted 7 March 1995, E/CN.4/RES/1995/60, preamble. See also The CSCE Copenhagen Document, Copenhagen Meeting of the Human Dimension (1990) 29 ILM 1318, para. 30 (“questions relating to national minorities can only be satisfactorily resolved in a democratic political framework”).

¹⁰⁹ S. Whatley, “Democracy in International Law: A European Perspective,” 51 *Int’l & Comp. I. Q.*, 225, 246 (2002) (quoting E/CN 4/RES/1995/60).

¹¹⁰ World Bank, *The State in a Changing World: World Development Report 116* (1997).

¹¹¹ OECD, PUMA Policy Brief No. 10: *Engaging Citizens in Policy-Making: Information, Consultation and Public Participation*, 2 (2001), [online] at <http://www.oecd.org/pdf/M00007000/M00007815.pdf>.

International law and institutions actively encourage democratization of states.¹¹² In a Supplement to Reports on Democratization, the Secretary General of the United Nations has argued that democratic institutions and processes minimize the risk that differences will erupt into armed conflict or confrontation because democratization channels competing interests into arenas of discourse and provides means of compromise that can be respected by all participants of debates.¹¹³ According to the Secretary General, the United Nation's Charter "offers a vision of democratic states and democracy among them."¹¹⁴ The Bucharest Declaration, adopted at the Third International Conference of the New or Restored Democracies states that there exists "an almost universal recognition that a democratic system of government is the best model to ensure a framework of liberties for lasting solutions to the political, economic and social problems that our societies face."¹¹⁵

Some argue that the right to democratic form of government has reached the status of a Universal Right.¹¹⁶ According to Stephen Wheatley, such is the case in Europe.¹¹⁷ The Treaty on European Union provides in Article 6(1) that "[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law principles, which are common to the Member states."¹¹⁸ Similarly, the Council of Europe's Court on Human Rights has concluded that "[d]emocracy... appears to be the only political model contemplated by the [European Convention on Human Rights] and, accordingly, the only one compatible with it."¹¹⁹ Moreover, the participating states of the Organization and Security and Co-operation in Europe have agreed to "build, consolidate and strengthen democracy as the only system of government of our nations," and to "cooperate and support each other with the aim of making democratic gains irreversible."¹²⁰ Wheatley argues, however, that the same recognition of the right to democratic government has not taken place within the broader realm of international law. Even if that is true, Wheatley correctly recognizes that

the evolving internal aspect of the right of a people to self-determination, the increasing numbers of states party to universal and regional human rights instruments (which all

¹¹² See S. Wheatley, "Democracy in International Law: A European Perspective," *Int'l & Comp. Law Quarterly*, Apr. 2002, 51, p. 221. The author concludes that a universal obligation for states to introduce and maintain democratic government exists in Europe, although he rejects the claim that international law should recognize such universal obligation.

¹¹³ *Supplement to Reports on Democratization*, U.N. Doc. A/51/761 (20 Dec. 1996), para. 1.

¹¹⁴ *Supplement to Reports on Democratization*, U.N. Doc. A/51/761 (20 Dec. 1996), para. 28. See also GA Resolution 50/133, adopted 16 February 1996, *Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies*, preamble, A/RES/50/133.

¹¹⁵ *Progress Review and Recommendations*, adopted by the Third International Conference of the new or Restored Democracies on Democracy and Development held at Bucharest from 2 to 4 September 1997, UN Doc A/52/334, 11 Sept. 1997.

¹¹⁶ See S. Wheatley, "Democracy in International Law: A European Perspective," *Int'l & Comp. Law Quarterly*, Apr. 2002, 51, p. 221. In fact, the state report to the Human Rights Committee submitted by India states that "[t]he internal aspects of self-determination... includes the right of people to choose their own form of government and the right to democracy...." Third periodic report (India) U.N. Doc. CCPR/C/76/Add.6, para.32. See also S. Wheatley, "Democracy in International Law: A European Perspective," *Int'l & Comp. Law Quarterly*, Apr. 2002, 51, p. 221.

¹¹⁷ S. Wheatley, "Democracy in International Law: A European Perspective," *Int'l & Comp. Law Quarterly*, Apr. 2002, 51, p. 221, at p. 234.

¹¹⁸ *Id.*, quoting Treaty of European Union 1992.

¹¹⁹ *Id.*, quoting *United Communist Party of Turkey and others v. Turkey*, Report 1998-I, at para. 45.

¹²⁰ *Id.*, quoting CSCE Charter of Paris for a New Europe (1990) 30 *ILM* 190 (1991).

contain provisions on free and fair elections and political participation), and recognition that a democratic system of government may not legitimately be replaced by an authoritarian one, indicates a progressive and irreversible movement to a world community of democratic states.¹²¹

In addition to the project of encouraging world-wide democratization, some have called for increased democratization within the international community itself. The age of globalization has precipitated the emergence of global governance. The establishment of international institutions, whether formed around regions (e.g., the European Union), or around economic (e.g., World Trade Organization) or political (e.g., NATO) interests, supplemented by a rising number of international judicial institutions (e.g., International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal for Rwanda, International Criminal Court) and an even larger network of transnational, international and national non-governmental organizations (NGOs), resulted in the creation of a virtual system of global governance and increasingly self-conscious constitution of transnational civil society.¹²² This system of governance generates laws and creates institutions, for the most part without direct engagement of the people. Some have thus argued that such system of global governance suffers from a democratic deficit and consequently from lack of legitimacy.¹²³

If international law strives to establish a democratic polity (whether nationally or internationally), then it is logical that it should also strive to foster skills necessary for participation in such polity—the most fundamental being the skill of deliberation. Deliberation requires critical thinking, reason, understanding and appreciation of differences, including different forms of deliberation, and tolerance, among others. Teaching of these skills is democratically desirable because it provides children (as citizens) with the ability to understand and communicate with others, as well as face and resolve conflicts in a peaceful way.¹²⁴ Amy Gutmann correctly notes that

Without this sort of mutual understanding, we could not expect to achieve widespread toleration of dissent and respect for differing ways of life. Nor could we expect minorities to convince majorities, or to be convinced by them, of their point of view. But quite apart from its political function, children will eventually need the capacity for rational deliberation to make hard choices in situations where habits and authorities do not supply clear or consistent guidance. These two facts about our lives—that we disagree about what is good and that we face hard choices as individuals even when we agree as a group—are the basis for an argument that primary education should be both exemplary and didactic. Children must learn not just to *behave* in accordance with authority but to *think* critically about authority if they are to live up to the democratic ideal of sharing political sovereignty as citizens.¹²⁵

¹²¹ *Id.* See also T. Franck, “The Emerging Right to Democratic Governance,” 86 AJIL (1992) 46.

¹²² A.M. Slaughter, “Building Democracy,” Chicago Journal of Int’l Law, Fall 2000, p. 223 at 225.

¹²³ For a comprehensive account of the problem of legitimacy in transnational governance, see J. Delbrück, “Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?” Indiana Journal of Global Legal Studies: Winter 2003, p. 29.

¹²⁴ A. Gutmann, “Democratic Education,” Princeton University Press (1987; preface and epilogue: 1999), p. 50.

¹²⁵ *Id.* at p. 51.

Deliberation allows citizens to participate in democracy. Even if public debates cannot result in a consensus on a particular issue, they are much more likely to result in increased understanding of the issue by everybody than if the resolution were left to “experts” or authoritative figures. By engaging in deliberation, citizens are empowered to make policy. Democracy is not simply a system of majority-rule; rather it is an ideal of a society whose members are equipped by their education and authorized by political structures to share in ruling.¹²⁶ As Woodrow Wilson pointed out, what is important about “opinion” in democracy is not the number of people who hold it, but the process of weighing the opinion so “that every voice can be heard, every voice can have its affect, every voice can contribute to the general judgment that is finally arrived at.”¹²⁷ Deliberation enables citizens to participate in the shared ruling. In this capacity, deliberation reinforces democratic self-governance.

Even if democracy were not the preferred form of governance, there is nonetheless a strong argument for insisting on inculcating in children the virtue of deliberation. Critical thinking, tolerance, appreciation of divergent perspectives, and dialogue can be invaluable tools for challenging entrenched majoritarian positions, be they in the realm of politics, religion, culture, or custom. The ability to implement effectively fundamental rights guaranteed by various international human rights instruments at the national level may be greatly enhanced, and the rights themselves may acquire greater legitimacy, if the implementation takes place through public deliberations. Moreover, deliberation may be an effective tool for examining and negotiating the rights themselves, both at national and international levels. Finally, as stated earlier, even if deliberation fails to reach a solution, it will nonetheless contribute to better awareness, knowledge, understanding, mutual respect, and appreciation of differences.

Like Gutmann’s democratic education, deliberative education requires teaching the appreciation of social contributions and life experiences of various groups that constitute the society. It also strives to inculcate recognition and respect for students with different cultural identifications. States can focus on their own multicultural heritages while at the same time exposing students to foreign cultures and fostering in them the appreciation of cultural diversity. I adopt here Gutmann’s justification of the greater focus on the history, cultures, and politics of one’s own country.¹²⁸ First, particular cultures and politics would not thrive were people to take an equal interest in, and feel an equal commitment to, every existing culture and politics. Second, children often learn to respect other human beings by first learning to respect people who are close and familiar to them. Third, focus on the politics of the student’s own country is necessary because it is primarily the politics that the student must enlist to help people not only within but also outside the national borders. However, these reasons do not justify the neglect of world history and politics beyond national boundaries. Students must be exposed to histories and cultures of other countries so as to be able to understand different perspectives, cultures and ways of life. Display of religious differences can both contribute to the development of understanding and

¹²⁶ A. Gutmann, “Democratic Education in difficult times,” *Teachers College Record*, Fall 90, Vo. 92, Iss. 1, p. 14.

¹²⁷ S. Charnovitz, “The emergence of democratic participation in Global Governance (Paris 1919),” *Indian Journal of Global Legal Studies*, Winter 2003, 10; 1, p. 45, at 58, quoting W. Wilson, *Address in Pueblo, Colorado (Sept. 25, 1919)*, in *Addresses of President Wilson*, 36 *Stan. J. Int’l L.* 191 (2000).

¹²⁸ A. Gutmann, “Challenges of Multiculturalism in Democratic Education,” *Philosophy of Education* 1995, [online] at http://www.ed.uiuc.edu/EPS/PES-Yearbook/95_docs/gutmann.html, p. 15.

appreciation of different ways of life as well as provide students with an opportunity to engage in respectful discussions about differences and diversity. For similar reasons, education about religions is not incompatible with the theory of deliberative education. However, teaching of religious principles of a particular religion violates the principles of nonrepression and nondiscrimination because it imposes a particular religious view on students who may not share it and forces such students to conform. In some circumstances, religious teachings may be allowed if exemptions are provided for those who do not wish to participate in such studies and provided that the teachings themselves are not inconsistent with attitudes necessary for effective deliberation in a democratic society (e.g., values of tolerance, mutual respect, etc.).¹²⁹ But, as Gutmann points out

... appreciation of cultural diversity is not enough to teach students the civic virtue of mutual respect...The second, pedagogically as well as politically more demanding, way in which schools can cultivate mutual respect is to teach students how to engage together in respectful discussions in which they strive to understand, appreciate, and, if possible, resolve political disagreements, including those that may be partly rooted in cultural difference. Mutual respect that rests only on the *recognition* of cultural diversity is an incomplete democratic virtue. Recognition needs to be accompanied by a willingness and ability to deliberate about politically relevant disagreements.¹³⁰

Deliberative education can thus foster a sense of shared humanity while at the same time allowing for each country or community to put emphasis on their own heritage and to devise a curriculum that is most appropriate to their particular circumstances.

(D) *Deliberative education, state and parents*

Earlier in the paper, I suggested that because international law is not a product of citizen participation, it should only establish a very broad framework for educational content. I have argued that such an education framework should require that, apart from equipping students with literacy skills, education must be directed towards inculcating in children the ability to deliberate. But how to ensure that in practice education actually comports with the principles of deliberative education?

Under international law, responsibility for provision of education lies primarily with the state.¹³¹ However, as Gutmann recognized, without challenge to political authority, government control over schooling could easily subvert the goals of deliberative education. I adopt here Gutmann's concepts of *nonrepression* and *nondiscrimination* as the guiding principles in limiting political authority over education. But who is in the best position to safeguard these principles? Gutmann, speaking of education at the state level, argues that teachers are best suited for this role.¹³² Such a

¹²⁹ However, if the exemption itself places the student in a situation where the child feels repressed or discriminated against, the existence of the exemption is insufficient to render the religious teachings nonrepressive and nondiscriminatory.

¹³⁰ A. Gutmann, "Challenges of Multiculturalism in Democratic Education," *Philosophy of Education* 1995, [online] at http://www.ed.uiuc.edu/EPS/PES-Yearbook/95_docs/gutmann.html, p. 4.

¹³¹ See CRC, Article 28; ICESCR, Article 13.

¹³² A. Gutmann, "Democratic Education," (Princeton University Press, 1999), Chapter 3.

claim, of course, assumes (and in fact requires) the autonomy of professionalism from the majoritarian hegemony. However, whereas such autonomy arguably could be ensured in some countries (for example, through the establishment of teachers unions), in other countries political powers of teachers are limited. India is a good example of a country in which the ability of teachers to exert control over the content of education has been severely limited.

Under the Indian constitution, education is subject to concurrent jurisdiction, with responsibility shared between the central and state governments.¹³³ The broad policies and guidelines for curricula and management practices are laid down by the Central Government, developed (at least in theory) through consultation with India's thirty-two states and union territories.¹³⁴ States are free to frame their own educational policies within the broad national framework.¹³⁵ Pivotal to dialogue between the central and state governments are the Central Advisory Board on Education (CABE), a 104-member body consisting largely of state representatives and independent experts, and the NCERT, an "autonomous" body that draws up the National Curriculum Framework based on the broad educational policies. CABE approves the National Curriculum Framework based on which detailed syllabi for each class and subject are formulated, and the textbooks ultimately follow the syllabi. CABE appears to be one of very few (if any) of the states and educators to participate in the establishment of the curriculum; without it the states' views largely would be excluded from the curriculum-textbook process.¹³⁶ The NCFSE, however, was not presented to CABE and was not approved by them. Instead, in 1998-1999 the BJP government, then leading the coalition government at the federal level, embarked on a hiring frenzy within NCERT, filling the posts with supporters of Hindu-biased ideological agenda.¹³⁷ In November 2000, ignoring opposition from teachers and scholars, the BJP government declared the NCFSE "approved."¹³⁸ As a result of the exclusion of CABE from the process of curriculum formulation and the appointment of BJP loyalists to NCERT, non-BJP educators were prevented from participating in the educational process.

But even taking the exclusion of CABE as an anomaly in the India political process, other factors suggest that teachers may not be the best guardians of educational content. For example, the Probe Report notes that many teachers in India display a lack of commitment to the promotion of

¹³³ Constitutional Amendment 42, Seventh Schedule, list III—Concurrent List, 25.

¹³⁴ India: Educational Policies and Curriculum at the Upper Primary and Secondary Education Levels, NCERT, [online] at <http://www.ibe.unesco.org/Regional/AsianNetwork/AsianNetworkPdf/ndrepin.pdf>.

¹³⁵ National Council of Educational Research and Training, Educational Administration System, www.geocities.com/Athens/Parthenon/2686/edu.

¹³⁶ P. Bidwai, "Major Conflict in India on Education; Row Brewing on Pro-Hindu Slant in Textbooks," [online] at http://www.satibune.com/archives/sep23_29_02/opinion_bidwai.htm.

¹³⁷ *Id.*; N. Taneja, "BJP's Assault on Education and Educational Institutions," South Asia Documents, [online] <http://www.ercwilcom.net/indowindow/sad/article.php?child=29&article=27> (On coming to power, the BJP appointed its supporters to every national body related to education and research, including the Indian Council of Historical Research, the Indian Council for Social Science Research, the Indian Institute for Advanced Studies, the University Grants Commission, and the National Council for Educational Research and Training); interview conducted by Human Rights Watch with Professor Arjun Dev, Delhi, January 19, 2003.

¹³⁸ The Indian Supreme Court dismissed challenges of the NCFSE on the grounds that the curriculum was not presented to CABE holding that CABE is not a statutory institution and that CABE's approval of the curriculum is not mandatory.

education in the local community.¹³⁹ Partly, this can be explained by the social distance between teachers and students. Within the rural society, for example, teachers remain relatively privileged in terms of economic class, caste and gender.¹⁴⁰ Moreover, according to the Probe Report, over half of the teachers in rural areas belong to Hindu communities outside the scheduled castes, tribes and other “backward” caste categories, with each of the latter two categories accounting for about 20 percent of all the teachers.¹⁴¹ Thus, the upper castes are over-represented while the other communities are under-represented. Moreover, males dominate the primary school sector with only 21 percent of all the teachers appointed in primary sections being female.¹⁴² The social background of the students, on the other hand, has significantly shifted in the direction of underprivileged groups, partly due to a major shift towards private schooling among privileged families.¹⁴³ Wide differences in educational background further extend the social distance between teachers and their students’ families.¹⁴⁴

Other reasons for teachers’ negative attitudes towards education include the public perception of teaching as a profession, as well as the personal set of views and biases that teachers bring into the classroom.¹⁴⁵ For example, in rural areas, teaching jobs tend to be seen as lucrative positions with good salaries, secure employment and plenty of free time.¹⁴⁶ Thus, anyone with the required formal qualifications may be tempted to apply even if the person has no affinity for children or commitment to the aims of education. Teacher selection tends to focus on academic qualifications and in some states has been further devalued by corruption in the appointment process.¹⁴⁷ Moreover, those with aptitude for teaching may be actually discouraged from entering the profession in the public sector. Poor infrastructure, lack of parental support, inconvenience of postings (which may be in remote, not easily accessible locations), unsupportive management, and lack of recognition may lead many promising pedagogical candidates to feel that state schools provide no scope for their skills to flourish and that they might do better by teaching at a private school.¹⁴⁸ In addition, there is at least anecdotal evidence that the BJP government supported teacher training conducted by Vidya Bharati (VB), the education wing of the Sangh family (of which BJP is the political wing), which aims to promote Hindutva ideology through education.¹⁴⁹ Obviously, teacher training that promotes and inculcates a purely nationalist agenda is unlikely to create a brand of teachers that would challenge the political authority of the state. Under these circumstances, the ability of the teachers to safeguard education against repression

¹³⁹ The Probe Team (in association with Centre for Development Economics), *Public Report on Basic Education in India* (Oxford University Press, 1999) (the “Probe Report”), p. 57.

¹⁴⁰ *Id.* at p. 54.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at p. 56.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at p. 57.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ A VB representative in the state of Goa told Human Rights Watch that: “[VB teachers] training is a Bachelor of Education and VB training. They get the VB training here in the building. The government supports use there. The State Institute of Education—the VB does its training there. ...VB has seminars for training in all education institutes, they organize seminars on education...VB works with all the schools, public and private.” Interview conducted by Human Rights Watch with Dilip Betkekar, organizing secretary of Goa Vidya Pratishthan and Secretary and Manager of Dr. K.B. Hedewar S.P. Mandal School, Panjim, Goa, December 18, 2002.

and discrimination is severely compromised.

An alternative proposition would be to say that the best-suited actors to challenge political authority and to protect against “despotism of the mind” are the parents and, to a lesser extent, students themselves. Parents have a keen interest in ensuring that education provided to their child is relevant to the life of the child and adequately prepares the child to function in the society. Moreover, as the Special Rapporteur repeatedly emphasized, while the primary obligation to ensure the fulfillment of the right to education lies with the government, parents act as guardians of pluralism. Parents, as citizens in the society, have both the interest in education of their children and the ability to deliberate the framework of educational policy and to influence the formation of the framework by the government. But what happens when the parents’ interests themselves conflict with the principles of deliberative education? Here it is necessary to recall that the state bears the primary responsibility for ensuring that education comports with international legal standards. Thus, the state and parents effectively form a checks-and-balances system whereby each bears the responsibility for ensuring that the other does not subvert the goals and principles of deliberative education. When the state and parents come into conflict, courts often become the medium through which the conflict is resolved. As we will see in the next section, the courts, without explicitly saying so, in fact apply the deliberative education theory in resolving such conflicts.

(E) Theory of deliberative education and the courts

Courts and international human rights documents implicitly recognize the value of deliberation, for example, by requiring that the government of the state be representative of all people and not simply a majority.¹⁵⁰ Thus, for example, the European Court of Human Rights noted that in a democracy the views of a majority will not always prevail and that “a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.”¹⁵¹ The educational framework that emerges from the analysis of international conventions and guidance discussed in Part I of this paper is consistent with the deliberative education theory. Although neither the conventions nor the guidance mention deliberation, they almost uniformly take the view that education should focus on fostering diversity, promoting dialogues, understanding and tolerance, and teaching respect for differences—all skills that are both necessary for and that are fostered by deliberation.

In dealing with education, in the majority of cases courts, too, appear to adhere to the principles of deliberative education theory by giving primacy to values and attitudes, the fostering of which is necessary for democratic deliberation. Below is a representative sample of jurisprudence from various jurisdictions in which the courts grapple with challenges to the content of education. In this section I attempt to show how the deliberation theory can be used to mediate debates surrounding the content of education. Moreover, in the majority of the cases discussed herein, the reasoning of the courts appears to be consistent with the theory of deliberative education, thus suggesting that the theory of deliberative education can be integrated into contemporary judicial thought without too much difficulty.

¹⁵⁰ S. Wheatly, “Deliberative Democracy and Minorities,” EJIL (2003), Vol. 14 No. 30, 507, p. 511.

¹⁵¹ *Chassagnou and others v. France*, ECHR, Reports 1999-III, para. 112.

(a) European Caselaw

Article 2 of the European Convention for the Protection of Human Rights, Protocol 1 (“Protocol 1”) provides 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.

Much of the litigation in the area of education has focused on the extent to which parental religious and philosophical conviction can influence state education. A seminal case in this area is *Kjeldsen, Busk Madsen and Pedersen v. Denmark* (“*Kjeldsen*”).¹⁵² In *Kjeldsen*, the applicants were parents of school-age children who objected to the Danish law on sex education in schools, which made sex education compulsory and integrated it into the curriculum of State primary schools.

Consistent with the theory of deliberative education proposed in this paper, the Court took the view that the second sentence of Article 2 aims at safeguarding the possibility of pluralism in education, which is essential for the preservation of the democratic society. Moreover, the Court appears to have merged the second paragraph of Article 2 into the first; that is, in the words of the Court, “[t]he right set out in the second sentence of Article 2 is an adjunct of this fundamental right to education.”¹⁵³ Parents, the Court held, have the primary responsibility to educate their children. The state, however, is not prevented “from imparting through teaching or education, information of directly or indirectly religious or philosophical kind.”¹⁵⁴ What the second paragraph of Article 2 implies, the Court said, is “that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner.” The parents do not have the right to object to the integration of religious or philosophical teaching in the school curriculum, but the State is forbidden to pursue an aim of indoctrination that might be considered as not respectful of parents’ religious and philosophical convictions.¹⁵⁵ On the facts of the case, the Court found that although sex education does contain considerations of moral order, they were very general in character and did not overstep the bounds of what a democratic state may regard as public interest. Moreover, such education did not amount to an attempt at indoctrination aimed at advocating a specific kind of sexual behavior and does not affect the right of parents to enlighten and advise their children, to exercise with regard to their children natural parental functions as educators, or to guide their children on a path in line with the parents’ own religious or philosophical convictions.

To put the reasoning of this decision in the context of the proposed theory, the state has the authority for the content of education, provided that the content is guided by principles of reason, equality, diversity, and nonrepression. Parents’ roles are to act as the guardians of nonrepression,

¹⁵² Series A, No. 23, ECHR, 7 December 1976.

¹⁵³ Para. 52.

¹⁵⁴ *Id.*

¹⁵⁵ Para. 53.

nondiscrimination, and pluralism. With respect to the facts of the particular case, enforcing the policy of mandating sex education regardless of parental preference that is democratically sanctioned is legitimate although, as Amy Gutmann points out, perhaps unwise if it caused conservative parents to flee the public school system. In this case it would have been wiser to allow students who wish to be exempted to do so.¹⁵⁶ On the other hand, a decision of whether this particular policy is “wise” or “preferred” should not be made by international law or its institutions. Individuals, including students themselves, within states should be left to deliberate about the best policy on sex education in schools. Depending on a particular community and surrounding circumstances, decisions may be different. For example, a community with high incidence of teenage pregnancies or evidence of frequent practice of unprotected sex among students may decide that sex education should be imparted to all students, even if the parents object. This decision would not be repressive because students, not their parents, are required to take sex education courses and evidence of frequent practice of premarital sex may indicate that students themselves do not believe in the sanctity of sex. On the other hand, a community where some form of sex education can be gained from a variety of sources (e.g., social groups, community centers, outreach programs, religious groups, etc.), the community may decide that it would in fact be wise to allow those students who wish to be exempt from sex education to do so. Moreover, a community may decide to ban sex education in public school altogether (or mandate abstinence-only teachings). If democratically sanctioned, such policy would be legitimate with one caveat. Public regulation of sexual practice is often inextricably linked to gender roles. Sanctity of marriage is often linked with the sanctity of woman’s virginity. Although expression of men’s sexuality is often glorified or at the very least not stigmatized, women’s sexual activity outside the forum of marriage is often vilified. Thus, to the extent that the sanctity of marriage is tied to the sanctity of virginity, policy banning sexual education on the grounds of safeguarding the sanctity of marriage is indirectly discriminatory. Moreover, such a policy could also be discriminatory towards homosexual teenagers who may be told implicitly that they can never enjoy (guiltless) sexual activity. If in fact the policy were repressive or discriminatory, international law through its institutions would legitimately mandate intervention because such a policy would be contrary to the principles of deliberative education.

The next case that I examine is that of Valsamis v. Greece,¹⁵⁷ which also deals with Article 2 of Protocol 1. In that case the European Court of Human Rights was asked whether suspension imposed on the Jehovah’s Witness student for refusing to take part in a school parade violated Protocol 1. The student objected to participating in a school parade commemorating the National Day, the anniversary of the outbreak of war between Greece and Fascist Italy. As a Jehovah’s Witness, the student claimed that she was prohibited from joining in the commemoration of war because pacifism is a fundamental tenet of her religion. The school officials rejected the student’s objection and punished her for her failure to attend the parade with two days’ suspension from school. The parents of the student launched a complaint with the European Court of Human Rights alleging, among other things, that the punishment of the student infringed their right to ensure that their daughter’s education is in conformity with their own religious and philosophical convictions pursuant to Article 2 of Protocol 1.

The deliberative education theory would say that inculcating the virtues of patriotism is not in

¹⁵⁶ A. Gutmann, “Democratic Education,” Princeton University Press (1987; preface and epilogue: 1999), p. 110.

¹⁵⁷ App. No. 21787/93, ECHR (18 December 1996).

itself inconsistent with the goals of deliberative education, provided however that fostering skills and attitudes necessary for deliberation is not adversely affected. In this case, participation in the parade was surely an attempt to rouse patriotic feelings in the students. There is no evidence, however, that the parade was accompanied by any rhetoric of Greek supremacy or denigration of Italian people, or any other teachings that would undermine the principles of equality, toleration, or diversity. Nor was there evidence that the parade glorified war or other means of violence as methods of resolving conflicts; if, however, that were the case, the claimants' argument would have much more force.

The Court split in its decision with regards to the claim of violation of Article 2. The majority vaguely constructed an argument similar to what I suggested the deliberation theory of education would require. Citing Kjeldsen, the majority reaffirmed the view that religious education may be imparted by the state, provided that it is not in pursuance of the aim of indoctrination. The parade, the majority held, is aimed at protecting the country's collective historical memory and to inspire patriotic ideals, such as the love of liberty and a determination to protect the territorial integrity of the country. Because the parade had no "military complexion," requiring a Jehovah's Witness student to participate in the parade does not violate Article 2 of the Protocol 1. The awkwardness of the Court's argument lies in the phrase "military complexion." The Court did not expand on the meaning of the phrase, although I would suggest that it would not be enough to show that the parade did not require students to march, salute or wear uniforms. What is necessary to support the conclusion that the Court reached is evidence that the teachings did not glorify nationalism to the point of denigrating other cultures and did not promote or glorify war and was not otherwise inconsistent with promoting the virtues of equality and diversity. Assuming, however, that the Court did in fact have such information, its decision is consistent with the deliberation theory of education.

The minority, I believe, got it wrong. The dissent in this case appears to have taken the view that promotion of nationalism and patriotism is *de facto* unacceptable. Justice Schermers noted that "[n]ationalism is at the root of many wars and conflicts" and expressed his sympathy for "those whose philosophical convictions object against any education stimulating nationalism."¹⁵⁸ He would have held that the Greek authorities should have respected the philosophical convictions of the girls' parents. Other dissenting Justices went even further and held that "placing the children under [the obligation to participate in commemoration of the start of the war between Greece and Italy] could be interpreted as an indirect attempt to indoctrinate them with a patriotic value system." In a democratic society, they concluded, "such activities, however symbolic, are difficult to reconcile with parents' right freely to choose the manner in which their children are educated." Respectfully, however, I do not believe this last statement is correct. Patriotism (when not misused) fosters a sense of shared identity among citizens of a polity. As Gutmann rightly points out, children learn to respect other human beings by first learning to respect people who are close and familiar to them.¹⁵⁹ Thus teaching children about their domestic cultures and politics can form a basis on which to begin cultivation of children's capacity to identify with members of other societies.¹⁶⁰ Focusing on one's domestic policies is also important because it is

¹⁵⁸ Partly Dissenting Opinion of Mr. H.G. Schermers.

¹⁵⁹ A. Gutmann, "Challenges of Multiculturalism in Democratic Education," *Philosophy of Education* 1995, at http://www.ed.uiuc.edu/EPS/PES-Yearbook/95_docs/gutmann.html, p. 15.

¹⁶⁰ *Id.*

those policies that people must enlist to help themselves within the society. At the same time, citizens also invoke domestic policies to help those beyond their national borders.¹⁶¹ Thus, the ability to participate effectively as a citizen of one's own society may help to further the cause of global justice as well.¹⁶² As Professor Gutmann accurately noted:

The demand for educating children within a sovereign society makes moral sense if only because each sovereign society is a major political actor in bringing about better or worse conditions for its own citizens as well as other people significantly affected by its policies. The best way we now know to bring about justice for all people on a global scale is to educate children as free and equal citizens of separate democratic societies. Our moral aim, then, should not be to abolish the sense of patriotism that attends education for democratic citizenship, but to educate children, whatever their citizenship, to be concerned with pursuing justice for all people as far as the division of moral labor among societies makes possible.¹⁶³

Despite the cases decided consistently with the principles of deliberative education, there are instances in which the European Court of Human Rights had reached decisions, which I believe, are both inconsistent with the theory of deliberative education and undesirable in a democratic society. Consider for example the case of Angeleni v. Sweden.¹⁶⁴ In that case, the European Commission on Human Rights was asked whether refusal by a school to grant an exemption from religious education to a student whose parents were atheists violated the European Convention for the Protection of Human Rights. The general framework of the Swedish public sector school education is as follows:

The curriculum reflects a democratic view of society and its members, the implication being that human beings are active and creative and that they both can and must assume responsibility and seek knowledge in order to co-operate with others in understanding and improving their own living conditions and those of other people. The content and working methods of school must be designed in such a way as to be conducive to this attitude towards people and society. ...The fields of knowledge which are to be dealt with must be fundamentally important to all, irrespective of their future activities. This means, for example, that schools must familiarise their pupils with questions of belief, with major issues concerning human relations and survival, with international affairs, with science and technology, with resource conservation, with environmental questions, with economic questions, with questions concerning working life and the labour market, with cultural questions, with family questions, with sexual matters, with immigrant affairs, with law and justice, with questions concerning road traffic, and with the hazards involved in alcohol, drugs and tobacco. All pupils must acquire knowledge of at least one foreign language. A prominent place must be given to knowledge with an important bearing on everyday life. ...The way in

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at p. 13.

¹⁶⁴ (1988) 10 E.H.R.R. CD123.

which different ethical opinions govern our acts and the positions we take on various views of life, for example on what is right and wrong, good and evil, various ways of looking at the human being and the nature of life. The significance of a religious belief when adopting a position as to different views of life. The views of life may relate to our responsibility for each other and for living beings, questions concerning things, life and death, similarities and differences between human beings, friendships and family relations, the solution of conflicts, loneliness, community, security, comfort, friendship, honesty, justice. *The teaching should emanate from and refer to the pupils' own experiences, events and phenomena of current interest and deal with relevant contemporary personalities. The teaching also comprises studies of: the Bible, for example Abraham and the patriarch stories, Joseph and his brothers, Moses, selected events from the life of Jesus Christ; some churches and communities in the society; songs and hymns connected with the subjects dealt with; and personalities and patterns of life in inter alia the Jewish religion.*¹⁶⁵

Exemption from religious education is granted to those who provide a certificate that they have received other religious instruction. The applicants allege that failure to grant their daughter an exemption from religious education violated Article 2 of Protocol 1.¹⁶⁶

The framework of the Swedish education is on its face consistent with what would be mandated under the theory of deliberative education. That is so until the meaning of “religion” is considered. The deliberative education theory advocated here would support the Swedish model of education provided that those whose *religious* belief was that God does not exist were also exempted from religious study.¹⁶⁷ After all, if one defines religion as a relationship between God and individual than atheism is also a religion in that its relationship with God is that of denial. Yet, the European Commission took a different view. It concluded that atheism or secularism is not a “religious faith” and therefore the applicant does not fall within the category in respect of which exemption has been arranged. By this conclusion alone, the European Commission violated both the principles of nonrepression and nondiscrimination. But the Commission did not stop there. It further held that although Article 9 of the European Convention on Human Rights affords protection against indoctrination of religion by the State in education or elsewhere, because the Swedish curriculum’s subject of religious knowledge aims at “teaching about religion, not in religion,” religious education in this sense does not violate Article 9 even though “the instruction in religious knowledge focuses on Christianity at junior level.” Such conclusion is perplexing to say the least, especially because the Commission accompanies it with little reasoning.

I contend here that the Commission was wrong in its decision because it endorsed a model of education that was repressive and discriminatory against minorities, and which failed to teach

¹⁶⁵ Emphasis added.

¹⁶⁶ Sweden, however, has made a reservation to the article to the effect that parents could only obtain a dispensation for the children from the obligation of taking part in certain parts of education if the parents and children belong to a religious faith other than the Swedish Church and other satisfactory religious instruction has been arranged for the children.

¹⁶⁷ It is assumed, for lack of evidence to the contrary, that an exemption was not discriminatory.

students the broader language of deliberation (i.e., in the sense advocated by Marion-Young). The Commission allowed for Christian education to be imposed on students of non-Christian denominations as well as on students of atheist persuasion, thus essentially requiring such students either to suppress or conform their beliefs. The Commission failed to recognize that allowing the curriculum to focus on Christianity lent a certain legitimacy to that religion over others. Any debate on religion that could occur in such classrooms likely would take place from the perspective of Christianity (because Christianity would be viewed as a baseline against which other religions would be judged or debated). In other words, such an environment would not be conducive to the transformation of “the partial and parochial interests and ideas of each into more reflective and objective judgment.”¹⁶⁸ In this context, atheism could not be judged “objectively” because the teaching of religions would not include the experience, knowledge and interests of atheists. As a result, not only would atheist students be disadvantaged in religious deliberations but other students would fail to acquire understandings and appreciation of the atheist position, thereby complicating communication across such perspectives. Such an outcome is especially undesirable in modern-day societies, where religious (as well as secular) rhetoric often polarizes opinions on issues ranging from abortion to gay rights to religious fundamentalism. In such an environment greater, rather than lesser, understanding between religious and atheist positions is necessary.

The European Court of Human Rights appears to resolve the debates surrounding education by reference to the “indoctrination” standard. That is, so long as state education does not amount to indoctrination, parents cannot object to the curriculum on the grounds of it being inconsistent with their own beliefs. On the other hand, if state education is repressive or discriminatory or otherwise amounts to indoctrination, parents’ rights to educate their children in accordance with their beliefs can override the state’s curriculum. In other words, consistent with the deliberative education theory, parents and the state act as a system of checks-and-balances to ensure that children receive education that is reflective of the values of a democratic society. Without explicitly stating that the purpose of education is to inculcate in students skills and values necessary for their effective participation in a democratic society, the Court’s decisions are generally consistent with such premise. Where the Court deviates from the principles of deliberative education is in the way it deals with religion in state schools. Specifically, the Court appears to view “religion” and “secularism” as two opposing and irreconcilable concepts, failing to recognize that state promotion of counter-religious philosophies can be as repressive and discriminatory as state promotion of traditional religion. In this respect, the European Court of Human Right differs from American and Canadian courts, which, in the opinion of the author, correctly recognize that the boundary between “secularism” and “religion” is often blurry.

(b) *American Caselaw*

American courts have been more willing than the European Court of Human Rights to acknowledge explicitly that public schools are vital vehicles for “inculcating fundamental values necessary to the maintenance of a democratic political system.”¹⁶⁹ In one case, the court stated that students need a basic education that would allow them to “function productively as civic

¹⁶⁸ I.M. Young, *Difference as a Resource for Democratic Communication*, in ed. D. Estlund, “Democracy” (Blackwell Publishers Inc. 2002), p. 229.

¹⁶⁹ *Plyler et al v. Doe, Guardian, et al.*, 457 U.S. 202; 102 S. Ct. 2382 (1928).

participants capable of voting and serving on a jury.”¹⁷⁰ In another, the court noted that “education prepares students for active involvement in political affairs...[It] stimulates an interest in the political process and provides the intellectual and practical tools necessary for political action. Indeed, education may well be the dominant factor in influencing political participation and awareness.”¹⁷¹ The court also added that “education serves as a unifying social force among our varied population, promoting cohesion based upon democratic values.”¹⁷²

Despite these pronouncements, the courts have provided few details regarding what values are necessary for the maintenance of democracy or cohesion of the social order. Some guidance, however, can be gleaned from the multitude of cases dealing with various aspects of state education. A comprehensive discussion of all cases is beyond the scope of this paper. Instead, a few seminal cases are presented. These cases illustrate, broadly, that, in contrast to the European Court of Human Rights, the American courts tend to adhere more strictly to the principles of deliberative education.

In Abington School District v. Schemp,¹⁷³ the United States Supreme Court held unconstitutional a law that required readings from the Bible at the opening of each school day. The Court reasoned that neither a state nor Federal government can constitutionally force a person to profess a belief or disbelief in any religion. Reading of the Bible was a religious ceremony, and even if the purpose was not strictly religious, the effect was a profession of belief in a particular religion—Christianity. The Court dismissed contentions that unless the religious exercises are permitted a “religion of secularism” would be established in the schools, although the Court agreed that the State may not establish a “religion of secularism” in the sense of affirmatively opposing or showing hostility to religion, thus “preferring those who believe in no religion over those who do believe.”¹⁷⁴ The Court went on to state that

it might well be said that one’s education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. But the exercises here do not fall into those categories. They are religious exercises, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion.¹⁷⁵

Since Abington, several lower courts have entertained the argument that public schools are

¹⁷⁰ Campaign for Fiscal Equity, Inc. v. Sate, 655 N.E.2d 661, 666 (N.Y. 1995).

¹⁷¹ Hartzell v. Conell, 679 P.2d 35, 40-41 (Cal. 1984) (internal quotation marks omitted).

¹⁷² *Id.* (internal quotation marks omitted). See also Board of Education v. Pico, 457 U.S. 853 (1982) (court notes that school’s function is to provide instruction in community values); Ambach v. Norwick, 441 U.S. 68, 80 (1979) (stating that teachers have an obligation to promote civic virtues); Brown v. Board of Education, 347 U.S. 483 (1954) (asserting that education is the principal instrument in transmitting cultural values).

¹⁷³ 374 U.S. 203, 225 (1963).

¹⁷⁴ *Id.* at para. 15.

¹⁷⁵ *Id.*

unconstitutionally establishing secularism.¹⁷⁶ In most of these cases courts rejected the argument that public schools were establishing secularism but did so not because they found that secularism was not a religion, but because either secularism was not in fact being established or the proof of establishment was irrelevant to the remedy sought.¹⁷⁷

In Mozert v. Hawkins County Board of Education,¹⁷⁸ the Sixth Circuit upheld the school board's refusal to accommodate a parent's request for an alternate reading series based on their religious objections to the one used in class. The parents objected to the reading series because they taught that "one does not need to believe in God in a specific way but that any type of faith in the supernatural is an acceptable method of salvation."¹⁷⁹ A lower court found that compulsory use of the textbooks violated the plaintiff's free exercise of religion and ordered the school to permit the students to "opt-out" of the reading program. The Court of Appeals for the Sixth Circuit, however, reversed the lower court ruling, holding that the mere exposure to religiously objectionable material does not burden free exercise rights because students are not compelled to affirm or disaffirm any particular religious belief or practice. The Court explicitly noted that a purpose of public schools is to educate students in fundamental values and instill civil tolerance of the views of others in society, and that developing skills of critical thinking in children is essential for children to become productive members of society.¹⁸⁰

The Mozert case should be contrasted with Hansen v. Ann Arbor Public Schools,¹⁸¹ in which the court was asked to consider whether school officials could constitutionally prohibit a student from representing her point of view on homosexuality at an assembly held during a Diversity Week. In that case, a school was planning its annual Diversity Week, which traditionally included student panels on issues of race and religion. For this Diversity Week, however, it was suggested by the student group Gay/Straight Alliance that a panel be created on homosexuality and religion. The plaintiff, a member of a student group Pioneers for Christ, expressed interest in participating in the panel. Her participation was initially welcomed. Subsequently, however, the Gay/Straight Alliance, which was charged with formulating the panel, decided that instead of having students on the panel, it would be useful to have religious figures address the interaction of religion and homosexuality. When the plaintiff found out about it, she asked whether she could bring religious figures from her community to the panel. The Gay/Straight Alliance did not, however, want panel members that expressed views contrary to their own. As a result, the panel was comprised only of religious leaders with pro-gay positions. Some of the clergy wore clerical garb during the panel, and all panel members were held out as experts on matters of religion. As a gesture of good will, the plaintiff was told that she could make a short speech on what diversity meant to her; however, she had to submit her speech for review prior to be able to present it at the assembly. Upon review by school officials, a portion of the plaintiff's speech was found to be objectionable¹⁸² and she was asked to revise her speech accordingly. The

¹⁷⁶ For a comprehensive review of caselaw on this subject, see M. Harter Mitchell, "Secularism in Public Education: The Constitutional Issues," 67 B.U. L. Rev. 603.

¹⁷⁷ M. Harter Mitchell, "Secularism in Public Education: The Constitutional Issues," 67 B.U. L. Rev. 603, p. 611.

¹⁷⁸ 827 F.2s 1058 (6th Cir. 1987).

¹⁷⁹ *Id.* at p. 1053.

¹⁸⁰ *Id.* at p. 1068.

¹⁸¹ 293 F. Supp. 2d 780 (U.S. Dist. Ct., Eastern Dist. Mich., Southern Div., 2003).

¹⁸² The objectionable content was as follows: "One thing I don't like about Diversity Week is the way that racial diversity, religious diversity, and sexual diversity are lumped together and compared as if they are the same things.

plaintiff complied with the school directions, but subsequently filed a suit claiming that the school violated the plaintiff's First Amendment Right to Freedom of Speech, the Establishment Clause of the First Amendment as well as the Equal Protection Clause of the Fourteenth Amendment.

The defendants claimed that the objective of the panel was to teach students to stay on topic, make students aware of minority points of view, and create a safe and supportive environment for gay and lesbian students. It is in pursuit of these goals that the plaintiff's speech was restricted. The court found, however, that "in explaining how each of these goals were furthered by restricting [the plaintiff's] speech, it is not educational theory or practice that the Defendants rely upon, but rather it is their specific disapproval of the message that [the plaintiff] would have conveyed that underlies their decision." Could a theory of deliberative education have been helpful here? Could the decision of the school officials have been different if they did in fact employ such a theory?

Deliberative education theory suggests that students should be provided with the tools necessary to become effective deliberators in a democratic society. The ability to communicate across differences, critical thinking and discussion, understanding and appreciation of different viewpoints are all critical deliberation skills. The school officials refused to allow the plaintiff to present her viewpoint plainly because they found her religious position to be "wrong." Yet, rather than exploring the notion of religious authority and religious knowledge production, the school officials simply opted out for presenting the "right" religious view. Students thus were presented with "expert" and "authoritative" religious opinions without being taught the skills necessary to assess the validity of such opinions. Had the school officials approached the issue from the perspective of deliberative education theory, they might have concluded that presenting a panel of religious figures with diverse positions would expose the fact that religious truth is not absolute; rather, it takes shape through interpretations, opinions and practice. It is unlikely that such a dialogue would have created an unsafe environment for the gay community. Perhaps, quite to the contrary, such dialogue would have exposed flaws in the conservative assertions that homosexuality is sinful and thus could have contributed to a more open-minded position among students like the plaintiff.

The Court agreed with the plaintiff that the right to free speech, the Establishment Clause, and the Equal Protection Clause were violated. The Court refused, however, to find that the school violated the parents' right to control the religious upbringing and education of their children. The Court held that

if all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to fashion a separate curriculum for each student whose parents had genuine religious or moral disagreements with the

Race is not strictly an idea. It is something you are born with; something that doesn't change throughout your life, unless your [sic] Michael Jackson, but that's a special case. It involves no choice or action. On the other hand, your religion is your choice. Sexuality implies an action, there are people who have been straight, then gay, then straight again. I completely and whole-heartedly support racial diversity, but I can't accept religious and sexual ideas or actions that are wrong."

school's choice of subject matter. The Court does not believe that the framers of our Constitution intended to impose such a burden on this nation's public schools.

Without disagreeing with the Court's conclusion, I find this reasoning, which appears to be common in American jurisprudence on this issue,¹⁸³ unpersuasive. Administrative difficulty cannot be used as a blanket reason for affirming or denying an individual's rights. Here, the deliberative education theory could be of help. As discussed earlier in the paper, a parental right to control the content of education is necessary to ensure that the state itself does not violate the principles of deliberative education. In this case, the school's decision was contrary to the principles of deliberative education because it was repressive and discriminatory. On the other hand, what was being asked by the plaintiff and her parents was neither repressive nor discriminatory, and in fact was fully consistent with the principles of deliberative education. In such circumstances, parental intrusion into the school's decision is justified.

The United States Constitution does not recognize a fundamental right to education. Nor has such a right been implied from the jurisprudence. Instead, controversies surrounding aspects of education are usually framed around other rights, such as the right to free speech, a right to free exercise of religion, the Establishment Clause, or the Equal Protection Clause. Nonetheless, the reasoning of the courts tend to be very closely aligned with the principles of deliberative education. The Mozert case is an example of the closest alliance between the reasoning of the courts and the theory of deliberative education. Similarly close adherence to the principles of deliberative education can be observed in Canadian jurisprudence.

(c) *Canadian Caselaw*

In Canadian Civil Liberties Assn. v. Ontario (Minister of Education),¹⁸⁴ the Ontario Court of Appeal was asked to address whether religious education in public schools violated section 2 of the Canadian Charter of Rights and Freedom ("the Charter"), which guarantees every individual freedom of conscience and religion; freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; freedom of peaceful assembly; and freedom of association.

The original curriculum was established before 1986 and was predominantly concerned with teaching the Christian faith. The Elgin County School Board of Education concluded that this curriculum constituted indoctrination and, thus, was a violation of the Charter. An interim curriculum was established for 1986-87, the stated purpose of which was *inter alia* development of understanding of the moral and religious values of the local community, appreciation of the

¹⁸³ See also Brown v. Hot, Sexy and Safer Productions, Inc., 68 F.3d 525 (1st Cir. 1995) (mandatory school AIDS awareness assembly during which sexually explicit language and material was not unconstitutional; rights of parents do not encompass a broad-based right to restrict the flow of information in the public school); Leebaert v. Harrington, 332 F.3d 134 (2nd Cir. 2003) (state requirement that public schools include in their health education component teaching about alcohol, tobacco, drugs, and sex did not violate the Constitution; "recognition of [a parental fundamental right]—requiring a public school to establish that a course of instruction objected to by a parent was narrowly tailored to meet a compelling state interest before the school could employ it with respect to the parent's child—would make it difficult or impossible for any public school authority to administer school curricula responsive to the overall educational needs of the community and its children.").

¹⁸⁴ 19 A.C.W.S. (3d) 355; 1990 A.C.W.S. LEXIS 15281; 65 D.L.R. (4th).

values of others, and having due regard for freedom of conscience. The curriculum, however, specified teaching on themes that emanated from Judeo-Christian theology. The curriculum prepared for 1988-89 adopted the same specified purposes, but had some modifications. For example, the curriculum content included non-religious materials and more general educational emphasis. Nonetheless, lesson objectives were based on Judeo-Christian perspectives. The Court of Appeal held that this curriculum was in violation of the freedom of religion and, despite the changes, nonetheless amount to indoctrination. The Court found that Judeo-Christian teachings received disproportionate emphasis as well as a different approach from the purely factual approach given to other religions. From the perspective of the deliberative education theory, this conclusion is correct given the evidence suggesting that the curriculum was both discriminatory and repressive. Centering the curriculum on the Judeo-Christian tenets impedes rational deliberation of competing ideas and also represses those groups that do not recognize Judeo-Christian theology as the foundation of community values.

In Chamberlain et al. v. The Board of Trustees of School District No. 36 (Surrey) et al.,¹⁸⁵ the Supreme Court of Canada was asked to decide whether the ban by a Board of Trustees in a school district of books which depicted same-sex parented families violated section 76 of the British Columbia School Act (the “Act”). Section 76 of the Act provides that “[a]ll schools and Provincial schools must be conducted on strictly secular and non-sectarian principles.” It also emphasizes that “[t]he highest morality must be inculcated, but no religious dogma or creed is to be taught in a school or Provincial school.” The Act confers on the Minister of Education the power to approve basic educational resource materials to be used in teaching the curriculum in public schools, and confers on school boards the authority to approve supplementary educational resource material, subject to Ministerial direction. A Kindergarten-Grade One (“K-1”) teacher asked the Surrey School Board to approve three books as supplementary learning resources, for use in teaching the family life education curriculum. The books depicted families in which both parents were either women or men. The Board passed a resolution declining to approve the books. The Board’s overarching concern, as found by the trial judge, was that the books would engender controversy in light of some parents’ religious objections to the morality of same-sex relationships. The Board also felt that children at the K-1 level should not be exposed to ideas that might conflict with the beliefs of their parents; that children of this age were too young to learn about same-sex parented families; and that the material was not necessary to achieve the learning outcomes in the curriculum.

The British Columbia Supreme Court quashed the Board’s resolution, finding the decision offended s. 76 of Act, because members of the Board who had voted in favor of the resolution were significantly influenced by religious considerations. The British Columbia Court of Appeal set aside the decision on the basis that the resolution was within the Board’s jurisdiction. The Supreme Court agreed with the British Columbia Supreme Court and allowed the appeal.¹⁸⁶ The majority of the Court felt that the school Board’s decision was unreasonable in the context of the educational scheme laid down by the legislature. The Court acknowledged that the School Board is an elected body and a proxy for parents and local community members, which suggests that some deference is owed. However, the Court held, *inter alia*, that the absence of a privative clause, the clear commitment of the Act and the Minister to promoting tolerance and respect for

¹⁸⁵ 2002 SCC 86.

¹⁸⁶ Two justices dissented.

diversity, and the fact that the problem before the Board has a human rights dimension, all militate in favor of a stricter standard of review. The Court further held that the Act's requirement of secularism in s. 76 does not preclude decisions motivated in whole or in part by religious considerations, provided they are otherwise within the Board's powers. But the Board must act in a way that promotes respect and tolerance for all the diverse groups that it represents and serves.

Justice LeBel, although concurring with the majority, wrote his own decision. Justice LeBel noted that the Board was authorized to approve or not to approve books for classroom use. But its authority is limited by the requirements in s. 76 of the Act to conduct schools on "strictly secular and non-sectarian principles" and to inculcate "the highest morality" while avoiding the teaching of any "religious dogma or creed." According to Justice LeBel, the words "secular" and "non-sectarian" in the Act imply that no single conception of morality can be allowed to deny or exclude opposed points of view. Disagreement with the practices and beliefs of others, while certainly permissible and perhaps inevitable in a pluralist society, does not justify denying others the opportunity for their views to be represented, or refusing to acknowledge their existence. Justice LeBel also acknowledged that section 76 does not prohibit decisions about school governance that are informed by religious belief but instead is aimed at fostering tolerance and a diversity of views. It does not limit in any way the freedom of parents and Board members to adhere to a religious doctrine that condemns homosexuality but it does prohibit the translation of such doctrine into policy decisions by the Board, to the extent that they reflect a denial of the validity of other points of view.

The opinions of the majority of the Supreme Court reflect a very devout adherence to the principles of deliberative education. Although none of the Justices refer to deliberation explicitly, the central tenet of their reasoning is the mandate that education be inclusive so as to allow everybody to present their own views and perspectives. As Justice LeBel pointed out, education is aimed at "fostering tolerance and diversity of views."¹⁸⁷

In Zylberberg v. Sudbury Board of Education (Director),¹⁸⁸ the Ontario Court of Appeal held that the regulations of the education act that provide for the recitation of the Lord's Prayer and the reading of the Scriptures from the Christian Bible are inconsistent with the Charter. In this case, the Ontario Education Act (the "Act") provided that "subject to the regulations, a pupil shall be allowed to receive such religious instruction as his parent... desires...." Another section of the Act (s. 28(1)) required a public school to open or close each school day with religious exercises consisting of the reading of the Scriptures or other suitable readings and the repeating of the Lord's Prayer or other suitable prayers. The appellants, parents of children enrolled in elementary public schools, sought a declaration that s. 28(1) of the regulations is of no force and effect because it violates the guarantee of freedom of religion in s. 2(a) of the Charter. The application was dismissed at trial and appealed to the Court of Appeal.¹⁸⁹

¹⁸⁷ For similar outcomes and reasoning, see also *R. v. Jones*, [1986] 2 S.C.R. 284; *Manitoba Assoc. for Rights & Liberties Inc. et al v. Gov't. of Manitoba et al*, [1992] Man. D. 875-02.

¹⁸⁸ 52 D.L.R. (4th) 577.

¹⁸⁹ One justice dissented.

The majority of the Ontario Court of Appeal held that the appeal should be allowed and declared section 28(1) of the Act to be of no force and effect. The majority reasoned that the recitation of the Lord's Prayer and the reading of the Scriptures from the Christian Bible imposes Christian observances upon non-Christian pupils and religious observances on non-believers. The Court further held that the presence of a right to request exemption from the recitation did not save the regulations. The Court stated that while the majoritarian view may be that by allowing exemption section 28 confers freedom of choice on the minority, "the reality is that it imposes on religious minorities a compulsion to conform to the religious practices of the majority." The evidence in the case before the court supported this conclusion. The three appellants chose not to seek an exemption from religious exercises because of their concern about differentiating their children from other pupils. The Court noted that "[t]he peer pressure and the class-room norms to which children are acutely sensitive, in our opinion, are real and pervasive and operate to compel members of religious minorities to conform with majority religious practices." The Court cited Justice Brennan in Abington School District v. Schempp, 374 U.S. 203 at p. 288 (1963):

[B]y requiring what is tantamount in the eyes of teachers and schoolmates to a profession of disbelief, or at least of nonconformity, the procedure may well deter those children who do not wish to participate for any reason based upon the dictates of conscience from exercising an indisputably constitutional right to be excused. Thus the excusal provision in its operation subjects them to a cruel dilemma. In consequence, even devout children may well avoid claiming their right and simply continue to participate in exercises distasteful to them because of an understandable reluctance to be stigmatized as atheists or nonconformists simply on the basis of their request.

Thus, the Court concluded that s. 28 of the Act violated the provisions of the Canadian Charter of Rights and Freedoms.¹⁹⁰

(d) *Summary*

As this section demonstrated, the theory of deliberative education is not inconsistent with judicial approaches to education and, in some instances, would have provided a more persuasive basis for the courts' decisions. Without requiring a major overhaul of judicial thought on this issue, deliberative education theory provides a clear framework within which education controversies could be resolved. In the case of the European Court of Human Rights, adoption of the deliberative education theory could contribute to a revised approach in dealing with issues of religion and education. The adoption of the deliberative education theory by the courts could lead to decisions that are more just and more beneficial to the democratic society and its citizens. In addition, adoption of the deliberative education theory in international law could lead to uniformity in the ways regional courts deal with the issue of education. Finally, as illustrated by the Hansen case, adoption of the deliberative education theory at local levels can facilitate the resolution of controversies locally, thus preventing such disputes from rising to the level of the courts.

Having concluded that deliberative education theory could be adopted at international level without requiring an overhaul of judicial thought on the issue of education, the next section

¹⁹⁰ See also Russow v. British Columbia (Attorney General), 13 A.C.W.S. (3d) 297 (reaching the same conclusion).

illustrates how deliberative education theory can be used to address common challenges to school curricula.

PART IV—DELIBERATIVE EDUCATION IN PRACTICE

Often challenges to the curriculum turn on whether the religion should be included in the educational curricula. These debates may focus on whether to teach creationism (as in the case of Serbia and Dover Area school board) or on whether religious symbols can be worn by students (as in the case of French ban on *hijab*). Curricula can also be challenged on the grounds that they promote an ethno-centric view of the world or assert religious or cultural supremacy (as in the case of Indian NCFSE). This section will show how deliberative education theory can be used to adjudicate these and other conflicts.

As Amy Gutmann pointed out, “public schools are the primary institution by which a democratic society educates future citizens, preparing them to share in responsible self-government.”¹⁹¹ Deliberative education thus requires that future citizens be taught, among other things, religious tolerance. That will often entail educating children about different religions, their origins and values, all along providing space for critical thinking and sharing of ideas among students. At the same time, educators should be mindful of principles of nonrepression and nondiscrimination. Thus, while teaching students in civics or cultural studies classes about the existence of various theories of human creation, ranging from evolution to creation, is an acceptable educational exercise, teaching creationism as part of biology curriculum may in certain circumstances violate the principle of nonrepression. Specifically, if teaching of creationism as part of biology requires students to accept unequivocally the central role of divinity in universe creation, then such teaching effectively restricts the scope of *rational* deliberation of competing ideas. On the other hand, if creationism is presented as a view that, like scientific theories, may be fallible and is open to critical examination, then its teaching is consistent with deliberative education.

Increasingly, the gap between religious and secular voices has been widening, with members of each group unwilling (or unable) to comprehend contrary positions. Schools must work to narrow this gap, exposing students to varied ideas and viewpoints and teaching them to appreciate and respect difference. To invoke Iris-Marion Young’s position, the most successful deliberator is one that is fluent in many languages of deliberation. Religion is not a uniform and static concept. Although generally based on sacred writings, the majority of religious practices and viewpoints have evolved as a result of clerical interpretations and changing societal values. A debate about a particular religious viewpoint thus is not only possible, but desirable. Take the issue of *hijab*, for example. Some, including some Muslim women, lauded the ban on *hijab* as a move away from gender discrimination.¹⁹² The French government insisted that *hijab* represented the influence of Muslim fundamentalism. Yet others, however, argued that *hijab* is a strong symbol of Muslim women’s identity and may even bring greater equality with men, as

¹⁹¹ A. Gutmann, “Challenges of Multiculturalism in Democratic Education,” *Philosophy of Education* 1995, at http://www.ed.uiuc.edu/EPs/PES-Yearbook/95_docs/gutmann.html.

¹⁹² At a demonstration in Paris, a 16-year-old Muslim woman told the reporter: “For years we’ve been warning about the fundamentalists, the radical imams, the huge step backwards that they represent for women and Muslims in general in France. This law is really necessary. You’ve got no idea what pressures some girls come under.” J. Henley, “Europe Faces Up to Islam and the Veil: Muslims claim discrimination in legal battles over religious symbol,” *The Guardian*, February 4, 2004.

women are no longer treated as sexual objects.¹⁹³ *Hijab* is, in fact, a site of many narratives. Although some of the narratives reflect the outdated theories of sexuality that clearly denigrate women, other narratives portray *hijab* as a symbol of identity (whether sexual, religious, cultural, or political) and symbol of resistance against majoritarian rule.¹⁹⁴ A unilateral ban on *hijab* justified on the grounds that *hijab* is repressive or representative of Muslim fundamentalism plainly ignores the complex relationship of Muslim women to *hijab*. The ban effectively eliminates any opportunity for deliberation and exchange of viewpoints among students since the government's position is deemed authoritative. In this respect, the ban is not only repressive but also discriminatory as it oppresses the group of Muslim women for whom the *hijab* is an important element of their identity.

By banning the *hijab* (along with other religious symbols), the French state effectively removed the space within which religious differences can be addressed, thus making it that much more difficult to foster among students understanding and toleration of religious differences. It would have been preferable to allow the girls to wear the *hijab* but invite them to share with their classmates their experiences with Islam and the veil. In the case of the *hijab*, in particular, given the diversity of narratives, a fruitful debate could have ensued not only about Islam (and various discourses thereof) but also about women's rights, cultural rights, and international affairs. Such debates not only increase students' awareness, but also promote critical thinking and reasoning, while maintaining respect and tolerance for each other's viewpoints. It is in this environment that good democratic citizens can be born.

Fostering understanding and toleration of religious and cultural differences does not, however, require the schools to accommodate every belief or viewpoint. In fact, those positions that themselves are clearly repressive or discriminatory must be excluded from curricula. An example of this is Indian NCFSE. Books issued pursuant to the NCFSE were riddled with inaccuracies and biases, designed largely to elevate Hindu supremacy at the expense of other religions.¹⁹⁵ For example, the textbooks suggest that the Aryans were indigenous to India and that they migrated to other places. This Aryan culture is being equated with the Vedic culture, purporting to reflect the superiority of the Hindu religion.¹⁹⁶ Christians, Muslims and other non-Hindu peoples are labeled as "foreigners," while the Hindus are depicted as "the minority in most states of the country."¹⁹⁷ In addition, as Professor Kum Kum Roy pointed out, "there is a preoccupation [in the books] with classifying developments as the first and the best, occasionally at the cost of

¹⁹³ S. Ahmed, "Islam Unveiled," film (Channel Four International Production, 2003).

¹⁹⁴ See. H. Hoodfar, "More Than Clothing: Veiling as an Adaptive Strategy," in S. Alvi, H. Hoodfar & S. McDonough (eds) *The Muslim Veil in North America: Issues and Debates* (Toronto: Women's Press, 2003); S. Shaikh, "Transforming Feminisms: Islam, Women, and Gender Justice" in O. Safi (ed) *Progressive Muslims* (Oxford: Oneworld, 2003).

¹⁹⁵ B.D. Chattopadhyaya, "NCERT's 'Objective' History: *Ancient India: Class XI History Textbook*" in "Saffronised and Substandard," a compilation of critiques of the new NCERT textbooks (Safdar Hashmi memorial Trust, 2002), p. 87.

¹⁹⁶ "Saffronisation and Imperialism in Indian Education," interview with Professor Prabhat Patnaik, Professor of Economics at the Centre of Economic Studies and Planning, Jawaharlal Nehru University, *Akhbar*, No.2, February-March 2000, at <http://66.51.111.239/indowindow/akhbar/article.php?article=97&category=7&issue=16>.

¹⁹⁷ T. Setalvad, "How textbooks teach prejudice," Sabrang Communications & Publishing Pvt. Ltd, 2001, at <http://www.colaco.net/3/textbook%20prejudicie.htm>.

truth.”¹⁹⁸ Thus, for example, the Harappan civilization is described as being 12 and 20 times larger, respectively, than the combined civilizations of Egypt and Mesopotamia;¹⁹⁹ the Upanishads are described as the “greatest works on philosophy in the history of humankind”;²⁰⁰ and Indian civilization (together with only Chinese civilization) are said to be “the only ones which have survived right from the time they came into existence to date.”²⁰¹

The diversity of the Indian community itself is seriously suppressed in the books. The only diversity that is acknowledged is that of different political powers, which social change is brushed aside.²⁰² Linguistic diversity is likewise suppressed.²⁰³ There is also a shocking lack of attention given to tribal populations and scant examination of the question of untouchability and the consequent failure to acknowledge oppression associated with caste and the effects thereof on vast sections of the population. Thus, students presented with information akin to that in the NCFSE-based books are unlikely to develop awareness of the true diversity of Indian society and are even more unlikely to gain meaningful knowledge about other cultures and religions.²⁰⁴ Moreover, such books are both repressive and discriminatory as they elevate Hinduism while implicitly (and sometimes explicitly) denigrating other religions and cultures. Views and beliefs of religious minorities are alienated and devalued. Moreover, the textbooks do not appear to encourage critical thinking or debates about religious principles and the role and effect of religion on the society thus implicitly rendering the textbooks’ vision of world religions as authoritative. In this environment, minority students are likely to feel alienated and hesitant about presenting their own viewpoints. Under such conditions, deliberative education theory would mandate against introduction of such textbooks into the school curriculum.

CONCLUSION

Deliberative education theory can be an invaluable tool in adjudicating competing interests relating to the right to education. However, the benefits of the deliberative education theory extend beyond the realm of the judiciary. Thus, for example, the theory can be used to challenge the contents of the curriculum using the language of civil and political rights. Because, under the theory, education is a necessary tool for insuring citizens’ ability to deliberate in a democratic society, deficiencies in the quality of education necessarily negatively impact the ability of citizens to exercise their fundamental civil and political rights. Framing challenges to public education in terms of violations of civil and political rights enhances the justiciability of such

¹⁹⁸ K. Roy, *Where Do We Go From Here?* in “Saffronised and Substandard,” a compilation of critiques of the new NCERT textbooks (Safdar Hashmi memorial Trust, 2002), p. 28.

¹⁹⁹ Page 80 of the Class VI textbook.

²⁰⁰ Page 91 of the Class VI textbook.

²⁰¹ Page 58 of the Class VI textbook.

²⁰² Kumkum Roy, “India’s National Textbooks for the Future?” *Economic and Political Weekly* (December 21, 2002), at <http://india.indymedia.org/en/2003/01/2631.shtml>.

²⁰³ *Id.*

²⁰⁴ Most recently, publicly acknowledging the biased nature of the NCFSE-based books, the review committee set up by the newly-elect Congress government and composed of Professors J.S. Grewal, S. Settar and Barun De, in their report to the Human Resource Development Minister, Mr. Arjun Singh, recommended the discontinuation of the current books on the grounds of factual errors and biased interpretations. Talking to the press, Professor Settar noted that “besides factual errors and sub-standard language and content, we found a philosophy running throughout the book, which we felt is objectionable and should not be passed on to the students.” “Current books should be replaced, says NCERT panel,” *Tribune News Service*, New Delhi, June 24, 2004.

claims in circumstances where the state did not ratify the ICESCR, the national constitution does not explicitly guarantee the right to education, and/or where justiciability of social and economic rights claims is otherwise impeded.

The success of the deliberative education theory in guaranteeing that the content of education is consistent with democratic principles and in ensuring that education around the world enables each child to become an effective citizen of a democratic society remains to be seen. In addition, further examination must be conducted of the applicability of the deliberative education theory to private educational institutions and the interaction of the right to education with the right to religious self-determination. Nonetheless, the theory of deliberative education at a minimum offers a starting point for unraveling a comprehensive theoretical foundation for international policy prescription on education. Without revealing the theoretical underpinnings of the right to education, “we cannot adequately judge [such theoretical] principles or the policy prescriptions that flow from them.”²⁰⁵

²⁰⁵ A. Gutmann, “Democratic Education,” Princeton University Press (1987; preface and epilogue: 1999), p. 6.