Classifying the Limitation of the Right to Education in the First Protocol to the European Convention

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1. Introduction

The aim with this contribution is to classify the limitation of the right to education in Article 2 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1952 (Article 2 Protocol 1).[1] The provision holds 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.

The discussion is conducted by first explaining what is meant by the limitation of a right, after which two limitation models are developed in order to be applied to the Convention, with special emphasis on the right to education.

2. Limit

It makes very little sense to embark on an analysis of the limitation of a right, without first shedding light on what is meant by a 'limit'.

The description of the content of a right under a declaration of rights, and thus the extent of its guaranteed protection, is sometimes viewed as a limit of sorts.[2] The non-extension or non-inclusion of protection under a declaration is equated with limitation. This approach is based on treating non-protection as a synonym for a limit. However, this does not have to be the case. For example, I.M. Rautenbach and E.F.J. Malherbe argue that:

> The expressions constitution-makers use to describe what they intend to protect, undoubtedly describe 'boundaries' or 'limits', but these are limits that can be distinguished clearly from the *justifiability* of incursions into the predefined boundaries in terms of limitation clauses. In the last instance we deal with the 'limitation' of rights after the commencement of the bill of rights and therefore with the application of limitation clauses.[3]

This definition of a limit as a justified interference with protection after having ascertained such protection in terms of a declaration is preferred for current purposes. This is because the intention is to investigate whether incursions are allowed in the protection afforded by the right to education, and not to discuss whether the formulation of the right had to be different to alter the scope of its protection.

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1 Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 20 March 1950, ETS no. 009.

2 Guradze, Heinz (1968), *Die Europäische Menschenrechtskonvention*, Verlag Franz Vahlen, Berlin, pp. 24-25; Alexy, Robert (2002), *A theory of constitutional rights*, Oxford University Press, Oxford, p. 185.

3 Rautenbach, I.M. and Malherbe, E.F.J. (1999), *Constitutional law*, 3 ed., Butterworths, Durban, pp. 331-332.

Having sketched the point of departure by explaining the concept of a limit, the attention is turned to developing and applying particular models of limitation in facilitating the classification of the right to education.

3. Models of limitation

The function to be investigated, namely that fulfilled by a limit, may be brought to bear in or ordered into specific structures. The identification and application of such limitation models serve the purpose of explaining the components and functioning of a particular system. A model is thus used as an instrument with which to classify a system.

In this regard two models of limitation may be distinguished, namely the two-stage model and the one-stage model.

The *two-stage model* is premised on the fact that the possibility of setting limits to rights is provided for in or may be derived from a given declaration of rights. The focus during the first stage of the inquiry thus rests on ascertaining whether the scope of a right was satisfied in order for its protection to be released. In order for the release of protection to be secured it must be established that the relevant or contested action or in-action forms part of the protected conduct and interests of the given right. However, it also follows that the bearer of such protection may only avail themselves thereof if there exists no hindrance or interference with the provided protection that would require further scrutiny. The first stage is thus satisfied upon having established the nature and extent of what is protected and the fact that such protection is not interfered with. Should an interference be identified though, the second stage of the inquiry becomes operational in order to ascertain whether the interference may be justified by the satisfaction of the limitation requirements.[4] If it proves that an interference is indeed justifiable a limit results that supplants the scope. The opposite also holds true, namely that a violation is identified if the interference is not justifiable, thereby not supplanting the scope of protection.[5]

In contrast, the *one-stage model* is typified by the absence of limitation possibilities. In other words, a right, once guaranteed, may not be subjected to interferences. Any interference with the protection in terms of a right would amount to a violation, as no distinction is made between *justified* and *non-justified* interferences.[6] Stated differently, the application of the one-stage model does not provide for a distinction between scope and limit. C. Edwin Baker captured the difference between the two-stage and one-stage models as follows:

> Those 'absolutists' who reject limitations assert that the central task is to determine the content of fundamental rights. This task, of course, involves consideration of the rationale for or the justifiable meaning of the right. In contrast, those who accept limitations assert that the appropriate legal inquiry must include consideration of other societal interests unrelated to the rationale of the right. The difference between those who do not and those who do accept limitations on fundamental rights is that the first group stops after the first inquiry.[7]

It is important for the further development of the inquiry to emphasise that the mere existence of the possibility of limiting rights does not contradict the primary purpose of a declaration of rights as a guarantor of freedom. As a matter fact, it is open to serious doubt whether the one-stage model poses a viable option for modern needs and requirements. For example, it is agreed with A.K. Koekkoek and Willem Konijnenbelt that the acceptance of the possibility to limit rights is generally uncontested, as it is obvious that not all conceivable rights can be exercised at will without conflicts arising in some form or another with the rights of others or other societal interests in general.[8] It is clear that a given right

4 *Cf.* Rautenbach, I.M. and Malherbe, E.F.J. (1999), Constitutional law, ibid., p. 323; Michalowski, Sabine and Woods, Lorna (1999), German constitutional law: the protection of civil liberties, Ashgate Publishing, Aldershot, pp. 79-80.

5 Grimm, Dieter (1994), 'Human rights and judicial review in Germany', in: Beatty, David M. (ed.), *Human rights and judicial review: a comparative perspective*, Martinus Nijhoff, Dordrecht/Boston/London, pp. 286-287.

6 *Cf.* Duchachek, Ivo D. (1973), *Rights and liberties in the world today: constitutional promise and reality*, Clio Press, Santa Barbara, CA/Oxford, pp. 167-171.

7 Baker, C. Edwin (1986), 'Limitations on basic human rights – a view from the United States', in: de Mestral, Armand, Birks, Suzanne, Bothe, Michael, Cotler, Irwin, Klinck, Dennis and Morel, André (eds.), *The limitation of human rights in comparative constitutional law/La limitation des droits de l'homme en droit constitutionnel comparé*, Yvon Blais, Cowansville, p. 77. Fn. omitted.

8 Koekkoek, A.K. and Konijnenbelt, Willem (1982), 'Het raam van hoofdstuk 1 van de herziene grondwet', in: Koekkoek, A.K., Konijnenbelt, Willem and Crijns, F.C.L.M. (eds.), *Grondrechten: commentaar op hoofdstuk 1 van de herziene grondwet*, Aers Aequi Libri, Nijmegen, p. 22. *Cf.*

functions within a wider reality that may call for the balancing of competing rights and other interests in order to justify the exercise of such a right in a limited or unlimited state. The answer, therefore, does not necessarily lie in a total negation of the possibility of limitation, but lies rather in the responsible limitation of a right. Eugene Gressman opines in similar vein with regard to the one-stage model that:

> [T]his theory becomes less and less useful in our highly complex and pluralistic society, where greater citizen obligations and greater interdependence and interactions among diverse individuals make it difficult to define freedom of expression primarily in terms of self-fulfilment. An orderly complex society may need to impose more constraints and obligations on individuals. Such governmental claims for constraint, legitimate or not, can no longer be intelligently assessed or resisted by a blanket reliance on an unrestricted, wholly personal right of self-fulfilment.[9]

An attempt to salvage the one-stage model is usually sought in a variable and particularly narrow interpretation of the protection afforded by a right.[10] For example, Black J. of the United States Supreme Court handed down a number of minority judgments between 1937 and 1971 wherein he opted for narrow and case-specific interpretations of the protection afforded by First Amendment rights, whereas the majority preferred a two-stage approach irrespective of the fact that such rights are not guaranteed subject to the express possibility of limitation.[11]

In what follows an attempt is made to classify the Convention on the basis of the distinction between the two-stage and one-stage models, with particular emphasis on the right to education.

4. European Convention

The Convention may be typified as exhibiting a *dual* or *hybrid* nature due to the fact that both the two-stage model and the one-stage model find application under it.[12] The *two-stage* nature of the Convention is evident from the fact that a number of rights are guaranteed subject to the express possibility of limitation. The clearest examples of which may be found in articles 8 to 11 where the right to be protected is guaranteed under the first sub-article of each right, after which provision is made for the limitation of the preceding right under the second sub-article of each right.[13] In any particular case the Court is called to first consider if the right protected was interfered with or not; and if so, whether any such interference can be justified in the light of the paragraph restrictions.[14]

Further express examples of the two-stage model may also be found in article 5, article 6(1), as well as in article 1 of the First Protocol and article 2 of the Fourth Protocol.[15]

It is of particular importance to note though that the relevance of the two-stage model is not to be confined only to such rights as are guaranteed subject to the *express* possibility of limitation.[16]

Bellekom, T.L., Heringa, A.W., Van der Velde, J. and Verhey, L.F.M. (2002), *Koopmans' compendium van het staatsrecht*, 9 ed., Kluwer, Deventer, p. 301; *Belgian Court of Arbitration*, no. 202/2004, 21 December 2004, B.12.2.

9 Gressman, Eugene (1990), 'Bicentennializing freedom of expression', 20 *Seton Hall Law Review*, (378) 387. *Cf.* Erasmus, Gerhard, 'Limitation and suspension', in: van Wyk, Dawid, Dugard, John, de Villiers, Bertus and Davis, Denis (eds.) (1994), *Rights and constitutionalism: the new South African legal order*, Juta, Kenwyn, p. 629.

10 Kortmann, C.A.J.M. (1978), 'Algemene en bijzondere beperkingen van grondrechten', *Nederlands Juristenblad*, 921-922; Rautenbach, I.M. (1995), *General provisions of the South African Bill of Rights*, Butterworths, Durban, pp. 82-83.

11 *Cf. Barendblatt v. U.S.*, 360 U.S. 109 (1960); Meiklejohn, Alexander (1961), 'The First Amendment is an absolute', *Supreme Court Review*, 245-266; Reich, Charles A. (1963), 'Mr. Justice Black and the living constitution', 76 *Harvard Law Review*, 673-754; Neuborne, Bert, 'Freedom of expression in the United States – a case study in implied limitations on textually absolute constitutional rights', in: de Mestral, Armand, Birks, Suzanne, Bothe, Michael, Cotler, Irwin, Klinck, Dennis and Morel, André (eds.), *The limitation of human rights in comparative constitutional law/La limitation des droits de l'homme en droit constitutionnel comparé*, Yvon Blais, Cowansville, p. 388.

12 The Convention is at times also classified by asking if a right is subject to *express limitation* or *inherent limitation*. The term 'inherent limits' refers to limits contained in the very definition of a right. However, this does not accord with the definition followed here in respect of the term 'limit'. Namely, an incursion into predetermined protection. An inherent limit is thus little more than a narrow interpretation of the scope of a right incorrectly called a limit.

13 *E.g.* ECHR, case *Sunday Times v. the United Kingdom* of 26 April 1979, *Publ. Eur. Court H.R.*, Series A, no. 30, §§ 45 *et seq.*; ECHR, case *Ahmed v. the United Kingdom* of 2 September 1998, *Reports of Judgments and Decisions*, 1998-VI, §§ 35, 39-41, 65.

14 *Cf.* Sieghart, Paul (1983), The international law of human rights, Clarendon Press, Oxford, p. 91.

15 Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 20 March 1950, ETS no. 009; Protocol no. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms securing Certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto of 16 September 1963, ETS no. 46.

16 *Cf. Belgian Court of Arbitration*, no. 202/2004, 21 December 2004, B.12.2.

Although a general rule may be formulated that the presence of the express possibility of limitation indicates the application of the two-stage model, the opposite does not necessarily hold true. Namely, that the absence of such an express possibility indicates the application of the one-stage model by way of course.[17] The Court reinforced its stance in Golder v. the United Kingdom by holding that there was room for limits to be imposed on the content of the right in article 6(1), even though the latter right did not make express provision for such limits.[18] The two-stage character is particularly clear from the fact that the Court noted that limits could be justified 'apart from the bounds delimiting the very content of any right', thereby drawing a clear distinction between the first stage, namely content or protection, and the second stage that considers limits on the content or the protection that the first stage guarantees.[19] The relevance of the two-stage model is undoubtedly not simply to be associated with the presence, or not, of the express possibility of limitation.

Yet, the Convention also clearly exhibits a *one-stage* nature. This is especially the case with regard to article 3 that provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.[20] The Court has repeatedly affirmed that no limits may be considered or justified in respect of article 3.[21] For example, it was held in Chahal v. the United Kingdom that:

> The Court is well aware of the immense difficulties faced by the States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.[22]

However, the one-stage model in respect of article 3 is sustained by a narrow interpretation of the protection afforded by the right. This is achieved by requiring that the conduct complained of must attain a 'minimum level of severity', thereby setting a high threshold before a matter will reside within the protected conduct and interests of the right.[23] Moreover, the interpretation of the protection afforded is also strongly context-based. The aspect is illustrated in Selmouni v. France where it was observed that:

> [H]aving regard to the fact that the Convention is a 'living instrument which must be interpreted in the light of present-day conditions' (...), the Court considers that certain acts which were classified as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future.[24]

The one-stage character of article 3 is thus preserved by a careful and restrictive approach to what is protected by the right, in order to avoid sweeping constructions of protection that would inevitably and by necessity occasion the possibility of limitation. Stated differently, the 'absolute' nature of the right in the sense of the absence of the possibility of limitation is compensated for by means of flexible interpretation to take account of changing circumstances and standards.

The attention is now turned to explaining and classifying the limitation of the right to education in Article 2 Protocol 1.

4.1 Right to education

A simple reading of Article 2 Protocol 1 shows that the provision consists of two sentences. The first sentence provides that: 'No person shall be denied the right to education'. While the second sentence enjoins that: 'In the exercise of any functions which it assumes in relation to education and to teaching, the

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17 *Cf.* BVerfGE 28, 243 (261); Alexy, Robert, A theory of constitutional rights, o.c., p. 188; Michalowski, Sabine and Woods, Lorna (1999), German constitutional law: the protection of civil liberties, o.c., p. 81.

18 ECHR, case *Golder v. the United Kingdom* of 21 February 1975, *Publ. Eur. Court H.R.*, Series A, no. 18, § 38.

19 *Cf.* ECHR, case *Mathieu-Mohin and Clerfayt v. Belgium* of 2 March 1987, *Publ. Eur. Court H.R.*, Series A, no. 113, §§ 47, 52.

20 The prohibition of slavery and servitude in art. 4 is also based on the one-stage model. *Cf.* Costello, Declan (1992), 'Limiting rights constitutionally', in: O'Reilly, James (ed.), *Human rights and constitutional law: essays in honour of Brian Walsh*, Round Hall Press, Dublin, p. 177.

21 *Cf.* ECHR, case *Soering v. the United Kingdom* of 7 July 1989, *Publ. Eur. Court H.R.*, Series A, no. 161, § 88; ECHR, case *Ireland v. the United Kingdom* of 18 January 1978, *Publ. Eur. Court H.R.*, Series A, no. 25, § 163; Ovey, Clare and White, Robin (2002), *Jacobs and White: the European Convention on Human Rights*, 3 ed., Oxford University Press, Oxford, pp. 59-60.

22 ECHR, case *Chahal v. the United Kingdom* of 15 November 1996, *Reports*, 1996-V, § 80. *Cf.* ECHR, case *Aksoy v. Turkey* of 18 December 1996, *Reports*, 1996 VI, § 62; ECHR, case *Egmez v. Cyprus* of 21 December 2000, § 77.

23 *E.g. Ireland v. the United Kingdom*, *l.c.*, § 162.

24 ECHR, case *Selmouni v. France* of 28 July 1999, *Reports and Judgments and Decisions*, 1999-V, § 101. *Cf.* Addo, Michael K. and Grief, Nicholas (1998), 'Does Article 3 of the European Convention on Human Rights enshrine absolute rights?', 9 *European Journal of International Law*, 510-524.

State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.'

Each sentence guarantees a separate, yet interdependent right. The *first* sentence formulates the right to education as such, while the *second* sentence obliges member states to respect the convictions of parents in the provision of education and teaching. The structure of Article 2 Protocol 1 was explained as follows in Kjeldsen, Busk Madsen and Pedersen v. Denmark:

> As is shown by its very structure, Article 2 (P1-2) constitutes a whole that is dominated by its first sentence. By binding themselves not to 'deny the right to education', the Contracting States guarantee to anyone within their jurisdiction 'a right of access to educational institutions existing at a given time' and 'the possibility of drawing', by 'official recognition of the studies which he has completed', 'profit from the education received' (...). The right set out in the second sentence of Article 2 (P1-2) is an adjunct of this fundamental right to education (paragraph 50 above). It is in the discharge of a natural duty towards their children – parents being primarily responsible for the 'education and teaching' of their children – that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education.[25]

It is clear that although two rights are guaranteed, no provision is made for their possible limitation. In other words, the guarantees in Article 2 Protocol 1 are textually absolute. However, it must be kept in mind that the two-stage model can also be applicable to rights not guaranteed subject to the express possibility of limitation, such as was the case with respect to certain elements of the right to a fair trial in Golder v. the United Kingdom – as explained above.[26]

Rather than focusing on the text as such, attention must be paid to determine whether the right to education can be divided into a scope and limit or simply a scope. In other words, is a two-stage approach followed, which sees the possibility of interferences with the right being justified, or do all interferences amount to violations?

Each of the two rights comprising the right to education will be considered separately.

4.1.1 First sentence

The first sentence of Article 2 Protocol 1 guarantees freedom of education as such.[27] The Court in its decision Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v. Belgium was called upon to decide whether the fact that French was not a possible language of instruction in state schools in a number of municipalities in Belgium violated the right to freedom of education.[28] The Court characterised the first sentence of Article 2 Protocol 1 in the following manner:

> The right to education guaranteed by the first sentence of Article 2 of the Protocol (Pl-2) by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals. It goes without saying that such regulation must never injure the substance of the right to education nor conflict with other rights enshrined in the Convention. The Court considers that the general aim set for themselves by the Contracting Parties through the medium of the European Convention on Human Rights, was to provide effective protection of fundamental human rights, and this, without doubt not only because of the historical context in which the Convention was concluded, but also of the social and technical developments in our age which offer States considerable possibilities for regulating the exercise of these rights. The Convention therefore implies a just balance between the protection of the general interest of the Community and the respect due to fundamental human rights while attaching particular importance to the latter.[29]

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25 ECHR, case *Kjeldsen, Busk Madsen and Pedersen v. Denmark* of 7 December 1976, *Publ. Eur. Court H.R.*, Series A, no. 23, § 52; De Groof, Jan and Lauwers, Gracienne (eds.) (2004), *No person shall be denied the right to education: the influence of the European Convention on human Rights on the right to education and rights in education*, Wolf Legal Publishers, Nijmegen, p. 18; Lauwers, Gracienne (2005), *The impact of the European Convention on Human Rights on the right to education in Russia: 1992-2004*, Wolf Legal Publishers, Nijmegen, p. 2.

26 *Golder v. the United Kingdom*, *l.c.*

27 *Cf.* De Groof, Jan and Lauwers, Gracienne (eds.) (2004), *No person shall be denied the right to education: the influence of the European Convention on human Rights on the right to education and rights in education*, *o.c.*, pp. 19-22, regarding the contents of the right.

28 ECHR, case *Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v. Belgium* of 23 July 1968, *Publ. Eur. Court H.R.*, Series A, no. 6, § 1 *et seq.* of the Facts.

29 *Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v. Belgium*, *l.c.*, § 1B5 of the Law.

The above quote clearly illustrates that although the right in question was formulated without the express possibility of its limitation, the state could still *regulate* the exercise of the right, provided that such regulation was *justified*. The need for such regulation was then also identified by the fact that the right could not be interpreted and applied as a closed circuit that stood and functioned immune to all societal influences and claims – but had to be interpreted and applied mindful of striking a just balance between the rights of bearers and the general interest of society. In other words, the state could *limit* the protected conduct and interests of the right. The Court also sanctioned any 'regulation' of the right, provided that it did not injure the substance or core of the right, had the Court intended a one-stage approach instead of a two-stage approach, such an observation would have been needless, as any regulation of the right would have amounted to its violation. In other words, the Court drew a distinction between the protected conduct and interests which formed part of the core of the right, and protected conduct and interests which did not form part of its core.[30] In sum, the quote illustrates a distinction between the scope of the right – *in casu* the right of equal access to existing educational institutions – and the possibility of limiting such access.

The two-stage character of the right to education can also be identified in Campbell and Cosans v. the United Kingdom.[31] A pupil was suspended from a state school in Scotland due to the fact that his parents refused to accept that he was liable to receive corporal punishment.[32] The Court based its approach in the matter on its decision Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v. Belgium that a state may interfere with the right to education, but not to the extent that such interference violates the substance of the right – clearly a two-stage approach as explained above.[33] It found that the condition imposed on access, namely acceptance by the parents of corporal punishment for their son, could not be justified as it violated their right to have their religious and philosophical convictions respected by the state.[34] In other words, the regulation of freedom of access in terms of the first sentence of Article 2 Protocol 1 was judged too over-extensive and unreasonable, as it led to the violation of the convictions of the parents contrary to the guarantee provided in the second sentence of the provision. The Court did not find that access could not be regulated as such – which would have been a one-stage approach – but found that access could be regulated, provided that such regulation was justified – which it was not *in casu*. It was then unnecessary, and strange, for the Court to add that the state's regulation fell outside its regulatory power after having analysed why the power was exercised in an unreasonable fashion.[35] Had the power not resided within the state's regulatory competence no need would have arisen to argue that its exercise was unreasonable. The two-stage model can only function properly by allowing interferences to be considered during the second stage, care must be taken not to conduct the justificatory exercise at the first stage by setting high barriers in identifying interferences, thereby debilitating the second stage.[36]

Clear examples of the two-stage character of the right to education are also presented in the jurisprudence of the erstwhile Commission. For example, the applicant in Jordebo v. Sweden complained that the state's refusal to allow a private school to present classes 7 to 9, while permission was granted to present classes 1 to 6, violated the right to freedom of education.[37] It was held that:

> Article 2 of Protocol 1 (Pl-2) guarantees the right to start and run a private school. However, such a right cannot be a right without conditions. It must be subject to regulation by the State in order to ensure a proper educational system as a whole.[38]

In other words, the protection afforded during the first stage by the scope of the right, namely the freedom to establish private schooling, may be limited during the second stage in the interests of ensuring quality education. The Commission applied this principle by evaluating the merits of the state's refusal to approve classes 7 to 9.[39] In so doing it investigated whether the state's interference with the protected

30 Although the notion of a core or essence is used to illustrate the two-stage application of the right, *cf.* Van der Schyff, Gerhard (2005), *The likeness of a democratic society: a comparative study of the limitation of fundamental rights and freedoms in accordance with the European Convention and the Constitution of South Africa*, Ph.D. thesis, Antwerp University, pp. 225-229 for criticism of the notion of an inalienable core.

31 ECHR, case *Campbell and Cosans v. the United Kingdom* of 25 February 1982, *Publ. Eur. Court H.R.*, Series A, no. 48.

32 *Campbell and Cosans v. the United Kingdom*, *ibid.*, § 8 *et seq.*

33 *Campbell and Cosans v. the United Kingdom*, *l.c.*, § 41.

34 *Ibid.*

35 *Ibid.*

36 *Cf.* Van der Schyff, Gerhard (2005), *The likeness of a democratic society: a comparative study of the limitation of fundamental rights and freedoms in accordance with the European Convention and the Constitution of South Africa*, *o.c.*, pp. 54-58.

37 ECmHR, no. 11533/85, *Jordebo v. Sweden* of 6 March 1987. *Cf.* De Groof, Jan and Lauwers, Gracienne (eds.) (2004), *No person shall be denied the right to education: the influence of the European Convention on human Rights on the right to education and rights in education*, *o.c.*, pp. 40-41.

38 ECmHR, *Jordebo v. Sweden*, *l.c.*, § 1 of the Law.

39 *Ibid.*

conduct and interests of the right, in the form of its refusal to approve the classes, was reasonable given the circumstances. The Commission concluded by upholding the state's interference with the right as being justified, as none of the teachers at the private school in question possessed the necessary qualifications to present classes 7 to 9.[40] The state's concern with ensuring that quality education be provided in Sweden thus trumped the applicant's freedom to organise private schooling free from outside interference. The right could thus be interfered with, provided that such interference was acceptable.

In Cyprus v. Turkey Greek Cypriots parents living in the north of Cyprus could only enrol their children in Greek-language primary schools there, Greek-language secondary schools having been abolished by the Turkish Cypriot authorities.[41] Greek Cypriot parents wanting to enrol their children in such secondary schools had to send their children to the south of the island. The parents complained, *inter alia*, that the absence of Greek-language schools in the north amounted to a denial which violated their right to freedom of education for their children.[42]

The Commission examined the right contained in the first sentence of the Article 2 Protocol 1 and concluded that the provision includes the right to be educated in the national language or one of the national languages of a country for it to be meaningful. In other words, the scope of the right extended to include language rights.[43] It was added that such a right calls for regulation by the state 'which may vary in time and place according to the needs and resources of the community and of individuals' – the scope can thus be limited.[44]

Upon reviewing the facts the Commission reached the conclusion that the absence of Greek-language secondary schools in the north of the island could not be justified, as it did not recognise the legitimate wish of Greek Cypriot parents for such education.[45] The refusal to continue such education also violated an inter-communal agreement dating to 1975 that allowed the applicant to organise Greek-language secondary education in territory under the control of Turkish Cypriots.[46] The Commission also noted that Greek-Cypriots who chose to follow appropriate education in the south were prohibited from returning to the north, thereby denying the exercise of the right to education even further.[47]

Unfortunately the Court did not follow such a clear two-stage approach in its handling of the matter as the Commission had done.[48] The Court was particularly hesitant to interpret the first sentence of the provision to include a right to be educated in one or more of the national languages, instead it emphasised that the decision to discontinue Greek-language secondary education amounted to an interference with the right that saw its substance intruded upon, thereby resulting in its violation.[49] Nonetheless, the fact that the Court chose to evaluate the right by stressing that its essence or substance could not be limited indicates that regulation which does not offend its core scope can be allowed, thereby evidencing its two-stage nature. In other words, not all interferences with the protected conduct and interests of the right will result in its violation – which would have been the one-stage approach – but only such interference that sees its core compromised.

Particularly heartening though as to the two-stage nature of the right guaranteed by the first sentence is the landmark Grand Chamber decision of Leyla Şahin v. Turkey.[50] The applicant complained that a prohibition on the wearing of religiously inspired headscarves in higher education institutions in Turkey constituted an unjustified interference with her right to education, as she was refused entrance to exams for having worn such a headscarf.[51] The Grand Chamber proceeded to investigate the right to education and found that:

40 *Ibid.*
41 ECmHR, no. 25781/94, *Cyprus v. Turkey* of 28 June 1996, §§ 474, 478.
42 *Ibid.*
43 ECmHR, *Cyprus v. Turkey*, *l.c.*, § 476.
44 *Ibid.*
45 ECmHR, *Cyprus v. Turkey*, *l.c.*, § 478.
46 *Ibid.*
47 *Ibid.*
48 ECHR, case *Cyprus v. Turkey* of 10 May 2001, *Reports of Judgments and Decisions*, 2001-IV.
49 *Cyprus v. Turkey*, *ibid.*, § 278.
50 ECHR, case *Leyla Şahin v. Turkey* of 10 November 2005. The same argument was also raised before the Fourth Section of the Court in ECHR, case *Leyla Şahin v. Turkey* of 29 June 2004, but the Court only decided the matter with reference to the right to freedom of religion, and not the right to education.
51 *Leyla Şahin v. Turkey*, *ibid.*, § 143.

> In spite of its importance, this right is not, however, *absolute*, but may be subject to *limitations*; these are permitted by implication (...).[52]

In other words, the right is to be divided into a scope and limit, it is not to be interpreted in an absolute manner, as its protection may be limited. Not only did the judgment find that there could be 'limitations', but it continued that in complying with the right, states were afforded a certain 'margin of appreciation' in this respect, but still had to pursue a 'legitimate aim' in limiting the right, the pursuit of which had to exhibit a reasonable relationship of proportionality between the means employed and the aim sought to be satisfied.[53] It is abundantly clear from the decision that the bench employed standard limitation terminology and methodology in analysing and applying the right to education in the first sentence of Article 2 Protocol 1. This is something which is to be welcomed, as the Court expressly recognised that although the right is formulated in a textually absolute fashion, this does not mean that it had to be applied in a one-stage fashion; but recognised its two-stage nature, thereby setting an important precedent for future decisions.

4.1.2 Second sentence

The second sentence of Article 2 Protocol 1 guarantees parents the right to have their religious and philosophical convictions respected by states.[54] While the first sentence of the provision grants states the leeway to decide on the nature and scope of their involvement in education, the second sentence obliges states to respect the convictions of parents in the duties and functions that they assume in this regard.

The applicants in Kjeldsen, Busk Madsen and Pedersen v. Denmark were a number of parents who complained that their right to ensure the education of their children in conformity with their religious and philosophical convictions had been violated.[55] The applicants objected to sending their children to state schools where sex education, which they wanted to provide themselves, was compulsory.

The Court analysed the purpose of the right, it was decided that the right was aimed at safeguarding pluralism in education, which is essential for the preservation of a democratic society – teaching being a prime method in realising such pluralism.[56] Parents were thus afforded the right to ensure the education of their children in conformity with their convictions in order to respect the plurality of society. Yet, it is borne from the decision that such a right is not absolute. For example, the Court held that:

> In particular, the second sentence of Article 2 of the Protocol (P1-2) does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable. In fact, it seems very difficult for many subjects taught at school not to have, to a greater or lesser extent, some philosophical complexion or implications. The same is true of religious affinities if one remembers the existence of religions forming a very broad dogmatic and moral entity which has or may have answers to every question of a philosophical, cosmological or moral nature.[57]

In other words, states may regulate curricula matters that touch upon religious and philosophical issues. The right of parents to claim respect for their wishes in this regard can thus hardly be said to be absolute, as the state may interfere with such matters. In other words, the scope of the textually absolute right – namely education and teaching according to parental convictions – can be limited under certain circumstances. However, the ideals of a democratic society must be honoured by states in regulating education and teaching that affect the convictions of parents. For example, it transpires from the decision that the right would not be *limited* but *violated* were the state to interfere with it to such an extent as to amount to *indoctrination* – as this would negate the purpose of the right by stifling pluralism.[58]

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52 *Leyla Şahin v. Turkey*, *l.c.*, § 154. Emphasis added.
53 *Ibid*.
54 *Cf.* De Groof, Jan and Lauwers, Gracienne (eds.) (2004), *No person shall be denied the right to education: the influence of the European Convention on human Rights on the right to education and rights in education*, *o.c.*, pp. 23-29.
55 *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, *l.c.*, § 36 *et seq.*
56 *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, *l.c.*, § 50
57 *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, *l.c.*, § 53.
58 *Ibid*.

Evaluating the facts the Court noted that the contested education could not be conducted without it encroaching upon the 'religious and philosophical sphere'.[59] It continued:

> These considerations are indeed of a moral order, but they are very general in character and do not entail overstepping the bounds of what a democratic State may regard as the public interest. Examination of the legislation in dispute establishes in fact that it in no way amounts to an attempt at indoctrination aimed at advocating a specific kind of sexual behaviour.[60]

In sum, the interference with the right of parents was of such a general nature that it could not be said to violate their right, the interference was therefore justified – a clear example of the two-stage approach.

In addition, in commenting on the second sentence of Article 2 Protocol 1 the Court stressed that the right it contained was related to that of freedom of education in the first sentence.[61] This remark strengthened the two-stage character of the second sentence, as it would be unwise to interpret the second sentence as an example of the one-stage approach while the first sentence is applied in a two-stage fashion. The bench continued that the right had to be considered in light of the Convention as a whole, stressing its link with the rights to family life, freedom of conscience and religion and freedom of expression in Articles 8 to 10 – rights in terms of which a clear two-stage approach applies.[62] This bolstered the two-stage character of the right in the second sentence, as it would indeed be difficult to view these rights contextually were they not all interpreted in a two-stage fashion.

In Valsamis v. Greece the applicants complained that their right to have their daughter educated in conformity with their religious convictions had been violated, as she had to participate in a national day parade.[63] They considered that the parade had military overtones that clashed with their pacifist beliefs as Jehovah's Witnesses.

It was found that the applicants' beliefs were protected by the second sentence of Article 2 Protocol 1 – turning the question to whether the state respected the right *in casu*.[64] The point was made that the duty imposed on the state was particularly wide.[65] In other words, the right of parents to have their beliefs respected was given a wide interpretation. Yet, the Court made it clear that:

> [A]lthough individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.[66]

Although the bearer of the right can claim protection of their beliefs, such protection, termed respect in Article 2 Protocol 1, can be limited upon a balancing exercise having been conducted. The Court continued:

> [I]t can discern nothing, either in the purpose of the parade or in the arrangements for it, which could offend the applicant's pacifist convictions to an *extent* prohibited by the second sentence of Article 2 of Protocol No. 1 (Pl-2).[67]

In other words, the convictions of the parents, as protected by the provision, were interfered with, but then to a justified extent. The right of parents to have their religious and philosophical convictions respected was proven not to be absolute. The right is only upheld where justified, thereby allowing the state to interfere with the realisation of such convictions if necessary – a two-stage approach in other words.

This does not mean to say that the one-stage approach would have afforded parents better protection in realising the education and teaching of their children in conformity with their religious and philosophi-

59 *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, *l.c.*, § 54.
60 *Ibid.*
61 *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, *l.c.*, § 52.
62 *Ibid.*
63 ECHR, case *Valsamis v. Greece* of 27 November 1996, *Reports*, 1996 VI, § 21. *Cf.* ECHR, case *Efstratiou v. Greece* of 18 December 1996, *Reports*, 1996 VI.
64 *Valsamis v. Greece*, *ibid.*, §§ 25-26.
65 *Valsamis v. Greece*, *l.c.*, § 27
66 *Ibid. Cf.* ECHR, case *Young, James and Webster v. the United Kingdom* of 13 August 1981, *Publ. Eur. Court H.R.*, Series A, no. 44, § 63.
67 *Valsamis v. Greece*, *l.c.*, § 31. Emphasis added.

cal beliefs. A one-stage approach would simply not have allowed such a broad approach to the protection afforded the beliefs of parents. It would have sought to exclude protection of the beliefs in question, instead of protecting such beliefs and then attempting to limit their protection. This the one-stage approach would have done by arguing that the parents' beliefs were not religious or philosophical – or it would have followed a very narrow definition of the state's duty in respecting such beliefs – thereby leaving the state ample room to act by arguing that its actions were not controlled by the provision. The same result would thus have been reached under both the one-stage and two-stage approaches, but by different means.

5. Conclusion

The Convention exhibits both a one- and two-stage nature. It can be said that the two-stage model dominates the thought underlying the limitation scheme employed in it. However, rights do not have to be guaranteed subject to the express possibility of limitation in order to be limited. A two-stage approach can also be implied – such as is the case in respect of the two main education rights guaranteed by Article 2 Protocol 1.

The two-stage approach is to be lauded, as it allows the Court to openly balance competing interests in deciding whether a right was justifiably interfered with – instead of trying to argue that rights may never be limited. A position that can only be upheld by disguising the balancing of interests in deciding which values are outweighed by the circumstances and which values are upheld.

However, even though the right to education in Article 2 Protocol 1 is applied in a two-stage fashion, it would be wise for the Court to apply the model more explicitly and consistently. As the clear and principled application of the two-stage model to the right to education will strengthen its guarantees by providing legal certainty.