

The shaky legal foundations of the global human rights education project

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Abstract: School students should be taught about the law and this includes rights education. The global human rights education (HRE) project focuses on universal human rights and has a strongly utopian orientation, drawing as it does on international declarations and principles of human rights law. International human rights law is, however, at best a fragile edifice, characterised by legally non-binding declarations, treaties that are subject to the vagaries of *jus voluntarium*, and mostly impotent international tribunals. HRE appears to rely more on its own interpretations of international human rights law, which may include reading (and writing) into texts what is simply not there. Far from being a form of law education, HRE is a form of social-transformative activism. Same-sex marriage advocacy is used as an example of the excesses to which HRE is prone. School-based rights education should be within the context of a comprehensive curricular package of law education using students' domestic legal frameworks as the principal point of reference.

Introduction

Teaching school students about their rights within the context of an educational programme about the law that they live under is part and parcel of law education. As was recently argued in this journal, "If schooling is a preparation for adult life in one's society, it seems axiomatic that school curricula should contain topics about the law of relevance to any citizen" (Vlaardingerbroek, Traikovski & Hussain, 2014, p. 109). Within this context, rights education can be delivered with reference to the legal framework that is in operation within a given jurisdiction. Students can be introduced to the relevant statutes and cases that illustrate how the courts interpret those statutes (in Common Law jurisdictions, add case law). Thus students come to realise that rights do not occur in a vacuum and are not 'stringless' entitlements. They also come to realise that rights are not absolute dicta 'from on high' akin to the mythical Ten Commandments but are products of human reasoning and are underpinned by value structures that vary in time and space.

Human Rights Education (HRE) goes well beyond the parameters set by national jurisdictions. In the words of Ramirez, Suárez and Meyer (2007), "Current emphasis on human rights education reflects a growing understanding of the individual person as a member of a global society rather than as mainly a national citizen" (p. 35). Tibbitts (2002) notes that the 'Values and Awareness' model of HRE that applies to formal schooling has a marked international orientation in that it targets global human rights issues and the international court system. Amnesty International (AI), a major actor in HRE, describes human rights education on its website (<http://www.amnesty.org/en/human-rights-education>) as "a deliberate, participatory practice aimed at empowering individuals, groups and communities through fostering knowledge, skills and attitudes consistent with internationally recognized human rights principles."

But a "member of a global society" remains within the jurisdiction of a national legal system. In dualist legal systems in particular (those in which domestic and international law are regarded as occupying different spheres), an internationally declared right is not justiciable unless it has been incorporated into domestic law. To 'educate' young people about their rights must surely take domestic and not international law as its starting point.

This paper adopts a critical approach to HRE as a form of law education in schools. It examines the basis of HRE's claim to legal legitimacy in international law and finds it severely deficient, exemplifying its shortcomings through an in-depth analysis of same-sex marriage advocacy by HRE.

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The paper comes to the conclusion that HRE in its global, utopian form is not 'law education' at all but rather a facet of a social-transformative activist movement and that school-based rights education would be far better situated in a comprehensive law education curricular package.

What/Whose 'Internationally Recognised Human Rights Principles'?

Art. 4 of the UN Declaration on Human Rights Education and Training 2011(DHRET) states that HRE "should be based on the principles of the Universal Declaration of Human Rights and relevant treaties and instruments." This was a General Assembly (UNGA) declaration and as such has no legal force (only Security Council resolutions do). Indeed the Universal Declaration (UDHR), likewise a UNGA declaration, has no legal force, although it is so widely accepted that it may be regarded as customary international law. Customary law being a rather fickle entity relying on uniform State practice as well as *opinio juris* – the view that the practice invokes legal obligations – the UDHR's real legal effects come through in treaties that it gave rise to.

One would be expected to be on firmer ground with respect to treaties (usually referred to as 'conventions' or 'covenants' in international human rights law) but there are caveats. Some conventions are not intended to be enforceable, the prime example here being the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) which, unlike its sister treaty the International Covenant on Civil and Political Rights 1966 (ICCPR), is non-justiciable. The principle of *jus voluntarium* (the freedom of States to decide whether to be bound by a treaty) remains a pillar of international law and means that States can refuse to enter into a treaty altogether, or enter reservations with respect to given treaty articles (where the treaty so allows). In the human rights field, a striking example of this was the Convention on the Elimination of Discrimination Against Women 1979 (CEDAW) which numerous Muslim States either did not sign up to or entered reservations towards.

The principle of *jus cogens* supposedly overrides States' reticence to be bound, but there is little consensus on the 'peremptory norms' that are invoked by this maxim other than those relating to slavery, genocide, colonialism and apartheid, and the prohibition on torture. Interpretations of these vary; the dismissal by the ICJ of mutual charges of genocide by Croatia and Serbia last year suggests that proving a case of genocide can be very difficult even where the facts seem straight-forward. The right of self-determination is a contentious addition despite its appearance in the UN Charter, the ICCPR and the ICESCR and can still not be considered either customary law – the UN Declaration on the Rights of Indigenous Peoples 2007 was voted against by, *inter alia*, the US, Canada and Australia – or a peremptory norm. The 'principle of non-discrimination' that has such a high profile in HRE does not make it onto the list at all.

The principle of *jus cogens* invokes the notion of there being absolute rights, and indeed there are numerous rights designated as 'absolute' in international law. However, the term 'absolute' in international law means that no reservation may be entered to that particular article and that no derogation is ever permitted from it; this is very different from what the word means in non-legal English ('unqualified' being one synonym). A good example of this nuance of usage is Art. 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention on Human Rights – ECHR) which declares the existence of the 'Right to Life' but qualifies it by making an allowance for the application of the death penalty (an issue later covered by an optional protocol).

With the exception of the European Court of Human Rights (ECtHR), international human rights courts and tribunals tend to be toothless tigers with no enforcement capabilities. The political shenanigans surrounding both UN human rights commissions (UNCHR/UNHRC) are a matter of public record. The founding statute of the Inter-American Court of Human Rights was signed by neither the U.S. nor Canada.

The use of the word 'principles' by the DHRET and AI introduces a creative element involving the extrication of meta-rules supposedly underlying human rights declarations and conventions and

using those to create rights *de novo*. There is nothing new about this endeavour. The past half century has seen a mushrooming of 'rights', Alston back in 1984 referring to much new human rights law being created by the UNGA and the UN Human Rights Commission "as though by magic" as illicit. This is a debatable proposition, but what appears less debatable is that the legal basis claimed by HRE proponents is at best a fragile one. The following case study exposes the soft underbelly of HRE's claim to legal legitimacy.

Case Study: Same-sex Marriage (SSM) Advocacy Through HRE

Upon entering the Amnesty International UK website's HRE resources page, one encounters a set of dialogue boxes with the phrases "I am a teacher" [looking for] "Teaching resources" pre-filled in. Upon proceeding, a list of resources appears headed by an 'LGBTI Activity Pack' (http://www.amnesty.org.uk/sites/files/lgbti_rights_activity_pack_february_2015_0.pdf) the stated aim of which is to "enable teachers to explore the human rights of sexual and gender minority groups with children and young people." The first activity involves 5- to 8-year-olds coming to the realisation that a family may have two Dads or two Mums. The activity pack boldly asserts that "International law recognises that sexual orientation and gender identity are integral to every person's identity and humanity" (p. 22). A perusal of other resources reveals an older LGBT rights activity guide that specifically mentions same-sex marriage (http://www.amnesty.org.uk/sites/files/activities_lgbt_rights_0.pdf) and a 'simplified' version of the UDHR (http://www.amnesty.org.uk/sites/default/udhr_simplified_0.pdf) that audaciously 'simplifies' Art. 16 to read "Every grown up [sic] has the right to marry and have a family if they [sic] want to." Setting aside the qualms that any parents of primary-school age children may have about exposing pre-pubescents to LGBTI issues let alone the same-sex marriage controversy, these assertions are simply erroneous and represent, at best, wishful thinking and, at worst, wilful distortions of international human rights law.

The AI position on SSM is succinctly put by AI (USA) (<http://www.amnestyusa.org/our-work/issues/lgbt-rights/marriage-equality>) as follows:

The right of adults to enter into consensual marriage is enshrined in international human rights standards.

Article 16, Universal Declaration of Human Rights (UDHR):

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

For more than a decade, this non-discrimination principle has been interpreted by UN treaty bodies and numerous inter-governmental human rights bodies as prohibiting discrimination based on gender or sexual orientation. Non-discrimination on grounds of sexual orientation has therefore become an internationally recognized principle and many countries have responded by bringing their domestic laws into line with this principle ...

Indeed, the right to marry and found a family is encountered not only in the UDHR but also in the ECHR, ICCPR, American Convention of Human Rights 1969 (ACHR) and the ECHR. The right to marry is one aspect of a compound right (Somerville, 2007). The verb 'found' in this context is of significance, thesaurus entries including 'originate', 'create' and 'bring into existence'. (The ACHR uses the weaker term 'raise'.) The family reappears in the UDHR, ICCPR, ICESCR, ACHR and the African Charter of Human and People's Rights 1981 all of which define it as the "natural" base unit of

society. It is clearly the case that these authoritative sources envisage marriage as occurring between persons who form an inherently fertile unit that is capable of producing a natural family, *i.e.* a man and a woman. This view was shared by the UN Human Rights Committee in *Joslin v New Zealand* 2002 when it held that

Use of the term ‘men and women’, rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties ... is to recognize as marriage only the union between a man and a woman wishing to marry each other...

The ECtHR in *Schalk and Kopf v Austria* 2010 likewise held that the choice of words in ECHR Art. 12 – ‘men and women’ as opposed to ‘everyone’ or similar – had been deliberate and that the article clearly targeted male-female marriage. The Court subsequently came down firmly against the proposition that there is a right to SSM embedded in the ECHR, asserting in *Gas and Dubois v France* 2012 that

The Court observes at the outset that it has already ruled, in examining the case of *Schalk and Kopf* ... that Article 12 of the Convention does not impose an obligation on the governments of the Contracting States to grant same-sex couples access to marriage... Nor can a right to same-sex marriage be derived from Article 14 taken in conjunction with Article 8.

This is not to say that SSM contravenes European law, but rather that the right of jurisdictions to strike their own balance in relation to the issue of same-sex relationships in law is upheld – the ‘margin of appreciation’. This resonates with the European Union Charter of Fundamental Rights 2000 (EUCFR) Art. 9 of which states that “The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights”. The African Charter also declares this to be the case.

Ironically, the earlier case of *Goodwin v UK* 2002 at the ECtHR had reinforced the hetero-exclusivity of marriage: while the Court held that the inability of a given couple to produce children did not annul the right to marry, the upshot once translated into domestic law was that a transsexual could marry, but only after having the sex on the birth certificate changed to that opposite to the sex of the intended spouse.

The ‘traditional’ view of the family was challenged by the 2007 Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity, Art. 24(b) of which calls for a recognition of “the diversity of family forms”. However, while requiring States to treat same-sex partnerships the same as their hetero-equivalents, the Yogyakarta Principles stop short of demanding a right to SSM.

The ‘simplification’ by AI of ‘men and women’ to ‘every grown-up’ is supported by neither international human rights law pertaining to marriage, nor by international human rights courts commenting thereupon. On the contrary, the AI position is diametrically opposed to international human rights law which explicitly defines marriage in hetero-exclusive terms with a view to the establishment of nuclei for natural family formation.

It will be noted, though, that the AI position statement quoted above does not dwell on the niceties of international human rights law pertaining to the nature of marriage but homes in on the principle of non-discrimination which it appears to regard as a matter of *jus cogens*. In reality, it would be an understatement to say that sexual orientation issues in general have *not* been enthusiastically pursued at the international level. Art. 21 of the EU Charter of Fundamental Rights prohibits discrimination on the basis of sexual orientation. However, the principle of non-discrimination is by no means universally accepted in the context of sexual orientation. Saiz (2004) commented on the

ideological impasse between traditional and 'modernising' forces both within and between cultures which had effectively polarised the UN. Tahmindjis (2008) mused that

It has been suggested that to expand international human rights law to expressly include GLBT issues would involve a broad interpretation of human rights norms by national and international bodies, or the adoption of separate protocols or of a new specific convention. There is considerable antipathy to this course, however.

Much of that antipathy emerged in the course of the 2011 UNGA and UN Human Rights Council splits over LGBT rights. To claim that the UNGA passed a resolution against discrimination on the basis of sexual orientation is to ignore the counter-resolution that was backed by numerous countries (for details see Zebley, 2011). This is hardly surprising given that, despite changes in social attitudes in Western societies over the past decades, numerous countries continue to criminalise homosexuality, with some continuing to invoke the death penalty. Widespread State practice and *opinio juris* do not bear out any claim to the effect that freedom from discrimination on the basis of sexual orientation is a 'recognised principle of international law'.

More pointedly, it is a quantum leap in reasoning to extrapolate from non-discrimination against homosexuals as a general principle to allowing same-sex couples to marry. It is a quantum leap that many appear to have made, as the SSM campaign successfully turned the issue into one of the right to freedom from discrimination by restrictions on marital choice (for background see Gross, 2008; Kollman, 2007). The appeal to non-discrimination as a basis for demanding a right to SSM in the context of international law is at best an instance of the application of *lex generalis* – and one which flies in the face of the *lex specialis* regarding the nature of marriage furnished by international human rights law. The right to marry has moreover never been unqualified – all jurisdictions qualify the right, consanguinity restrictions representing a ubiquitous example of conditions that may be imposed. These vary between jurisdictions, and fall under the margin of appreciation inherent in 'according to their national laws' clauses. Depending on one's point of view, barring a brother/sister couple from marrying is either not discriminatory at all or is an instance of lawful discrimination. Given the explicit heteronormativity of international human rights law in its view of marriage and its functions, restricting marriage to opposite-sex couples does not constitute unlawful discrimination. It must be emphasised at this juncture that the foregoing comments apply to *international* human rights law. A number of national jurisdictions have amended their Marriage Acts to accommodate SSM, thereby making SSM a right in those jurisdictions. The UK's adoption of SSM made *Goodwin* redundant; that did not, however, change anything at the level of European human rights law or at the ECtHR. SSM advocates have taken heart from recent US Supreme Court pronouncements on SSM. However, the US Supreme Court makes law for the US and not for the world, and does not furnish AI's specious claim of drawing on 'principles of international law' with any measure of legitimacy.

Advocacy and activism vs. rights education as an aspect of law education

HRE is, by its own criteria, largely a form of social activism. Few of its practitioners – in the context of this paper, school teachers – possess any qualifications in law (Tibbitts, 2002; Vlaardingerbroek, Traikovski & Hussain, 2014). It calls upon children as young as 7 to become 'activists' (see numerous teaching resources on AI-UK website targeting 7 to 11-year-old 'activists'). HRE is one of the tentacles of a worldwide ideological movement (Tibbitts [2002] refers to it in relation to 'social movements') that has been remarkably successful in infiltrating Western education systems and influencing educational policies and practices, including curricula (Ramírez, Suárez & Meyer, 2007, p. 53). Typical of ideological movements, it operates with missionary zeal, its operatives spurred on by the perceived rightness of their cause. And as is also typical of ideological movements, it pays scant

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regard to niceties such as academic rigour (and intellectual honesty) in promoting its cause. Its proponents cite documentary authorities with the same absolutism as that with which the religious fundamentalist cites scripture – and in so doing may impose an interpretation that is far from self-evident to the detached analyst and may even be at odds with the reality.

HRE in schools raises many ethical questions that are long overdue for serious reappraisal. The ethics of teachers getting 5-year-olds to ‘understand’ that a family can have two Dads or two Mums, the ethics of activist teachers recruiting 7-year-olds to their social-transformative cause, the ethics of riding rough-shod over the rights of parents to inculcate their values and morals in their own children – these and more support the view that HRE is in the business of indoctrination rather than education.

One thing that HRE definitely is *not* is law education. It plays fast and loose with international human rights law, reading into it whatever it chooses regardless of the purport of the pronouncements in question, and disregarding those articles and international court decisions that do not add weight to its claims. More importantly from an educational perspective, it fails to adequately contextualise human rights within the legal frameworks within which they operate at national level. By ‘legal framework’ is meant more than just allusions to legislation that conveniently upholds a particular human right, but rather the whole legal machinery of governance that encompasses how laws are made, how they are administered, and how they are interpreted and enforced. One needs to be able to do a great deal more than thump the table and declare, “It’s my right!” – especially in instances where one’s country has either not signed up to a treaty or has entered reservations against the article in question, or has not incorporated that right into its domestic law. These are not subtle academic nuances but are fundamental to an understanding of the workings of the law in relation to rights, including ‘universal’ or ‘global’ rights. HRE is supposed to be a form of ‘empowerment’ but to ignore these aspects of human rights is actually to disempower as it consigns rights to the realm of rhetoric.

The writer of this paper is not ‘against human rights’ or ‘against human rights education’. The author is an active advocate of law education in schools from primary school level up, and considers rights to be an important aspect of such a programme. What does concern the author is the harnessing of the human rights education project to a social engineering agenda and the receptivity of some education authorities to the Trojan Horse that is HRE. If there is to be HRE in schools, it should be as part of a holistic law education programme devised and delivered by professionals with academic qualifications in law – not by often barely legally literate social-activist zealots doubling as educators.

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