



LEGAL FRAMEWORK FOR FREEDOM OF EDUCATION by Jan De Groof

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Education and the law

Most sovereign states have enshrined the core content of the right to education in their constitutions and basic regulations, and there are numerous examples of courts applying domestic and international law to protect the right to education. Vagueness has also not prevented international development agencies from producing volumes of research on educational conditions.

Historical neglect of the right to education cannot be attributed to methodological obstacles. The main obstacle to realizing the right to education remains a lack of political will and commitment on the part of states, international institutions and NGOs whose responsibility it is to *respect*, *protect* and *promote* these rights for the benefit of all human beings. The following list provides just a few examples of right to education violations that are already being tried in courts around the world: discrimination in access to education, banning teachers unions, failing to provide any primary level education, educational institutions in such poor condition that they are a risk to safety, unfair treatment of ideological, philosophical, religious or linguistic rights....

Currently, there is no way for individuals to bring forward violations of the right to education to international courts, except for regional courts, such as the European Court for Human Rights (ECtHR), the European Court of Justice (ECJ), and national courts.

However, governments have been meeting every year at the United Nations level to discuss monitoring reports, sometimes including individual complaints. NGO educational activists strongly support having an individual complaint mechanism available.

Most countries have ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC) or Committee on the Elimination of Discrimination against Women (CEDAW), both of which include the right to education. Petitions by NGOs can be effective in highlighting an issue and seeking remedy.

At the domestic level, there are political and legal remedies for many educational violations. Although these remedies are still far from comprehensive, they do demonstrate that educational rights are fundamentally justiciable. For example, a core part of every international convention is a prohibition on discrimination. Anti-discrimination laws exist in most countries, and are fully enforceable in a court of law.

Support for the implementation of the right to education and freedom in education must be converted into a political reality and into a program of transformation of the educational system and the legal system that is understandable to a significant part of society. A joint search for a new strategy is needed, which will also rely on the efforts and accomplishments of individual organizations within civic society bold enough to undertake truly radical and forward-looking actions.

Freedom of education – as a basic human right – is worldwide still one of the most prominent dimensions where the society is challenged to guarantee and refine fundamental choices for each citizen.

Within any national society consensus should be reached on the predominant role of parental rights in education and on the contribution of civic society, and particularly of non-state schools, to the fulfillment of these rights. The international norm has to be appreciated as a guiding principle.

The 2004 OSCE¹ “Guidelines for Review of Legislation Pertaining to Religion or Belief”² on Religion and Education (including financing) stipulated that primary and secondary education is one of the most complicated areas pertaining to rights of religion or belief. Laws involving education should be reviewed to identify these and other issues raising concerns regarding international standards and OSCE commitments.

The guidelines specified that among the most common (interrelated) issues, the following principles are to be implemented legally:

1. Parental rights related to education of their children. It is generally recognized that parents have the right to determine the religious education of their children.
2. *State financing of religious education (both within State and community schools and religious and other private schools).* There is a wide variety of State practices regarding State financing of religious education both within State schools and private religious schools. The most obvious potential issue is whether the financing, when provided, is offered on a non-discriminatory basis.
3. *Religious, ethical, or humanist education in State and community schools.* There is a wide variety of State practices regarding religious, ethical, and other forms of ideological education in State and community schools. When considered in conjunction with the rights of the parents, it is presumably the case that children cannot be required to take instruction in denominational or ideological education against their parents' wishes, though general education about religions, beliefs, and ethics generally is permissible.
4. *State authorization of private religious or philosophical schools.* (...) Parents should be able to educate their children in private religious schools or in other schools emphasizing ideological values. Certainly, the dominant practice among OSCE participating States is to allow for private religious and ideological schools, though the State is permitted to establish neutral criteria for the teaching of standard subjects such as mathematics, history, science, and languages. The State also permissibly may regulate teacher certification.
5. *Rules pertaining to hiring and firing teachers and other school personnel on grounds of religion or belief.* Cases involving the hiring and firing of teachers and other school personnel at schools (both State and private) when religion or belief is a factor can be very complicated and fact-specific. Religious schools, for example, may require that employees must be members of the religion and may wish to terminate those who leave the religion or engage in conduct that officials deem to be contrary to the ethos of the school. There are many State practices in this regard, and it is a continually evolving area of the law."

But the 'juridification' and 'judicialisation' of the education system has pejorative overtones involving excessive recourse to legal procedure to resolve issues previously settled by negotiation or informal agreement or by the education institutions themselves. Here, however, juridification is to be understood as that part of the broader process of 'incorporation' which brought the education institutions into the formal ambit of either administrative or constitutional law as the main instrument for regulating the boundaries of systems of governance whilst also giving formal legal recognition to powers and areas of responsibility previously defined internally by practice, tradition and custom within and by, the academic guild.

The rule of law implied codifying the ties between the government and the school so that

due process - or its violation - could be ascertained. But, it also had the task of defining the boundaries within which autonomy could be exercised as well as defining the nature of that autonomy. The boundary between the 'public' and the 'private' lives of the school were drawn in some countries with care but remains unclear in many cases, in keeping with the principle of the freedom to learn and to teach.

A philosophy of 'steering from a distance' was introduced: a move towards a *result*-oriented, rather than *rule*-oriented responsibility for the institutions involved. Government's role is changing.³ From the role of sole provider and detailed regulator with the responsible minister as the important actor, it has redefined its role to that of supervisor of a level playing field.

The changing role of the government, the trend towards deregulation, a certain diversification of institutes, the gearing of national politics to the international context are the factors of change which affect education. The school has to deliver new answers on 'if', 'what', 'when' and 'how' education and research will be organized.

On all legal dimensions of school life autonomy has been questioned. "Education is more closely audited, assessed and centrally controlled than at any time in history. This has formed an important part of the centralisation of power over the direction of education policy and the management of the system to meet various political and economic goals. The relationship between law and politics in the context of education reform is important to an understanding of the way that the politicisation of education during the past 30 years has shaped its legal framework and the structure of control and regulation within the system."⁴

From the 1990s, the concept of autonomy was fiercely juxtaposed with the requirement for accountability. A range of external policies created new demands on education institutions which were regarded as leading to an erosion of autonomy. The international and transnational cooperation within the education landscape provoked some changes in the institutional behaviour. In a short period of time, government had intervened quite directly in education institutions both to guarantee quality management but also to require compliance with a new regime of education and funding regulations. This raised charges against government on the basis of infringing on institutional autonomy.

In conclusion: it does not seem to be contradictory to state that the increasing delegation of powers to the institutional level is accompanied by an increasing power and number of norms of the central authority. States should guide the education sector through a framework of general rules, policy objectives, funding mechanisms and incentives for quality education, equal opportunity norms and standards.... In return for being freed from over-regulation and micro- management, schools should accept full institutional accountability to society at large for their results.

It would appear that the call for a more transparent regulation of administrative relationships on the basis of the broadest possible concept of autonomy and flexibility for institutions in the organisation of the educational process is also relevant to other areas.

An experimental space for certain elements merits a legal foundation. The regulator, too, ought to permit himself some flexibility. New control tools might be considered and the ‘*contractualisation*’ of (the organisation and provision of) school education has various precedents, including the introduction of instruments of private law and contract-like institutions/pupils, institutions/staff, institutions/State, intra-institutional relations and management contracts.⁵ Schools must be adequately equipped to function competitively in the transitional space between market and government. The economic dimension of education requires structural adjustments.⁶

‘Deregulation’ does not stand in the way of ‘government control’. It does however require choices in relation to the limitations that government may set for itself and the obligations which it may impose on the institutions. After all, one of the most forceful arguments in current legislative doctrine is that *evaluation of legislation* as a tool for enhancing the quality of the law can no longer be ignored. It is a fundamental characteristic of democracy that it entails the possibility of self-correction, through an openness to debate, the revocability of decisions and the precarious nature of the positions of power.

This applies all the more strongly during the phases of coordination, codification and modification. Even more relevant than Montesquieu’s claim that “one should not touch the law but with trembling hands” is the adage that any first rule of law must be written with huge circumspection. In education, it appears, ‘legality’ often overtakes ‘reality’.

L’erreur sur le caractère dynamique du droit vient de la succession rapide des lois
– *On the Law on Education*⁷

Education policymakers identified also *deregulation* as an overall objective. Policies cope with the apparent contradiction between drafting framework law enabling institutions to implement autonomy and the differentiated systems of accountability. In most countries there were criticisms of the role of the ministry and complaints about the unsupportive mix between too much and too hurried prescriptive legislation.

Complaints were also frequently voiced about either premature or unnecessary administrative overregulation which interfered with institutional autonomy. The expanding governmental and legal *instrumentarium* contradicts finding that the dependence of the public-funded system of education institutions on government grants has continued to be reduced with the development of a more market- oriented approach.

In modern education, few major decisions are made without considering the legal consequences, and though the core functions of education are remarkably free from external legal influences, no one would plausibly deny the increase of legalization on schools or campus.⁸

The *Law on Education* deals with practically all aspects of the school, with social rights with governance and management and the budget, with education as businesses, with property and estate issues and dispute management, and – chiefly – with staff and pupils. Since ten years ago, there has been growth in the key areas with respect to the impact of

the law upon the school environment, including the application of the principles of consumer law to the pupil-school contract; the issue of the degree of affirmative action/positive discrimination over admissions, not only with reference to race/ethnicity; but also increasingly concerning socio-economic background; the exercise of expert school judgement in terms of probing whether the school really has delivered the content that the prospectus has promised; a greater emphasis on alternative and preventive dispute resolution in handling disputes with students and employees; ...

The education world tended to think of itself as removed from and perhaps above the world of law and lawyers. *"(...) education (...) was often viewed as a unique enterprise that could regulate itself through reliance on tradition and consensual agreement. It operated best operating autonomously (...). An outsider would, almost by definition, be ignorant of the special arrangements and sensitivities underpinning this environment. And lawyers and judges as a group, at least in the early days, were clearly outsiders."*⁹

But 'justice and efficiency go hand in hand,'¹⁰ so long at least as the law does not impose excessive refinements. The national legislative reform of education should make use of the comparative set of legal indicators.¹¹

Common objectives and standards do not prevent education from continuing to be embedded in national traditions and based on specific cultural, social and confessional values, as well as on a diversity of social and economic policies. "It is fair to say that no other sector of law and administration reflects the traditions and culture of a people as much as does its provision for education."¹²

Freedom of and right to education as basic norms in democratic societies

The legal framework for schooling, and especially for how educational freedom is ensured, generally provides an accurate reflection of a nation's cultural traditions and social context. This is why education laws tend to differ from country to country in the same continent, and even more so from continent to continent. The institutional arrangements for education vary according to each country's constitution. National and individual religious identities generally interweave: the historical, political and legal background of a given country will certainly influence the way in which it individual citizens express and perceive their religious identity. Promoting religious or philosophical identity in the education sector prominently encouraged the emergence of schools which seek to enforce a religious ethos.¹³

Comparisons do nonetheless need to be made, and this is partly on account of the growing interest in the way educational rights and freedoms are becoming internationalised.

This essay uses a synthesizing approach as a basis for attempting to discover how to

define the basic educational rights and freedoms and decide which educational rights are enshrined in international standards of justice.

Freedom of education has several aspects. The principle may therefore be described in different ways, dependent on the point of view from which a definition is made.

From a negative point of view, freedom of education implies that a government does not have the right to establish any philosophical, ideological or religious theories nor to recognise any one of them as being the sole basis for an educational system. The government does not have a monopoly on education, nor may it use compulsory schooling to exercise a tyranny over the consciences of children and youth.

In a case brought on behalf of Jehovah's Witness pupils who were expelled or threatened with expulsion for refusing to join in the Pledge of Allegiance as a patriotic ceremony, decided in the midst of the Second World War, in 1943, the United States Supreme Court held that

National unity as an end which officials may foster by persuasion is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement. . . . As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrines and whose program public educational officials shall compel youth to unite in embracing... freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion (*West Virginia State Board of Education v. Barnette*, 319 U.S. 624).

In his jurisprudence, namely the *Case of Kjeldsen, Busk Madsen and Pederson*, the so called 'Danish Sex Education' case (*Judgment 7 December 1976, Series A no. 23*) and later in the *Case of Campbell and Cosans* on the infliction of corporal punishment (*Judgment, 25 February 1982, Series A, no. 48*), the European Court on Human Rights stated that the State must respect the right of parents to ensure the right to education for their children in conformity with their own religious and philosophical convictions and thus that the State is forbidden to pursue an aim of indoctrination. 'Education' and 'teaching' were defined as follows:

the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas teaching or instruction refers in particular to the transmission of knowledge and to intellectual development (ECtHR, *Judgment of 25 February 1982*).

Looked at in this light, education is a typical example of a basic right, and it has two of the traditional features of this sort of right: first, there has to be freedom to enjoy the education of one's choice and in this respect the rights of parents and pupils or students take precedence.

Second, there has to be the possibility to choose what type of education to provide: in other words, any individual or body has the right to use an ideological or religious belief as a basis for providing education.

It is clear that both aspects of "freedom of education" are closely linked. If parents had the right to choose any school but in fact government did not allow real alternatives to its own schools, the right would be meaningless. Or if everyone had the right to freely provide alternative schools but parents could not select among them, the right would be equally meaningless.

Both are extreme cases, but we can see tendencies in both directions in a number of existing systems. For example, the various state governments in the United States generally allow non-state schools to operate with little oversight, and there is thus great variety among them, but the lack of public subsidies effectively excludes many pupils whose parents cannot afford to pay tuition. Educational freedom under those circumstances exists for the school but not for many parents who might seek to send their children to that school if they could afford the cost. In several other countries, as we will see, government subsidies makes it possible for low-income parents to make use of non-government schools, but government regulations limit the distinctiveness of the schools and thus the basis upon which educational freedom is exercised.

From the point of view of sponsor or owner of a non-government school, a distinction can be made among freedom of *establishment*, freedom of *orientation* and freedom of *organization* -- that is, the freedom to define how the school will operate.

The recent report by an international organization promoting educational freedom found that every country from which information was obtained, except Cuba and Vietnam, permitted non-state schools to operate, and thus met the first threshold of educational freedom. Among these countries that allowed non-state schools, however, there was considerable variation with respect to government support for the exercise of educational freedom, with 34 countries (counting the United Kingdom as three) providing substantial or complete financial support, and another 22 providing partial financial support.¹⁴ Countries promoting educational freedom are for the most part located in the region of Europe and North America. Greece and Ukraine are exceptions. Countries part of other regions such as Chile, Israel and, to a lesser extent, Filipinos, Argentina and Paraguay, are implementing policies that promote freedom of education.¹⁵

The autonomy granted to religious groups seems more limited in 'laic' States than it is in neutral States or States with an established or official religion;¹⁶ the distinction

between more strictly controlled non-state schools and other State aided private schools may not be necessarily be significant in terms of the religious ethos of the school.¹⁷

The international setting of educational rights

Legislation is an indispensable instrument in accomplishing economic, social and political transformation.¹⁸ However, views differ on the appropriate methodology for drafting laws to facilitate those changes.

Comparative law ought to be a vital part of the preparation of new legislation and the implementation or amendment of existing legislation. Young democracies, such as Russia and South Africa, have even guaranteed the supremacy of international law in their constitutions and have laid down an explicit constitutional obligation to use relevant comparative law as an instrument and touchstone when drafting laws or resolving legal disputes.

All those concerned with education law and education policy realise very well that national sovereignty is not necessarily compromised by international indicators and benchmarks, nor by the relevance of comparative education law. The international dimension should clearly be seen as a genuine component of national education policy.¹⁹

The same can also be said of the primacy of concern for quality in education. Research into and the organisation of systems to evaluate quality can hardly be set up as purely national undertakings nowadays. Every national administration and all applied research is based to an important degree on comparative educational science.

This need not automatically lead to a single, uniform education system, like in the former Eastern Bloc. That would be contrary to the principle of mutual respect and democracy. The realisation of international benchmarks must always be reconcilable with the rule of subsidiarity within the international community.

Comparative law can also involve a critical challenge and act as a spur where content is concerned for the legal specification of priorities for education policy.

Comparability is thus a means of discovering where one's own education policy is situated and possibly a source of inspiration for new law-making. The need for comparability and an international legal dimension to education, through standardisation, action programs and legal practice, is bound to increase in the future.

Not a few changes in legislation are themselves a response to international trends. Work that has contributed to analysing the condition of national systems of higher

education has been undertaken by the *Organisation for Economic Cooperation and Development* in its national reviews of education and the survey on *International Indicators of Education Systems (INES)*, the databank “*Eurydice*” of the European Union, even on ‘private education’ (*Eurydice*, 2000), *Programme for International Student Assessment (PISA)*, *Trends in International Mathematics and Science Study (TIMSS)*, Governments routinely cite developments in the international arena as one of the main justifications for amending education legislation. That international developments are reflected in national legislation will doubtless strengthen the drive towards a greater international coherence in education systems, in its terminology and instrumentalities at a time when a greater degree of flexibility in the administrative and financial relationships between government and higher education figures high on the political agenda.

A major focus of comparative education law lies on practical aims, such as the advancement of legislation, judicial decision-making and the *harmonisation* or even the *unification* of education law. In European Union perspective, the term ‘*coherency*’ is also relevant, depending on the matters concerned. The ELA conferences and publications on *Legal Status of Teachers*, *Legal Status of Minorities*, *Legal Status of Pupils* drew attention to major differences in legal status among teachers, pupils and minorities in the various European countries and argued in favour of harmonisation of national regulations in the light of the principle of the free movement of workers.²⁰

Findings of comparative legal studies are also applied to the development of *international* law. As an aid to national legislation, comparative law has already established a considerable influence.

Of course, the application of foreign solutions should be based on careful study of the historical, cultural, geographical and economic environment of a legal solution as well as existing legal regulations. The possibilities for incorporating foreign legislation into elementary, primary and secondary education are probably limited due to differences in culture, economics, and the structure of the legal code in different countries. Looking at actual developments in systems of education in Europe, however, the differences appear to be diminishing, since the national systems are faced with similar problems.

Apart from using comparative law as a “*reservoir of legal solutions*,” from which the best may be chosen and adopted, comparative education law can make an effective contribution to general progress in public policy. Education legislation has strong instrumental aspects, because it serves certain *policy goals*. But if education law is regarded merely as an instrument of education policy, the comparison will focus on policy goals, and little or no attention will be paid to legal principles and values. A critical approach to comparative educational law will have to involve a critical reflection on policy as well as revealing any contradictions between law and reality. The function of law is to integrate the various pragmatic, ethical-political, moral and juridical points of view, chiefly in the field of education, on the basis of *common*

principles.

Worldwide, the concern exists that education is becoming more ‘legalized,’ but the interpretations of this phenomenon differ. A study in the United States found that “from 1909 to 1968, there were fewer suits by or on behalf of public school students challenging teacher, principal, and school board practices than in the years from 1969 to 1978 [alone]. The percentage of cases decided in favor of students rose dramatically, from 19 percent (before 1969) to 48 percent (1969 to 1978).”²¹

Is this increasing recourse to legal answers to educational problems a positive or a negative phenomenon? Does the stress upon the legal context of education, the frequent litigation, the constant recourse to legislation to address matters which in the past would have been decided by educators, undermine the focus and effectiveness of schools, as some fear, or is it a necessary protection for the rights of pupils, parents, and school staff? The education law should be judged by the standard of its *functionality* for the development of individuals and the functioning of society.

Several countries have transformed the legal right to education into a constitutional right and the courts are made responsible for arbitrating in disputes concerning, for example, the right of parents to a free choice of school, the right to a free choice between a religious or non-denominational education under the official educational system, the right to education free of charge up until school-leaving age, the right for pupils in compulsory education to receive moral or religious education with the costs being chargeable to government, the right to equal treatment for pupils and students, parents, members of the teaching staff and for schools.

The European Union’s *Charter of Fundamental Rights* came into force on 1 December 2009 does not lead to drastic changes in the delineation of mutual competences.

This will inevitably raise the question whether the Member States with a more extensive catalogue of basic rights will not be exposed to pressure as soon as a ‘European Constitution’ is drafted. Although the right to education “is calling by its very nature 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” -- according to the European Court on Human Rights (*Case ‘relating to certain aspects of the laws on the use of languages in education in Belgium’, Judgment 23 July 1968, Series A no. 6*) -- the conformity of national law to international law will have to be carefully checked in the future. As an Austrian scholar argued extensively, the right to education is one of the most complex human rights under present international law.²²

The role of the State in promoting human rights in education

International legal standards remind us that human rights are universal, individual, interdependent, and interrelated. According to the “*Vienna Declaration and Programme of Action*”, adopted by the World Conference on Human Rights: “the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”

The right to education and to educational freedom is clearly a cross-sectoral right, simultaneously civil, political, economic, social and cultural. They are interlinked with the freedom of thought, conscience, religion, association and belong also to the group of solidarity rights. The European Court of Human Rights reiterated that in the area of education and teaching art. 2 of Protocol No.1 is in principle the ‘*lex specialis*’ in relation to other fundamental rights (*Case of Folgerø and Others v. Norway, Judgment 29 June 2007*; *Case of Lautsi and Others v. Italy, Judgment of 18 March 2011*).

Jurisprudence emphasized that freedom of education should be interpreted in the light of the right to privacy and freedom to receive information. The *UNESCO Convention against Discrimination in Education*, the European legal non-discrimination framework and recently the Committee on Economic, Social and Cultural Rights (ECOSOC) refined the application of the non-discrimination principle in the education sector (*General Comment No. 20, 2 July 2009*).

About 40 documents produced by the United Nations and regional and international institutions deal with education rights.²³ Recent texts stipulate that “States are duty bound . . . to ensure that education is aimed at strengthening the respect of human rights and fundamental freedoms, they call for human rights to be included in the curricula of learning instructions”. The international community “considers human rights education, training and public information essential . . . for fostering mutual understanding, tolerance and peace.”

Most legal doctrine and the concept of the right to education stress the links between this right, the development of a personality and of the social community and the enjoyment of human rights.

Among most authors there is a general agreement that education: (a) allows man freely to develop his personality and dignity; (b) allows his active participation in social life in a spirit of tolerance; (c) respects parents, national values and concern for environment; and (d) contributes to the development of human rights.

The ultimate basis of the right to education as embodied in the various national and international/constitutional or other legal instruments is the commitment to the dignity

inherent in every human being and hence to the development of the human personality.

It is perhaps pertinent to bear in mind that these rights belong to the human being as an individual and that the so called “collective” rights are qualified as “functional” rights.

Education is a *pre-condition* for the full enjoyment of a variety of human rights. The literature distinguishes three obligations of the State related to human rights: “to respect”, “to protect” and “to fulfil”. “The first level is the ‘obligation to respect’. This obligation prohibits the State itself to act in contravention of recognized rights and freedoms. This means that the State must refrain from interfering with or constraining the exercise of such rights and freedoms. The second level is the ‘obligation to protect’. This requires the State to take steps - through legislation or by other means - to prevent and prohibit the violation of individual rights and freedoms by third persons. The third level concerns the ‘obligation to fulfill’. This obligation can be characterised as a program obligation and implies more of a long-term view.”²⁴

All these distinctions illustrate the quite original nature of the rights to and in education and their link to the consideration of human rights education. It is therefore worth trying to identify the role of human rights education within the context of the right to education in general and to show how a real human rights culture can be built up maintaining continuity with specific cultural and religious traditions:

*Education in human rights and the right to education should not be studied separately, since education in human rights is part of the purpose of education recognized by international instruments (...) A distinction has to be drawn between education in human rights, law, religion and civic ethics, a part of social ethics, which, in turn, should not be separated from ethical training as a whole.*²⁵

The *Education and Religion Recommendation of the Council of Europe*, (4 October 2004) stipulated that “*the family has a paramount role in the upbringing of children, including in the choice of a religious upbringing. However, knowledge of religions is dying out in many families. More and more young people lack the necessary bearings fully to apprehend the societies in which they live and others with which they are confronted*” (§3); “*Governments should also do more to guarantee freedom of conscience and of religious expression, to foster education on religions, to encourage dialogue with and between religions and to promote the cultural and social expression of religions*” (§6).

International experience confirms that there is an overall urgent need to introduce human rights education, as a responsibility shared by governments and educational institutions. The effort to implement it universally, in order to ensure that an understanding of the nature of human rights is widely distributed, implies reconsidering in some respects the objectives of education and culture.

Partnerships and consultations among the different actors (including international organisations and NGO’s, as well as the media, religious authorities, corporations, trade

unions, specific professional bodies such as lawyers, the police, etc.) are essential to ensure that implementation is effective, that the approach is democratic and that ideas are turned into action.

In 2010, all the Member States of the EU adopted the *Council of Europe's Charter on Education for Democratic Citizenship and Human Rights Education*. National curricula and/or education regulations may encourage the whole school to adopt attitudes and values that emphasise the principle of democracy. However, recent research pointed out that this is the case in only a third of European countries, whether or not in direct connection with citizenship education.²⁶ All European countries, except Cyprus, Sweden and Turkey, have introduced central regulations and official recommendations to allow or encourage parental involvement in school governance, even in highly decentralized educational systems.²⁷

The contribution of international norms

From the standards of international law concerning the right to education can be deduced a miscellany of guarantees of freedom and socio-economic-cultural rights on the part of parents and pupils or students on the one hand, and general aims for and obligations of the government on the other.

According to the international declarations and treaties concerned with human rights, the tasks of the government are more detailed and the principle of non-discrimination explicitly defined. Depending on both the legal definition in the international treaty, and on the legal culture which nationally tolerates or encourages the enforceability of the international norm, these governmental tasks must be regarded as prescriptions for programs or as positive legal obligations, sanctionable by the courts.

In several countries the direct effect of international standards concerning education is accepted, albeit reluctantly, although this legal capacity (*iuscogens*) cannot be ascribed to all conditions without exception. Nevertheless, by the application of international standards on education, which oblige States to take 'suitable measures' within national legislation and the existing legal order, mention is made of their relevance as guidelines or as an "international minimum."

If the *jus cogens* of the international standard is taken seriously, it would appear that the test of international law, in respect of the right to education, should be seen as a formal part of the legislative process. As the UN Committee on Economic, Social and Cultural Rights has pointed out, the obligation to 'fulfil' consists in setting up the appropriate legislative, administrative, judicial "and other measures".

The effectiveness of the international norm depends on its applicability and on its implementation by judges. Judges should be more systematically involved in

compatibility issues between the national and the international legal education norm. Global legal standards could be attained.

One of these standards might be the so-called '*standstill obligation*', which relates to secondary and higher education. It has been refined by some Constitutional Courts. Article 13 and 14 of the *International Covenant on Economic, Social and Cultural Rights* oppose measures that are contrary to the objective of free education, despite the precarious economic and budgetary situations.

Over the years, the 'Committee on Economic, Social and Cultural Rights' and the 'Committee on the Rights of the Child' have reported for example, that there is an apparent 'lack of action' in El Salvador to remedy child labour; that the government in Congo has abolished free education; that the educational situation has regressed in Kenya, Haiti, Mexico and Mali; that the Japanese Government has introduced fees in public education, shifting the high cost of private education; that the budget of Guinea is clearly inadequate to deal with the serious shortage of teachers. And they have called upon the Government of Jamaica to provide adequate safety nets for vulnerable and poor children....

From a comparative perspective it is also highly problematic that in several countries there is limited or no opportunity for education of one's own choice: either there is only State-controlled education, or in a mixed system, private education is too expensive for parents.²⁸

The *General Comment No. 13, 1999* of the Committee on Economic, Social and Cultural Rights (ECOSOC) proclaimed that given the principles of non-discrimination, equal opportunity and effective participation in society for all, the State has an obligation to ensure that the liberty set out in art. 13 (4) ICESCR does not lead to extreme disparities of educational opportunity for some groups in society (§ 30).

The international educational rights apply in all situations, however tight State finance may be. Official reports have focused on the unwillingness of governments to redress discriminations, worldwide. But reports also mention that progress has been made in India; that its legal framework on elementary education as a sanctionable human right has been improved. In short, there have also been positive experiences on all continents.

Here it is assumed from the outset that the government ought to watch over the effective application of the right to education, in its various definitions, and that such is of overriding importance for the democratic quality of society. In this respect too an absolutely priority character is attached to the right to education in conformity with the nature of the right. Also valid as a corollary to the right to education is the existence and the maintenance of a minimum of education provided by the State, otherwise (as noted above) that right would be illusory, chiefly for those who have not sufficient means.

Obviously, on the international level, there is no uniform rule on how educational rights should be protected and enjoyed; there are too many differences among nations and their social and legal arrangements. Even less is it possible to prescribe any specific kind of education or educational level postulated, although elementary education must be assumed to be the absolute minimum.

A remark about the South African Constitution: it might be expected that a 'new democracy' would appeal to international legal standards more frequently than is the case in constitutional democracies which already dispose of a proven or refined jurisprudence in educational matters. On this point too South Africa can teach something to the 'old' democracies, since these give a rather limited interpretation and scope to international norms and only scanty acceptance to the self-executing character of treaty conditions. The first pronouncements of the Constitutional Court - cases CCT 39/95 of 4th April 1996 and CCT 46/95 of 3rd April 1996 -- and the Supreme Court of South Africa - case no. 2436/96 of 16th February 1996 offer a clear reflection of the integration of the international legal standards and the relevance of comparative law.

Section 39 (1) reads as follows: *'The court, tribunal or forum must consider international law; the judge may consider foreign law'...*

According to Article 13 (3) International Covenant on Economic, Social and Cultural Rights, State parties undertake to have respect for the liberty of parents to choose other than public schools for their children and to ensure their religious and moral education. The same obligation is encountered in other international instruments, such as the International Covenant on Civil and Political Rights (Article 18 (4)), the European Convention on Human Rights (Article 2 of the First Protocol) and the UNESCO Convention against Discrimination in Education (Article 51 (b)).

The *Charter of Fundamental Rights* of the European Union guarantees a right to education in Chapter 2 (Article 14). It states that:

- everyone has the right to education and to have access to vocational and continuing training (para. 1), that
- this right includes the possibility to receive free compulsory education (para. 2), and that
- the freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right (para. 3).

In Article 14 of the *Charter* the right to education is obviously formulated in positive

terms. Taken literally, it is a right to have access to education, which easily might imply positive obligations on the European Union and the Member States, when they are implementing Union Law (Article 51). Article 14 thus embraces a right of the individual to receive an education and this right can be read as imposing a duty to establish publicly-supported educational institutions, if such institutions do not exist. If the right to education is to be effective, its exercise requires by implication the existence and maintenance of a minimum of education provided or supported by the state. Otherwise that right would be illusory, in particular for those who have insufficient means.

Not only the philosophical roots of the right to education but legal comparisons demonstrate quite definitely that this right has something to do with the notion of freedom. In this tradition, education is intended to enable a human being to freely develop his or her personality and human dignity. This implies freedom of choice between different kinds of education or schools, on the basis of religious, philosophical, or pedagogical convictions or for reasons of language or ethnic affiliation. It implies also freedom from indoctrination in educational institutions and demands respect for the personality and human rights of the learner, who has to be protected also against misguided forms of educational influence of whatever kind. It might also include the freedom of home instruction. Such an interpretation brings a dimension of individual freedom to light, which must be protected against state infringements.

Based on this interpretation we have to consider the right to education not merely as a social right to receive education and of equal access to educational institutions provided by the State. It is also a freedom protecting against any infringement in the human personality, which might occur in the process of education.

According to the *Charter*, the freedom to found private schools is limited by respect for democratic principles and must be exercised in accordance with the arrangements defined by national legislation. The evocation of democratic principles will exclude certain types of private school, for instance schools, which intend to discriminate against certain pupils on the basis of their race, or which exercise school discipline in a way that is not compatible with respect for human rights.

The founding of private educational institutions is subject to national legislation, as mentioned in Paragraph 3. This is a reminder that the necessity to regulate many aspects of education is also an aspect of the realization of the right of education.

What might seem startling in connection with the right to found private schools is the somewhat strange reason given for this freedom. According to the explanatory notes, the freedom to found private schools is one of the aspects of freedom to conduct a business. However, a pure economic approach runs short, should it be its main or sole justification. Such an approach would neglect the dominant aspect of pedagogical, religious or ethnic choice that motivates the maintenance of private educational institutions in most cases. Any interpretation of the right to found private schools based on a purely economic rationale would therefore curtail fundamental aspects of this liberty and would lead to wrong consequences.²⁹

In conclusion: the right to education is intrinsically linked to free choice of education without interference from the State or a third party, particularly, but not exclusively in terms of the family's religious or philosophical convictions. This element is violated according to international law if a State fails to respect the free choice of parents with regard to the religious instruction of their children. This means not only, in practice, that a State must ensure an objective and pluralist curriculum and avoid indoctrinating students within 'public'³⁰ education. According to the Western approach, States should be reluctant to the promotion of philosophical 'concepts of life', which to some extent seems not in contradiction with art. 17(3) of the African Charter on Human and Peoples Rights, which states that the promotion and protection of morals and traditional values recognized by the community should be the duty of the State.

In this respect, the *ECtHR Grand Chambre Judgment of 18 March 2011 in the Case of Lautsi and others v. Italy* seems to be quite relevant, although focusing on state schools but with a broader impact on State obligations. The government explained *in casu* that the presence of crucifixes in state-school classrooms, being the result of Italy's historical development, is considered as a fact which gave it not only a religious connotation but also an identity-linked one, now corresponded to a tradition which they considered it important to perpetuate. The judgment added that, beyond its religious meaning, the crucifix symbolised the principles and values which formed the foundation of democracy and western civilisation, and that its presence in classrooms was justifiable on that account.

The Court took ultimately the view that the decision whether or not to perpetuate a tradition fails in principle within the discretion or 'margin of appreciation' of the respondent State. The Court must moreover take into account the fact that Europe is marked by a great diversity between the States of which it is composed, particularly in the sphere of cultural and historical development. It emphasises, however, that the reference to a tradition cannot relieve a contracting State of its obligation to respect the rights and freedoms enshrined in the Convention and its Protocols. "Moreover, the fact that there is no European consensus on the question of the presence of religious symbols in State schools (...) speaks in favour of that approach" (§ 67-70).

In previous cases the Court explained that in view of the place occupied by Christianity in the history and tradition of Norway, the question of a syllabus dealing with religion and philosophy has to be regarded as falling within the margin of appreciation left to it in planning and setting the curriculum (see *Folgerø case*, cited above § 89) and it reached a similar conclusion in the context of "religious culture and ethics" classes in Turkish schools, where the syllabus gave greater prominence to knowledge of Islam on the ground that, notwithstanding the State's secular nature, Islam was the majority religion practised in Turkey (see *Judgment 9 October 2007 in Case of Hassan and Eylem Zengin v. Turkey*, no. 1448/04, §63).

Freedom of education versus preventive measures

The principle of freedom of education includes the rejection of *preventive measures* or preliminary permissions that prevent or unduly hinder the establishment of schools. In history, many examples could be mentioned of limitations upon the provision of non-state schools, including those adopted by the totalitarian States and Cuba and Vietnam do not allow such schools at present.³¹

These are extreme cases, of course, and none of the countries included in our study forbid non-state schools. On the other hand, the long hesitation in several members of the EU about whether to allow Islamic schools reminds us of an earlier episode in the United States, when anxiety about Catholic immigrants led the voters of Oregon to approve a measure that required all children to attend public schools until completion of the eighth grade. This repressive measure was the occasion for an important decision by the United States Supreme Court striking it down on constitutional grounds. The Court ruled, in 1925, that

the fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

The Court, it should be noted, also stressed

the power of the state reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare (*Pierce v. Society of Sisters* (268 U.S. 510)).

“Reasonably” is the key word here, and each state has had to work out its own balance between intrusiveness and respect for the autonomy of schools which it does not operate or (except in limited and indirect fashion) support. Must nonpublic school teachers be state-certified? How can government ensure that nonpublic schools are academically equivalent to public schools? Should the state somehow intervene if a nonpublic school is teaching racist doctrines?

In most cases, the regulatory impact of government on nonpublic schools in the United States has been quite limited. In this and other countries, however, educational freedom requires that the administrative practice regarding the registration of independent schools not cause direct or indirect obstacles to the effective implementation of the freedom of education, as is sometimes the case in young democracies. It is no accident that the European Court of Human Rights expressly stipulated that the right to

establishment of and access to private schools outside the public school system falls under the provision of the ECHR.

The *travauxpréparatoires* indisputably demonstrate (...) the importance attached by many members of the Consultative Assembly and a number of governments to freedom of teaching, that is to say, freedom to establish private schools (*Judgment of 7 December 1976, A. 23*)

In a more positive vein, the process established for approval of non-state schools can be set up and administered in a way which either hampers or promotes diversity in the system, as the example of Poland makes very evident. The 1950 “*modus vivendi*” agreement between the new Communist government and Cardinal Wyszyński provided that “schools run by the Church will be able to enjoy the rights of state schools on the general principles prescribed by appropriate laws and regulations issued by the education authorities,”³² but only ten Catholic secondary schools (eight of them boarding schools for girls run by religious orders) were able to maintain their existence. The Polish Constitution adopted in 1952 did not guarantee educational freedom; regulations adopted by the Ministry on February 26, 1965 made provision for approval of schools outside the state system, but the Ministry’s officials made this exceptionally difficult. Only recognized local organizations that professed socialist ideology were considered eligible.³³

In June 1988, while the non-socialist Civic Educational Association was trying to negotiate a way through the approval process so that it could sponsor non-state schools, an individual, Anna Jezioma of Kraków, petitioned the Ministry for permission to open an independent elementary school. The petition was refused, but she appealed the decision to the High Administrative Court with the support of a number of organizations including the CEA. On February 24, 1989 her right to open an independent school was sustained by the Court; the ice was beginning to break up.³⁴

With the radical political changes that took place later that year, the Ministry established, on August 25, 1989 new provisions for subsidizing from the state budget educational programs run by the Catholic Church. The new team, members of Solidarity, that came to the Ministry of Education in late 1989 resolved to use the existing provision for approval of non-state schools as a means of responding to the growing parent-initiated demand and stimulating new initiatives by teachers. They gave broad publicity to their willingness to approve applications without endless bureaucratic hassles. Response was overwhelming. “Between April and July 1990, 2 or 3 non-state schools appeared every day in various parts of the country.”³⁵

As the Polish example illustrates, formal legal provisions may be interpreted and applied in ways which promote educational freedom and diversity, or which hamper it. The Russian education law, for example, shows quite clearly how prohibitive legislation hinders non-state education initiatives.³⁶

Non-state schools must accept quality control and some form of core curriculum, in return for recognition of diplomas and funding. This could nevertheless lead to the decrease of education freedom and even some loss of their specific mission. Their distinctiveness, their '*zone d'autonomie*', could be at stake. These following legislative criteria are inspired by international conventions (f.eg. art. 13, section 3 of the previously mentioned *ICESCR*):

- The lawmaker must restrict himself to *minimal* standards, respecting the specific mission of the school. These standards should be relevant and proportionally detailed with respect to the goal envisaged.
- It must leave enough room for *alternatives* for realising the same goals.
- Thirdly, legislation can only be designed after broad *consultation* of all recognised forms of education and stakeholders.
- Finally, full *autonomy* must be guaranteed in terms of didactic aspects and *pedagogical* approach.

If these conditions are not met, which unfortunately is often the case (f.eg. imposing a timetable), you could but conclude that the State-standards themselves undermine essential aspects of freedom of education.

Education is expected to be more the expression of a local democracy than a uniform interpretation of national identity. The legislative approach I propose will also be beneficial to non-state schools. An *OECD* report states that "*Experience has shown that the most decentralised systems are also the most flexible, the quickest to adapt and have the greatest propensity to develop new forms of social partnership*".³⁷

Freedom of education versus indoctrination

Freedom of education requires that all forms of indoctrination by the authorities be resisted. This is always a danger, because governments are tempted to see schooling as a useful instrument for promoting their policies.³⁸ As Wilhelm von Humboldt warned in 1791, *before* he became a Prussian education official,

national education -- or that which is organized or enforced by the State--is at least in many respects very questionable. .The grand, leading principle, towards which every argument hitherto unfolded in these pages directly converges, is the absolute and essential importance of human development in its richest diversity; but national education, since at least it presupposes the selection and appointment of some particular instructor, must always promote a definite form of development, however careful to avoid such an error. And hence it is attended with all those disadvantages which, as we have already seen, flow from such a positive policy; and I need only add that every restriction becomes more directly fatal when it operates on the moral part of our nature--that if there is one thing more than another which absolutely requires free activity on the part of the individual, it

is precisely education, whose object it is to develop the individual.... The freest development of human nature, directed as little as possible to citizenship, should always be regarded as of paramount importance. He who has been thus freely developed should then attach himself to the State; and the State should test itself by his measure. . . all systems of national education, governed as they are by the spirit of regulation, impose on nature a special civic form.³⁹

Similarly, John Stuart Mill insisted, in 1859, that

All that has been said of the importance of individuality of character, and diversity in opinions and modes of conduct, involves, as of the same unspeakable importance, diversity of education. A general State education is a mere contrivance for moulding people to be exactly like one another; and as the mould in which it casts them is that which pleases the predominant power in the government . . . in proportion as it is efficient and successful, it establishes a despotism over the mind, leading by natural tendency to one over the body.”⁴⁰

The obligation “to respect” Art. 2 of the First Protocol of ECHR should be interpreted in a positive sense; it requires a positive, tolerant attitude from the State toward the religious or philosophical convictions of parents. The verb ‘respect’ means more than ‘acknowledge’ or ‘take into account’: in addition to a primarily negative undertaking, it implies some positive obligation on the part of the State (*ECtHR Judgment 29 June 2007, Folgerø Case*, cited above, § 84 (c)). International law not only prohibits the State from preventing parents from opting for the education of their children outside the public schools, but also requires the State actively to respect parental convictions within the public schools. This requirement is then obviously not met simply by the availability of private schools or alternative means of education other than the public schools.⁴¹

In the same *Judgment 29 June 2007, Folgerø Case*, the Court stipulated that although according to the government, it would have been possible for the applicant parents to seek alternative education for their children in private schools, which were heavily subsidised by the State, as it funded 85% of all expenditure connected to the establishing and running of private schools, the existence of such a possibility could not dispense the State from its obligation to safeguard pluralism in state-schools (§101).

It is submitted that the term “to respect” in Article 13(3) of the ICESCR has a similar meaning. The character of the obligation “to respect” is such that it ensures a domain that is free from State interference.⁴² This type of obligation fits in well with obligations relating to the implementation of civil and political right, such as the right to privacy and the right to family life. No further measures of implementation are required for it to function in the domestic legal order of State parties. It is of an immediate nature.⁴³

The democratic principle asserted by the constitutions of most democracies and the basis for freedom of education is founded on the confidence that most persons will make use of their rights responsibly, while at the same time respecting other persons' rights and liberties. Unfortunately, policymakers are always tempted to see schooling as a useful instrument for some social or political purpose, often with the best of intentions but almost inevitably in conflict with the freedom of parents and of teachers and sponsors of non-state schools. In the words of a French constitutionalist, "the question of freedom of education remains always open. It is a natural tendency of the governors of the State, whoever they may be, to endure the freedom of others impatiently."⁴⁴

The approach to freedom of the democratic State which was laid down in Western constitutions during the 19th century is in no way libertarian but expressive of the legal relation between public authorities and citizens. The public authorities, whose power is founded on the people, may not exert that power in areas where citizens individually determine their attitude with regard to the powers that be; if this were not so, the State would be able to manipulate its citizens in order to perpetuate its existence. The areas involved are especially those that are concerned with spiritual freedom: conscience, religion, speech, press, association... and education.

The principle of freedom of choice means thus that *no pressure may be exerted in any way* with the aim to influence that choice in order to favor a specific type of education. Various national legal stipulations confirm explicitly that parents are free to send their children to the school of their choice and that they should not be forced in any way to let their children attend a school which is not of their own choosing. But is it enough to allow parents to choose, if government restrictions make the sort of schooling they would choose unavailable, or if government policies make it unaffordable?

Right to education linked with freedom of education

Freedom of education has acquired a new meaning as a result of a change in the perception of the role of the State.

The Liberal State has given way to the "Welfare State," gaining a social dimension. As a result, the traditional freedoms have been supplemented by so-called basic social rights. If the traditional rights and freedoms are regarded as being the result of ideas developed during the 18th and early 19th century, then social rights must be looked upon as the fruit of the social, cultural, and economic developments of this century. These rights and freedoms emerged, gained recognition and were carried to fruition in reaction to much abuse of power by governments. They owe their origins in a reluctance to trust the State, which was regarded as representing the greatest danger to the freedom of the individual.

In contrast, social rights have been also developed in reaction to abuses of power by private organizations and—more importantly—by a breakdown of many of the civil society institutions which have traditionally met most human needs. Social rights are based on trust in the State, which was granted the power to intervene in virtually all dimensions of social life in an unprecedented manner.

Associated with this shift in thinking is the concept that citizens have a right to make claims upon the State for all manner of services. While governments have sponsored and funded schooling for many decades in most Western nations, it is possible to detect a shift in assumptions toward a concept of entitlement. The right to an education has come to count as a basic social right, as we can see particularly clearly in the case of children with extreme physical or mental handicaps who at present are entitled to extremely expensive care and treatment by educational systems which, a generation ago, would have disclaimed any responsibility for them.

In order for each citizen to be able to enjoy real freedom in both the social and economic spheres, the State has to be able to guarantee that everyone can make use of the right to what the constitutions of some American states refer to as a “free and appropriate” education.

The right to such an education may be interpreted as an objective that has to be attained in order to achieve positive freedom, and this objective legitimizes government intervention without which freedom would be devoid of content for many individuals.

The fact is, freedom of education appears to be no more than a theoretical principle, if the freedom is not transformed into an effective social or cultural right and is not incorporated conclusively in national and international educational laws. Social rights do not seek freedom *from* but freedom *through* government intervention.

Governments need to intervene by providing a framework in which the freedom of and the right to education are genuinely possible. The right to and freedom of education relate to each other in this respect as *complementary* principles.

Compulsory education, imposed by the law, cannot be avoided in a genuine democracy . . . though it should not be confused with compulsory schooling, much less compulsory attendance in a state school. Modern “freedom of education” -- and this refers to the first, somewhat forgotten or implicit interpretation of the term -- aims to act as a ‘guardian’ of democracy, by *guaranteeing that each citizen will receive adequate education*, so that all citizens can make proper use of their democratic rights and liberties and lead independent and productive lives to the fullest extent of their capacities.

The right to education is not only a matter of access but also of content. Article 29⁴⁵ of the *Convention on the Rights of the Child* adds a qualitative dimension to article 28, i.e. the need for education to be child-oriented. Globalisation causes tensions,

between the global and the local, the individual and the collective, tradition and modernity, competition and equal chances, etc.⁴⁶ Article 29 (1) stipulates that education should promote a broad range of values that go beyond the boundaries of religion, nation and culture. At first glance, this objective may lead to conflict, e.g. in the case of the promotion of the child's own cultural identity, between the language and the values from which it hails on the one hand and the national values of the country in which the child lives and other civilisations on the other. The significance of this stipulation lies in its emphasis on the need for a balanced approach to values within education and the promotion of dialogue and respect for others. Children do not lose their rights when they walk through the school gate. Their rights must be guaranteed in the educational process, the pedagogical method, the environment in which education is provided.

Children must be allowed to express their opinions freely in accordance with article 12 (1) and to participate in a school life that respects the child's dignity. According to article 2, any form of discrimination, be it overt or covert, is in violation of the dignity of the child. Denying access to education is primarily in contravention of article 28, while there are numerous ways in which article 29 (1) is violated, with similar effect.⁴⁷

Unlike the ECHR, the *United Nations Committee on the Rights of the Child* and the *United Nations Committee on Economic, Social and Cultural Rights* have expressed their concern about the imposition of any ban on the wearing of the headscarf at schools.

The active exercise of education freedom guarantees religious and ideological pluralism, - a cornerstone of democratic society. *It would appear that, in various countries, precisely these values are under threat, while freedom of religious conviction remains a condition for a societal consensus.*

In her dissenting opinion (ECtHR, *Judgment 10 November 2005, Case Leyla Sahin v. Turkey*) Justice Françoise Tulkens observed: "... toutes ces interdictions avaient tendance à opposer laïcité, liberté, égalité, alors que l'objectif serait plutôt de les combiner »!

Relevancy of the non-state sector

Why is freedom of education sometimes referred to as "the least loved of all forms of expression," as the French author Jean Rivero put it "*La liberté la moins aimée au monde*"?

According to comparative constitutional law, freedom of education is always at stake in the transition from a non-democratic state to democracy. This was the case when the Western democracies emerged in the 19th century. The first presidential decree after the collapse of the USSR dealt with freedom of education. Education issues caused two

deadlocks in the negotiations on the new *South African Constitution*; thankfully they were resolved.

The legal status of minorities could be mostly screened from their education rights.⁴⁸ European jurisprudence focused in this respect as follows on conflict between groups within a nation: “*Although 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*” (Judgment

18 December 1996, Case of Valsamis v. Greece, Reports of Judgments and Decisions, 1996-VI, § 27; Case of Folgerø, cited above, § 27).

In 1994, Albania did not allow non-state schools for minorities; in Serbia and Montenegro, schools teaching in other languages than Serbian were banned. No non-state schools were allowed in Iran after 1979. Vietnam and Cuba prohibit them. The most frequent educational request from *CIS*-countries to the European Union after their independence concerned expertise in education legislation and the breaking of school monopolies, including the establishment of alternative publishing firms for schoolbooks. The third generation of education laws should be screened. This seems not the prior concern of international legal agencies (“*while avoiding any evaluation of the legislation’s expediency*”, *ECtHR Judgment 4 December 2008, Case Dogru v. France, § 63; Zengin Case, § 53*), but should be organised by NGO’s and comparative law research experts.

Education is a sphere of life that relates to the formation of values and worldviews. To define the appropriate position of the State vis-à-vis non-state educational initiatives remains a pertinent issue, in all countries, both past and present. The late Father Arrupe, the former General of the Jesuit Order, once said that the dictatorial regimes of Latin America tried to achieve in just a few decades what had not been achieved for centuries: to stifle the cry for freedom in society by closing down non-state schools.

After all, the efforts to create the “*new Soviet man*” through schooling were also justified in the name of democracy, social justice, peace, and other worthy goals, but they were a fundamental denial of the human dignity that depends upon freedom of mind as well as of body.

This question defines a sphere of recurrent political conflict in many countries.

Freedom, in turn, remains an empty principle unless it is given institutional expression. Without pluralism, free choice of education – a core content of the right to education – is meaningless. Alexis de Tocqueville, writing on *Democracy in America*, asserted that “... *without local institutions a nation may give itself a free government, but it has not got the spirit of liberty;*” and he added the following rhetorical question: “*How can liberty be preserved in great matters among a multitude that has never learned to use it in small ones?*”

Elsewhere De Tocqueville claimed that “...among the laws that rule human societies, there is one which seems to be more precise and clear than all others. If men are to remain civilized or to become so, the art of associating together must grow and improve in the same ratio in which the equality of conditions is increased”.

A living democracy is characterised by commitment on the part of civilians, by an impressive array of organising bodies, stakeholders, and volunteers within civic society. People sustain policy. They are co-responsible for the public interest. To some extent, international rules do recognise this sector as an official partner within human rights organisations. But in some countries, the legal framework is still lacking.

The *UNESCO* planning unit recognises that precisely the non-state sector makes a tangible contribution to the realisation of the right to education in a number of African countries.

Article 7 of the *World Declaration on Education for All* says that providing basic education for all is the unique obligation of national, regional and local authorities. But it immediately adds that the authorities cannot be expected to carry out that obligation alone. This requires partnerships with families, religious groups, local communities and NGOs.

There is a further dimension to the issue.

One reason why educational freedom is not an ‘obvious’ freedom -- unlike the other fundamental rights -- is that most non-state schools are faith-based or connected with a religious organisation. They are, to a large extent, rooted in a specific tradition, as are many hospitals, childcare institutions and homes for the elderly.

A diversity of schools is a logical response to the diversity in terms of culture, worldviews, and educational demands in a free society. It does justice to societal pluralism. “Choice is an expression of autonomy”.

Religious bodies play a large part in public life, especially through schools, and beyond the inner circle. Justice Sachs put it as follows in the Judgment of the Constitutional Court of South Africa in the case of “*Christian Education South Africa versus the Minister of Education* (August 14th 2000)”: “Such religious bodies are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation. Religion is not just a question of belief or doctrine. It is part of a way of life, of a people’s temper and culture, and has the capacity to awake concepts of human dignity and self-worth which form the cornerstone of human rights.”

And he concludes that “such pluralism enjoys the right to be different; language, culture and religion constitute a strong weave in civil society.” A less forceful reference to the role of identity-related institutions is found in the draft Constitution for Europe. It formally recognises “... the specific and positive contribution from churches and non-confessional associations and communities”.

So we may conclude that educational pluralism and school choice foster not only human dignity but freedom itself, especially when we are concerned with the transmission of values. Recent research has shown, that the majority of parents consider the transmission of values, moral development and character formation the most crucial objectives of the education process.

It would therefore appear that freedom of education is not a matter simply of allowing or supporting alternatives to State schools; it also extends to the functioning of state schools and the influence they exert.

Endnotes

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- ¹ SCE is the Organisation for Security and Co-operation in Europe. The OSCE was founded in the 1970s, and included as participant States most European countries, plus the USA and Canada.
- ² Prepared by the OSCE/ODIHR advisory panel of experts on freedom of religion or belief in consultation with the European Commission for democracy through law (Venice Commission), adopted by the Venice Commission at its 59th plenary session (Venice, 18-19 June 2004), welcomed by the OSCE Parliamentary Assembly at its annual session (Edinburgh, 5-9 July 2004).
- ³ Prosser T., Regulation, Markets and Legitimacy, in Jowell J. and Oliver D., (eds.), *The Changing Constitution*, 4th Edition, Oxford: O.U.P., 2000, p. 229-257.
- ⁴ Harris N., 2007.
- ⁵ De Groof J., Flexibilisering mits contractualisering? Inleidende bedenkingen, als discussietekst, in VLOR, *De meerwaarde en gevolgen van de flexibilisering van het Vlaamse hoger onderwijs: een verkenning*, Antwerpen: Garant, 2007, p. 187-212.
- ⁶ De Groof Jan, Lauwers Gr., Dondelinger G., eds.), *Globalisation and Competition in Education*, Wolf Legal Publishers, Nijmegen, 2003.
- ⁷ Ripert G., *Les forces créatrices du droit*, Paris, 1955, p. 133.
- ⁸ Compare with. “. We know surprisingly little about the law’s effect upon higher education, but virtually no one in the enterprise is untouched by statutes, regulations, case law, or institutional rules promulgated to implement legal regimes.”, Olivas M., The Legal Environment. The Implementation of Legal Changes on Campus, in Altbach P., Berdahl R. and Gumpert P. (eds.), *American Higher Education in the Twenty-First Century. Social, Political, and Economic Challenges*, 2nd Edition, Baltimore: John Hopkins University Press, 2005, p. 226.
- ⁹ Kaplin W.A. and Lee B.A., *The Law of Higher Education*, 1995, p. 1 -75.
- ¹⁰ Wade H.W.R., Forsyth C.F., *Administrative Law*, 9th ed., 2004.
- ¹¹ De Groof Jan, Improving the Regulatory Environment for the Implementation of the Right to Education, in de Lange R. en Rogier L.J.J. (eds.), *Onderwijs en Onderwijsrecht in een Pluriforme Samenleving – Opstellen aangeboden aan Prof. mr. dr. D. Mentink*, Boom Juridische Uitgevers, Den Haag, 2008, p. 39-55.
- ¹² Glenn Ch., De Groof Jan, *op.cit.*, 2002, vol. II, p. 56.

¹³ Hunter-Henin, 2011, 10.

¹⁴ Fernandez & Nordmann, 2002.

¹⁵ Nordmann&Ponci& Fernandez, 2008/2009.

¹⁶ Cohen, 2011

¹⁷ Vickers, 2011; Sandberg, 2011.

¹⁸ Seidman&Seidman, 1995.

¹⁹ De Groof & Lauwers, 2004; De Groof & Lauwers & Singh, 2006

²⁰ De Groof, 1995a; De Groof, 1996; De Groof, 1998.

²¹ Hampel, 1986, 94.

²² Berka, 1997.

²³ A convenient though somewhat dated selection is provided in Fernandez & Jenkner, 1995.

²⁴ Coomans, 1995, 23.

²⁵ Ricoeur, 1998.

²⁶ eurydice, 2012, 98.

²⁷ Ibidem, 51.

²⁸ On the issue of State Funding for Non-state Schools: see Glenn Ch., De Groof J, 2002, p. 243-265.

²⁹ It might be noted, however, that the decision of the United States Supreme Court in *Pierce v. Society of Sisters* (1925), the “Magna Carta” of educational freedom in that country, was based in part upon the right of proprietors to conduct a private school as a business and not to be deprived of “business and property for which they claim protection.”

³⁰ On the terminology of ‘public’ and ‘private’ education: see Glenn Ch., De Groof J, 2005, p. 274.

³¹ Fernandez & Nordman, 2002.

³² Stehle, 1965, 307; see Glenn, 1995, from which the following is taken, for discussion of the loss and regaining of educational freedom in Poland.

³³ Bugaj, 1991, 3.

³⁴ Paciorek, 1990, 10.

³⁵ Pomianowski, 1991.

³⁶ De Groof, 1993 and 1994b.

³⁷ De Groof Jan, Berka Walter and Penneman Hilde, *Autonomy in Education*, Kluwer Law International, Den Haag, 2001.

³⁸ See Glenn, 1988 and 2011 for historical accounts of this process in France, the Netherlands, Belgium, Austria, and Germany

³⁹ Humboldt, 1993.48 49.

⁴⁰ Mill, 1975, 99.

⁴¹ *Case of Kjeldsen, Busk Madsen and Pedersen*, Report of the Commission, at 44.

⁴² Beiter, 2006.

⁴³ Coomans, 1995.

⁴⁴ Esmein, 1921, 599.

⁴⁵ Article 18 should be interpreted within the context of the convention as a whole, including the stipulations regarding freedom from discrimination (art.2), the best interests of the child (art. 3), the right to life, survival and development of the child (art. 6), the right to express an opinion and to have that opinion heard (art.12), the rights of the parents (art. 5 and 18), freedom to seek, receive and impart information (art. 13), freedom of thought, conscience and religion (art. 14), access to media and information (art. 17), the rights of disabled children (art. 23), the right to the highest attainable standard of health (art. 24), the right to education (art. 28), the right of children of minority communities to enjoy their own language and culture (art. 30).

⁴⁶ United Nations Educational, Scientific and Cultural Organization, *Learning: The Treasure Within*, Report of the International Commission on Education for the 21st Century, 1996, pp. 16-18

⁴⁷ “Quand l’interdiction du foulard entrera en vigueur, les filles que leurs parents forcent à porter le foulard risquent de sortir de l’enseignement public et d’être envoyées dans des écoles religieuses. Elles peuvent se retrouver mariées très jeunes à un homme que leurs parents jugent convenable et être mères de plusieurs enfants à 30 ans. Si les filles de ces milieux doivent obtenir plus de chances de décider activement de leur avenir, seule l’éducation dans un environnement culturel plus ouvert leur donnera ces chances”, Anthony Giddens, “Voile islamique : la France sur la mauvaise voie”, in: *Le Monde*, 14.01.2004.

⁴⁸ De Groof, 1996.

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